IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C OF A (CRI) 10A/08

In the matter between:

NATHANAEL MOKHOTHO **APPELLANT**

AND

THE LEARNED MAGISTRATE **FIRST RESPONDENT**

CLERK OF COURT MASERU **SECOND RESPONDENT**

DIRECTOR OF PUBLIC PROSECUTIONS **THIRD RESPONDENT**

THE MASERU MAGISTRATE'S COURT **FOURTH RESPONDENT**

CORAM: RAMODIBEDI, P

MELUNSKY, JA

MAJARA, JA

Heard : 3 October 2008

Delivered : 17 October 2008

Summary

Criminal review - Delay in applying for - Review on notice of motion for setting aside criminal proceedings in which the appellant was convicted of car theft and sentenced to 8 years imprisonment - No application for condonation of the long delay - No explanation for the delay furnished - The High Court dismissing the review application on the grounds of undue delay of almost 4 years. - The phenomenon of missing records a matter for concern.

JUDGMENT

RAMODIBEDI, P

[1] The phenomenon of records which conveniently go missing in the courts of this country is cause for concern. The

insidious effect of this cancerous practice on the proper administration of justice is self-evident. There can be no doubt that if this problem is not addressed decisively and as a matter of urgency our whole justice system will fall into disrepute, if it has not done so already. I should point out at the outset, therefore, that it behoves the courts and all those entrusted with the safety of records to step up their resolve to fight this scourge. Those who are guilty of this sordid practice, which bears all the hallmarks of an orchestrated racket, must not be allowed to get away with defeating the course of justice.

[2] In outline, the facts show that the appellant was tried before the first respondent in the Maseru Magistrate's Court on a charge of car theft. He was found guilty as charged and sentenced to eight years imprisonment.

[3] After serving almost four years of his term of imprisonment, the appellant brought an application on notice of motion in the High Court for a review of his case and the setting aside of the proceedings as being irregular. Significantly, he omitted to make an application for condonation of the long delay in bringing the application.

Furthermore, he conveniently omitted to disclose his date of conviction and sentence in his founding affidavit.

[4] The High Court (Mahase J) dismissed the appellant's application essentially on two grounds, namely, (1) that there was inordinate delay of almost four years before the review application was made and (2) that the appellant had failed to allege that the proceedings before the Magistrate's Court occasioned him any prejudice resulting in a miscarriage of justice. Aggrieved by this decision, the appellant has now appealed to this Court.

[5] The appellant's complaints giving rise to his application for review are contained in paragraph 6 of his founding affidavit. Therein he says the following:

"-6-

> I aver that I was ignorant in court and did not understand proceedings and seriousness of the charge. I aver further that there was no interpreter in my proceedings and I did not have legal representative. Proceedings have been recorded in English language yet they were conducted in Sesotho and English language and never used interpreter. I must aver further that the proceedings were being conducted in both Sesotho and in English and since I do not know English language I failed to hear when the proceedings were handled in English. I am advised by my lawyer that the proceedings were supposed to have been handled in the language that one understands. This is in terms of the provision of the Constitution of Lesotho section 12."

[6] It is necessary to digress there for a moment and point out that on 4 February 2008, the High Court ordered the second respondent to dispatch the record of proceedings in the matter to the court for review purposes. It is common cause, however, that the record could not be dispatched because it had gone missing. This in turn had the effect that the Director of Public Prosecutions was understandably handicapped in responding issuably to the appellant's averments.

[7] It is important to emphasise that all efforts to trace the record have typically failed. It is, therefore, necessary to

reflect more closely on the appellant's averments in paragraph 6 of his founding affidavit, namely: "Proceedings have been recorded in English language yet they were conducted in Sesotho and English language and never used an interpreter." The appellant ought to at least have explained when he read the record, who gave it to him and what he did with it. This then begs the rhetorical question, where is the record? To permit a litigant to take advantage of the missing record in such a situation would no doubt result in a failure of justice.

[8] It is well-recognised that even although there is no fixed time limit for an application for review, such an application must, however, be made within a reasonable time. In the case of **Mohlomi Seutloali v Director of Public Prosecutions C of A (CRI) 14/06** this Court made the point in the following terms which bear repetition:-

> "[4] It is necessary to point out at the outset that, unlike an appeal, there is no specific time limit laid down for a review. A court seized with a review application, however, is fully entitled to refuse to entertain such proceedings if it considers that there has been unreasonable delay. Each case must nevertheless be considered in the light of its own peculiar circumstances, including, but not limited to, prejudice.
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> [5] I should be prepared to emphasize at this stage that, as a matter of general principle, courts are loath to hear review applications which are brought after unreasonable delay. In this regard I am mainly attracted by the remarks of Gregorowski J expressed some 111 years ago in **Louw v Mining**

Commissioner (1896) 3 **OR** 190, 200, namely, that courts are reluctant to hear an applicant who "now wishes to drag a cow long dead out of a ditch." This, I am afraid, is exactly what the appellant seeks to do in this case.

[6] It is important to recognise that the concerns about undue delay of the institution of review proceedings are, in my view, mainly motivated by four factors, namely, (1) finality to litigation, (2) prejudice to the party which has obtained judgment in having to await execution thereof, (3) the need to hear matters while they are still fresh in the minds of the parties and witnesses and (4) by the consideration of the impact a ready recourse to the re-institution of proceedings has on the efficient administration of justice. The Criminal Courts are already over-burdened and should not be unnecessarily placed under greater stress than they already are."

See also **Wolgroeiers Afslaers (Pty) Ltd v Municipality of Cape Town** 1978 (1) **SA** 13 (**A**) (Translation).

[9] It requires to be stressed that an application for review made after inordinate delay, as here, is not just there for the

taking. Generally speaking, the applicant must ordinarily make a properly motivated application for condonation and give an acceptable explanation on oath as to why the delay came about. In a nutshell, he must address the concerns relating to the undue delay as fully set out in the preceding paragraph. This is so in order to enable the court in the exercise of its discretion to determine whether or not to condone the delay in question. It follows from these considerations in my view that the appellant's failure to apply for condonation and indeed to give reasons for the long delay of almost four years is fatal in the circumstances. Accordingly, the learned Judge *a quo*'s

approach in dismissing the application on this ground cannot be faulted. The learned Judge is indeed supported by a wealth of authority. Thus, for example, in the **Mohlomi Seutloali** case, supra, where there was a delay of six years and where, typically as here, the record of proceedings was untraceable, this Court expressed itself in the following terms in paragraph [8] of its judgment:-

> "In view of the lengthy delay it may well be impossible to determine the reliability of the appellant's bald averment that the alleged irregularity occurred. To do so would mean that in any review application where the record is no longer available, the *ipse dixit* of an accused would have to be accepted. This is clearly unacceptable."

[10] In the view I take of the matter it is strictly unnecessary to determine the other point on which the appellant's application was dismissed, namely, prejudice or lack of it.

[11] It follows from the aforegoing considerations that the appeal cannot succeed. It is accordingly dismissed.

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M.M. RAMODIBEDI

PRESIDENT OF THE

COURT OF APPEAL

I agree: _____

L.S. MELUNSKY

JUSTICE OF APPEAL

I agree: _____

N. MAJARA

JUSTICE OF APPEAL

For Appellant : Adv T.N. Habasisa

For Respondents: Adv N.B. Rammina