

CIV/APN/326/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

NTEBEKE SETOFOLO

APPLICANT

and

THE MAGISTRATES COURT QUTHING

(His Worship Seleke)

1st RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS

2nd RESPONDENT

THE ATTORNEY GENERAL

3rd RESPONDENT

For Applicant : Adv. Z. Mda

For Respondents : Adv. T. Dlhagamandla

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 16th day of October 2000.

This was application for the review of the judgment of the magistrate for the district of Quthing, presided over by His Worship M. Seleke Esq., in a certain

2

criminal case number CR 140/2000, wherein Applicant was charged with stock theft and contravention of the provisions of section 6 read with section 14A (I) (ii) of the Stock Theft Act No4/200. The application was supported by affidavits of the Applicant and his Counsel and the latter's secretary.

In the main the Applicant sought an order reviewing and setting aside his conviction and sentence contained in the said judgment on two main grounds:

- i. that he was denied legal representation in violation of his entrenched constitutional right as clearly provided in section 12 (i) (2) (d) of the Constitution of Lesotho. Consequently as he contended he was denied a fair trial; and
- ii. That he was denied his fundamental right of equality before the law and the equal protection of the law.

The Respondents did not file any affidavit. The First Respondent has since filed his reasons for judgment pursuant to this Court's Order issued on the 1st September 2000.

It was not disputed or at least from the reasons for judgment filed by the First Respondent that the following appeared to be common cause. Firstly, that no reasons for judgment were filed after the conviction was pronounced and sentence

3

meted out until service of this Court's Order was effected on the First Respondent on the 4th September 2000. Since the reasons were filed I did not attach anything to the delay. This delay could perhaps be attributed not to neglect or remissness on the part of the presiding officer. It could be attributed to the absence of a requirement in the practice of magistrates to render reasons for judgments every time after the conclusion of the proceedings unless there is a notice that there has already been an appeal in a case. In that event the magistrates courts rules prescribe the procedure to be followed with regard to responding to the grounds of appeal. It was urged to observe that the First Respondent was on this aspect not candid enough to indicate on record as to when the reasons were filed nor at least in the copy provided to Counsel. I did as observe that no date was indicated nor was there attachment of the signature of the presiding officer to his own judgment. I find it unnecessary to comment more than to say that the learned magistrate must have done things hurriedly. This I say without intention to condone anything.

Secondly, that the First Respondent ruled that the case should proceed, and in fact it proceeded to finality with the accused unrepresented in spite of the fact he had proved to the Court that he had engaged the services of a lawyer to conduct his defence. In that case I was referred to paragraphs 4.4, 4.5, 4.6 and 4.6.2 of the founding statement and reasons for judgment at page 2 paragraph 3 thereof.

4

Thirdly, that Applicant asserted his right to legal representation then remained mute throughout the proceedings. I observe for this paragraphs 4,6.1 of the founding statement and reasons for judgment at page 5 paragraphs 2 and 3.

Reference to the Applicant's case showed the following: Firstly Applicant had contended that First Respondent adopted a completely strange procedure not affording him an opportunity to engage services of another lawyer if the Court felt that the one he had engaged was delaying the course of justice. I was urged to observe that First Respondent's tenacity in inexplicably persisting to deny Applicant his fundamental human rights constituted judicial impropriety. The First Respondent on the other hand had belatedly and as an afterthought contended that he needed to proceed with the case, with the Accused unrepresented, because Accused had not acceded to his advise to get another lawyer and that the Accused had insisted that he did not want another lawyer because he had already paid Mr. Mda. This can be seen from the reasons of judgment at page 2 at paragraph 3.

Then the following legal issues were raised in favour of the Applicant. Firstly it was with regard to the rights to legal representation. It was submitted that the normal situation and what was expected over an accused person was that he would ask to be afforded an opportunity to such legal representation. The right of an accused person to legal representation was only violated where the accused asserted

5

it but the Court proceeded with a trial despite the clear desire and request by the accused procure legal representation. The Court was referred to the case of NDABE KHOARAI v DIRECTOR OF PUBLIC PROSECUTIONS (CRI/APN/614/93) delivered by this Court on the 9th February 1994. Counsel went further to say that in similar circumstances as pertaining to the case in casu the Botswana Court of Appeal in LAWRENCE MAPHANE v

THE STATE CRI/A/12/91 the Court therein had occasion to discuss the right of legal representation within the conspectus of section 10 (2) (d) of the Constitution of Botswana couched in similar terms as our section 12(2)(d) save that there is an addition of words "at his own expense" where, inter alia, the following observations were made by Amisshah J.P.

"It is not unknown for lawyers instructed by clients not to turn up on the appointed day to represent their client's interests. The trial Court in this case made no enquiry to find out whether this was one of those occasions. Should the non appearance of a lawyer on such occasions be taken against the client? Should the accused person always be made to bear the responsibility of the lawyer he has hired not appearing to conduct his case or giving an explanation for his non appearance? If not, how would a Court distinguish between cases where the accused should be made responsible, and those in which he should not, without that Court making some enquiry into the

6

circumstance? These are the type of questions which I would expect a Court confronted with this problem to ask. That no such questions were considered is a matter which gives cause for concern in this case." (See page 6 of judgement)

The Court in MAPHANE'S case proceeded to say:

"The protection conferred by the Constitution should not be taken away by the Courts merely because the lawyer he has hired has abused it..... The protection belongs to the accused, he should not be denied it because of the fault of another." (See page 13 of the judgment)

Then Counsel went further to quote from that judgment to say:

"I agree that neither the accused nor his lawyer should be allowed to dictate to the Court. I agree that the convenience of the Court should not be determined by the convenience of the accused or his layer. But the Courts should not give the impression that would undoubtedly be wrong, that they are so jealous of encroachment on their dignity or convenience that the legal representation of the accused is secondary to that." (See page 14-15 of (he judgment)

I was also referred to useful headnote (the report being in Afrikaans) in S v

7

SEHERI AND ANOTHER 1964(1) SA 29. For the summary of the said case I was referred to p.805 of Si v NQULA 1974 (1) SA 801 (E.C.D.) and S v SHABANGU 1976 (3) SA 555 (AD).

The Namibian Supreme Court (i.e. the Court of Appeal) in its interpretation of article 12 (1) of the Namibian Constitution couched in similar terms as our section 12(2) (d) has held that the right to legal representation is so fundamental that failure to inform an accused of such right may in certain circumstances vitiate the whole proceedings. See also S v KAN AND OTHERS 1995 N R I(S C) at p.7C and 9H. I was being referred to the quotation in S v KAN'S case at p.7 particularly the observation by Dumbutshena A.J.A. where he said:

"In Namibia the right to be defended by a lawyer of ones choice is a constitutional right. When the trial magistrate failed to inform the Appellants of his right he deprived them of their constitutional right. Because the right is given to the people by the Constitution it is the duty of judicial officers to inform those that appear before them of their right to representation." In this way a Constitutional right is given practical meaning.

It was submitted that as a point of departure our courts have adopted the international culture of constitutional jurisprudence which has developed to give the

8

constitutional interpretation, in particular the provisions of a constitution that deals with the protection of fundamental rights and freedoms, a generous interpretation avoiding what has been called "the austerity of tabulated legalism", suitable to give the individual the full measure of the protected fundamental rights and freedoms. I was referred also to MAKAPELA v THE MINISTER OF HOME AFFAIRS 1995-1996 LLR and L.B 224 Court of Appeal at p 230 and ATTORNEY GENERAL OF LESOTHO AND ANOTHER v SWISSBOROUGH DIAMOND MINES & OTHERS 1997 (8) BCLR 1122 at p 1131 B-C, F-G and MOLAPO v DIRECTOR OF PUBLIC PROSECUTIONS 1997(8) BCLR 1154 (Lesotho).

There were other submissions made by Applicant's Counsel. Firstly, that on the facts of the Applicant's right to legal representation was violated in spite of his unequivocal assertion of it. Secondly, the First Respondent's discretion to proceed with hearing the case in the absence of Applicant's lawyer was exercised capriciously in that:

- i. he did not inquire into the circumstances of Applicant's lawyer non-attendance and to verify whether Applicant was to blame or not.
- ii. According to the record of proceedings it appears he assumed that Applicant's Counsel was at fault and that was no reason to deprive the Applicant of his constitutional right.

9

Thirdly, even assuming without conceding that the First Respondent had advised Applicant to seek another lawyer that would still constitute a violation of Applicant's right to legal representation of his choice in that –

- i. On the facts First Respondent had not made any inquiries as regards the non attendance of Applicant's Counsel; neither was there a reasonable opportunity given to the Applicant to engage another lawyer.
- ii. In the evaluation of the predicament of the Applicant; First Respondent ought to have attached due weight to the fact that Applicant was not on bail and had to rely on the goodwill of his relatives in helping him to procure legal representation.

Fourthly, on the facts as a whole there was no basis for the criticism of the conduct of Applicant's Counsel in his discharge of Applicant's mandate. In fact the whole blame must be

must be laid on the door steps of the First Respondent for the most cavalier and nonchalant manner in which he handled Applicant's matter.

Fifthly, First Respondent placed too much emphasis on the convenience of the Court and was on the facts unduly influenced by factors which were irrelevant such as:

"Who calls the shots between the lawyers and the Courts?"

10 It was submitted in addition as was held in MAPHANE'S case (supra) at p. 14, that it was not the lawyer who was the authority vested with the power to enforce the constitutional protection of the accused but the courts. It was significant that section 118 of the Constitution clearly stipulated that the Courts in the performance of their functions shall be subject to the constitution. Be that as it may, it should be emphasised that accused right to legal representation is not secondary to Courts' consideration of convenience.

I now have to consider as to whether rights explained to the accused person must be recorded. If anything is explained to the accused, it should appear on the record; as was stated by Steward J in S v MDODANA 1978(4) SA 46E at 48 A-B that:

"It is impossible for this Court on review, to decide whether or not proceedings are in accordance with justice if the record omits to state clearly what procedural steps have been followed. This is not to say that the Magistrate's ipsissima verba must always be transcribed in full, but at the very least, the record must indicate and prove when the accused is unrepresented whether or not the accused's rights were properly explained to him and that he understood his position."

See also S v WELLINGTON 1990 N R 20 (H C) per Frank AJ. with Levy J concurring. I was again referred to R v MOLAPO C of A (CRI) No. whose

11

citation was not stated.

The further submissions were that on the facts, it was inconceivable that the First Respondent could not have recorded his advice to Applicant to seek an alternative lawyer.

- a) This Court was urged that it will observe the First Respondent was very cautious in recording all that he said to the accused and the latter's response.
- b) Since First Respondent maintained that it was applicant's disavowal of his advise which made him to proceed with the case he could not have omitted to record such a fact. It was submitted that this is another instance of judicial impropriety on the part of the First Respondent in trying to falsely embellish the record.
- c) In any event the Applicant solemnly stated that he was not given the opportunity to engage the services of another lawyer and was supported by the record in this regard.

The next thing to consider was the question of the right to equality before the law and equal protection of the law. It was contended that section 19 of the Constitution provided that every person shall be entitled to equality before the law and to the equal protection of the law. Secondly in interpreting a similar provision

of the Constitution of the Republic of South of 1996 the Constitutional Court of South Africa has held that the right to equality is infringed only by differences in treatment which are illegitimate. I was referred to PRINSLOO v VAN DER LINDE 1997(3) SA 1012 (CC) at para 17 and the case of S v NTULI 1996(1) SA 1207 (CC).

It was submitted in conclusion that the First Respondent violation of Applicant's right to legal representation was illegitimate and had no rational basis. And further that Applicant was deprived of the right enjoyed by every accused person in Lesotho. Consequently, his equality rights under section 19 were violated.

In all the circumstances of this matter it was prayed that the application be granted as prayed. As I indicated in my ruling of the 11th September 2000 this was an application that went unopposed. The Crown represented by Miss Dlangamandla indicated that it had no answer to the application as it stood. I therefore allowed the application and I made other consequent orders which were as follows:

- a) The matter be heard de novo before a different magistrate.
- b) Application for bail shall be dealt with by the magistrate who then will consider surrounding and relevant circumstances.
- c) Exhibits (animals) be kept by the complainant until re-trial.

T. MONAPATHI
JUDGE