

**IN THE HIGH COURT OF LESOTHO**

**CRI/REV/003/2014**

In the matter between:

**BONANG KHUTLISI**

**APPLICANT**

**And**

**HER WORSHIP (MARAKABEI)  
THE CLERK OF COURT  
(Mokhotlong Magistrate)  
D.P.P.**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Coram** : Honourable Mr. Justice E.F.M. Makara  
**Dates of Hearing** : 11<sup>th</sup> February, 2014  
**Date of Judgment** : 11<sup>th</sup> February, 2014

**Summary**

Application for review against the proceedings in which the Applicant was convicted of contravening Sec. 8 (1) (9) and Sec. 10 (1) (6) read in conjunction with Sec. 27 of the **Road Transport Act 1981**. On the 2<sup>nd</sup> Count for C/S 50 (2) and (9) read with Sec. 98 of same. The 1<sup>st</sup> Count relying upon a Section which doesn't disclose an offence. The Crown found to have failed to have demonstrated that the Applicant had committed an offence under the 2<sup>nd</sup> Count. Thus, the order for him to forfeit the vehicle to the state unwarranted since this may apply where the offence was proven. In any event such a drastic order should be reserved for the extra-ordinary circumstances.

The proceedings consequently set aside and directed that the case be commenced *de novo* before a different Magistrate.

**CITED CASES**

**Rex v Ormajee 1955 (2) 546**

**Rex v Mohapi 1954 (10) SA**  
**Rex v Sesinyi LLR 1881 (1)**

STATUTES

Road Transport Act No.6 of 1981

Road Traffic Act 8 of 1981

**Makara J**

[1] This matter came before me for review at the instigation of the Applicant. Its chronological developments are in the background that the applicant had originally featured before a Court of Resident Magistrate in the district of Mokhotlong. The charge which had been preferred against him consisted of two counts. In the first, he was charged with contravening sections 8 (1) (9) and 10(1)(6) read in conjunction with **Sec. 27 of the Road Transport Act No.6 of 1981**. Its content unfolded thus:

Count 1

That the accused is charged with contravention of Section 8 (1) (a) and 10 (1) (b) read with **Sec.27 of the Road Transport Act 6 of 1981** as amended – In that upon or about the 10<sup>th</sup> day of December 2013 and at or near Lekhalo-la-Kotsie and along A1 public road in the district of Mokhotlong; the said accused did wrongly and unlawfully and intentionally use on a public road a motor vehicle Registration No. D1615 for purposes of conveying passengers from Khotsong to Mokhotlong, whereas at the time he did not have a short-term permit authorizes him to convey such passengers as required under the Act, thereby committing the aforesaid offence.

Count 2

That the accused is charged with contravening Section 50 (2) and (9) read with **Sec.98 of the Road Traffic Act 8 of 1981** as amended.- In that upon or about the 10<sup>th</sup> day of December, 2013 and at or near Lekhalo-la-Kotsie in the district of Mokhotlong; the said accused did wrongly and unlawfully and intentionally, whilst a public motor vehicle Registration No. D1615 is allowed to carry fifteen (15) passengers, allow five (5) people to mount such vehicle in excess of the fifteen allowed by permit, and did convey the twenty (20) passengers to Mokhotlong per such vehicle, thereby committing the aforesaid offence

[2] Whilst the Court is conscientious that the review is, *inter alia*, not being sought on the ground that the learned presiding Magistrate had not sufficiently explained to him his rights to a legal representation, it observes in passing that the Magistrate had contrary to a plethora of authorities from this Court and a Court of Appeal, failed to record *in verbatim* terms how the explanation was conveyed to the accused. This has repetitively been recognized as imperative for this Court to appreciate if, in the circumstances, the Applicant could have appreciated the technical significance of a Legal representation. There is for instance *ex-facie* the record no reference whatsoever to the existence on the Legal Aid Services. A comprehensive explanation could have also drawn to the attention of the Applicant the drastic consequences provided under **Section 27 of the Road Traffic Act**. This had a propensity for his forfeiture of vehicle concerned. The cases for reference in this regard are **R v Ormajee**<sup>1</sup>, **R v Mohapi**<sup>2</sup>, **Rex v Sesinyi**<sup>3</sup> and Others.

[3] Another procedural defect in the record is that at the end of the outline by the Crown, the Magistrate never bothered to explain to him the essential elements for the sustainance of the counts. This is a prerequisite for the accused who tendered a plea of guilty to the charge to have made an informed decision on the question of whether or not the summary discloses the commission of the offences charged.

[4] The grounds advanced for the review were: firstly that count one of the charge was defective in that it did not disclose a commission of the offence. Mr. Mokotleng elucidated that the deficiency is attributable to the fact that the

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<sup>1</sup> 1955 (2)SA 546 at 550

<sup>2</sup> 1954(10)SA PAGE 57

<sup>3</sup> LLR 1881 (1) PAGE 78

section on which the count is anchored, does not create an offence, in that it could only do so if it was couched in such a way that it had to be read with Sec. 27 of the Act. On this basis, he submitted that the first leg of the charge was fatally defective and consequently the Applicant ought not to have been convicted under it. The sections in seriatim provide:

8.(1) No person shall, except in accordance with the terms required and conditions of a Permit, use on a public road

(a) a public motor vehicle, and

(b) a motor vehicle operated on own account the carrying capacity of which exceeds 1000kg.

(2) When a goods vehicle is being operated on a public road for the carriage of goods, the driver of such vehicle, if it belongs to him or is in his possession under an agreement for hire purchase, and, in any other case, the person in whose ownership or possession the vehicle is, shall, for the purposes of this Act, be deemed to be the user of the vehicle.

(3) Where goods are carried by a goods hire vehicle which has been hired by a person who, at the time of the carriage of such goods, is, within the meaning of this Act, the user of such vehicle, such person shall be, deemed to be using a public motor vehicle.

(4) A person who contravenes subsection (1) is guilty of an offence specified in the permit for vehicle and trailers of each type.

10. (1) The short-term permits shall enable goods vehicles or passenger carrying vehicles to be used temporarily –

(a) for the purposes of a seasonal business;

(b) for the purposes of the execution of a particular piece of work; or

(c) for any purpose of a limited duration.

(2) The Board may grant a short-term permit

**[5]** The ground advanced for review in relation to Count two (2) was exclusively on the sentence itself. The initial contention was that the Magistrate had misdirected herself by applying the Sec. 27 punishment which culminated in her order for the forfeiture of the vehicle to the state and yet this would apply if the accused had been properly convicted under that count.

[6] It is the view of this Court that the Magistrate must objectively be seen to have exercised her discretion judiciously by ordering that the Applicant should forfeit the vehicle to the State. The necessary implication under Sec. 27 is that such an order with drastic consequences against a citizen should be reserved for the extraordinary circumstances. Another dimension for the review was that the five months imprisonment without an option of a fine was severe in that it is not in the circumstances of this case justifiable.

[7] The Court finds that there is a merit in all the grounds for review and in the legal arguments presented in their support. In the premises the application for review succeeds. It is consequently ordered that the proceedings and the decision of the Magistrate in CR164/2013 are set aside and that the proceedings should start *de novo* before another Magistrate.

**E.F.M. MAKARA  
JUDGE**

**For the Applicant : Adv. Mokotleng Instructed by Legal Aid  
Chambers**

**For the Respondent : Adv. Thaba Instructed by DPP's Chambers**