IN THE HIGH COURT OF SOUTH AFRICA

(TRANVAAL PROVINCIAL DIVISION)

Date: 25/05/2006

Case No: A1113/04

UNREPORTABLE

In the matter between:

LETLHONGONOLO KHUTLEDI Appellant

and

THE STATE Respondent

JUDGMENT

SOUTHWOOD J

[1] On 3 September 2003 the appellant was found guilty in the Klerksdorp magistrates' court of a contravention of section 65(2) of Act 93 of 1996 ('the Act') (driving a motor vehicle while the concentration of alcohol in his blood was not less than 0,05 gm/100 ml: 0,19 gm/100 ml) and he was sentenced to 18 months imprisonment and a further 12 months imprisonment conditionally suspended for four years.

[2] The appellant, who was legally represented, pleaded guilty to the charge and handed in a statement in terms of section 112(2) of Act 51

of 1977. The statement admits the elements of the offence. It is silent about the circumstances in which the offence was committed.

[3] The appellant noted an appeal against the sentence which he contends is excessive and induces a sense of shock. On 1 December 2003 the appellant was released on bail of R6 000 pending the appeal.

[4] When he was sentenced, the appellant had two previous convictions. On 25 August 1999 he was found guilty of reckless or negligent driving (committed on 29 December 1998) and sentenced to a fine of R200. On 7 March 2003 he was found guilty of a contravention of section 65(2) of the Act and a contravention of section 12 of the Act (driving without a driving licence). On the first count he was sentenced to R900 or 90 days imprisonment and a further R5 000 or 12 months imprisonment conditionally suspended. On the second count he was sentenced to a fine of R300 or 10 days imprisonment.

[5] The appellant's personal circumstances and the circumstances of the crime appear from the reports of the probation and correctional service officers which were handed in by consent. No *viva voce* evidence was led.

[6] The appellant's personal circumstances may be summarised as follows: he was born on 13 December 1973 and is the youngest of 11 children. He had a normal upbringing until 12 August 1993 when he

sustained a gunshot wound which caused permanent disability. He is now confined to a wheelchair. The appellant achieved standard 7 and has not received any further education or training which would equip him for employment. The appellant receives a disability grant of R700 per month and still lives at home with his mother. The appellant has a stable personality and can distinguish between right and wrong. He also knows what behaviour is acceptable and what behaviour is not. He used the compensation for the gunshot injury he received from the SAPD to purchase a combi. He does not have a driving licence but drives himself around in the motor vehicle. The appellant socialises with friends. They use alcohol and dagga. There is no suggestion that they are involved in other criminal activities.

[7] The appellant committed the offence while driving the combi. It happened when the family was preparing for the funeral of a niece. The appellant went to inform a relative about the funeral and ended up in a shebeen where he and a friend drank 8 bottles of beer. According to the probation officer's report the appellant says he was drunk when he left the shebeen and that he caused an accident. He collided with two boys, Mohau Mopedi and Kagisho Ntoagae, injuring both. At the time of sentencing one was still walking on crutches and the other's hand was still injured. The appellant expressed remorse for the harm he caused and a desire to compensate the two boys. He explained his behaviour as being caused by the stress of the death of his niece. He drank to relieve this stress. The probation officer reports that the

appellant has never received counselling for his disability and expresses a high level of frustration as a result of his condition. He deals with this by using alcohol and dagga.

[8] The consequences for Mohau Mopedi have been serious. He was 14 years old at the time. He was hospitalised for three months as a result of his injuries and underwent various surgical procedures. At the time of sentencing he had not yet resumed his studies as his right hand was not functioning properly.

[9] The appellant has been raised in a stable environment and enjoys the support of his mother. He uses alcohol and dagga, sometimes to excess, and in the past this has resulted in violent behaviour at home. However, since the offence the appellant's behaviour had improved and he is no longer violent at home. As already mentioned there is no suggestion that the appellant is involved in any other form of criminal behaviour.

[10] The learned magistrate in the court *a quo* rightly took a serious view of the offence and the circumstances in which it was committed. He regarded the previous conviction for a contravention of section 65(2) of the Act and the lack of a driving licence as aggravating features. He also referred to the high incidence of the crime within the court's area of jurisdiction and the fact that the crime is a serious one.

[11] Despite bearing in mind that the appellant was found guilty of a contravention of section 65(2) of the Act and not driving under the influence of intoxicating liquor (in contravention of section 65(1)), a more serious offence, the learned magistrate took into account the statement in the probation officer's report that the appellant was drunk when he left the shebeen and referred to a number of cases dealing with sentences for driving under the influence of intoxicating liquor. In doing so the learned magistrate misdirected himself. The state did not prosecute the appellant for a contravention of section 65(1) of the Act and accepted the appellant's plea of guilty to the charge of contravening section 65(2) of the Act. The appellant had to be sentenced for the lesser offence taking into account the mitigating and aggravating features of the case. The learned magistrate also misdirected himself by taking into account the appellant's previous conviction for a contravention of section 65(2) of the Act as a previous conviction. This offence was committed after the present contravention.

[12] The learned magistrate also did not sufficiently take into account the appellant's personal circumstances. He is disabled and confined to a wheelchair. The reasons for his behaviour are clearly psychological and social rather than criminal. It was an act of stupidity for the appellant to drive without a valid driving licence. This can be attributed to bravado rather than criminal intent. The appellant has never received counselling to enable him to deal with his disability and

frustration. A prison sentence without the option of rehabilitation is not appropriate.

[13] The sentence of 30 months imprisonment is also startlingly inappropriate in all the circumstances. It does not take sufficiently into account the personal circumstances of the appellant and the interests of the community. This alone entitles the court to interfere with the sentence.

[14] The learned magistrate did not consider adequately the imposition of correctional supervision as a condition for the suspension of the prison sentence – see section 297(1)(b) of Act 51 of 1977. The learned magistrate did not accept the view of the probation officer that the fact that the appellant is wheelchair-bound will be a great disadvantage in prison and that the appellant needs to be given a chance to be rehabilitated in his family environment. The learned magistrate took the view that being in a wheelchair was not an insurmountable problem because the appellant could be sent to a prison where there would be room for him to manoeuvre his wheelchair. His view is that the imposition of punishment is not intended to be for the convenience of the criminal. While this is true as a general proposition it should have been given greater importance in this case.

[15] The probation officer considers that the appellant is a suitable candidate for correctional supervision. He has a stable address where

he can be monitored. He can attend the sessions and programs presented by Correctional Services. On the other hand, the correctional services court official does not consider the appellant a suitable candidate for correctional supervision because the appellant is permanently disabled and will not be able to perform community service to repay the community for the offence he committed. This is not sufficient reason for the appellant not to be a candidate for correctional supervision. A period of correctional supervision will have a salutary effect on the appellant and hopefully he will be rehabilitated and given a sense of purpose. The inconvenience of house arrest is a serious restraint on the appellant's freedom of movement and will impress upon the appellant the seriousness of his actions if the programs do not. (Since the appellant was sentenced the nature and designation of the relevant programs has changed. These will appear from the order).

[16] Order:

I The appeal against sentence is upheld and the sentence is set aside and substituted with the following sentence:

'Twelve (12) months imprisonment suspended for four (4) years on the following conditions –

(1) that the accused undergoes correctional supervision in terms of section 276(1)(h) of Act 51 of 1977 from 1 June 2006 to 30 May 2007, which correctional supervision shall consist of –

(i) house arrest every day of the week at the accused's place of residence, X339 Jouberton, Klerksdorp, which he may only leave for the purpose of -

(a) shopping for personal requirements on the first Saturday of each month from 9 am – 11:30 am;

(b) receiving medical attention;

(c) attending and engaging in the Correctional Services Orientation program, Alcohol and Drug Abuse program, Life Skill program and Therapeutic sessions on Anger Management at such times and places as are determined by the Commissioner of Correctional Services;

(d) attending therapy with a psychologist at the Tshepong Hospital, Klerksdorp, at such times as are determined by the psychologist in consultation with the Commissioner of Correctional Services;

(e) travelling to and from the programmes, sessions and therapy;

(ii) Correctional Services Orientation program, Alcohol and Drug Abuse program, Life Skills program and Therapeutic Sessions on Anger Management at such times and places as are determined by the Commissioner of Correctional Services.

(iii) therapy with a psychologist at the Tshepong Hospital, Klerksdorp (until such therapy is not longer necessary in the opinion of the psychologist) at such times as are determined by the psychologist in consultation with the Commissioner of Correctional Services;

(2) that the accused is not found guilty of a contravention of section 65(1), (2) or (5) of Act 93 of 1996, committed during the period of suspension;

(3) that the accused is not found guilty of driving without a valid driving licence in contravention of section 12 of Act 93 of 1996 committed during the period of suspension;

(4) that the accused shall not use intoxicating liquor or dependence producing substances other than that prescribed by a medical practitioner during the full duration of the correctional supervision.'

II The Commissioner of Correctional Services is authorised to reduce or dispense with any part of any program, session or therapy if the Commissioner is satisfied that the accused has satisfactorily completed the program or responded to therapy.

III In terms of section 35(2) of Act 93 of 1996 it is ordered that the accused is disqualified from obtaining a learners or driving licence or permit for a period of four (4) years from the date of this order.

IV The accused shall report to the correctional officer at Klerksdorp not later than 9 am on 29 May 2006.

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B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

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M.N.S. SITHOLE
ACTING JUDGE OF THE HIGH COURT

CASE NO: A1113/2004

HEARD ON: 15 May 2006

FOR THE APPELLANT: ADV. A.B. BOOYSEN

INSTRUCTED BY: Kennedy Kgomongwe Attorneys

FOR THE RESPONDENT: ADV. H.O.R. MODISA

INSTRUCTED BY: State Attorney

DATE OF JUDGMENT: 25 May 2006