IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CRI) NO.1/2013

In the matter between

LECHESA LETSELA **APPELLANT**

And

REX **RESPONDENT**

CORAM: SCOTT JA
HURT JA
THRING JA

HEARD: 11 APRIL 2013
DELIVERED: 19 APRIL 2013

RULING

HURT JA

[1] In April, 2011, the appellant was convicted in the court of the Resident Magistrate, Maseru, on a charge of contravening s 4(1) of the Sexual Offences Act, No. 3 of 2003 and sentenced to 15 years' imprisonment.

[2] On 23February 2012 (some ten months after his conviction) he lodged an application in the High Court for the following relief:

> "1. Admission of the Applicant on bail per conditions the Honourable Court deems fit pending determination of the aforementioned (*sic*) Review.
>
> 2. The Clerk of the Court Maseru Magistrate's Court be directed to dispatch the record of proceedings in CR 695/2011 within fourteen days upon receipt of this application.
>
> 3. That the judgment in CR 695/2011 be reviewed, corrected and set aside."

In his founding affidavit he alleged a number of irregularities in the proceedings, which need not be listed here. He explained the ten month delay in bringing his application in the following brief terms:

> "I aver that since my incarceration on April 2011, my siblings never visited me at Maseru Correctional Services until December 2011 when my mother visited me whereat I requested her to find me a legal representation to apply for review herein. As a result that is foundation

> for my delay to approach this Honourable Court for review herein and I humbly beg the Court to be pleased to entertain this matter. I also did not have sufficient funds."

Annexed to the founding affidavit are two pages which appear to be copies of the charge sheet and handwritten notes by the presiding officers before whom the appellant appeared prior to the conviction and sentence.

[4] The Crown delivered a notice of intention to oppose the application on 27 February 2012 and the matter came before Nomngcongo J on 26 March. It appears that the learned Judge was informed that the Clerk of the Magistrate's Court was experiencing difficulty in tracing the record. Nomngcongo J made an order directing the Clerk of the Court to dispatch the record to the High Court before 2 April 2012. This directive was not complied with. Eventually, on 5 December 2012, the matter came before Hlajoane J and she made the following order:

> "The Court has been told that the Clerk of Court shows that the record cannot be traced. This matter has been postponed for more than three times with the hope that the record would eventually surface.
> In these circumstances the Court orders, as a last resort that the Magistrate and prosecutor concerned be tasked to reconstruct the record and the matter is postponed for the last time to 20/12/2012."

[5] No record, other than the two pages annexed to the founding affidavit, could be traced and the order to reconstruct the record was not complied with. There was no evidence from the prosecutor or the magistrate as to the reconstruction. The prosecutor had not delivered an answer to the appellant's founding affidavit and the explanation was that he had gone back to school. Even in the face of the explicit order made by Hlajoane J, it appears that nothing was done to comply either by the prosecutor or the magistrate.

[6] Argument proceeded before Hlajoane J on 20 December 2012 and she gave judgment on 4 February 2013. The last paragraph of the judgment reads:

> "The application for review is dismissed on the grounds of undue delay and that there has been no application for condonation for the delay."

An appeal was noted against this judgment, the Notice of Appeal alleging that the proceedings in the Magistrate's Court were fraught with irregularity and misdirection and that the learned Judge should have found accordingly.

[6] Unfortunately, the appeal to this Court in the circumstances set out above was irregular. Rule 8 of this Court provides that where the High Court exercises it "revisional jurisdiction", a party dissatisfied with the judgment must ask the judge for leave to appeal to this Court before an appeal can be noted. No such leave was sought in the court *a quo* and we are accordingly precluded from entertaining the appeal.

[7] I have used the word "unfortunately" at the start of para 6, above, fully conscious of its implication. The manner in which this case has been handled since the application for review was launched does not redound to the credit of the officers of the Magistrate's Court who were involved with it. Given that the appellant was in custody and complaining about the procedure at his trial, it was inexcusable for the Crown to drag the matter out for nearly nine months before it was brought before a judge. The excuse that the prosecutor was no longer in active service and could therefore not make an affidavit to respond to the serious allegations in the founding affidavit was nothing short of ludicrous, as was the complete failure of the Magistrate and prosecutor to make any effort to reconstruct the record or at least deliver an explanation as to why this could not be done. In the result, the

serious allegations of the appellant stand unchallenged and the reviewing court was constrained to reach its conclusions on evidence which may not have painted the whole picture. Moreover, I think it should be pointed out to the Judge and the legal representatives in the High Court that the rules do not prescribe a time limit within which an application for review or condonation must be brought. A review must simply be brought within a reasonable time after the decision concerned.[1]There is thus no question, in such proceedings, of condonation for failure to comply with any court rule being required. The test, insofar as any question of delay is concerned, is whether, in the circumstances set out in the evidence, the applicant's failure to act promptly is reasonably explained. Each case must be decided on its own facts and the resolution of any issue about delay is simply part of the process of considering whether the application should be granted.

[8] (a) The appeal is struck off the roll.

(b) If the appellant intends to lodge an application for leave to appeal against the judgment of Hlajoane J in

[1]See **Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa*, 4th ed. p955** and the numerous authorities there cited.

case number CRI/APN/153/2012, he must do so by 19th May 2013, failing which his right to apply for leave shall lapse.

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N.V. HURT

JUSTICE OF APPEAL

I agree _____

D.G. SCOTT

JUSTICE OF APPEAL

I agree _____

W.G.G. THRING

JUSTICE OF APPEAL

For Appellants: Mr T. Fosa

For Respondent : Adv M. Ranthithi