

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**LECHESA LETŠELA**

**Applicant**

**and**

**DIRECTOR OF PUBLIC PROSECUTIONS**

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

**THE MAGISTRATE MASERU**

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

**THE SENIOR CLERK OF COURT – MASERU**

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

**THE ATTORNEY GENERAL**

**4<sup>th</sup> Respondent**

**Coram:**

**Hon. Hlajoane J**

**Dates of Hearing:**

**4<sup>th</sup> June, 2012, 8<sup>th</sup> August, 2012, 10<sup>th</sup>  
August, 2012, 24<sup>th</sup> September, 2012, 25<sup>th</sup>  
October, 2012, 5<sup>th</sup> December, 2012, 20<sup>th</sup>  
December, 2012.**

**Date of Judgment:**

**4<sup>th</sup> February, 2013.**

**Summary**

*Delay in applying for review – Applicant having been convicted of rape  
and sentenced to fifteen years (15) imprisonment – Applicant failing to*

*apply for condonation of the delay in bringing the application and no reasons given for the delay – Culture of missing records cause for concern.*

## **Annotations**

## **Statutes**

## **Books**

## **Cases**

- 1. R v Mollison 1947 (4) S.A. 143**
- 2. The State v Van Sitters 1962 (4) S.A. 296 at 297**
- 3. R v Wolmarans and Another 1942 TPD 279**
- 4. Sekajane v Clerk of Court Maseru CIV/APN/363/2006**
- 5. Mokhotho v The Learned Magistrate and 3 Others C of A (CRI) 10A/2008**

[1] The matter came before Court by way of an application for bail pending review. The matter was opposed. The prayers sought in a summary form were for admitting applicant to bail pending review, order to dispatch the record of proceeding in CR695/2011 to this Court, and asking the Court to review, correct and set aside the proceedings of the trial Court.

- [2] The Court granted the prayer seeking the dispatch of the record of proceedings to this Court. The matter was postponed several times for the record to be dispatched.
- [3] The Clerk of Court filed an affidavit to the effect that despite her diligent search for the record of proceedings she had not been able to find it but still hoped she was going to find it.
- [4] The Court in an effort of showing that the record had to be found made an order for the reconstruction of the record. That proved futile as unlike the High Court where minutes by a Judge are just for his/her convenience the manuscript at the Magistrate's Court is the Court's file as there is no transcription at that level.
- [5] What has amazed this Court is the fact that copy of the charge sheet and a page for accused's bail application have been attached to this application, but the proceedings are said to be missing.
- [6] The Applicant has complained that he was misled into pleading guilty by the public prosecutor so as to curtail the proceedings and be allowed to go home. He further said some of the facts that were outlined were not true but he was never asked whether he admitted

or agreed with such outline of facts to which question he could have answered in the negative.

[7] Again the applicant has shown that having pleaded guilty he was not advised or allowed to mitigate and never informed of the nature and or purpose of mitigation. Further that he was not assisted by the Court in conducting the trial as he was unrepresented.

[8] In explaining his reasons for delaying in bringing this application, he said there was no one visiting him in prison since March 2011 till February when he finally brought this application.

[9] In opposing the application the crown submitted that the applicant has unreasonably delayed in applying for review yet he has not applied for condonation of the late noting of the application. He has taken almost a year before thinking of applying for bail pending review.

[10] I have earlier on indicated that the Court in an effort of having available the record to be reviewed had ordered for the reconstruction of the record which turned out to be impossible

considering the manner of producing the records at the Magistrate's Court.

[11] Applicant referred to various decisions in an effort of convincing the Court to uphold the review on the basis of the unsatisfactory nature of the record. Relying on **Rex v Mollison**<sup>1</sup> applicant argued that this Court is forbidden to even order any re-hearing as the Magistrate who has convicted and sentenced him is *functus officio* in that case and would be wrong for him to amend or amplify the record.

[12] Taking it from a different angle, yet arriving at the same decision **Banks J** has been referred to the case of **The Sate vs Van Sitters**<sup>2</sup> which quoting from **Greenberg JP in R v Wolmarans and Another**<sup>3</sup> dealt with a review case in which the accused pleaded guilty and the record went missing. The Court dissented from previous decisions in which a rehearing of evidence had been ordered. It was said that the power to compel the attendance of an accused and any witness was to be limited to the trial.

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<sup>1</sup> R v Mollison 1947 (4) S.A 143

<sup>2</sup> 1962 (4) S.A 296 at 297

<sup>3</sup> 1942 TPD 279

[13] In 2006 the High Court per **Majara J in Sekajane v Clerk of Court Maseru**<sup>4</sup> ordered the release of the applicant from prison after setting aside the conviction and sentence. Applicant had been charged and convicted of culpable homicide and sentenced to eighteen (18) years imprisonment.

[14] It had been more than one and half years since the judgment was delivered without applicant being given access to the record for purposes of filing an appeal. Efforts to have the record proved futile as clerk of court blamed the magistrate and vice versa.

[15] But in **Mokhotho v The Learned Magistrate and 3 Others**<sup>5</sup> the Court of Appeal dismissed the appeal against the decision by the High Court of referring to review the Magistrate's Court decision where there had been an inordinate delay to apply for such a review.

[16] The Court stressed that an application for review made after inordinate delay is not just there for the taking. That generally speaking, the applicant must ordinarily make a properly motivated application for condonation and give an acceptable explanation on

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<sup>4</sup> CIV/APN/363/2006

<sup>5</sup> C of A (CRI) 10A/2008

oath as to why the delay came about. The Court has to make an informed decision of whether to condone or not.

[17] In *casu*, the applicant has taken almost a year before bringing the application for review. He has not applied for condonation of late filing of the application for review. Granted, there is no fixed time limit for an application for review, unlike an appeal, but such application must be made within a reasonable time.

[18] The proceedings to be reviewed involved a sexual offences case where the applicant had been convicted and sentenced to fifteen (15) years imprisonment. Realizing that the record could not be traced, applicant's counsel suggested to the Court that there were two (2) options. One of ordering further search for the record and the other of considering compensation for the complainant.

[19] The complainant was indeed called but she was in tears when she explained that she would not have anything to do with the applicant and his monies, considering how she was threatened with death by him, she was very clear in saying she would not want the applicant to be having any hold on her to be saying he had even bought her.

[20] Because of the above the phenomenon of records going missing at the Magistrates' Court lately got me worried. Such concern was echoed in the words of the Court of Appeal in **Mokhotho v The Learned Magistrate and Others** *supra* thus:

“The phenomenon of records which conveniently go missing in the Courts of this country is cause for concern. The insidious effect of this cancerous practice on the proper administration of justice is evident. There can be no doubt that if this problem is not addressed decisively and as a matter of urgency our whole justice system will fall into disrepute, if it has not done so already.”

[21] The rate at which records to be reviewed or appealed against from the Magistrates go missing is really disturbing. And the problem has to be seriously addressed.

[22] It would not be because the blame is being imposed on the applicant or the respondents in this case that the Court is going to give the decision in the matter as it does now, but the decision is based on the fact that applicant has not applied for condonation for the delay in bringing the application for review and that he has not furnished reasons for such delay.



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

**A. M. HLAJOANE**  
**JUDGE**

For Applicant: Mr Fosa

For Respondents: Ms Ranthithi