

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 68/2012

THE STATE

versus

NYAKALLO MONYAMANE

CORAM: DAFFUE, J *et* SNELLENBURG, AJ

JUDGMENT BY: SNELLENBURG, AJ

DELIVERED ON: 12 JULY 2012

[1] Nyakallo Monyamane, a 21 year old male, Lesotho citizen, was convicted and sentenced in the Ladybrand district court (under case nr 1448/2012), on a charge of contravening section 66(2) of The National Road Traffic Act, 93 of 1996. The matter was subsequently sent to this court as an automatic review in terms of section 302 of the Criminal Procedure Act, 51 of 1977 as amended.

[2] The matter was received by this court on the 4th of April 2012 and allocated to a judge in chambers to review the matter. The learned reviewing judge made the following enquiries to the presiding magistrate in the court *a quo*:

(“Was the accused’s ability to pay a fine properly established?

ii) Was the sentence imposed not too harsh considering (i) that the accused person was still a student at the time of the commission of the offence and thus had no income of his own; (ii) was a youthful offender; (iii) was a first offender and (iv) readily pleaded guilty?”

The enquiries were received by the magistrate’s court on 14th May 2012. The magistrate responded to the enquiries on the 15th of May 2012 as follows:

“Ad Paragraph 2.1

With respect, the court had thoroughly canvassed the accused’s ability to pay fine, his brother was prepared to pay a deferred for accused.. in court’s view it was quite risky given the fact that accused’s brother has no residential address in Republic of South Africa country. Both accused and his brother are Lesotho citizen. If accused’s brother failed to honour his obligation it will be difficult to track him down.

Ad paragraph 2.2

In my view the sentence was not harsh, the court did consider factors mentioned by the Honourable, but seriousness of the

offence, its prevalence, and the fact that the accused cross the border driving a vehicle without his parent's permission outweighs his personal circumstances.

3. I respectfully submit that if the Honourable is of the opinion that I over –emphasized seriousness of the offence at the expense of the accused. No harm or prejudice suffered by the accused. I will recommend the sentence to be reduced or set aside. The fine was paid on the same day the accused was sentenced.”

The reply by the magistrate was received on the 6th of June 2012 and it is now the duty of this court to review the matter and to determine whether not only the conviction and sentence, but the proceedings as a whole, were in accordance with justice. In light of the view that I take of this matter, I requested the Director of Public Prosecutions, Free State to consider the matter and to make such submissions as that office deems meet. I must record my appreciation for the thorough consideration which was afforded to this matter by the Deputy Director, Mr Hiemstra and Mr D Pretorius and the written submissions which were of great assistance to me.

[3] The following appear from the original charge-sheet (J15):

The name of the accused is indicated as Nyakallo Monyamane Monyamane; the accused's address is given as Lithabaneng; his nationality is being said to be Maseru. On the typed charge-sheet the name of the accused is indicated as Nyakallo Monyamane and his nationality as Lesotho. Upon further perusal of the original charge-sheet, it is indicated that the accused was arrested on the 12th of December 2011 (Monday) and had his first appearance on the 15th of December 2011 (Thursday). I will return to this aspect later in the judgement.

- [4] The accused in this matter was charged as accused nr 1 and a certain Onkabetse Modise appeared as accused nr 2. At their first appearance, both accused had their rights to legal representation explained to them, both indicated that they understood their rights and both elected to conduct their own defence. The prosecutor at the first appearance indicated to the court that both the accused person's addresses were confirmed and that the passport of accused nr 1 was in order and that the state did not have any objection to bail being granted to the accused. The matter was postponed until the 3rd of January 2012. Bail in the amount of R1000-00 was set for each of the accused on condition that they would be

present at 08:30 (03/01/2012) and to remain in attendance.

- [5] On the 3rd of January 2012, both accused appeared before court. Again both accused confirmed that they would still conduct their own defence. The charge was put to both accused, but before they were asked to plead to the matter, the state withdrew the charge against accused nr 2. Accused nr 1 was asked whether he understood the charge against him, which he then confirmed. He then also indicated to the court that he was pleading guilty to the charge against him.
- [6] The court then proceeded to apply section 112(1)(b) of the Criminal Procedure Act, 51 of 1977, as amended. This does not appear explicitly from the record, but I am willing to make that finding in favour of the magistrate. The magistrate did indicate to the accused that the court will ask him some questions to satisfy itself that he is guilty as pleaded. The magistrate did however not explain the possibility of section 113 of the Criminal Procedure Act *supra* applying if the accused did not admit all the allegations in the charge sheet.
- [7] The accused admitted that on the 12th of December 2011 he was the driver of a Toyota Corolla, registration number

M1265; that he was driving this vehicle on a public road; that the vehicle belonged to his mother and that he drove the vehicle without her consent. He also indicated to court that the reason why he took the vehicle and drove off was due to the fact that someone provoked him at church. This aspect was not cleared up by the court.

[8] The court then proceeded to ask the accused whether he knew it was wrong and unlawful to drive a vehicle without the consent of the owner, and also whether in doing so he was contravening the provisions of section 66(2) of Act 93 of 1996. On both occasions the accused answered in the affirmative.

[9] The prosecutor indicated that the state accepts the plea as tendered by the accused and the magistrate convicted the accused as charged. The state did not prove any previous convictions.

[10] The court proceeded to explain the accused's right to give evidence in mitigation of sentence and also indicated that the accused must address the court in terms of section 35 of Act 93 of 1996 *supra* as to why the court should not endorse his

driver's licence.

[11] The accused elected to testify under oath. Upon taking the oath, the accused indicated that his name is Nyakallo Confidence Monyamane. The accused testified that he is single; father of two children and that he is a student. The accused also indicated to court that he realised that he made a mistake and that will accept the judgement of the court. He further indicated that he would like to call his mother and brother to testify on his behalf. The prosecutor did not cross-examine the accused and the court then asked the accused if he can give any reason why the court should not endorse his licence in terms of section 35 *supra*. The accused indicated that he has none.

[12] The accused's mother, Maneo Monyamane testified next. She asked the court to give the accused a sentence which is blended with mercy. She asked the court to impose a wholly suspended sentence as he is still schooling and she also indicated that she has no idea as to what amount the accused would be able to pay, should the court impose a fine. She did testify that her children normally drive around with her car and that she was under the impression that he would return later, but he did not. It was only when the

accused's sister phoned her that she came to know of his whereabouts. The rest of her evidence is hearsay evidence and I will not deal with it further.

- [13] The accused's brother, Thabo Steven Monyamane testified next. He testified that his brother is an A-grade student (meaning that he obtains distinctions in most of his subjects). He also on more than one occasion indicated that they did not wish to proceed with the charges against the accused. I understand his evidence to be that they merely wanted the police to assist them in apprehending the accused so that he would not run away and they could take him back home. He further testified that the reason the accused wanted to run away was because he was afraid of his parents, for the punishment he might get on returning to their home. The witness then further reiterated that he was not standing there on his own accord, but also on the family's behalf and that they did not wish to have any charges against the accused. He, along with his family also paid accused's bail.

- [14] The court then asked the accused's brother how much they (he and his father) were prepared to pay as a fine, since they've got a company. The witness then told the court that

he would not be able to say, since the company was very small and that they were still only starting. The magistrate then made the following remark: (I quote from the record)

“But the fact that you mentioned the company, that means you are well off. - - No we will not say we are well off, but I do believe that an entrepreneur is somebody who is still struggling to actually break through. We haven’t break even yet.”

The court then proceeded to ask the witness again how much they would be able to pay and the witness responded by requesting the court to caution and discharge the accused.

[15] The court further asked the witness about endorsing the accused’s driver’s licence. The witness indicated to the court that the accused really needed his driver’s licence, as he, from time to time, drives to the Republic to buy some protective clothing for the shop and would need his licence for that purpose.

[16] The prosecutor had only one question in cross-examination pertaining to what discipline it will instil on the accused if the

court should caution and discharge the accused. The witness responded to say that the family discipline that the accused is already getting is quite severe on him.

[17] The court then proceeded to sentence the accused and I quote the sentencing of the accused by the court:

“Mr Monyamane, the Court has listened to your mitigating factors that you placed before Court and you called two witnesses and the Court will impose a sentence that is in line with your personal circumstances and also taking into consideration the seriousness of the offence and the interest of the community.

After careful consideration the Court is of the opinion that this one would be a suitable sentence:

You are sentenced **FOUR THOUSAND RAND (R4000.00) OR EIGHT MONTHS IMPRISONMENT** and in terms of section 35 of Act 93 of 1996 the accused’ driver’s licence is **ENDROSED FOR SIX (6) MONTHS** not to drive here in the Republic of South Africa for six (6) months.”

[18] The court then proceeded to explain to the accused his rights to appeal.

[19] I want to make the following remarks with regards to the sentence imposed by the magistrate:

19.1 In his response to the reviewing judge's enquiries, the magistrate said that the court thoroughly canvassed the accused's ability to pay a fine, but this is simply not the case. No question to that effect was put to the accused himself. His mother testified to the effect that she was unable to say what amount he (the accused) could pay and asked the court to impose a wholly suspended sentence. His brother testified also that he is not able to say what amount they (the brother and father ironically) would be able to pay and asked the court to caution and discharge the accused. The court itself made the inference, wrongfully in my view, that because the accused person's family owned a business, they were well off. But sentencing must focus on the accused and his personal circumstances and in the instance of imposition of a fine his (the accused person) ability to pay the fine.

19.2 The magistrate proceeded to apply section 35 of the

National Road Traffic Act, 93 of 1996. The Act clearly sets out when section 35 is applicable. Section 35 states:

'35 On conviction of certain offences licence and permit shall be suspended for minimum period and learner's or driving licence may not be obtained

(1) Subject to subsection (3), every driving licence or every licence and permit of any person convicted of an offence referred to in-

a) section 61 (1) (a), (b) or (c), in the case of the

serious injury to a person;

(aA) section 59 (4), in the case of a conviction for an offence,
where-

i) a speed in excess of 30 kilometers per hour over the
prescribed general speed limit in an urban area was
recorded; or

ii) a speed in excess of 40 kilometers per hour over the
prescribed general speed limit outside an urban area or
on a freeway was recorded;

(b) section 63 (1), if the court finds that the offence was committed
by driving recklessly;

(c) section 65 (1), (2) or (5), where such person is the holder
of a driving licence or a licence and permit, shall be
suspended in the case of-

(i) a first offence, for a period of at least six months;

(ii) a second offence, for a period of at least five years; or

iii) a third or subsequent offence, for a period of at least ten
years,

calculated from the date of sentence.

- (2) Subject to subsection (3), any person who is not the holder of a driving licence or of a licence and permit, shall, on conviction of an offence referred to in subsection (1), be disqualified for the periods mentioned in paragraphs (i) to (iii), inclusive, of subsection (1) calculated from the date of sentence, from obtaining a learner's or driving licence or a licence and permit.
- (3) If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit.
- (4) A court convicting any person of an offence referred to in subsection (1) shall, before imposing sentence, bring the provisions of subsection (1) or (2), as the case may be, and of subsection (3) to the notice of such person.

- (5) The provisions of section 36 shall with the necessary changes apply to the suspension of a driving licence or a licence and permit in terms of this section.'

As is apparent, the court can only apply section 35 once an accused has been convicted of contravening sections 59, 61, 63 or 65 of the said act. Therefore it follows that if the conviction stands, that this part of the sentence should be set aside.

19.3 The magistrate merely mentions the factors taken into account for purposes of sentencing and proceeds to give sentence. In my view, should the conviction stand, the sentence is strikingly inappropriate. The magistrate failed to take into consideration that the accused is a first offender and pleaded guilty readily; the fact that the complainant did not really want to proceed with the charge against the accused and also the fact that he is still a student and it is not clear what income he has of his own. He also has two children. Furthermore, the accused often used the vehicle with consent and the complainant (who did not want to proceed with the charge) is his immediate family.

[20] To determine whether the conviction is in order, the point of departure is to consider the original charge-sheet (J15). I am mindful of the heavy burden that prosecutors have regarding case load. Notwithstanding the afore-mentioned consideration, the drafting of the charge-sheet left much to be desired, with respect, for the following reasons:

20.1 The charge sheet fails to allege the element of 'intent'.

I agree with Mr. Pretorius that negligence is not sufficient for this offence (See **S v VAN WYK** 1974 (1) SA 36 (A) at 41G).

20.2 From the record it appears that the name of the accused is not Nyakallo Monyamane Monyamane as reflected on the charge-sheet, but Nyakallo Confidence Monyamane. This was never amended.

20.3 At the first appearance it was indicated to the court that the address of the accused was confirmed, yet the J15 only states Lithabaneng.

20.4 The nationality of the accused is indicated as 'Maseru'. Surely this cannot be correct.

20.5 The date of arrest is indicated as 12 December 2011 and the date of first appearance is indicated as 15 December 2011.

[21] The annexure to the J15 which contains the actual charge that was preferred by the state against the accused, is also in my view incomplete. It reads as follows:

“That the accused is guilty of contravention of:

Sec 66(2) Act 93/1996

In that the accused upon or about 12/12/2011

At/near/on SHELL GARAGE

A place/public road in the said district wrongfully rode in or drove vehicle TOYOTA COROLLA with registration M1265 without the consent of the owner, operator or person in lawful charge thereof.”

Nowhere in this annexure is any reference made to the district where the offence allegedly took place. Even if one were to read this annexure with the J15, the mentioning of Ladybrand in the J15 pertains to where the trial would be conducted and not necessarily where the offence was committed. Up to the point where the court convicted the accused, no evidence was placed before court that the

offence was indeed committed in Ladybrand or in the district over which the court has jurisdiction.

[22] As the annexure stands now, no reference is made to the penalty clause of the relevant Act, section 89(1). Also no reference is made to section 89(6), which indicates the relevant penalty for contravening section 66(2) of the said Act. Section 66(2) on its own merely creates a prohibition and not an offence. See **S v LEPHATSWA EN ANDERE** 1973 (2) SA 96 (O) at 98B.

[23] Sentencing forms just as much a part of the criminal proceedings and should therefore not be neglected, or, as in this case, be omitted from the charge-sheet. Keeping in mind that the accused did appear in person and also the fact that section 112 of the Criminal Procedure Act *supra* was placed on the books to protect undefended accused persons, can one say that the omission of the relevant sections, as mentioned above, does not infringe on the accused's right to a fair trial as entrenched in section 35(3)¹ of the **Constitution of the Republic of South Africa**, Act 108 of 1996?

¹ Juta Law Online Publications:

(3) Every accused person has a right to a fair trial, which includes the right-
(a) to be informed of the charge with sufficient detail to answer it.

[24] Returning to the fact that the accused was arrested on 12th December 2011 and only appeared on 15th December 2011, it may well be that the accused was arrested outside court hours on the 12th of December 2011, but the record lacks any explanation whatsoever to that effect. Nowhere is there any note by the magistrate at the first appearance nor at the trial as to why the accused was only brought to court on the 15th of December 2011. Section 35(1)(d) of the Constitution *supra* states:

“35 Arrested, detained and accused persons

“(1) Everyone who is arrested for allegedly committing an offence has the right-

...

(d) to be brought before a court as soon as reasonably possible, but not later than-

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;”²

[25] Due to the lack of any evidence as to why the accused was only brought to court on the 15th of December 2011, I cannot

find there was no infringement on the rights of the accused as set out in section 35 of the Constitution *supra*. Mr Pretorius concedes that the accused's right to be brought before a court within 48 hours seems to have been infringed in light of the content of the charge-sheet. He however submits that this does not *per se* lead to the inference of an unfair trial. The concept of a fair trial embraces a factual enquiry. He also argues that it does not appear from the record that this infringement caused any prejudice to the accused in the conduct of his trial (See *S v Mashinini* (502/11) 2012 ZASCA 1). I agree that this infringement in isolation does not appear to have caused any prejudice. When considered cumulatively with the other irregularities, it may however lead to the inevitable conclusion that the accused did not have a fair trial.

- [26] As touched on, one or even more of the irregularities referred to above may, depending on the facts and circumstances of each individual case, not be such as to lead to a finding that an accused person's right to a fair trial was infringed. In light of the present circumstances, I am for the reasons stated above and those that follow, of the opinion that the cumulative effect of the irregularities in the matter are such

that it cannot be found that the accused had a fair trial.

[27] In light of the fact that the annexure to the charge-sheet does not disclose an offence and is in fact fatally defective disposes of this matter. The state's failure to prove whether the offence was committed in the jurisdictional district of the court *a quo* and the failure by the state to give any explanation on record as to why the accused was only brought to court on the 15th of December 2011 simply compounded the matter and would also, cumulatively, have merited the finding that the accused did not have a fair trial. I am therefore of the view that the proceedings as well as the conviction was not according to justice and should therefore be set aside.

[28] This conclusion renders it unnecessary to deal with the sentence of the accused, save for the remarks already made.

[29] Mr Pretorius submitted that, due to the specific facts and circumstances of this matter, no order should be made that the matter be remitted to the magistrate's court to start the trial *de novo* before another magistrate. An order should be

made that the accused should be reimbursed for the money paid towards the fine. I agree.

In the result I would make the following order:

1. The conviction and sentence of the accused, under Ladybrand case nr 1448/2011, is set aside;
2. The fine in the amount of R4000.00 (FOUR THOUSAND RAND) which has been paid must be reimbursed.

N. SNELLENBURG, AJ

I concur and it is so ordered.

J.P. DAFFUE, J

Submissions on behalf of the Director of Public Prosecutions,
Free State:

The Deputy Director of Prosecutions, Adv JHS Hiemstra SC
assisted by Adv D Pretorius.