

IN THE HIGH COURT OF LESOTHO

In the Application of

THABISO DAVID MLONYENI Applicant

v

THE MAGISTRATE T Y Respondent

J U D G M E N T

Delivered by the Hon Chief Justice Mr Justice
T S Cotran on the 22nd day of June 1984

The applicant appeared before a magistrate of the first class sitting at TY charged with culpable homicide, alternatively with reckless driving contrary to s 90(1) of the Road Traffic Act 1981 (Act 8 of 1981) He was found guilty of culpable homicide and fined M450 or 2 years imprisonment in default of payment. The applicant's driving licence was suspended for one year. He works as a driver and is employed by Astoria Bakery.

An application for review was lodged in terms of Rule 50 of the High Court Rules to set aside the conviction sentence and order on the following grounds -

- 1 The magistrate did not allow the applicant to put certain questions to the main witness and that had the magistrate allowed those questions there would not have been sufficient evidence to convict
- 2 That the applicant was not allowed to lead evidence by calling on his behalf two witnesses which he had intended to call

/The

The applicant in his founding affidavit averred that he did not have a fair trial because he was being continuously "interfered with and interrupted" by the magistrate

The application was resisted by the Crown.

Upon receipt of a copy of the proceedings the applicant made a supplementary affidavit "amplifying" his first In this the applicant attacked the magistrate further adding, in effect, that the public prosecutor was in league with the magistrate The applicant avers that his complaints were not reflected in the record of proceedings either because it was silent on what had actually taken place, or because the record states somethings that had not taken place

The magistrate, the public prosecutor and a policeman (who made a sketch of the scene of the accident) filed affidavits They all deny the applicant's allegations of harassment or bias

I am satisfied from the affidavits that the applicant's general complaints about the magistrate and the prosecutor have not been made out

There is, however, something which worries me quite considerably, viz, whether there was in fact evidence justifying conviction It is necessary to go into the merits of the case

The deceased Sets'oana was a little school girl aged about 8 years, the daughter of a police sergeant and she was walking with a group of school children who were on both sides of the road after having attended a football match Phemo Mokone (P W 1), a school teacher, was accompanying these children on a clear

/sunny

sunny day It was a happy occasion and the children were singing
The road (which was the main TY Maseru road not far away from an
L E C School) was straight at that stretch

The accused was driving a truck and he had two passengers
next to him Mr Phamo Mokone says he first saw the accused's truck
when it was 50 paces away from him The deceased girl was 30 paces
away from him It would seem therefore that some only 20 paces
separated accused's truck from the deceased girl when the accident
occurred (according to this witness) but the accused says it was
only 6 paces

It was common cause that the girl, for some unexplained
reason, crossed from one side of the road to the other It should
be emphasised that there were school children on both sides The
main witness, in chief, said -

"The deceased crossed the road to the other side
She was running When the child was about to
get off the tarred road that vehicle hit her"

The width of the tarmac road was 9 paces so it would seem as if the
accused was very close, that is, nearer 6 paces than 20

In cross examination by the accused the witness said -

"Q Were there children on my left at the time the
vehicle hit the child?

A I was aware there were children on your left

Q Did the children from whom Sets'oana left get
into the road?

A I saw as if there was a child who tried to catch
her as she left I heard other children say 'Jo
there is a vehicle and it is close'

Q Was it close as they said so?

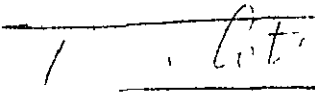
A At the time I heard that noise it was at the time
the vehicle hit the child"

The applicant could not have been convicted of the charge unless his negligence was so gross as to justify criminal punishment. The fact that he killed the little girl is not per se evidence of criminal negligence since she quite obviously was unaware of his approach and the other girls tried, in vain, to warn her, or to stop her from going out of her side to cross the road. The kind of injuries the girl suffered, in fact, support the accused's story. She was not run over but succumbed to her death from an injury to her skull and the brain when she hit, or was hit, from the side.

This is the kind of case where the magistrate himself should have urged the prosecutor to locate one of the two other eye witnesses who were in the accused's cab and should have granted at least one adjournment *meru moto*.

There does appear to have been an inspection in loco but the magistrate's observation should be reflected on the record and it must be based on *viva voce* evidence of the witnesses before him. This girl literally jumped in front of the accused's vehicle and I would need stronger evidence than a surmise by Mr Phemo Mokone that the accused was speeding to such an extent that he thought "perhaps the children would clear from the road". If the magistrate believed that this had truly occurred he would not have simply fined the accused but jailed him.

It is unsafe to allow this conviction to stand. The conviction, sentence and order are accordingly set aside.


CHIEF JUSTICE
22nd June 1984

For Applicant Mr Redelinghuys
For Crown Mrs Bosiu