IN THE HIGH COURT OF LESOTHO

CRI/APN/206/2013

In the matter between:

VINCENT NOTSI **APPLICANT**

And

1ST CLASS MAGISTRATE HER WORSHIP MRS MOFILIKOANE – LERIBE MAGISTRATE COURT **1ST RESPONDENT**

SENIOR CLERK OF COURT-CRIMINAL REGISTRY **2ND RESPONDENT**

DIRECTOR OF PUBLIC PROSECUTIONS **3RD RESPONDENT**

ATTORNEY GENERAL **4TH RESPONDENT**

JUDGMENT

Coram :Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 20 June, 2013
Date of Judgment : 20 June,2013

Summary

A review application seeking for the setting aside the trial proceedings before a magistrate – The first Ground being that the magistrate had misconstrued ***sec 202 of The Criminal Procedure and Evidence Act 1981*** *–Magistrate ruling that she has an exclusive power to invoke the procedure in the section by mero motu determining whether or not a complainant could be recalled into the witness box for further cross examination – The previous counsel realizing after the witness had left the witness box that he had not cross examined her on the salient aspects of her evidence –The second ground for the review being that*

*the magistrate had wrongly relied upon **the Subordinate Court (Amendment) Rules under Legal Notice 76 2006** by dispensing with the service of an interpreter and functioned in a dual capacity as a presiding officer and as an interpreter –The court deciding that the magistrate had, given the adversarial system of justice and the discovered case law on the subject, misconceived **sec 202** and that it was a procedural irregularity for her to have served as an interpreter since she had not been sown as such - The proceedings ultimately being set aside –A recommended way forward in addressing the perennial problem of the scarcity of the interpreters and their short comings in their proficiency in Sesotho and English.*

CITED CASES

State v Makhudu 1953 (4) SA 143. Kobile v The Director of Public Prosecution Cr/Apn 472/ 2006(unreported).Ndachile Jeremane v The Director of Public Prosecution Cri/ Apn/25/2006(unreported).

STATUTES AND SUBSIDIARY LEGISTLATION

The sexual offences act No. 3 2003. The Criminal Procedure and Evidence Act no. 1981. (CP&E Act).The Criminal Procedure Act 1955. The Subordinate Court (Amendment) Rules under Legal Notice 76 2006. The High Court Act 1978

BOOKS

Swift Law of Criminal Procedure 2nd edition

MAKARA A.J

[1] This court became seized with the present review application on the 10th June 2013 and was scheduled for hearing on the 20th August 2013. The hearing date was, however, advanced to the 11th June 2013. This was after Adv. Teele KC in collaboration with Adv. Mathe for the Crown had appealed to the Court to have the matter set down for any possible nearest date since the case centered around two short and precise points of law. They were both in

agreement that it would be in the interest of justice if the application is expediently disposed of since the applicant is already serving an 8 year prison sentence which has been imposed without an option of a fine.

[2] The background facts which had culminated in the conviction and the sentencing of the applicant by the Magistrate Court was that he had featured before the Court against a criminal charge that he had contravened **Sec 3 (2)** read with **sec 32 (a) (iii) of the sexual offences act No. 3 2003**. The supportive allegation was that he had on or about 30th October 2012 at the Tsikoane High school in the district of Leribe unlawfully and intentionally committed a sexual act with a minor girl aged 16 years by inserting his penis into her body without her consent. He had pleaded innocence to the charge and his lawyer had advised the court that the plea was in accordance with his instructions.

[3] It emerges from the record of the proceeding in the Court a *quo* that the material facts which preceded the alleged offence stand as common cause. The applicant is a teacher at Tsikoane High school which is the place of the scene while the complainant was a 16 year old form B student in the same school. It is not in any manner, whatsoever, in dispute that the teacher had at the relevant time called the student into the stuff room which is adjacent to the principal office and that of one teacher Emily. The complainant's testimony before the Court is that after the applicant had called her

into Emily's office and that after both of them had entered therein, he closed the door. Some short while thereafter, the teacher turned into the opposite direction and assumed a body posture which gave her the impression that he was placing a condom around his penis and that when he turned to face her, he made her lie down on a small carpet and then committed sexual intercourse with her without her consent.

[4] The applicant is, in summarised terms, before the court seeking for its intervention by way of reviewing the criminal proceedings conducted against him as the accused, before the learned Magistrate Mrs Mofilikoane of the first class powers in the district of Leribe. The foundation of his application is two levelled as follows:

1. He complained that the trial magistrate committed a procedural irregularity by refusing to have the complainant to be recalled for the purpose of being re cross examined on some of the salient features of her evidence against the applicant. His counsel had inadvertently omitted to direct those relevant questions at the time she was at his disposal in the witness box for his cross examination.

2. The proceedings were also procedurally irregular in that the magistrate had dispensed with the service of an interpreter throughout the proceedings and thereby not recording the evidence but rather her own understanding of it since she was not sworn as a translator.

[5] In his motivation of the first ground, Adv. Teele KC for the applicant contended that the refusal by the magistrate to allow the complainant to be recalled for the stated purpose was, with

reference to the record of proceedings before her, premised upon her miscomprehension of **sec 202 of the Criminal Procedure and Evidence Act no. 1981. (CP&E Act)**. The reason being that the previous counsel , had in asking the magistrate to have the complainant recalled into the witness box, relied upon the section which provides under **subsections 1 and 2** respectively as follows:

> (1) The court may at any stage of the criminal trial subpoena or cause to be subpoenaed any person as a witness or examine any person in attendance though not subpoenaed as a witness or recall and re-examine any person already examined.
>
> (2) The court shall subpoena and examine or recall and re-examine any person if his evidence appears to it essential to the court's decision of the case.

[6] Adv. Mathe for the Crown has counter argued that the magistrate had properly construed the powers involved in the section. He maintained in support of the ruling taken by the magistrate that the defence counsel before the trial court could only ask the court to order for the return of the complainant into the witness box but not to compel the court to do so. The impression he gave is that the authority to direct so, lies exclusively within the discretionary powers of the presiding officer.

[7] The Magistrate had in refusing the application ruled that the section gave her the exclusive discretionary powers to invoke the procedure therein provided. She had in the same vein, dismissed the counsel's view that she could persuade her to use the section.

Her general perception of the provision was that she as the presiding officer was the one who could utilize it acting *mero mutu* under the circumstances in which given the evidence before her, she determines that it would be in the best interest of justice to *inter alia* order for the recalling of a witness into the witness box for further cross examination.

[8] Adv. Teele has in his endeavour to convince the court that the section should be construed to accommodate the procedure whereby the presiding officer could also be motivated from the bar to discover a need to have a witness recalled for further cross examination by relying upon two authorities. He has initially relied upon **Swift Law of Criminal Procedure 2nd edition pg 370** in which **sec 210 of the Criminal Procedure Act 1955** which is written in *pari materia* terms with **sec 202** in consideration, was discussed. The court found no specific content assisting it in the part of the text referred to. The heads lacked precision of reference. He had further relied upon the case of **State v Makhudu 1953 (4) SA 143** where it was directed that:

> A magistrate should not deny a request that a witness be recalled unless he feels that the request is unreasonable or obstructive. The whole purpose is to arrive at the truth.

[9] In the perception of the Court the **sec 202** powers should be conceived within the context of our adversarial system of justice. Here the presiding officer is primarily expected to receive assistance and guidance from the counsel involved without any usurpation of

his judicial discretionary powers. Thus, the trial magistrate should have judiciously considered the application advanced by the defence for the recalling of the complainant. She should demonstratively be seen to have applied her mind on the question of whether or not the order sought for would facilitate for the ascertainment of the truth. The court, nevertheless, appreciates the practical dilemma in which the magistrate and the crown counsel had found themselves as a result of the tactical procedural omissions by the lawyer involved. This has unnecessarily protracted the litigation.

[10] It was in pursuit of the stated second ground for the counsel contended on behalf of the applicant that the failure of the magistrate to have secured an interpreter resulted in the accuracy and the authenticity of the record of the proceedings being questionable. This was attributed to the simple and precise reasoning that the manual recording by the magistrate is not reflective of the true testimonies of the witnesses but rather her lay person's interpretation of it since she is not a sworn interpreter or translator. The position maintained was that the interpreter's conveyance of a translated English version from the evidence tendered in Sesotho was indispensable for the ascertainment of its correctness and reliability. The argument was presented against the undisputed fact that the interpreter had not been involved in the proceedings and that the magistrate had technically functioned as a presiding officer and simultaneously as an interpreter. The

magistrate had apparently religiously relied upon **the Subordinate Court (Amendment) Rules under Legal Notice 76 2006** when she adopted the roles. She had resorted to the translation role after having seemingly struggled to secure the interpreter and failing to obtain one. This is revealed in the words, "Could not get the services of an interpreter". The amendment which altered **Rule 63** by adding **sub rule (5) (a)** reads:

> It shall be competent in civil or criminal proceedings for a presiding officer to record evidence in English without the assistance of a court interpreter where all parties understand Sesotho and the services of the interpreter cannot be secured with undue delay, expenses or inconvenience.

[11] The applicant's counsel took the opportunity to mount an attack against the sub rule by drawing it to the attention of the court that it has been shot down by Maqutu J in **Kobile v The Director of Public Prosecution Cr/Apn 472/ 2006(unreported)**. The amendment was described as having been unnecessary since it purports to override the common law position against the duality role assumed by the magistrate.

[12] The crown counsel responded that for the application to succeed it must exhibit irregularities of a serious magnitude so as to vitiate the whole proceedings. He stated that there were no such irregularities in the present case and held a position that the proceedings can not, on that account, be set aside. On that note, he relied upon the case of **Ndachile Jeremane v The Director of Public**

Prosecution Cri/ Apn/25/2006(unreported). He further referred the court to **sec 8 of the High Court Act 1978** which provides that:

> Notwithstanding that a point raised might be in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity unless it appears to the High Court that a failure of justice has resulted therefrom.

[13] The court has in relation to the first ground for this application, searched in vain for any authority within the jurisdiction which could provide some guidance on the interpretation of **sec 202 of the CP&E Act** to ascertain the question as to whether or not the procedure provided there is exclusively exercisable by a presiding officer. It nevertheless, emerged that the understanding of the operational effect of the section in the **State v Makhudu***(supra)* is sufficiently persuasive for this court to follow because it synchronises with the adversarial litigation. It is trite knowledge that this system is characterised by the encounter between the parties while each is seeking to convince the court to appreciate its point. This is managed through reference to the facts and the applicable law. In that process, the court receives the substantive and procedural law guidance towards its interlocutory or final decision in the case involved. In the understanding of this court, it would be logical to come to a conclusion that the defence counsel before the Magistrate Court was entitled to apply to the presiding officer for her consideration to order that the complainant be recalled into the witness box for further cross examination. The magistrate should, thereafter, have judiciously made his ruling subject to whether the recalling would assist her to make truthful

revelations. Thus, the court holds that the magistrate had erred in law by having ruled that the **sec 202** procedure was entrusted upon her exclusive discretion to apply.

[14] Despite the decisions which have clearly been taken, the court wishes to register a point that **Legal Notice 76 of 2006** sought to address a daily operational problem which occasions delays in the administration of justice in the magistrate courts. The impasse is caused by the limited numbers of the interpreters compared to the strength of the magistrates. The truth is also that the magistrates command a far much understanding and articulation of Sesotho and English than the interpreters. The reality on the ground is that in the majority of cases a magistrate depends more upon his competency in the languages rather than upon the interpretation. If they would religiously record the translated version verbatim, the record of the proceedings would be more likely incomprehensible and thereby frustrate the administration of justice. It is not conceivable yet that there would soon be sufficient numbers of the interpreters or recording facilities in the magistrate court. The amendment introduced by the Legal Notice *(supra)*, should be regarded as a progressive attempt to address a practical challenge. It could be enhanced by providing for the magistrates to undergo an examinable tutorship in the languages translation and interpretation; after passing the examination be certificated and ultimately become sworn interpreters. They could then whenever

the interpreter is unavailable, be at large to record in English the evidence given in Sesotho.

[15] A pathetic part with the interpreters is that their work is being compromised by the fact that they do not receive any form of training in the two languages. The assumption is that their being sworn in as such is indicative of their proficiency in them.

[16] The review application finally succeeds and it is accordingly ordered that:

1. The proceedings and the subsequent conviction and sentence of the applicant by the 2nd respondent in **CR: 631/12 Rex v Vincent Nots'i** Leribe Magistrate Court are set aside;

2. The charge against the applicant be tried *de novo* before a different Magistrate.

E.F.M. MAKARA
ACTING JUDGE

For Applicant : Adv. M. Teele K.C.
For Respondent : Adv. S.P. Mathe