IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CRI/APN/133/10**

In the matter between:

MABEKEBEKE MASHALI **1ST APPLICANT**
MONAHENG LEKENO **2ND APPLICANT**
TS'ELISO MOOROSI **3RD APPLICANT**

AND

THE LEARNED MAGISTRATE-MOHALE **1ST RESPONDENT**
THE CLERK OF COURT-MOHALE **2ND RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS **3RD RESPONDENT**

SUMMARY

Review application- Undue influence and assault by the police for accused to admit guilt- Ground not sustained- Denial of the accused right to legal representation upheld- Review application succeeds- Matter to start de novo before a different Magistrate.

JUDGMENT

Delivered by the Honourable Madam Justice Madam Justice Chaka-Makhooane on 10th day of August, 2010

[1] This is a review application. The prayers sought in the notice of motion were couched in the following terms:

1. *That the decision of the Learned Magistrate (Mohale Magistrate Court) be reviewed, corrected and set aside.*
2. *That the proceedings should start de novo before a different Magistrate.*
3. *That the Clerk of court, Mohale Magistrate Court be ordered to dispatch the record of the proceedings.*
4. *Costs in the event of opposition.*
5. *Further or alternative relief.*

[2] The accused persons in the court *a quo* were charged with the crime of robbery in that on or about the 30th November, 2009 and at or near Setleketseng in the district of Maseru, they

robbed one 'Mapheane Morie of certain property worth nine thousand one hundred and seventy Maloti (M9, 170.00). They were tried before the Mohale Magistrate Court and were found guilty as charged. Each accused was sentenced to five (5) years imprisonment, without an option of a fine.

[3] The applicants have applied for a review because they argue that the proceedings were held in a lopsided and irregular manner warranting the setting aside of the entire proceedings.

[4] **Mr**. **Nthontho** for the accused submitted that the accused were assaulted and influenced by the police to admit guilt in order to obtain a lenient sentence. He further submitted that the police occupy a place in authority and a plea tendered consequent to threats from them or any sort of promise, cannot be allowed to stand. **See Rex v Dunga 1934 AD 223** and **Rex v Thompson 1893 2 QB 12**.

[5] **Mr Nthontho** further contended that the court *a quo* did not explain to the accused persons the crime with which they were charged. He submitted that this is premised on the fact that the accused are ignorant and lack appreciation of court procedures.

[6] The accused averred that they were not asked individually how they pleaded, instead the court concluded that they were all pleading guilty. They further averred that the money they were alleged to have stolen, no longer appeared in the facts outlined by the Prosecutor.

[7] It is common cause that **Mr**. **Nthontho** called the Prosecutor by telephone to introduce himself as the accuseds' lawyer and asked that the matter be postponed to the nearest possible date. The Prosecutor is said to have disregarded the request since he went ahead with the trial. **Mr**. **Nthontho** further

submitted that the Prosecutor owes the court the duty to conduct the case with judicial discretion and a sense of responsibility not with the excessive zeal to try to secure a conviction. See **S v Jija 1991 (2) SA 52**.

[8] **Mr Nthontho** contended that the court did not accord the accused persons the right to legal representation fundamentally conferred to them by the law. He informed the court that the Magistrate was fully informed that he would represent the accused. Even though he was not before court, **Mr Nthontho** asked for a postponement during the accuseds' first remand, however, the Magistrate proceeded with the trial. Counsel argued that the law allows the seeking and granting of a postponement to allow the accused to prepare for his/her defence. See **Van Niekerk 1924 TPD 487**.

[9] The review application was opposed. The 1st Respondent filed an opposing affidavit in which it was denied that the police had coerced the accused to admit guilt. The 1st Respondent believed that were it the case, the accused would have indicated to the court. 1st Respondent said the accused did not appear to have been assaulted either. It was submitted therefore, that the allegation that they were tortured to admit guilt should not stand.

[10] **Ms**. **Kanono** for the Respondents argued that the court had discharged its duty of explaining the charge to the accused and they said they had understood. They pleaded guilty to that charge and accepted the outline of the facts. They cannot be heard to say they did not appreciate the nature of the crime with which they had been charged since they are adults and not children.

11] It was **Ms**. **Kanono**'s further contention that the Applicants were informed of their right to legal representation and they indicated that they would appear in person. They also showed readiness to proceed. According to the 1st Respondent, the Applicants did not acknowledge Mr Nthontho, inspite of the call that was received from him. It was submitted therefore, there was no need for a postponement.

[12] It was alleged that the accused were unduly influenced and coerced by the police to plead guilty. In **R v Berlin 1929 AD 459** at **462** Innes CJ held that:

> *"The common law allows no statement made by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made- in the sense that it has not been induced by any threat or promise proceeding from a person in authority."*

[13] *In casu* it is apparent that the learned Magistrate was unable to detect that the accused may have been coerced, influenced

or even tortured to admit guilt. In the absence of any visible injuries or any complaint from the accused the court *a quo* could not have been privy to any such information. Disclosing that they had been assaulted to admit guilt would have cast some light to the court in order for the court to intervene. It is my humble opinion that this ground cannot succeed.

[15] I come to the issue of the plea of guilty entered by the learned Magistrate. The record reflects that the four (4) accused *in casu* individually pleaded guilty. At the close of the Crown's case, the learned Magistrate recorded the accuseds' response as the following:

> *"We have heard the facts as outlined by PP and accept them as correct except that when we were arrested we were asked about the M300 which was also reported stolen but now the facts do not include such money."*

[16] In principle, if after the outline of the facts by the prosecutor, the accused disagree with the facts, the court must immediately enter a plea of not guilty. This should be the case despite the tendered plea of guilty. See **section 164** of the **Criminal Procedure and Evidence Act No.9** of **1981** (CP&E).

[17] I find that the Magistrate erred in entering a plea of guilty in view of the additional averments to the facts outlined.

[18] The accused were faced with a very serious charge. The position of the law under the circumstances is that the charge must be explained to the accused and the possible sentence of conviction thereof. In the case of **Hlalele and Another v Director of Public Prosecutions LAC 2000-2004 233** at **237 Steyn P** remarked that:

> *"It is important, for the proper administration of justice, nonetheless, that an unrepresented accused, at the commencement of his trial, be*

informed of his rights in regard to legal representation…"

Steyn P held at page **237** that:

"The failure to do so therefore on its own the setting aside of the proceedings…"

Ackermann JA agreed in the Court of Appeal decision of **Phomolo Khutlisi v Rex 1993-1994 LLR-LB 18** at **21**:

"I would emphasize however the importance, in the fair administration of justice, of an accused being informed at the commencement of the trial of his right in regard to legal representation."

[19] The importance of the right of an accused person to be legally represented cannot be overemphasized. It is common cause that the accused were informed of their right to legal representation. They however, indicated that they would proceed unrepresented. Even though **Mr**. **Nthontho** was not before the court, he made a conscious effort to alert the court that he was the accuseds' lawyer. He even requested a postponement. I believe that it would have been prudent for

the trial court to have exercised caution by postponing the matter, even if it was only to understand the circumstances since the accused seemed to have no idea he was their lawyer.

[20] I find that proceeding with the trial under those circumstances was in equal measure, tantamount to a denial of the accuseds' right to legal representation. The accuseds' right to legal representation is an observed cardinal rule in our jurisdiction which must always be upheld. See **S v Radebe, S v Mbonani 1988(1) SA 191** at **196** where **Goldenstone J** held that:

> *"If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of possible consequences of a conviction."*

[22] It is the duty of the court to protect the ignorant accused against any possible prejudice. The fact that the accused

herein are adults, does not mean that they appreciated the court proceedings. They could not have been required to know what was expected of them in a trial. See **Lets'aba v Magistrate of Leribe and Another LAC 2000-2004 785.**

[23] On the basis of the above reasons it is ordered that proceedings in the matter under review start *de novo* before another magistrate

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L. CHAKA-MAKHOOANE
JUDGE

For Applicants: **Mr. Nthontho**

For Respondents: **Ms. Kanono**