

**IN THE HIGH COURT OF LESOTHO**

**HELD IN MASERU**

In the matter between

**MOSITO MAKAFANE**

**Applicant**

**And**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**1<sup>st</sup> Respondent**

**HIS WORSHIP MAGISTRATE (Mr Bale)**

**2<sup>nd</sup> Respondent**

**ATTORNEY GENERAL**

**3<sup>rd</sup> Respondent**

**JUDGEMENT**

Coram : Hon. Mr Monapathi J

Date of Hearing : 13<sup>th</sup> April, 2012

Date of Judgement : 2<sup>nd</sup> May, 2012

**SUMMARY**

*Where an accused has been convicted on his own plea and where on his application for review, the issue is that a Magistrate has not used as interpreter and where the merits of the application are dismally lacking the court will in a proper case (invariably) dismiss the application such as the present one.*

## **CASES CITED**

***Makula and Another v Magistrate CRI/APN/720/2003.***

***Thamae Lenka v Rex C of A (CRI) No. 2 of 2004.***

***Ranthithi and Another v Rex C of A (CRI) No. 12 of 2007.***

***Tšehle v Magistrate and Another (CRI/APN/68/2009)***

***Litšoane v DPP and Another CRI/APN/758/2004.***

***Basia Lebeta v Rex C of A (CRI) No.1 of 2008.***

***Rathulo v Magistrate (Mohale) and Another CRI/APN/628/2009.***

***Senkhane v S (300/10) 2011 ZA SCA 94.***

***Rampo v Magistrate Berea and 3 Others CRI/APN/401/2005.***

## **BOOKS**

[1] Having been convicted on his own plea and having been sentenced to imprisonment for fifteen (15) years on the 18<sup>th</sup> January, 2011, the Applicant (Accused) brought this application for review on the 24<sup>th</sup> February, 2012 on the following grounds:

- a) That the Magistrate acted as his own interpreter in that he recorded the proceedings in English whereas they were conducted in Sesotho;
- b) That as a result of (a) above, what was recorded was not evidence and therefore he was convicted without evidence;
- c) That the magistrate failed to assist him in ensuring that he understood the charge leveled against him;

d) That he did not intend to plead guilty as he did and the magistrate entered the plea of guilt in error.

- [2] Mr. Ndebele informed the court during argument that he abandoned some prayers for review. He only pursued one prayer that the magistrate had acted as his own interpreter. Mr Mahao responded to say that in several cases before our court that is no longer a sole ground for invalidating a conviction and sentence. The Applicant also sought for the issue of condonation of the late filing of his application.
- [3] The Applicant was charged under the ***Sexual Offences Act 2003*** and he pleaded guilty to the charge. He was sentenced to a term of fifteen (15) years imprisonment as aforesaid.
- [4] Mr Ndebele for Applicant argued that the Magistrate ought to have secured the services of an interpreter in dealing with Applicant's case. Counsel strongly relied on the case of ***Thamae Lenka v Rex C of A (CRI) No. 2 of 2004*** where the Court of Appeal nullified the proceedings of the Magistrate on the ground that magistrate ought to have employed the services of the interpreter and as a result the court found the procedure as irregular. To support this point, Mr Ndebele cited several cases including this case ***of Litšoane v DPP and Another CRI/APN/758/2004*** (unreported) and also the case of ***Rampo v Magistrate Berea 3 Others CRI/APN/401/2005*** (unreported).
- [5] Regarding the issue of condonation Applicant contended that he had no means of paying a lawyer and it was only recent

that the members of his family had contributed to secure the services of a lawyer. This was the reason why he had asked to court to condone his delay in lodging this application for review.

[6] I took the view, as Mr. Mahao had correctly submitted that the case of **Thamae Lenka** (*supra*) had long been overruled by the Court of Appeal in the case of **Ranthithi and Another v Rex C of A (CRI) No. 12 of 2007**. There are numerous cases before this court which dealt with this issue. See the following cases of **Tšehle v Magistrate and Another (CRI/APN/68/2009)** by this court which was delivered on the 7 July 2009 and also the case of Guni J which was delivered on the 9<sup>th</sup> January 2009 unreported – CRI/APN/.....It is in these cases where there the courts had occasioned to deal with issue as to whether to quash the proceedings because the proceedings were in Sesotho language allegedly irregularly. In dealing with this issue the question is whether the Accused had suffered any prejudice as a result of the proceedings being recorded in Sesotho. It is common cause that the Accused was a Sesotho speaking person. He understood the language very well. That is why he pleaded guilty to the charge, which he confessed to have understood, out of his own volition.

[7] By way of repetition, in this case of **Tšehle** (*supra*), the court said the applicant had failed to demonstrate prejudice which he had suffered and the proceedings were accordingly not to be set aside. In the same manner Mr. Ndebele had failed to demonstrate that Accused has suffered any prejudice. The court had to satisfy itself that proceedings were in accordance with real and substantial justice, not necessarily in accordance with strict law.

[8] The court in **Tšehle**'s case went on to say:

“for it is possible for them to be in accordance with real and substantial justice even though a rule of criminal procedure may not have been observed”.

I agree that the same applies to the present matter.

[9] I also referred the parties to the **High Court Act No. 5 1978** section 8 (2) which equally apply with regard to appeals and reviews. The section reads:

“when considering a criminal appeal and notwithstanding that a point might decide in favour of the Accused, no conviction or sentence shall set aside or altered by reason of any irregularity or defect in record of proceedings, unless it appears to the High Court that failure of justice has in fact resulted there from.”

This section was applied in the case of **Makula and Another v Magistrate CRI/APN/720/2003**, 23<sup>rd</sup> April 2004. This clearly indicates that prejudice in applications of this nature is the determining factor. See also the following cases and **Basia Lebeta v Rex C of A (CRI) No. 1 of 2008 (unreported)** and **Rathulo v Magistrate (Mohale) and Another CRI/APN/628/2009** by Chaka-Makhooane J. It because lack of prejudice, real and substantial justice go together.

[10] In one of the cases I have clearly remarked whether evidence tendered under section 240 (b) of the ***Criminal Procedure and Evidence Act 1980***, where accused had offered his plea of guilty and where the public prosecutor has outlined the facts, that is strictly speaking evidence as envisaged in above cases. I thought it was not. It is more so because the prosecutor spoke in Sesotho, a language that an accused person understood. Accused admits to the facts which invariably he would not take lightly. More often than not an accused thereby shows remorse. This is another reason why this application ought to fail

[11] In considering a condonation issue, the following factors have to be taken into account; Firstly, the degree of lateness; Secondly, the explanation thereof; Thirdly, the prospects of success and fourthly, the importance of the case.

The factors are interrelated and have been followed in a number of cases handed down by this court on the question of condonation.

[12] In the case of ***Senkhane v S (300/10) 2011 ZA SCA 94***, 31 May 2011 unreported by Snyders, Bosielo, Shongwe and Navsa, Seriti JJA the court had the following to say;

“Among the facts usually relevant are degree lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated. They are not individually decisive. That would be a piecemeal approach incompatible with the true discretion, save of course if there are no prospects of

success there would be no point in granting condonation.”

As already stated above Applicant’s application has no merit at all and for that reason, there no need to discuss the issue of condonation. Other than to say on the test enunciated in paragraph 11(above) it would not succeed.

[13] On the grounds set out above, including that the application is dismally lacking in merits, this application for review is bound to fail.

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**T. E. MONAPATHI**  
**JUDGE**

For Applicant : Mr. Ndebele  
For Respondents : Mr. Mahao