IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CRI) NO. 1/2013

In the matter between:

LECHESA LETS'ELA	**APPELLANT**
AND	
THE DIRECTOR OF PUBLIC PROSECUTIONS	**1ST RESPONDENT**
THE MAGISTRATE (Maseru Magistrate's Court)	**2ND RESPONDENT**
THE SENIOR CLERK OF THE COURT (Maseru Magistrate's Court)	**3RD RESPONDENT**
THE ATTORNEY – GENERAL	**4TH RESPONDENT**

CORAM: SCOTT, A.P
FARLAM, J.A
THRING, J.A

HEARD: 10 OCTOBER 2013
DELIVERED: 18 OCTOBER, 2013

SUMMARY

Review of proceedings in magistrate's court – Time within which to be brought – Reasonable time – Condonation required if delay unreasonable – Essential part of record of proceedings lost – No proper effort made by magistrate or prosecutor to reconstruct same, as ordered by the Court – Conviction and sentence of accused set aside on review.

JUDGMENT

THRING J.A.

[1] The appellant was charged in a magistrate's court with having contravened section 3 (1) of the Sexual Offences Act, No.3 of 2003 in that he had wrongfully and unlawfully compelled a woman, the complainant, to commit a sexual act with him against her will by assaulting her with a fighting stick and threatening to shoot her with a gun. He appeared in the magistrate's court on 31 March, 2011. The case was postponed to 1 April, 2011 and on that day it was further postponed to 15 April, 2011, and on that day to 20 April, 2011. On the latter date the appellant was found guilty as charged and sentenced to 15 years' imprisonment without the option of a fine.

[2] Some ten months later, on 23 February, 2012 the appellant instituted review proceedings in the Court *a quo* against the respondents in which he sought, *inter alia*, an order that the judgment of the magistrate be reviewed and set aside. To this end, an order was also sought to the effect that the third respondent, the clerk of the court, be directed to dispatch the record of the proceedings to the Registrar of the Court *a quo*. Such order was duly granted in the Court *a quo* on 26 March, 2012.

[3] Unfortunately, however, despite searches carried out by the senior clerk of the magistrate's court, all that has been found of the record is the charge sheet and a single page on which the proceedings of 31 March, 2011 and 1 and 15 April, 2011 are briefly recorded. There is no record available of the crucial proceedings of 20 April, 2011, when the appellant was tried, convicted and sentenced, save the cryptic legend on the charge sheet –

> "Judgment Guilty as charged"

and the sentence: "15 (fifteen) years imprisonment without an option of a fine."

[4] On 5 December, 2012 this was apparently conveyed to the Court *a quo*, which then ordered the magistrate and the prosecutor concerned to reconstruct the record. However, there is no indication on the papers before us that any effort has been made to comply with this order, nor has any explanation been advanced for the failure of the prosecutor and the magistrate to do so.

[5] The court *a quo* dismissed the review application on the single ground that the appellant had delayed unduly in bringing the application, and that there was no application for condonation of his delay. With leave of the Court *a quo*, the appellant appeals to this Court against this decision.

[6] As the learned judge *a quo* correctly pointed out, there is no fixed time limit for the institution of review proceedings such as there is for an appeal, which is governed by the applicable Rules of Court, the rule being simply that a review must be brought within a reasonable time after the decision which is sought to be reviewed. Whether or not the time which has elapsed is reasonable in

a particular case must, of course, depend on the facts and circumstances of the case.

[7] In his founding affidavit the appellant briefly explains why he waited some ten months before bringing the review application. He was then about 23 years of age, and he says that he is illiterate, although he is able to read and write his name. Since 20 April, 2011 he has been incarcerated, serving his sentence. He says that he received no visits in prison from his siblings until December, 2011. Then his mother visited him. He asked her to arrange legal representation for him so that he could apply for a review. For this, however, he did not possess sufficient funds. Nevertheless, some two months later, on 23 February, 2012 the review was launched. Whether or not the record of the appellant's trial and sentence in the magistrate's court would have been available in its entirety at any time between 20 April, 2011 and 23 February, 2012 is not apparent on the papers. In favour of the respondents I shall assume, without deciding, that at some stage during this ten-month period, probably at the beginning, it would have been available.

[8] There is clear South African authority for the nature of the enquiry which must take place in circumstances such as these. It is a two-fold one. In **Setsokosane Busdiens (Edms) Bpk. v. Voorsitter, Nasionale Vervoerkommissie en 'n Ander**, 1986 (2) SA 57 (AD) **Hefer, J. A.** held at 86 C – F (I quote from the English version of the headnote):

> "*The test which a Court has to apply to ascertain whether a common law application for review in the absence of a specific time limit, was brought within a reasonable time, is of a dual nature. The Court namely has to ascertain (a) whether the proceedings were instituted after expiration of a reasonable time and (b) if so, whether the unreasonable delay should be condoned. As regards (b), the Court exercises a discretion but the enquiry as far as (a) is concerned does not involve the exercise of the Court's discretion; it involves a mere examination of the facts in order to determine whether the period that has elapsed was, in the light of all the circumstances, reasonable or unreasonable.*"

See, also, **Wolgroeiers Afslaers (Edms.) Bpk. v. Munisipaliteit van Kaapstad**, 1978 (1) SA 13 (AD) at 39 C-D.

[9] Ten months was certainly a long time to delay the institution of these review proceedings, even for a young,

illiterate person who is in prison and lacks funds. As Ms Ranthithi, who appears for the respondents, has pointed out, nothing prevented the appellant from approaching the relevant authorities for legal aid during this time, or from approaching the Court in person. This may well be a valid criticism of the appellant's explanation for the delay. It is also cursory, sketchy and lacking in detail. In favour of the respondents I shall assume, again without deciding, that the finding of the Court *a quo* was correct that the delay was "undue", that is to say, I assume, unreasonable in the circumstances. However, that is not the end of the matter.

[10] It is true that there was no formal application before the Court *a quo* for condonation, in so many words, of the appellant's delay. However, in his founding affidavit the appellant explained, albeit somewhat cryptically, why there had been a delay, and he went on to say:

> *"As a result that is foundation (sic) for my delay to approach this Honourable Court for review herein and I humbly beg the Court to be pleased to entertain this matter.*"

In my view this passage is tantamount to an informal application for condonation, and ought to have been dealt with as such by the Court *a quo*.

[11] Whilst review proceedings should be instituted within a reasonable time, failure to do so will not be an insuperable bar in the absence of prejudice to the other party or parties: See **Hassan & Co. v. Potchefstroom Municipality**, 1928 TPD 827 at 828; **Chesterfield House (Pty) Ltd. v. Administrator of the Transvaal and Others**, 1951 (4) SA 421 (T) at 425 A – B; **Silbert v. City of Cape Town**, 1952 (2) SA 113 (C) at 119 B – D; **Shepherd v. Mossel Bay Liquor Licensing Board**, 1954 (3) SA 852 (C) at 857 A –D; **Arnison v. Tresize and Others**, 1960 (4) SA 508 (T) at 510 E – 511 A and **Stellenbosch Municipality v Director of Valuations and Others**, 1993 (1) SA 1 (C) at 5 F – H. Thus in **Silbert v. City of Cape Town,** supra, loc. cit. **Steyn, J.** said:

> *"In my opinion there are two factors to be considered as to whether or not to entertain an application for review, viz., (i) whether there has been unreasonable delay, and (ii) whether in the nature and circumstances of the*

> *case it is likely that the other side has been prejudiced, the more important factor being that of prejudice…"*

And in **Shepherd v. Mossel Bay Liquor Licensing Board,** *supra, loc. cit.* **Ogilvie Thompson, J**., as he then was, said:

> "*Condonation of the late institution of review proceedings is always a matter within the discretion of the Court…(T)he element of actual or potential prejudice to the opposing party must, in my view, always be a most material factor in determining whether or not condonation of the delay should be granted. While the Cape practice may not go quite as far as the Transvaal practice in making prejudice the sole criterion (see* ***Chesterfield House (Pty) Ltd. v. Administrator of the Transvaal and Others****, 1951 (4)* SA *421 at pp. 424 – 5 (T)), prejudice to the opposing party has in the practice of this Court, as I have known it, always been a most important factor in the decision of applications for condonation of delay in instituting review proceedings…"*

It must be added that prejudice or potential prejudice to the administration of justice is also a factor to be considered in making such a decision: see **Zwane v. Magistrate, Maphumulo**, 1980 (3) SA 976 (N) at 198 C.

[12] Now, it could no doubt be argued on behalf of the respondents that, as a result of the appellant's unreasonably long delay in bringing his review, the administration of justice will at least be potentially prejudiced, inasmuch as, because part of the record of his trial has been lost, the respondents are now precluded from disputing the irregularities which he alleges took place. Consequently, a guilty man may go unpunished for his crime. Under normal circumstances there would be merit in this contention as an argument in resistance of the granting of condonation.

[13] However, the circumstances here are unusual. Any prejudice or potential prejudice which the respondents or the administration of justice may have suffered as a result of the unavailability of the record is at least in large part attributable to the Crown and its officers and servants. In the first place, it was the duty of the third respondent, the clerk of the magistrate's court, to hold the record in safe keeping. But he or she appears to have lost a vital part of it. Secondly, it lay within the power of the Crown's officers to undo or prevent any prejudice which might otherwise

have been caused by such loss, by reconstructing the record from secondary sources: indeed, the magistrate (the second respondent) and the prosecutor were ordered by the Court *a quo* to do so on 5 December, 2012. No explanation has been forthcoming as to why they failed to comply with this order. In the absence of such explanation it seems to me that any prejudice of which the respondents may complain must be laid at the Crown's door rather than at the appellant's. Certainly, no blame can be attached to the appellant for the loss of the record: at all material times he has been in prison.

[14] It follows, in my view, that the Court *a quo* ought to have exercised its discretion in the appellant's favour and condoned his delay, and that it erred in not doing so.

[15] Where, in a criminal case, the record of the trial proceedings, or a very material part thereof, has been lost, and it cannot be reconstructed from secondary sources, the proceedings and sentence should be set aside on appeal or review: see **S. v. Collier**, 1976 (2) SA 378 (C) at

378 H – 379 A, **S.v Marais**, 1966 (2) SA 514 (T) at 516 G – H and **Theko and Another v. R**, LAC (1995 – 1999) 758 at 768.

[16] In his founding affidavit the appellant complains of serious irregularities at his trial. He says that the prosecutor induced him to plead guilty to the charge against him so as to curtail the matter and enable him to go home. According to him, after he had pleaded guilty, the prosecutor outlined certain facts to the magistrate which had not hitherto been disclosed to the appellant, namely that he had assaulted the complainant and threatened to shoot her. He was not asked whether he admitted these allegations, which he says were untrue. He says that he was also not afforded an opportunity to plead in mitigation of sentence. If what he says is true, it is clear that the appellant has been irregularly and unjustly convicted and sentenced.

[17] None of the appellant's above allegations have been denied by the respondents: they stand unchallenged.

[18] In the light of the foregoing, the Court *a quo* ought, in my view, to have set aside the appellant's conviction and sentence on review.

[19] Consequently, the appeal is upheld. The order of the Court *a quo* is set aside, and it its place is substituted the following order:

> "The conviction and sentence of the applicant in magistrate's court case No. CR 695/2011 are set aside on review."

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W.G. THRING
JUSTICE OF APPEAL

I agree

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D.G. SCOTT
ACTING PRESIDENT

I agree

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I. G. FARLAM
JUSTICE OF APPEAL

For Appellant : T. Fosa

For Respondents : M. Ranthithi