IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI)/3/16
CRI/REV/0017/15

HELD AT MASERU

In the matter between

SELLO LEUTA **APPELLANT**

And

SENIOR RESIDENT MAGISTRATE-
BEREA **1ST RESPONDENT**
CLERK OF COURT –
BEREA **2ND RESPONDENT**
DIRECTOR OF PUBLIC –
PROSECUTIONS **3RD RESPONDENT**

CORAM **:** I G FARLAM, AP
W J LOUW, AJA
DR. P MUSONDA, AJA

HEARD **:** 8 MAY 2017

DELIVERED **:** 12 MAY 2017

SUMMARY

Criminal law – Review – Constitutional right to a fair trial – Sections 4 (1) (h), 12, 21 (1) and 12 (2) (h) of the Constitution – Application to review fairness of trial procedure – Procedures reviewed and set aside – Section 8 (2) Court of Appeal Act, 1978 – Meaning of 'High Court in its revisional jurisdiction' – refers to review in the ordinary course by the High Court under the Subordinary Courts Act, 1988 – the Conviction under Section 8 (1) of the Sexual Offences Act, 2003 set aside

JUDGMENT

LOUW, AJA

[1] On 10 June 2015, the appellant who was 21 years old at the time, appeared in the Berea Magistrates' Court on a charge of contravening Section 8(1*)* of the Sexual Offences Act of 2003 *("the Act"),* namely that on or about 27 May 2015 at or near **Matlakeng, Selabeng**, in the district of Berea, he wrongfully, unlawfully and

intentionally committed an unlawful sexual act with a child, a girl of 14 years, by inserting his penis into her vagina. The appellant pleaded guilty to the charge, was convicted and sentenced to 5 years' imprisonment without the option of a fine.

[2] The appellant was dissatisfied with the conduct of the proceedings in the Magistrates Court and took the matter on review to the High Court under the Rules of the High Court, on the basis that his right to a fair trial under the Constitution of Lesotho, was breached by the magistrate who failed to advise him of the seriousness and complex nature of the offence and that the magistrate had failed to encourage him to seek legal representation and to afford him an opportunity to seek legal representation.

[3] The appellant filed an affidavit in support of the application. He stated that it was his first appearance in

court and that he was nervous and felt threatened by the environment. He confirmed that the magistrate had read out and explained the charge to him. He also confirmed that he had been advised of his right to apply for bail and to obtain legal representation. He states that he had not been advised of the seriousness of the offence and that *"(i)n my mind there was no idea how serious the charge I was faced with. This is the reason why at the conclusion of the proceedings I asked (the magistrate) to allow me to compensate the complainant but I was shocked to learn for the first time that the case was so serious that it did not carry the option of a fine. Not appreciating the seriousness of the offence, I had immediately decided to proceed in person right away."*

[4] The magistrate filed an answering affidavit in opposition to the application and stated that he had explained to the appellant that he "*was free in my court and he must feel as such"* and that the appellant

appeared relaxed; that although he did not record every word he had said to the appellant, "*everything*" was explained "*extensively*" to the appellant and that the appellant confirmed that he fully appreciated what had been said to him and indicated that he wanted the trial to proceed.

[5] The High Court (*per* ***Monapathi, J***) dismissed the application. **Monapathi J** dealt with the matter, incorrectly, on the basis that the appellant had been charged with committing the offence of rape.[1] Proceeding from this erroneous understanding of the charge, the learned Judge stated that he *"found it difficult to fathom that any ordinary Mosotho man would not have appreciated that rape was a serious offence and has punitive consequences not least that he would be imprisoned on conviction or at least as an alternative sentence'.* Consequently, the learned judge reasoned,

[1] The common law offence of rape was repealed by section 37(2) of the Act in 2003.

when the charge was read and explained to him, the appellant must have known that he faced a serious charge but which cannot be said to be a complex charge. The learned judge concluded that since the appellant had been advised of his right to legal representation and was found to have been fully aware of the seriousness of the charge he was facing, no irregularity occurred which impinged on his constitutional right to a fair trial.

[6] The appellant now comes on appeal against the dismissal of his application to review the proceedings in the magistrates' court. When the matter first came before this court on 25 April 2017, Mr Fuma, who appeared for the respondent, submitted that in the absence of leave to appeal having been granted to the appellant by the learned judge *a quo,* the matter was not properly before this court. On the assumption that leave was required, the matter then stood down to 8 May 2017 for the appellant to approach the learned judge for such leave.

When the matter was called on 8 May 2017, it appeared that the learned judge *a quo* had refused leave to appeal, but had not yet given his written reasons for the decision. Since the appellant could not in the absence of such reasons, proceed to apply for leave to this court, this court directed that the merits of the appeal be argued provisionally together with the question whether leave to appeal is required in this case. Mr Fuma relies on the provisions of section 8 of the Court of Appeal Act, 1978, which reads:

> "***Second appeals***
>
> *8 (1) Any party to an appeal to the High Court may appeal to the Court against the High Court judgment with the leave of the Judge of the High Court, or when such leave is refused, with the leave of the Court on any ground of appeal which involves a question of law but not on a question of fact nor against severity of sentence.*
>
> *(2) For the purposes of this section an order made by the High Court in its revisional jurisdiction, or a decision of the High Court on a case stated, shall*

be deemed to be a decision of the High Court in its appellate jurisdiction."

[7] Mr Fuma submitted that the decision of the court *a quo* was a decision made by the court in the exercise of its "*revisional jurisdiction".* Counsel could not assist the court with any authority for the proposition. The question is whether an order made in an application brought in terms of the Rules of the High Court on notice of motion for the review of proceedings in a subordinate court is an order made in the court's revisional jurisdiction. In **Mothabeng v R** LAC (1980-1984)166, this court considered the meaning and ambit of section 8 of the Court of Appeal Act. That case concerned the effect of a decision of a judge who was seized with a review of proceedings in the magistrate's court under section 67 of the Subordinate Courts Proclamation, 1938. That section (which contains the side heading *"What sentences subject to automatic review by the High Court)* provided that

where the punishment awarded in the lower court is imprisonment or a fine which exceeds limits set for the subordinate court, such sentences "*shall be subject in the ordinary course to review by the High Court".* This court held that where a reviewing judge corrects the proceedings in the magistrate's court and alters or confirms a sentence imposed by a magistrate, such altered or confirmed sentence becomes the sentence of the magistrate's court and is not a sentence imposed by the High Court. Section 67 of the Proclamation "*renders certain sentences subject to automatic review, while section 73 confers an unfettered right of appeal against 'any sentence'".* In the ordinary course, an appeal against a sentence confirmed or altered on review lies to the High Court under section 73 of the Proclamation and is not an appeal against the decision of the reviewing judge as if it were a judgment of the High Court. This court held that the jurisdiction and power to review proceedings of the magistrate's court exist entirely apart

from and are provided for in addition to the jurisdiction of the High Court to hear appeals. (at 168 D-F). A person whose conviction and sentence in the magistrate's court was confirmed or altered on *"automatic"* or review "*in the ordinary course . . . by the High Court"*, may, however, seek to appeal directly to the Court of Appeal with the leave of the judge who made the decision, on any ground of appeal which involves a question of law. This is then an appeal brought against an order made by the High Court in its "*revisional jurisdiction"* and is deemed by the provisions of section 8(2), to be an order made by the High Court in its appellate jurisdiction. At 169 D-F, this court held that such an appeal under section 8(2) "*does not deprive an Accused of his right of appeal against severity of sentence or on a question of fact to the High Court, but merely affords a more expeditious and less costly means by which to have a question of law brought before the Court of Appeal".* The Subordinate Courts Proclamation, 1938 was repealed and replaced by the

Subordinate Courts Order, 1988. The latter enactment contains similarly worded provisions in sections 66 and 72, to the provisions of sections 67 and 73 of the 1938 Proclamation. It follows that the present appeal is not an appeal brought by the appellant against an order made by the High Court in its "*revisional jurisdiction*" under section 8 of the Court of Appeal Act and therefore he does not require the leave of the judge *a quo.*

[8] I turn to deal with the merits of the appeal. The record of the proceedings in the magistrates' court up to the point where the appellant pleaded to the charge, reads as follows:

> *"On 10.06.2015. Accused appears before court, a charge is read and explained to him. Right to legal representative of his choice or even legal Aid is explained. He informs the court that he is appearing in person.*

Plea: I plead guilty".

The record further discloses that the Crown accepted the appellant's plea of guilty and that the prosecutor proceeded to outline the facts underlying the charge. These facts are that the complainant was born *around September 2000* and was 14 years old at the time of the incident on 27 May 2015. The appellant and the complainant were at a village with the complainant's uncle and another young girl, **Mpho Thoola**. When they all departed from the village, the appellant and the complainant took a different route from that taken by her uncle and **Mpho**. On their way, behind a tree, the appellant undressed the complainant and he had sexual intercourse with her. Afterwards, the complainant reported to her uncle that the appellant had had sexual intercourse with her without her consent. Two other girls saw the two of them have sexual intercourse and these girls went on to report the matter to the elders. When the

complainant was asked what had happened between her and the appellant, she repeated that he had sexual intercourse with her without her consent. The mater was then reported to the chief and the police. A report of the medical examination of the complainant, which is not part of the record on appeal, was apparently obtained and was handed in as an exhibit at the trial. It is to be noted that while the summary of facts does not record that the intercourse occurred without the complainant's consent, it is recorded that when she reported the matter, the complainant said that the intercourse had occurred without her consent.

[9] The record reflects that the appellant admitted the outline of facts given by the prosecutor and that he was thereafter convicted "*as charged*". After conviction, the prosecutor informed the court that the appellant was a first offender. In mitigation, the appellant stated:

"I am asking for pardon. I am ready to compensate the complainant. I look after livestock. The complainant is my girlfriend."

[10] In sentencing the appellant to five years' imprisonment without the option of a fine, the magistrate had regard to the fact that the appellant was young man who was a first offender and that he was remorseful. The magistrate considered that although the complainant was a child who is protected by law, the existence of an intimate relationship between the appellant and the complainant constituted a mitigating factor.

[11] It is trite that a review is not concerned with the merits of the conviction and sentence, but with the legality of the proceedings.[2] The fair trial provisions are contained in Chapter II of the Constitution of Lesotho under the heading **Protection of Fundamental Human**

[2] **Moonlite Taxis v Seboka** [2007—2008] LAC 132 at 135-6

Rights and Freedoms. Section 4 (1) (h) provides for the right to a fair trial of criminal charges. Under the heading **Right to fair trial, etc.**, the criminal trial provisions are set out in section12. These include the right to a fair hearing within reasonable time by an independent and impartial court established by law (Section 12(1)): the right to be informed as soon as reasonably practicable, in a language that the accused understands and in adequate detail, of the nature of the offence charged (section 12(2)(b)); the right to adequate time and facilities for the preparation of his defence (section 12(1)(c)); the right to defend himself in person or by a legal representative of his choice (12(1)(d)).

[12] The South African Constitutional Court in ***S v Zuma and others*** *[1995] ZACC 1; 1995 2 SA 642 (CC)*, at para 16, explained that the right to a fair trial conferred by the corresponding provision (Section 25(3)) of the then Interim South African Constitution, is broader than the

list of specific rights set out in the subparagraphs of the section. The court held that the right to a fair trial embraces a concept of substantive fairness that requires criminal trials to be conducted in accordance with *"notions of basic fairness and justice"* and that it was for all courts hearing criminal trials or criminal appeals to give content to those notions. In my view, this is an approach which should be followed in this Kingdom.

[13] The circumstances of each case need to be examined to determine whether an accused person's right to a fair trial had been impaired. The analysis of the provisions section 8(1) of the Act set below, shows that a charge under the Act is complex and that a conviction will have serious consequences for an accused. Notions of fairness and justice therefore require that the appellant should from the outset of the trial and before he decides to proceed with or without a legal representative and to plead to the charge, have been informed in adequate

detail and in a manner that he could understand, what the nature of the charge is and what the implications and consequences of the charge were. Such knowledge would enable him to make informed decisions in regard to issues such as whether to conduct his own defence; whether to apply for legal aid; whether to plead guilty or not; whether to testify on the merits and, if convicted, to testify on sentence; what issues need to be dealt with in evidence and what witnesses, if any, to call.

[14] Section 8(1) falls under Part III of the Act which deals with **Sexual Offences against Children.** The section reads as follows:

> "***Child molestation***
> *8(1) A person who commits a sexual act with a child commits an offence."*

Part IV of the Act deals with the **Commercial Sexual Exploitation of Children** and has no bearing on this case.

Section 2 of the Act contains extended definitions of "*child"* and "*sexual act"*:

> *"'child' means*
>
> *(a) for the purposes of part III, a person who is below the age of 16 years, and*
>
> *(b) for the purposes of Part IV, a person who is below the age of 18 years."*
>
> A *"sexual act"* is defined to include a number of acts of a sexual nature ranging from direct or indirect contact of an intimate nature, exposure or display of genital organs, genital stimulation and includes, relevant to this case, "t*he insertion of any part of the body of a person . . . into the vagina . . . of another person."*

[15] Section 16 contains a factual presumption regarding an accused person's knowledge of the age of a child. It reads as follows:

> *"**Age***
>
> *16 (1) For purposes of this Act, a person has knowledge of the fact that a child is below a certain age if*

(a) the person has actual knowledge of that fact; or

(b) the court is satisfied that the person

(i) believed that there is a reasonable possibility that the child may be below that age; and

(ii) failed to obtain information to confirm whether the child is below that age."

[16] The penalty provisions are set out in Part VIII the Act. Save for a first conviction for offences involving exposure or display or where the first offender was under the age of 18 years at the time of the commission of the offence (where the sentences are in the discretion of the court), Section 32 lays down compulsory minimum prison sentences for offences under the Act. Section 32(a) deals with the sentences to be imposed in the case of a first conviction while section 32(b) deals with second or further convictions of a sexual nature, including convictions under the common law and offences under the repealed

Women and Girls Protection Proclamation of 1949[3]. Section 2 gives an extensive definition of "*coercive circumstances*" and offences committed under such or similar circumstances attract stiffer minimum sentences.

[17] Section 31(1), provides that the prescribed minimum sentences are to be enforced by all courts (save for Central and Local Courts) unless extenuating circumstances or the proper consideration of the individual circumstances of the accused or lawful intimate relations between the perpetrator and the victim, dictate otherwise. Section 31(2) provides that where the appropriate penalty is beyond the penal jurisdiction of the trial court, that court shall send the matter to the High Court for the imposition of an appropriate sentence. Section 34(1) provides that a minimum sentence under Section 32 shall not be

[3] Repealed by section 37(1) of the Act. Under section 3(1) of the Proclamation it was an offence to have *'unlawful carnal connection'* and to *'commit immoral or indecent acts'* with a girl under the age of 16 years and a person convicted thereunder was liable to a fine or imprisonment not exceeding 6 years.

suspended by the court, save to the extent that the sentence imposed exceeds the prescribed minimum sentence.

[18] At the commencement of the proceedings, the appellant who was a first offender above the age of 18 years, if convicted, faced a minimum sentence of ten years imprisonment under the provisions of section 32 (a) (vi). It was of course not known to the magistrate before his conviction that the appellant was indeed a first offender. For a second offender in the position of the appellant, section 32 (b) (iv), prescribes a sentence of imprisonment for life.

[19] It is common cause that the appellant's right to legal representation and legal aid was explained to him at the commencement of the proceedings. However, there is a dispute on the papers in regard to two issues, namely the extent to which the complex nature and implications of

the charge were explained to and understood by the appellant and, secondly, the extent to which the consequences for the appellant, if he should be convicted, were explained to and understood by him.

[20] The record simply records that the "*charge is read and explained to him*" and in his answering affidavit, the magistrate states "*I was explaining the seriousness of the charge so that he could be encouraged to exercise his rights as explained"* and further, in general terms, the magistrate states that he *"had explained everything to the applicant extensively although I did not record every word that I said*".

[21] The magistrate does not respond specifically to the appellant's allegation that when after he had been convicted, he asked to be allowed to compensate the complainant, he was shocked to learn for the first time that the offence carried a prison sentence without the

option of a fine. While the magistrate's assertion that he had explained the seriousness of the charge to the appellant must be accepted, the appellant's assertion that he was unaware of the fact that he faced a compulsory prison sentence without the option of a fine before he exercised the choice to proceed with the trial without legal representation[4], was not answered directly and in terms by the magistrate. He couched his reply in general terms and has not given any details of the explanation that he had given to the appellant. The appellant's express averment that he did not know until after his conviction, that he faced a compulsory sentence of imprisonment without the option of fine, has not been denied or controverted and must in my view, be accepted on the papers.

[4] As noted earlier, the appellant said that "*(N)to appreciating the seriousness of the offence I had immediately decided to proceed in person right away.*"

[22] I am satisfied that the reading out of the charge and the explanation given by the magistrate to the appellant did not convey the serious implications and consequences of the charge to the appellant. The appellant's right to a fair trial required that he should have been advised in such a manner that the provisions of the Act which relate to the compulsory prison sentences applicable to the offence with which he was charged, were understood by the appellant before he was called upon to exercise a choice in regard to legal representation and before pleading to the charge. Knowledge of these provisions was relevant to his decision whether to proceed on his own without legal representation and whether to plead guilty. It would also be relevant to the decision whether to give the evidence and what evidence would be required of him to show that extenuating circumstances were present, what his relevant personal circumstances were and what the nature of his prior relationship with the complainant

was. The explanation given fell short of what is required for the hearing to be fair and for this reason, the proceedings should be reviewed and set aside.

[23] It is not clear at all that the appellant was adequately informed of the complex nature of the charge against him and for instance, that the appellant had been informed that the definition of "*child*" meant that the complainant had to be below the age of 16 years at the time of the incident. It is true that the charge mentions 14 years as the age of the complainant. The fact is, however, that in order to make an informed decision as to whether he should obtain legal representation and whether he should plead guilty or not, the appellant must be aware that his knowledge at the time of the incident, of the fact the that the complainant was younger than 16 years, is crucial to his guilt. If he did not know her age at the time of the incident or if he thought at that time that the

complainant was 16 years old at the time, the factual presumption contained in Section 16 (1) was crucially relevant. The provisions of that section would have had to be explained to him. It would not only have been relevant to his decision to conduct his own defence and whether to plead guilty or not, but also what evidence would be required of him if he should plead not guilty on the basis of his knowledge, or lack thereof, of the age of the complainant.

[24] Having concluded that the failure adequately to convey in manner that the appellant understood the seriousness of the charge and the applicable compulsory prison sentence, merits the review and setting aside of the proceedings, it is not necessary to decide whether the details and implications of the charge were adequately conveyed to the appellant.

[25] Arising from this judgment, this Court makes the following suggestions in the interest of justice and to promote certainty and fair trial procedures:

1. That a check list, covering the points raised in paragraphs 13 to 16 of this judgment, be prepared for use by trial courts so that they can adequately inform an accused of the nature of the charge under the Act and the consequences and applicable compulsory sentences which could follow on a conviction, before the accused person decides whether to proceed with or without a legal representation and before the accused person is called upon to enter a plea to the charge/s brought against him or her under the Act. The completed check list must form part of the trial record of the proceedings in each case.

2 If the use of a check list is not feasible, presiding officers should convey the details set

out in paragraphs 13 to 17 above to the accused person and record on the record of the proceedings that the information was conveyed to the accused.

3 In formulating a charge under the Act, prosecuting staff should set out particulars of the statutory provisions in regard to the charge and the penalty provision/s that will be invoked if the accused person should be convicted.

[26] In the result, the following order is made.

1. The appeal succeeds and the order by the court *a quo* is set aside.
2. The following order is substituted for the order of the court *a quo:*

(a) The application succeeds and the proceedings in respect of the applicant in Berea Magistrates' Court on 10 June 2015, are reviewed and are set aside;

(b) The applicant's conviction on the charge of contravening section 8(1) of the Sexual Offences Act, 2003 ("the charge") and the sentence of five years' imprisonment, on 10 June 2015 in the Berea Magistrates' Court, is set aside;

(c) The setting aside of the applicant's conviction and sentence shall not constitute an acquittal on the charge; and

(d) The question whether the applicant should be prosecuted again on the charge, is left for determination by the relevant prosecuting authority.

_____

LOUW AJA
ACTING JUSTICE OF APPEAL

I agree:

_____

I.G. FARLAM AP
ACTING PRESIDENT OF APPEAL

I agree:

_____

DR. MUSONDA AJA
ACTING JUSTICE OF APPEAL

For the appellant : Adv L P Nthabi

For the respondents : Adv T Fuma