

CRI/APN/186/01

IN THE HIGH COURT OF LESOTHO

In the matter of:

MALEFETSANE LENYETA

APPLICANT

vs

DIRECTOR OF PUBLIC PROSECUTION

RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs Justice K.J. Guni
on the 15th day of August, 2001

This is an appeal from LERIBE MAGISTRATE'S Court where this appellant was charged with an offence of contravening section 90 (1) ROAD TRAFFIC ACT N0.8 of 1981. It was alleged that on the 28th May 2000, at or near ST. MONICA, along the MAIN NORTH 1 ROAD, in the LERIBE district, the accused did unlawfully, negligently or recklessly, drive upon the public road, a motor vehicle registration number C 8403, as a result overturned and injured nine (9) passengers.

The section under which this appellant was charged provides as follows:-

- “90. (1) A person who drives a vehicle on a public road recklessly or negligently is guilty of an offence.
- (2) Without restricting the ordinary meaning of the word “recklessly”, any person who drives a vehicle in wilful or wanton disregard 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. [My underlining.] These are some of the circumstances which the trial court considered in the determination of the commission of an offence which this accused was convicted.

The plea of NOT GUILTY tendered by the accused was accordingly recorded. At the trial, all the nine passengers who were on board in that motor vehicle driven by the accused on the 28th May 2000, were, together with the traffic police officer who attended the scene of the accident, crown witnesses. After Pw1,2 , 3 and 4 had given evidence the accused decided to admit evidence of the rest of the crown witnesses after reading their statements and medical reports which were made by the doctor who treated those injured at the road accident involving the motor vehicle driven by the accused.

At the end of the trial, the accused was found guilty of negligent driving. He was sentenced to one (1) year imprisonment without an option of a fine. In addition, his driver's licence was suspended for a period of (12) months. The accused has appealed against the conviction, sentence and suspension order. The grounds of his appeal are set out as follows:

AS TO CONVICTION:

- (a) The trial magistrate erred in holding that the evidence for the prosecution proved the accused's guilt beyond reasonable doubt.
- (b) The trial magistrate erred in rejecting my version as to how the motor vehicle overturned when such version was neither improbable nor

demonstrably false.

AS TO THE SENTENCE:

- (a) The sentence imposed by the trial magistrate is excessive and induces a sense of shock.
- (b) The trial magistrate failed to accord due weight to my personal circumstances.
- (c) The trial magistrate exaggerated the circumstances surrounding the offence.

AS TO THE ORDER OF SUSPENSION OF THE LICENCE

- (a) The trial magistrate misdirected herself by ordering the suspension of my licence when there were no compelling reasons on record for invoking her powers of suspension.

The facts of this case are briefly as follows: On the 28th May 2000, LIKOCHE Snooker Team, consisting of nine (9) members, hired the taxi which was to convey them from HLOTSE to T.Y. The taxi, which they hired, was the venture motor vehicle driven by this accused. The accused was in fact not the regular driver hired to drive the said motor vehicle. The regular driver of that taxi was on sick leave. The owner of the taxi, who is also the accused's father, directed the accused

to drive the Snooker Team in that motor vehicle in the absence of the regular driver. The accused did not have a valid driver's licence or any licence at all on that date. The licence which the accused produced at the trial was issued to him in South Africa on 5th July 2000. This was at least one month or so after the road accident subject matter of the trial, had occurred.

This unlicensed driver, drove this venture motor vehicle, with nine (9) passengers on board, from HLOTSE along the Main North 1 road. T.Y. is in the South of the LERIBE district. So this motor vehicle was therefore travelling from north towards the south direction. It must have been early in the morning when this accident occurred. The Traffic police officer who attended the scene of that accident, received the report of the said road accident at 08.00 hours on the 28th May 2000.

The manner of driving the said motor vehicle by this accused was a cause for concern to all passengers according to the evidence of the crown witnesses who were in fact the passengers in that motor vehicle. They worried about the high speed and the apparent unsteady movement resulting therefrom. One of the passengers expressed this worry to everyone's hearing thus:- "we are not in a hurry, so the driver need not hurry this much" or words to that effect. Those who

heard and testified in court about the above statement, understood it to be an appeal to the accused to reduce the speed at which he was driving at that juncture.

The accused continued unabated in the same high speed. It may be because he did not hear the appeal to reduce speed or as he claimed under cross examination, he did not see the need to reduce the speed at which he was travelling. One of the crown witnesses Pw1 was sitting in front, next to the accused. He looked at the speedometer when it became apparent that the driver was losing control. The speedometer indicated the speed at which the motor vehicle was travelling as 140 KMPH. Pw1 saw the cattle which were drawing a scotch cart in front of them. They were travelling in the same lane and towards the same direction. He worried if the accused will successfully manage to overtake the cattle and scotch cart and at the same time be able to negotiate the coming curve after crossing the bridge. The worry must have been brought about by the excessive speed and the unsteadiness of the motor vehicle while travelling at that high speed.

The accused overtook the cattle and their scotch cart successfully by swerving to the right and travelling on the right hand lane. As he commenced to take the curve he turned the motor vehicle left, back into its lane. The motor vehicle shot passed the left lane and run outside the road on the left side. The accused turned it right

back into the road. It again ran passed the left lane and went into the right hand side lane for the oncoming traffic. The driver turned the motor vehicle once again to the left in order to travel in its correct lane. Once again it shot passed the left lane and went out of the road. The accused return endeavoured to it right back into the road. It now fell on its side and slided making a u-turn and thus stopped facing north where it came from.

All the nine (9) passengers sustained various injuries such as whiplash, spinal pains, bruises on the forehead, chest pains, small laceration on thumb, and Haematoma at the back of the head. Some were treated as out-patients. Others were admitted and detained overnight for observation. As appears from the evidence, all these injuries were minor. One or two of the witnesses still complained of pain from those injuries, at the trial. Otherwise all appeared to be well.

All these manoeuvres by this motor vehicle zig-zagging along as it moved in and out of the road are a matter in the common cause. It is accepted by all concerned, [that is the driver - this accused and the passengers - crown witnesses] that the accused lost total control over that motor vehicle while it performed those manoeuvres until it fell down and moved on its side.

What caused the accused to lose control? The accused claimed that the motor vehicle sustained a puncture at its left rear wheel and as a result of that sudden tyre burst he failed to maintain the control over that motor vehicle. It is being argued here on an appeal on his behalf by his counsel, that the trial court did not ascertain whether or not the cause of the motor vehicle to overturn was the sudden tyre burst.

The trial court seems to have accepted and correctly so, the overwhelming evidence that the accused was driving at the very high speed. The accused, although he denied that he was driving at the very high speed, he did not deny that the speed he was travelling at when he approached the bridge from which he ascent in a curve which he failed to negotiate, the speedometer indicated the speed at which the motor vehicle was being driven, as 140KMPH. The accused admitted under cross-examination that the sudden tyre burst would not cause the motor vehicle to overturn if he was travelling at the reasonable speed.

What is a reasonable speed? The public prosecutor suggested 50KMPH. The speed which enables the driver to remain in total control over the motor vehicle which he is driving is a reasonable speed. Maintaining the same speed despite the realisation that he was losing control over that motor vehicle while travelling at

that speed, was negligence bordering on delinquency.

The trial court must have considered the accused's defence in the light of his admission that the tyre burst would not per-se result in the overturning of the motor vehicle if it was not travelling at the high speed. S.V.QUESS 1976 (4) SA 715. Although the trial court must have accepted the discharge of the burden of proof by the crown, it also weighed against that discharge of that burden of proof the improbability of the tyre burst, per se, causing the motor vehicle to overturn. Negligent driving, of which this accused was convicted did not start and end at the point where the motor vehicle overturned. It has been a long process which was observed by the witnesses as shown in their evidence, for some distance, for example, as they approached **Tsikoane**, when they climbed up the hill passed **HABEN**, and as they descended down to the bridge. When one of the passengers remarked thus, "we are not in a hurry, so the driver need not hurry so much" or words to that effect, the manner of driving was already worrying every passenger. The worry for their safety was brought about [as it emerged from the evidence], by the excessive speed at which the motor vehicle was being driven.

The failure to negotiate a curve did not come as a surprise. According to Pw1, he wondered as they approached, whether at that speed, the driver will manage to

negotiate that curve. Over speeding by itself constitutes negligence particular when the driver who so speeds does not have full control over the said motor vehicle. Zig-zagging along the road, as this driver admitted doing, endangered the safety of other road users; and that fact compounds his negligence.

The accused, is the only person who remained at the scene of the accident. When the traffic police officer arrived he introduced himself to the accused as such. It is the accused who made indications to the police officer. It is from those indications made by this accused, that the traffic police officer took measurements and drew a sketch plan of the accident. No punctured tyres were shown to this traffic officer by the accused. The traffic officer in his evidence told the court that he saw no punctured tyres at the vehicle in question at the scene of the accident.

The admission by the accused under cross-examination, that a tyre burst on its own unaccompanied by an excessive travelling speed, cannot cause the motor vehicle to overturn, increased the improbability of his defence. Furthermore, when it became established beyond doubt, that there was never any tyre burst before, during or after the accident, the consideration that the tyre burst was the cause of the accident, was placed out of question.

As far as sentence and the order of suspension of the driver's licence of this accused, are concerned, the trial court has given no reasons. The registrar set down the appeal for hearing, without first placing the said record of appeal before the Judge to deal with it in terms of sections 327 and 328 criminal procedure and evidence act N0.9 of 1981. Director of Public Prosecution did not request from the learned magistrate, her reasons for sentence even though the setting aside of the same is opposed. My initial reaction was to send back the record to the learned magistrate to furnish her reasons for sentence. The original record had not in fact been forwarded to this court. The counsel for the appellant had made a copy which came without exhibits, annexures and all the documents produced at the trial. There is an inhibition to transmit records because of inefficiency and corruption which result in delays or disappearance of the records.

The perusal of the copy of the trial record gave me the impression that this is a bad case of negligent driving which because of the youth of the accused must be disposed of expeditiously.

The learned magistrate who convicted and sentenced the accused must have reasons for doing so. But those reasons were not recorded. May be the accused was given reasons for sentence because on the grounds of appeal against the

sentence there is no complaint that the learned magistrate gave no reasons for sentence.

The learned magistrate must have been influenced by some considerations in order to pass this type of sentence. All the time, the High court, appeals, to the magistrates to tell the convicted persons why the particular sentence imposed in each case is the suitable one. In numerous cases which come to the High court either on review or appeal, the magistrates are directed to furnish their reasons for judgment and sentence. *MATHABO MOJELA v REX* 1977 LLR 321.

I do not believe that judicial officers operate as automatons. They have clear consideration of the factors which [are there at all times] influence them to act in a certain fashion. It is true the judicial officers in the Subordinate court have too much work. They must be working under great pressure. But under no circumstances should they let themselves to be rushed through their work without paying proper attention. The judicial officer must be in full control of the proceedings over which she or he is presiding. The judicial officer must give herself or himself an ample opportunity to conduct the trial to its completion without skipping over some parts of the procedure required by law to be followed without good cause.

As was pointed out by The Honourable MOFOKENG J. as he then was in that matter of MOJELA v Rex 1977 LLR 321 at 324, “ Perhaps it is not appreciated that a consideration of what sentence to impose on a convicted person is a procedure which has to be carefully followed”. Failure to give reasons for sentence is an indication that not sufficient care was accorded that part of the trial.

The point raised, that is, the failure by the magistrate to furnish reasons for sentence, in my opinion, should be decided in favour of the appellant.

This is in accordance with the provisions of section 329 (2) CRIMINAL PROCEDURE AND EVIDENCE ACT N0.9 of 1981. The relevant portion thereof reads:-

“329 -----

(2) Notwithstanding the High Court is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reasons of any irregularity or defect in the record or proceedings unless it appears to the court of appeal that a failure of justice has resulted therefrom. [my underlining]

As appears from the record of the trial, this was a very bad case of driving

negligently. This was a young and excitable man of only 24 years of age. He had no driver's licence at the time. The motor vehicle so negligently driven had nine passengers on board. The driver's senses were deficient, particularly that of hearing and sight. Everyone heard the warning or remark by the concerned passenger that they were not in a hurry and the driver need not hurry much. The passengers saw the scotch card and cattle in front of their motor vehicle. That scotch card was overtaken but the driver denied seeing any cattle. He also claimed that he did not reduce speed when he approached the curve which he failed to negotiate. What kind of a driver is he?

There has been no failure of justice for sentencing this type of a driver to a jail term. There are instances when a first young offender must be sent to prison. The learned magistrate acted in terms of the statute under which this accused was charged and convicted. The conviction and sentence are confirmed together with the order of suspension of the accused's driver's licence. This must be so in order that this young man is permanently reminded of the near disaster he almost caused by driving in that negligent manner the motor vehicle in which he carried nine people. The endorsement of that occurrence should be in his mind in order to act as a restraint to his future behaviour particularly when he is behind the steering wheel. He should be made to have consideration for other users of the road.

This appeal must fail. It is therefore dismissed.



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K.J. GUNI
JUDGE

For Appellant : Mr Mathafeng
For Respondent: Mr Hoeane