IN THE HIGH COURT OF LESOTHO

CRI/A/14/2012

In the matter between:

TSEPE RALIBUSENG **APPELLANT**

And

DIRECTOR OF PUBLIC PROSECUTIONS **1ST RESPONDENT**

MAGISTRATE THABA-TSEKA **2ND RESPONDENT**

CLERK OF COURT THABA-TSEKA **3RD RESPONDENT**

JUDGMENT

Coram :Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 6 May, 2013
Date of Judgment : 30 May, 2013

Summary

*An appeal against the refusal of a magistrate to admit the appellant on bail – The magistrate's several postponements of the hearing of the application without any reasons assigned for that –The appellant facing a sexual offence charge under **sec 3 (2) of the Sexual Offences Act no.3 of 2003** –The allegation being that he had raped a 16 year old girl –The magistrate ultimately after series of postponements refusing the application –No reasons advanced for the decision –appeal based on the postponements and upon the groundless decision –The applicant's counsel arguing that the appellant had been wrongly charged under **sec 3 (2) of the Act** and yet he could not be charged under **sec 8** either –The magistrate being blamed of having un-procedurally conducted the case by leading the complainant in her evidence in chief and examining her and by hearing the complainant's evidence contrary **sec 28** which according to him, obliges the complainant just to attend – The court holding that the court a quo has transgressed the appellant's procedural rights by the several postponements without justification, refusal of the bail without any reason and*

*failure to attach urgency to the bail application –The court finding that the appellant had been properly charged and that the magistrate had unprocedurally led the evidence in chief contrary to **sec 24** – the words, " the complainant shall be in attendance" interpreted to be inclusive of her giving of evidence before the court –The decision of the magistrate set aside and the appellant conditionally admitted on bail.*

CITED CASES

Ngakane Ramaema v REX-CRI/A/1/92. Sandi Majali v The State Case No. 41 210/2010. Magistrate Stutterheim v Mashiya 2003(2) SACR 106 (SCA)

LEGISTLATION AND SUBSIDIARY LEGISTLATION

The Sexual Offences Act No. 3 of 2003. The Criminal Procedure and Evidence Act No. 7 of 1981. The Constitution of Lesotho 1993.

MAKARA A.J

[1] This is a criminal appeal in which the appellant is appealing to High Court against the refusal by the Resident Magistrate of the district of Thaba-Tseka to admit him on bail pending a hearing of a criminal case. The court is being approached for its intervention in terms of **sec 108 of the Criminal Procedure and Evidence Act No. 7 of 1981(CP&E Act)** read in conjunction with **sec 109 of the CP&E Act** which provides:

> The High Court may, at any stage of the proceedings taken in any court in respect of any offence admit the accused to bail

[2] The content of the allegation in support of the charge against the appellant who was 24 years old at the time of the instance, is that he had on the 19th May 2012 contravened **section 3 (2) of the Sexual Offences Act No. 3 of 2003** in that he committed an unlawful

sexual act with the complainant who was 16 years old at the material time, without her consent.

[3] The chronological developments of the case in the district of Thaba-Tseka as borne by the record is that, the appellant had appeared before the court against the charge on the 24th May 2012. He was unrepresented at the time. After the charge had been read to him by the presiding magistrate, he applied for bail. The record of the proceedings is silent on the reaction of the magistrate to the application save that the matter was postponed to the 28th May 2012. On this latter date, the appellant re-pursued his application. The record is again not reflective of any consideration which the presiding officer assigned to it or whatever decision he had made on the application. What transpires instead is that the magistrate simply rescheduled the hearing of the application to 31st May 2012. On this day the record is again not reflective of any development in the application. All that appears from the record is that the matter was further postponed to the 4th June 2012 and what appears is that on that day he was simply remanded in custody without any indication as to how the application was treated and decided upon.

[4] The application remained in a limbo state until on the 26th June 2012 when the application was apparently suddenly refused. This notwithstanding there is no recorded motivation of the application by the applicant and correspondingly that the court had ever addressed its mind to the relief sought and advanced reasons

for its refusal to grant bail. This court realises it from the stated developments that the magistrate had not attached any urgency to the application and that he did not demonstrate any conscientiousness to the fair trial rights under **section 12 of the Constitution** particularly the right of an accused to be presumed innocent until otherwise proven. The trend in the application is not reflective that the magistrate had ever considered the fact that the liberty of the subject was in jeopardy and that it was urgently imperative upon him to intervene accordingly and in that regard, furnish reasons for whichever decision he took.

[5] Mr Fosa who appeared for the appellant impressed it upon the court that the magistrate had obviously committed a dereliction of duty by indefinitely postponing the bail application and refraining from making any relevant decision on its merits. In support of this proposition he relied upon a decision by Lehohla J (as then was) in **Ngakane Ramaema v REX-CRI/A/1/92 @ 2** where it was cautioned that:

> The basic thing whether or not to grant bail is whether or not the applicant is going to stand trial and the state of law is such that the dice is weighted in favour of the liberty of the suspect. What this implies is that, should the court feel that the applicant is not going to stand trial, it should impose such conditions as would ensure that the applicant observes the conditions or make it not worth his while to abscond notwithstanding the fact that he may be inclined to do so.

[6] The *pendulum* of the dice as having been articulately described in the above quoted part of the judgement, is illustrative of the legal position that the court should be inclined to admit the accused on bail and that in the event of any doubt as to whether he would at

the end of the day, stand trial, it should resort to imposing upon him the conditions which would discourage him from absconding. The foundational basis of this thinking is to give a practical recognition of the accused's right to a presumption of innocence.

[7] Besides the ground of the appeal that the magistrate had endlessly postponed the bail application and that his final decision thereon was not judiciously made; the appellant's counsel advanced a second ground that the appellant had been wrongly charged under **sec 3 (2) of the Sexual Offences Act** because the victim was not a minor or a child. He argued further that the accused could not even be charged under **sec 8** since the victim was not below the age of 16. He illustrated this by stating that the victim is not a child for the purpose of part III under which **sec 8** falls. The impression which he sought to portray to the court is that the charge against the accused lacks any statutory basis.

[8] The third leg of the argument advanced by the appellant's counsel was that the magistrate had contrary to **sec 28** allowed the complainant to testify and yet the section only provides for the complainant's attendance. He projected the understanding that the section does not contemplate any testimony by the complainant but just her attendance.

[9] His last argument was that the magistrate had contrary to **sec 24** directly led the complainant in her testimony in chief and

subsequently examined her. He qualified the evidence obtained through that process as being illegal. The whole argument seems to be calculated at demonstrating it to the court that the accused deserves to be admitted on bail.

[10] Adv. Mofilikoane for the Crown did not contest the narrated chronological developments pertaining to the manner in which the magistrate had handled the bail application and the fact that it was in violation of the appellant's fair trial rights. Her reaction to the argument that the charge had wrongly been premised upon **sec 3 (2)** was not consistent. She had initially maintained that the man had properly been charged under the section since it generally covered all the sexual offences regardless of the ages or the status of the victims concerned. In the same connection, she pointed out that the section falls under Part II of the Act which bears the sub heading "*Sexual offences*". On this basis, she explained that the sexual offence under which the accused is charged is included under the section and therefore that he had been properly charged. This not withstanding she went further to contradict herself by admitting that the accused should have been properly charged under **sec 8** which falls under Part III.

[11] The undisputed developments surrounding the trend which the application took before the magistrate court is indicative that the court did not appreciate the basic jurisprudence pertaining to bail as a special judicial dispensation in criminal justice. His

approach is not reflective that he gave *an iota* of recognition to the appellant's right to a presumption of innocence which is a dimension of the fair trial rights under **sec 12 of the Constitution.** The record of the proceedings from the 24th May to the 26th June 2012 is totally supportive of the position that the court was, inadvertently, unmindful of the basic principle that a bail application should be heard urgently to genuinely explore the legal prospects of rescuing a subject from the predicament of being held in custody before his guilt is pronounced by the court. In **Sandi Majali v The State Case No. 41 210/2010 @ para 18** it was stated:

> A bail application should in principle be heard as a matter of urgency because it affects personal liberty.

And it was further held in **Magistrate Stutterheim v Mashiya 2003(2) SACR 106 (SCA)** that:

> It is evident that finalising an application for bail is always a matter of urgency.

[12] It should suffice to determine that the argument that the accused had been wrongly charged under **sec 3 (2)** lacks a foundation in law since the section is embracive of all sexual offences including the one preferred against him. **Sec 8** is found to be irrelevant as a basis of the charge since it refers to a complainant who is under the age of 16. The court is seized with the case of a 16 year old alleged victim of a sexual offence. It further applies to a perpetrator of a sexual offence who is a child between the ages of 13 and 18. The accused in this case is aged 24.

[13] The counsel for the appellant has totally misconstrued the meaning of the word *attend* as employed under **sec 28.** He has assigned to it a literal construction as opposed to its contextual and practical version. In the understanding of the court, *the attendance to court* by a complainant in a bail hearing concerning a sexual offence, would include *the complainant giving evidence before the court*. It would make no practical sense for such a complainant to just *attend* the hearing without assisting the court with the factual scenario which according to her has precipitated the charge.

[14] It is with reference to the undisputed recording of the proceedings, found that the court had acted unprocedurally by directly leading the complainant through the evidence in chief and, thereafter, examining her. The approach is clearly contrary to the procedure provided for under **sec 24**.

[15] In the premises, the court finds that the record of the proceedings is not reflective that the magistrate had dedicatedly ever addressed his mind to the bail application before arriving at his final decision since there are no reasons advanced for his sudden refusal to admit the applicant on bail. This is compounded by the background developments in his multiple postponements of the hearing without assigning any reason for that and continuing to remand the appellant into custody. Thus, the decision is set aside and is substituted with the order that the appellant is admitted on bail on condition that he:

1. Pays a bail deposit of Five Hundred Maloti (M500);
2. Secures an independent person who shall on his own recognisance stand him surety in the amount of Five Thousand Maloti (M5000);
3. Surrenders his passport to the Thaba-Tseka police;
4. Does not interfere with the crown witnesses;
5. Reports himself before the Thaba-Tseka police before 3 o'clock pm on every last Friday of the month;
6. Attends remands at the Thaba-Tseka Magistrate Court;
7. Stands trial as and when directed by the court.

E.F.M. MAKARA
ACTING JUDGE

For the Appellant : Adv. T. Fosa
For the Respondent : D.P.P.'s Chambers