CRI/A/20/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

SEMANO MONYANE Appellant

vs

REX Respondent

JUDGMENT

Delivered by the Honourable Mrs Justice K J Guni
on the 28th December, 2000

This matter came before me as an appeal against conviction and sentence, passed by The Maseru Magistrate's Court. This appeal was heard on 20th November, 2000. The appeal succeeded and was allowed. I then indicated that the reasons would be given later. These are the reasons:

The accused was charged with the crime of Contravening Section 90(1) of ROAD TRAFFIC ACT N0.8 of 1981. In that the said accused operated or drove a motor vehicle bearing Registration numbers AM682, on the said public Road recklessly or negligently, as a result collided or knock down one Johannes Lelimo, a pedestrian and did commit the crime as aforesaid.

The accused pleaded guilty and was found guilty as charged and sentenced to (12) twelve months imprisonment without an option of a fine.

The statement of agreed facts as appears on the record is as follows:- The complainant would show that on the day in question, he was at Lekhaloaneng, from work at about 7.30pm. He was going to UPPER THAMAE where he stays. He crossed the road after getting off the taxi. This taxi was from Lithabaneng direction. He then noticed a taxi which came from town and going towards Lithabaneng. This taxi was driven at the high speed. The complainant was at the edge of the road. The taxi knocked.

The accused immediately took the complainant and went to Pitso Ground Police Station. They reported the matter to the police. The police gave the complainant

a medical form referring him to the hospital for medical attention. The complainant was examined by the Doctor who reduced his findings into writing.

These are the entire facts of this case. There are no particulars of negligence or recklessness alleged in the charge. The trial court should have been guided by its consideration of Section 90 (2), (3) and (4) of ROAD TRAFFIC ACT 1981 which reads as follows:-

> " (2) Without restricting the ordinary meaning of the word"recklessly", any person who drives a vehicle in wilful or wanton disregarded for the safety of persons or property is deemed to drive that vehicle recklessly.
>
> (3) In considering whether an offence has been committed under subsection (1), the court shall have regard to all the circumstances of the case including but without prejudice to the generality of the foregoing the nature, conditions and use of the public road upon which the offence is alleged to have been committed, the amount of traffic which at the time actually was or which could reasonably have been expected to be upon that road and the speed at and the manner in which the vehicle was driven.
>
> (4) A person [convicted] of an offence under subsection (1) is liable _____
>
> (a) in case of the court finding that the offence was committed by driving recklessly to M2000 and 2 years imprisonment; or
>
> (b) in the case of the court finding that the offence was committed by driving negligently, to M1000 and 1 year imprisonment.

In the charge the section creating the offence must have been read with the section providing the penalty for committing that offence. In our present case, the penalty section was left out of the charge altogether. That is irregular. The proper formulation of the charge in the present case, should have included "Contravention

of Section 90(1) Road Traffic Act 1981 as read with sub-section (4) of the same Act"

Sub-section (2) has described the meaning of the word "recklessly". The driving of the motor vehicle by the accused, should have been shown, in the facts, as in the manner described within the meaning of the word "recklessly". In terms of sub-section (3) the court is obliged to have regard to all circumstances of the case, including :-

1. The nature of the road
2. The condition of the road
3. The use of the road
4. The amount of traffic reasonably, expected to be on the road or
5. Was actually on the road at the time of the accident
6. The speed at which the traffic must travel on that road and the speed the offending vehicle travelled at the time of the committal of the alleged offence.

In considering whether or not the offence charged under Section 90 (1) ROAD TRAFFIC ACT 1981 was actually committed, the court must bear in mind all the factors described in sub-section (3). In our present case, there are no facts alleged

in order for the court to determine whether or not an offence has been committed. What speed was the accused's motor vehicle travelling? High speed. This is no answer. The speed limit on that road is not mentioned. The speed at which the accused's motor vehicle was travelling cannot be satisfactorily described only as "high speed" The speed limit on that road should have been shown. The speed at which the accused's motor vehicle was travelling at the time of the accident must also be shown. It is only the comparison between the speed limit on the road and the speed at which the accused's motor vehicle together with the amount of traffic there at the time that a definite determination of the manner in which the accused drove his motor vehicle can be made. There must be facts which show the court that the accused drove his motor vehicle wilfully or wantonly in total disregard of the safely of other users of the road. This conclusion cannot be reached without the facts. The plea of guilty by itself does not specify nor describe the alleged recklessness or negligence.

In numerous cases which come before this court, on review, it has been persistently pointed out that the public prosecutors, must, in outlining the facts of the case, where an accused has pleaded guilty to the charge, put before court, all the facts which undoubtedly disclose the commission of the offence charged. Rex v MOLIKENG REVIEW ORDER No.6 of 1986, Rex v TANKISO PITSO

REVIEW ORDER No 17 or 1986, Rex v MOEKETSI RAJOANE REVIEW ORDER No. 21of 1986.

Without there being facts which describe the manner of recklessness or negligence of the accused, the conviction is unsupportable.

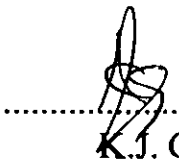
There is a further irregularity where an accused who is charged with two offences, one in the alternative of the other, is found guilty as charged. The accused's plea of guilty must be to one or the other of the two alternatives. It cannot be to both. In terms of sub-section (4)(a) and (b) it is very clear that driving recklessly is a different and separate offence from driving negligently. There is a different and separate penalty for driving recklessly under sub-section 4(a). There is another separate penalty under sub-section 4(b) for driving negligently. Therefore the accused cannot be properly found guilty as charged in this circumstances. The trial court should have specified exactly what the accused is found guilty of between driving recklessly or driving negligently. *Rex v SECHABA QATU 1991-1996 LLR page 1332.* The accused was wrongly convicted. It is for these reasons that the conviction was quashed.

SENTENCE

There are no reasons given for sentence. The learned magistrate has failed to show the factors if any, which influenced him to pass the type of sentence that he imposed upon the accused. Sentencing of an accused is discretionary, up to the limit that is imposed by the statute in this particular case Section 90 (4) ROAD TRAFFIC ACT 1981. The learned magistrate was obliged to find the accused guilty of one or the other of the two alternative charges. In the exercise of his discretion the learned magistrate should have followed the dictates of Section 90 (4) (a) or (b) depending on the type of the offence the accused is convicted of. Had the accused been found guilty of reckless driving, the maximum penalty in terms of 90 (4) (a) should have been M2000 or 2 years Imprisonment. Had the accused been found guilty of driving negligently, the maximum penalty should have been either M1000 or 1 year Imprisonment.

How the learned magistrate came about with the sentence of (12) twelve months term of imprisonment without an option of a fine is a total mystery, because the learned magistrate gave no reasons for the said sentence. It is of paramount importance that the accused is informed by the court why the particular penalty is found to be appropriate in his or her case. MATHABO MOJELA v Rex 1977 LLR at 324. The learned magistrate must have been influenced by certain and

particular considerations to pass the type of sentence which he imposed upon this accused. Why then does the learned magistrate deny the accused to know those reasons? He has a right to know. Without the reasons the sentence is unsupported and must be set aside.



K.J. Guni
JUDGE
20th November, 2000

Mr. Nchela for: Appellant
Mr. Hoeane for: Respondent