CRI/APN/129/12

IN THE HIGH COURT OF LESOTHO

In The matter between:-

ZHENG SHU XHIAN	**APPLICANT**
AND	
CHIEF MAGISTRATE	**1ST RESPONDENT**
SENIOR CLERK OF COURT	**2ND RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS	**3RD RESPONDENT**

JUDGMENT

Coram : Hon. Majara J

Date of hearing : 19th March 2012

Date of judgment : 4th April 2012

Summary

Application for review on the grounds of irregularities in court a quo – whether respondents should be allowed to file answering affidavit after points of law raised

in terms of rule 8 (10) (c) were dismissed – allegations of torture in the hands of the police – whether plea of guilty freely and voluntarily made – whether charge and outline of facts by prosecution discloses an offence – whether mens rea is an essential elements in terms of the statute – respondents application to file answering affidavit at late stage dismissed due to lack of requisite special circumstances – plea not voluntarily made – application granted.

[1] This is an opposed application for review of proceedings and the setting aside of the conviction of the applicant by the Subordinate Court of Maseru on the grounds of alleged irregularities. The applicant avers in his founding affidavit that after he was arrested by the police with respect to the charge in this matter he was detained in custody and tortured with suffocation, beatings and other 'atrocities' during which he fainted several times and in which case he would be revived by being splashed with water all over his body.

[2] Further that during the torture he was ordered to confess to having committed an offence under the Anti-Trafficking law failing which he would be subjected to more torture. That upon his release he requested for a medical form with which he went to a hospital for medical examination. The Doctor's medical report is attached as annexure "A".

[3] The applicant adds that he sought the services of a lawyer, Advocate Chobokoane and told him that he intended to plead guilty to the charge as he was afraid of the police upon which the latter told him that he had entered into an agreement on his behalf with the prosecutor that if he so pleaded he would be given an option of a fine by the Court in the amount of M10, 000.00 which amount he borrowed before the trial commenced.

[4]The applicant further asserts that during the proceedings he was informed that the charge had since been amended without being told the particulars thereof and

that his lawyer informed him that the amendment was in order. He further avers that he did not agree with the outline of the facts by the prosecutor and was not asked whether he did or not and was convicted.

[5] It is the case of the applicant that against this background, the proceeding were riddled with irregularities from the onset and that they should thus be set aside/quashed.

[6] The respondents filed their notice of intention to oppose. However, **Mr. Mahao** opted to invoke the provisions of the Court rules, [1] and raised points of law without filing an answering affidavit.

[7] On the date of hearing it transpired that all the points that Counsel for the respondents had raised had since been overtaken by events. The first one was that the applicant had noted an appeal to which the respondent had cross-appealed while the second one was that **Mr. Chobokoane** had not filed a notice of withdrawal as the applicant's Counsel of record. However, **Mr. Matooane**, who appeared on behalf of the applicant brought it to the attention of the Court that the appeal had since been withdrawn and that **Mr. Chobokoane** had also withdrawn from the matter and had filed a notice in that respect. Documents evincing the withdrawals were filed of record.

[8] While **Mr. Mahao** did not dispute these facts, he however, submitted that the applicant could not properly seek review of the proceedings while the respondents had noted an appeal. I however dismissed this point for the reason that the two procedures were not mutually exclusive. That in addition, the applicant was not estopped from seeking review for the reason that the respondents had noted an appeal, not to mention that the two procedures are premised on

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[1] **High Court Rule 8 (10) (c)**

different grounds. It was at that stage that Counsel for the respondents unsuccessfully sought the indulgence of the Court to allow him to file the answering affidavit. The reason for my refusal was that where a party invokes Rule 8 (10) (c), he does so at his own peril and that it is only under exceptional circumstances that the Court will allow him to file an affidavit at that stage [2]. I found this case highly persuasive where it is stated as follows:-

> *"Generally speaking our application procedure requires a respondent who wishes to oppose an application on the merits, to place his case on the merits before the Court by way of affidavit within the normal time limits and in accordance with the normal procedures prescribed by the Rules of Court. Having done so, it is also open to him to take the preliminary point…. On the other hand normally it is not proper for such respondent not to file opposing affidavits but merely to take preliminary points."*

[10] This is more so when one takes into account the wording of our provision which is very specific in that it allows a respondent that wishes to oppose the grant of an application thus:-

> *"if he intends to raise any question of law* ***without any answering affidavit,*** *he shall deliver notice of his intention to do so, within the time aforesaid, setting forth such question."*

[11] This is what the respondents *in casu* opted for hence my refusal to allow them at the stage of hearing to go back and file their answering affidavit because they always had the option to do so while at the same time raising their preliminary points. Unfortunately the consequence of this is that in the absence of such

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[2] **Bader and Another v Weston and Another 1967 (1) SA 134**

affidavit the applicant's averments have not been gainsaid and remain undisputed facts.

[12] In his submissions **Mr. Matooane** told the Court that the proceedings should be quashed because the irregularities that the applicant stated in his founding affidavit were prejudicial to him in that he was not afforded a fair hearing. It was his contention that the plea of guilty was not made freely and voluntarily; the charge did not specify the details of how the applicant's conduct had violated the provisions of the statute [3]; the charge as well as the outline made by the prosecutor did not disclose an offence.

[13] With regard to the first point namely that the plea was not freely and voluntarily made, Counsel for the applicant made the submission that the alleged torture at the hands of the police, coupled with the agreement between the two sides that the accused would be given an option of a fine should he plead guilty, which did not happen, vitiates the proceedings. I am persuaded by this submission in light of the fact that the allegations of torture that compelled the applicant to tender a plea of guilty have not been gainsaid. In addition, the medical report bears the applicant out on this fact because it reflects that he suffered the alleged injuries. Further, the record reveals that **Mr. Chobokoane** did inform the Court a quo that there had been a plea bargaining that led to the tendering of the plea.

[14] While the record also reveals that **Mr. Mahao** disputed this in the Court a quo, it is my opinion that the court a quo was duty bound to make a proper inquiry in that regard especially because the applicant and **Mr. Chobokoane** gave the name of the prosecutor with whom they had allegedly entered into the said agreement and he could have verified the matter. This is more so because it is also

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[3] **Anti-Trafficking in Persons Act 2011**

common cause that **Mr. Mahao** had not been seized with the matter from the outset but only came in at the stage of the trial.

[15] I now turn to deal with the question whether the charge sheet was defective. I have already stated that it was amended and the section in terms of which the applicant was initially charged [4] was replaced with another [5]. The latter provides as follows:-

> *"A person who- organizes, facilitates, incites, instigates, commands, directs, aids, advises, recruits, encourages or procures another person to commit; an offence of trafficking commits an offence and is liable on conviction, to the same punishment to which a person who is convicted of the actual commission of the offence of trafficking should be liable."*

[16] However the actual wording of the charge was not amended and it reads as follows in relevant parts:-

> *"... in that upon (or about) the.*(sic) *During the period between January 2011 and August 2011 at or near Lesotho Sun Hotel in Maseru District, the said accused did wrongfully and unlawfully encourage Xiuli Huang a Chinese female aged 28 years to engage the services of a victim of Trafficking and thus commit an offence."*

[17] From the record of proceedings, the said Huang Xiuli Li is the complainant in this matter. However, the wording of the charge sheet seems to suggest that she was encouraged to engage the services of a victim of trafficking, not that **she** was the actual victim. If that is the case, then I am inclined to accept that the charge is definitely defective for it implies that Huang Xiuli Li was encouraged to engage

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[4] **Section 8 (1)**
[5] **Section 5 (4) (b)**

the services of another person who would properly be the victim in terms of the charge. In other words, the absence of any clarity on the charge in the form of how the applicant is said to have committed an offence under the section in question, does render the charge defective. It was thus prejudicial to the applicant him though he tendered a plea of guilty. I might also add that I was also confused in the beginning when I read the charge sheet and tried to reconcile it with the outlined facts. As it has been stated, per Schreiner JA in **R v Ormajee** [6] :-

> *"The proper approach is to inquire a) whether what is stated discloses an offence, for if it does not the conviction cannot sand, and b) whether if the offence is disclosed it is so in a manner that is reasonably sufficient to inform the accused of its nature."*

[18] I must hasten to add that I should not be understood to be saying that there is no case to be made against the applicant. What I am stating is that the charge should be sufficient to disclose an offence in order for him to have properly pleaded.

[19] It was also submitted on behalf of the applicant that to allege an offence under a statute but fail to disclose every essential element thereof is a bad defect that cannot be cured by the evidence. It is the case of the applicant that the charge does not specify how he violated the section under which he was charged since it simply states that he encouraged the complainant to engage the services of a victim of trafficking. I have already dealt with this submission in part but would also add that even if the complainant was not the victim in this case, the Crown still had the onus to clearly set out how the applicant contravened the law.

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[6] **1955 (20 SA 546 AD 550**

[20] Another submission by **Mr. Matooane** is that there is ample indication that *mens rea* is an element of any offence under the statute in question. In this regard he cites the wording of section 6 thereof which provides that *'a person who knowingly, leases or subleases, uses or allowed to be used any house etc…'* commits an offence. To this end, he referred the Court to the work of Milton [7].

[21] Therein the learned author opines that where a statute uses the words which inherently connote knowledge or voluntariness in the commission of certain acts, it follows that such a statute incorporates *mens rea* as an element of any offence. Bearing this in mind, I turn to consider the wording of some of the provisions of the Anti-Trafficking law. Section 6 to which I have already made reference and section 8 contain the word knowingly in some of their sub-provisions whereas Sections 9 and 10 contain the words intentionally. It is not debatable that these words incorporate *men's rea* as an element and mindful of the view expressed by **Milton (supra)** it would appear that the intention of the Legislature was for the statute to incorporate this element into this law. I therefore find that this point was also well taken by the applicant.

[22] It is on the basis of these points that I find that the applicant has made out his case for the relief sought and that the proceedings in the court a quo should be set aside as being irregular and prejudicial to him. This effectively means that the conviction is set aside and the applicant is free to go home. I might add that the Crown is at liberty to institute fresh proceedings against the applicant if they so wish.

The application is accordingly granted with costs.

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[7] **South African Criminal Law of Procedure**

N. MAJARA
JUDGE

For the applicant : Mr. T. Matooane

For the respondents : Mr. Mahao