CRI/APN/155/2000

IN THE HIGH COURT OF LESOTHO

In the Application of :

YUSUF PATEL BHALI **Applicant**

vs

DIRECTOR OF PUBLIC PROSECUTIONS **1st Respondent**
HIS WORSHIP THE MAGISTRATE MR LESENYEHO **2nd Respondent**

J U D G M E N T

Delivered by the Hon. Mr Justice M.L. Lehohla on the 4th day of May, 2000

The applicant moved on notice :

(1) an urgent application against the two respondents calling upon them

(2) to show cause, if any, why the decision of the 2nd respondent delivered on 21st February 2000 shall not be reviewed, corrected and/or set aside,

(3) calling upon the 2nd respondent to dispatch within seven days of his receipt of this notice to the Registrar of this Honourable Court, the record of the said proceedings to be reviewed, corrected and/or set aside together with such reasons as the respondent is required or desired to give and to notify the applicant that he has done so,

(4) an order that respondents should pay costs of this application

(5) granting such further and/or alternative relief as the Court may deem fit.

As appears on the applicant's motion papers the number 3 is repeated in designating paragraph 4 as well. I shall however refer to the numbering of paragraphs in the corrected version embarked on by the Court *mero motu.*

The Court is in possession of the certified copy of the original demanded and made mention of in paragraph 2 above. The passport subject matter of the litigation marked Exhibit 1 eventually reached the Court after the matter was postponed due in part to the incompleteness of the record occasioned by the absence of this important Exhibit. Needless to say the Court granted the applicant bail during the very first time the parties appeared before it to argue this matter which had to be postponed for a variety of reasons including the one just mentioned above.

The applicant in his founding affidavit sets out that he is an Indian adult male residing at Pretoria in the Republic of South Africa. Otherwise his permanent home of which he is a citizen is Bhroda Gujarad in India.

He further sets out that on 17th February, 2000 he was travelling from Maseru

to the Republic of South Africa. On passing through the Maseru side of the border he handed his Indian passport to the Immigration Officer who inspected it and allowed the applicant to pass on to the South African side of the border.

On reaching the South African side of the border the applicant duly handed his passport to the South African Immigration Officer who inspected it and said something which created the impression in the applicant's mind that the officer thought the passport was not the applicant's. The applicant says he *told* the officer to look him up in the face whereupon he would see that the applicant is truly the holder of this passport. See paragraph 4.2 end of line three.

Thereupon the applicant without, as he says, understanding what was going on was taken by this officer and some South African police officer to the Lesotho side of the border. He was handed over to the Lesotho Police.

The applicant stresses the point that his English is very poor and he understands and converses in this language with extreme difficulty. He says he usually understands what is being said to him if sign language is used.

The record of the case from the Subordinate Court shows that the applicant pleaded guilty to the charge after this had been put to him. The public prosecutor and the court accepted the plea.

Thereupon the public prosecutor gave an outline of the case.

The outline is as follows :

The evidence of Inspector Rannoko of LMPS would show that on 17th instant he was on duty at the Maseru Bridge Police Post. Whilst he was there the accused was forwarded to him together with his passport by RSA police.

When he inspected the passport he noticed that the accused was supposed to be in Lesotho till the 13th instant.

One 'Mankopane Mothibeli was shown the accused's passport. She would testify that the Immigration Stamp in the accused's passport was not theirs and this would mean that it was a fraudulent stamp.

Trooper Molise would show that the accused was forwarded to him on that day. He then introduced himself to the accused and then asked him for an explanation; after which he cautioned him and then gave him a charge which he stands facing. I intend to hand in the passport as an exhibit marked Exhibit 1.

Accused : I accept the outline of facts
Verdict : Guilty as charged
Public Prosecutor : No previous permit (sic)
Sentence : I quite appreciate your request but the thing is you forged the permit and this is quite serious. I am sure even your own government would feel ashamed. You will go to jail for 18 months.

From the above text I would infer that 'Mankopane is an employee in the Immigration Department of Lesotho Government. I would also think the word *permit* appearing opposite the public prosecutor below the phrase *guilty as charged* above was intended to mean convictions. So that the common sense meaning intended to be conveyed would be *"no previous convictions"* instead of *"no previous permit"* which makes no sense.

From the outline of the public prosecutor it appears on the face of it that the case was properly made out for the conviction that followed.

I have had occasion to consider a more or less parallel authority in regard to the effect of a plea of guilty in a Criminal Review in ***Rex vs Joe Seipati*** 1985-1990 LLR p.235 at p.237 where it is reported :

"It would be worth noting that in ***Pulumo*** [CRI/A/37/88 unreported]

unlike in the instant matter the unrepresented accused had pleaded not guilty. Thus similarly in C. of A. (CRI) No.12 of 1974 ***Stephen Tsatsane vs Rex*** (unreported) where the appellant had pleaded guilty in the Subordinate Court and for purposes of sentence his matter was committed to the High Court where he sought to challenge the original plea **Maisels P** as he then was found it fitting to extract from **Hoffman** on the **South African Law of Evidence** 2nd Edition p. 305 *et seq* the following :-

> 'A plea of guilty is in effect a formal admission of the essential elements of the charge. Even after withdrawal, the fact that it was made is something which the court is entitled to consider'"

While on this point it is necessary to highlight the fact that although this matter has been brought to this Court by way of review which would *per se* be understood to mean that irregularity of some procedural matter is in point as opposed to substance or merits of the case, a question of substantive importance has been raised in the applicant's papers themselves; namely that ".....if the alleged forgery or irregular certificate was not used in Lesotho a crime cannot be alleged to have been committed" see paragraph 8.2.5.1. I should stress that this is a factor which relates to merits and which cannot properly be entertained in review proceedings which are confined to irregularity in procedure. Needless to say *Miss Thabane* for the applicant did not make any oral submissions regarding this important matter which I further stress the Court cannot lightly over-look.

Miss Thabane emphasised the fact that the accused was not represented and was labouring under great disadvantage of being unable to communicate with the court as there was no one to interpret for him what was being said. It would seem to me that the question raised here is two-fold. First it relates to legal representation or lack thereof. Here *Miss Thabane* charges that the Magistrate was wrong not to have warned the accused at the start of the desirability of having a legal representation. Next it relates to the constitutional right that the accused is entitled to follow the case preferred against him by means of a language that he can understand properly.

With regard to the first leg of the above argument in ***Seipati*** above reference is made to ***S vs Mashinyana*** 1989(1) SA 592 where it was held that -

> "A court is not obliged to enquire from an accused whether he wishes to have legal representation. The unexpressed desire of an accused to engage a legal representative cannot afford him a cause for complaint after his conviction and sentence".

The instant matter insofar as relates to legal representation is concerned fits in well with the above phrase with which I agree entirely.

Buttressing the above view the Swazi Court of Appeal in ***Caiphus Dlamini vs Regina*** Case No. 46/84 per Welsh J.A. said :

"However, where he (the accused) does not seek it, (legal representation) and where no irregularity occurs by which he is deprived of it, there is no principle or rule of practice of which I am aware which vitiates the proceedings".

Further an additional reference to section 240(1) of our Criminal Procedure and Evidence Act No. 7 of 1981 reflects that :

"If a person charged with any offence before any court pleads guilty to that offence or to an offence of which he might be found guilty on that charge, and the prosecutor accepts that plea the court may

(a) .....

(b) if it is a Subordinate Court, and the prosecutor states the facts disclosed by the evidence in his possession, he shall, after recording such facts, ask the person whether he admits them, and if he does, bring in a verdict without hearing any evidence".

C/F ***Tsatsane*** above (unreported) at p.2.

Needless to say in the instant matter the record shows that the applicant when supposedly asked if he admitted the facts outlined by the public prosecutor he answered in the affirmative.

In ***Rex vs Sibia*** 1947(2) SA 50 AD Schreiner J.A. is recorded at p.54 *et seq* as having said :

> "I do not wish to be understood as suggesting that it is an irregularity, of which the accused could take advantage, if no record is made. Speaking only from my own experience, I do not think that it could be inferred from the absence of any reference thereto in the judge's notes or in the shorthand record that the accused was not asked.....".

This is a very seasonable word of caution by an eminent jurist and therefore merits special observation; as it may well be pertinent to the case for the applicant in the instant matter.

In CRI/A/48/86 ***Mothakathi vs Rex*** (unreported) at p.7 this Court made the following observations :

> "Section 162(1) of the Criminal Procedure and Evidence Act provides that where provisions of section 159 of the Act have not been invoked the accused shall either plead to the charge or except to it on the ground that it does not disclose any offence cognisable by the court. In the instant case the charge and outline of the crown case clearly disclosed an offence committed."
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> Subsection 2 provides that if he pleads; he may plead
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> (a) that he is guilty of the offence charged; or
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> (b) that he is not guilty; or
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> (c) that he has already been convicted or acquitted of the offence with which he is charged; or
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> (d) that he has received the Royal Pardon for the offence charged; or

(e) that the court has no jurisdiction to try him for the offence; or

(f) that the prosecutor has no title to prosecute".

In the instant matter the accused in exercise of his unfettered right to opt for any one of the alternative listed above opted for that listed under (a).

Before reaching finality it would be fruitful to have reference to the law dealing with this Court's powers on review.

These appear in section 68(2) of (Order No.9 of 1988 which provides that

"If, upon considering the proceedings aforesaid, it appears.....to the judge ..... that the same are not in accordance with justice or that doubts exist whether or not they are in such accordance :

(a) .....

(b) the judge may,

(i) alter or reverse the conviction or increase or reduce or vary the sentence of the court which imposed the punishment; or

(ii) where it appears necessary to do so, remit such case to the court which imposed the sentence with such instructions relative to the taking of further evidence and generally to the further proceedings to be heard in such case as the judge thinks fit, and may make such order touching the suspension of the execution of

> any sentence against the person convicted or the admitting of such person to bail, or, generally, touching any matter or thing connected with such person or the proceedings in regard to him as to the judge seems calculated to promote the ends of justice".

While this Court is of the view that overwhelmingly there does not seem to be much cause for the applicant's complaint save that he was awakened to the reality of the seriousness of his offence when confronted with jail sentence, an omission apparently centred on over-weening confidence on the water-tightness of their case, was committed by the Crown. The Crown failed to counter or qualify the applicant's allegations of his failure to follow the proceedings in Court. This the Crown could have easily achieved by submitting an answering affidavit from the Magistrate who presided over the matter or from the public prosecutor in charge or both.

In the circumstances acting in terms of section 68(2) (b)(ii) of Order 9 of 1981 above, I set aside conviction and sentence imposed by the learned Magistrate and order a retrial *de novo* of the accused before a different magistrate.

I have observed that the applicant has prayed for costs of this application in prayer 4 of the notice of motion. I think that was uncalled for because in a criminal proceeding a party even if successful does not obtain an award of costs as the law

makes no provision for such. In this way the criminal procedure is in sharp contrast with the civil one where costs follow the cause. Care should be taken that an interpreter who understands the applicant's language is availed to the court going to retry his case.

Exhibit 1 should be released to the Director of Prosecutions Office for use in the re-trial in due course.

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JUDGE
4th May, 2000

For Applicant : Miss Thabane
For Respondents : Mr Kotele