

CRI/APN/320/2002

IN THE HIGH COURT OF LESOTHO

In the matter between:-

TANKI PHATE

APPLICANT

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT

Delivered by the Honourable Mrs Acting Justice A.M. Hlajoane  
on the 24<sup>th</sup> May, 2002

This is an Application for review and setting aside of conviction and sentence passed by the Berea first class magistrate on the 26<sup>th</sup> April, 2002. The order also sought is for the trial to start *de novo* before a different magistrate.

The accused, in a certain CR 138/2002 had been charged with two counts of culpable homicide, alternatively negligent or reckless driving in

contravention of section 90(1) of the Road Traffic Act 1981.

The charges were preferred after the accused had been involved in an accident and the car he was driving in collided with another vehicle killing two people who were in that other vehicle.

The accused has approached this Court inviting it to review the proceedings of the Magistrate's Court as he feels that there has been an unnecessary splitting of charges. In his affidavit the accused has shown that, despite the fact that the two people were killed in one accident, he had nonetheless been charged with culpable homicide for each of them and sentenced to eight years imprisonment for each count and such sentences made to run consecutively and not concurrently.

I may hasten to mention that as born out by the record, the accused had indicated that he had a lawyer when the trial commenced but the Court all the same decided to proceed with his case in the absence of his lawyer.

The trial went on after a plea of not guilty had been entered. The accused throughout the proceedings chose not to cross-examine the witnesses, neither did he choose to go into the witness box himself.

I have also been impressed by the attitude of the Respondent in this case, in that it has been conceded by the Prosecution that in fact the Applicant was denied his fundamental right to a fair hearing as he was denied a reasonable opportunity to secure a legal representation of his own choice despite having informed the Court that he needed one. This was in contravention of the provisions of Section 12 (2) (c) and (d) of the 1993 Constitution.

Numerous decisions of this Court have clearly shown that in the interest of justice, every accused person must be accorded the opportunity of clearly putting his case before Court which thing could only be adequately done where he has a legal representation of his choice. Any denial to such legal representation would definitely be fatal to the validity of the trial. See the

the cases of *Mothakathi vs Rex* Cri/A/48/86 and *Cri/A/32/88 Pulumo vs Rex*.

In *S vs Wessels* and another 1966 (4) S A 89 where the Magistrate had refused to allow legal representation, Van Zijl J with whom Banks J concurred, in examining in detail the authorities on the right of any person in a civil suit and the accused in a criminal matter to legal representation said that, “ even the devil has the right to be heard”. This failure to allow audience through a legal representative to an accused person was considered to be a gross irregularity, and so gross a departure from established rules of procedure that it can be said that the accused has not been properly tried.

Coming now to the manner in which the proceedings were conducted at the Magistrate’s Court. As rightly conceded by the Respondent, this is a clear case of improper splitting of charges and duplication of convictions. *S vs Mampa* 1985 (4) S A 633 with facts similar to the present except that the two people who were killed were both passengers in the car in which the accused was driving. The accused in *Mampa* had been convicted of two charges of culpable homicide. On review, it was held that the accused’s conduct could not

be separated into different acts, but that the accused should have been charged with one count of culpable homicide in which reference to both deceased persons was to be made. The conviction was set aside and replaced with one conviction in respect of both deceased.

I have therefore come to the conclusion that the Application should be granted, the effect being that;

- (a) the conviction and sentence by Berea Magistrate is set aside,
- (b) the trial to start *de novo* before a different Magistrate,
- (c) the Applicant to be released from detention pending his trial.

  
A.M. HLAJOANE  
ACTING JUDGE

For Applicant : Mr Matooane

For Respondent: Ms Lesupi.