

CONSTITUTIONAL CASE NO.7/2013

IN THE HIGH COURT OF LESOTHO

In the matter between:

LIRA JOHN RAMAISA

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS	1 ST RESPONDENT
THE COMMISSIONER-LESOTHO CORRECTIONAL SERVICES	2 ND RESPONDENT
THE MINISTER OF JUSTICE	3 RD RESPONDENT
THE MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS	4 TH RESPONDENT
THE ATTORNEY GENERAL	5 TH RESPONDENT

Summary

Constitution of Lesotho 1993 – Section 8 thereof – Freedom from inhuman treatment – Applicant convicted of offences including murder given a “special verdict” to be kept in custody in prison pending signification of His Majesty’s Pleasure – Mental condition of accused described as a temporary “psychogenic fugue state including amnesia” – Need for regular and periodic medical check ups.

Where in a murder trial the court returns a “Special Verdict” of “...Guilty but temporarily insane...” and commits the accused to be kept in custody in some prison pending the signification of His Majesty’s pleasure, it is incumbent upon the prison authorities and upon the **Pardons Committee on the Prerogative of Mercy to submit the accused (prisoner) to periodic and regular medical examinations to monitor and evaluate his or her suitability for release or for further detention.**

Failure and refusal to do so may infringe the right of the prisoner to a timeous and deserved signification of His Majesty’s Pleasure for his release or for further detention.

Prisoners under a special verdict have a right to be heard and should not be refused access to the courts or be disregarded because they have made applications to courts of law. To keep in custody a person who is certified sane and mentally normal amounts to an inhumane treatment because of the stressful environment of a mental prison.

Without reviewing the “Special Verdict” of the trial court, the Constitutional Court can “make any order or give such directives as it may consider appropriate for the purpose of enforcing or securing the enforcement of any provisions of sections 4 to 21 of the Constitution” [vide section 22 of the Constitution]

Annotations:

Statutes:

Constitution of Lesotho – 1993.

Mental Health Law No.6 of 1963.

Criminal Procedure and Evidence Act No.9 of 1981

Penal Code Act No.6 of 2012.

Books:

Snyman CR – Criminal Law (1995)

Cases:

Tsitso Matsaba v Rex – 1991-1996 (vol.1) LLR 615.

R. v Chrestien – 1981 (1) SA 1097

S. v Pederson – 1998 (2) SA 383

Cur adv Vult

Postea (13 March 2014)

JUDGMENT

**CORAM : HON. MR ACTING CHIEF JUSTICE T. MONAPATHI
HON. MR JUSTICE S.N. PEETE
HON. MRS. M. HLAJOANE**

DATE OF HEARING: 4TH MARCH 2014

DATE OF JUDGMENT: 25TH MARCH 2014

The Court (Per *Peete J.*):-

[1] In this Constitutional matter, the Applicant seeks relief couched thus:-

“(a) Declaring the Applicant’s continued incarceration by the organs of the Respondents herein without any medical and/or other attendances or treatment as inhumane and/or degrading contrary to the provisions of Section 8 of the Lesotho Constitution, the Human Rights Act 1983 and International Conventions to which Lesotho is a signatory,

- (b) *Directing the Respondents herein and/or their agents to release and/or cause the Applicant herein to be released from custody conditionally and/or unconditionally, by reason of the Applicant's stabilized mental condition,*
- (c) *Directing the Respondents herein to pay the costs hereof only in the event of opposition,*
- (d) *Granting the Applicant herein such further and/or alternative relief as this Honourable Court may deem fit in the circumstances.*

ALTERNATIVELY

- (a) *Directing that the provisions of section 172 (3) (a) and (b) of the Criminal Procedure and Evidence Act No.9 of 1981 are and/or be interpreted as rehabilitative and not punitive,*
- (b) *Directing the Respondents herein and/or their agent to release and/or cause the Applicant herein to be released from custody conditionally and/or unconditionally by reason of Applicant's stabilized mental condition."*

[2] The applicant had originally been charged with five counts of -

- (a) Murder of **Mahlaku Thamae;**
- (b) Murder of **Lekhotla 'Matli;**
- (c) Attempted murder of **Piti Khutlang;**
- (d) Attempted murder of **Makhoakhoa Matela;** and
- (e) Robbery of a firearm from **Piti Khutlang.**

To all these multiple charges, the applicant – who was then the accused and was a police officer then stationed at Mafeteng Police Station - had pleaded “**Not Guilty**”.

[3] In the applicant's criminal trial before **Mofolo J**, some twelve witnesses had been called and it was established that on the 27th September 1998, the following events occurred at or near Phahameng in the district of Mafeteng:-

- (a) It was common cause that during September 1998 there prevailed general unrest in Lesotho as a result of general election squabbles and the applicant was along with his colleagues on street patrol.
- (b) That the applicant (the accused) had been recently issued with a firearm serial No.5101639 X 9mm pistol plus 55 bullets.
- (c) It was not in dispute that on the 27/09/1998, the accused had – for no apparent – reason shot and intentionally killed
 - (i) **Mahlaku Thamae and Lekhotla Matli;**
 - (ii) and had shot and attempted to kill **Piti Khutlang** and **Makhoakhoa Matela;**
 - (iii) and had forcibly dispossessed **Piti Khutlang** a 9mm pistol.

All the victims were his colleagues.

[4] The trial Judge **Mofolo J**. analysed and assessed the evidence presented by crown. All these fatal shootings occurred at about 8.00 pm and it had appeared there had been some drinking in the vicinity. The accused and his colleagues were during that evening on a street patrol due to civil unrest then prevailing in Lesotho in 1998, as alluded to earlier.

- [5] Having heard all material witnesses for the crown and having heard the evidence of the applicant and more particularly the medical evidence of **Dr Shaikh**, the trial Judge found that the applicant

“...suffered from psychogenic fugue state. Differential diagnosis which includes psychogenic amnesia and malingering.”

- [6] **Dr Shaikh**, a qualified psychiatrist, gave a detailed description of this mental condition which he said involves loss of awareness of one’s identity, of memory and of consciousness. This befuddled condition can be temporary and if it occurs, important personal events cannot be recalled. It can recur or can never recur.

- [7] The Honourable **Mofolo J.** then concluded thus at the end of trial:-

*“...I have found that the mental defects attributed to accused by **Dr Shaikh** are all present in the accused. I was puzzled by his shooting Trooper Thamae and Matela for no apparent reason and having done so fleeing from the scene and not remembering exactly what happened ...Exchanging or mistaking his gun for Matli’s shows accused’s befuddled state of mind....”*

“Indeed the applicant who then appeared quite normal during the court proceedings did not deny the evidence against him, infact he feels ashamed of what he is claimed to have done.”

[8] The applicant was found “*guilty as charged*”¹ but that he was “*mentally incapacitated,*” and it was “*...ordered that the accused be kept in custody in some prison pending the signification of King’s pleasure.*” This is called a “*Special Verdict*” in terms of *section 172 (3)* of the **Criminal Procedure and Evidence Act No.9 of 1981.**

[9] It may be noted in passing that the new ***The Lesotho Penal Code Act No.6 of 2012*** *section 19* provides:-

“Insanity

19. (1) *For the purposes of subsection (2), every person is presumed to be of sound mind and to have been of sound mind, until the contrary is proved.*
- (2) *No person shall be convicted of a criminal offence if he or she proves on the balance of probabilities that at the time of the commission of the offence he or she was suffering from mental disorder of such a nature that he or she was substantially unable to appreciate the wrongfulness of his or her action or that he or she was unable to conduct himself or herself in accordance with the requirement of the law.*
- (3) *Where proof of mental disorder is established, the court shall return a verdict of insanity and order the detention of the person in terms of section 172 of Criminal Procedure and Evidence Act 1981.”*

¹ Tsitso Matsaba v Rex – 1991-96 (1) LLR 615 (CA)

[10] The Honourable **Mofolo J.** further opined:-

“...I am to mention that the court was much troubled by what to do since before me the accused seemed quite normal the doctor having testified the attack was of a temporary nature and might never recur. Be this as it may, I am of the view that conditions for accused’s release must be left with His Majesty acting on responsible medical evidence....”

[11] The judgment and sentence were delivered on 27th day of July 2006 and seemingly no appeal was ever lodged against the **Special Verdict.**

[12] When he lodged his present application in June 2013, the applicant had been in detention for about seven (7) years. *Brevitatis causa*, all he seeks is that he be released from custody, conditionally or unconditionally “*by reason of [his] stabilised mental condition*”, and that any continued detention despite his recuperation or recovery infringes his *Section 8* right under the **Constitution of Lesotho.**

[13] Invoked by the applicant is *Section 8* of the **Constitution of Lesotho 1993.** It reads as follows:-

“Freedom from inhuman treatment.

8. (1) *No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.*

- (2) *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises*

the infliction of any description of punishment that was lawful in Lesotho immediately before the coming into operation of this Constitution.”

[14] For avoidance of doubt, it must be understood that this Court is not sitting on review or on appeal over the Honourable **Mofolo J**'s judgment and sentence. The Court is sitting as a Constitutional Court to determine whether the human rights of the applicant are being infringed by his further detention.

[15] It is however clear that the applicant is presently in detention under a judgment and sentence and order made by a competent court all of which are lawful and extant.

[16] “*Special Verdict*” is by no means punishment but it is a lawful detention in custody of someone who has committed a crime but who because of his mental disorder had no criminal capacity to form an intention to commit the crime in question. This mental condition is described as insanity.²

[17] In order to determine whether the applicant's further detention as a patient under “*His Majesty's Pleasure*” amounts to an *inhumane*” treatment and infringement of his rights under *section 8* of the **Constitution of Lesotho**, it is necessary for this Court to be furnished with new and independent medical/psychiatric evidence that evaluates the present mental condition of the applicant. Indeed **Mofolo J** opined “...I

² See **Snyman CR – Criminal Law** (1995) p 130 – at p150; **R v Chrestien** – 1981 (1) SA 1097; – **S. v. Pederson** – 1998 (2) SA (2) 383.

am of the view that the conditions for the accused's release must be left with His Majesty acting on responsible medical advice..."; he also remarked that "the accused seemed quite normal" at the time when the judgment and committal order was made on the 27th July 2006 – some eight years after that fateful night in Mafeteng.

- [18] In his founding affidavit in support of his constitutional application/petition, he narrates his incarceration at *Mohales' Hoek Mental Prison*; he describes his bouts of severe stress and of mental fatigue and of the depressive environment of having to "*rub shoulders*" with mentally deranged inmates in Mohale's Hoek "*despite his perfect bodily and mental health.*"
- [19] He continues to note that despite an order in *CIV/APN/339/12* dated 6th August 2012 directing that he be supplied with copies of medical reports, he has been denied the same.
- [20] He further states that he was also referred to *Mohlomi Mental Hospital* where he was given counselling sessions after which he was introduced to the **Pardons Committee on the Prerogative of Mercy** in December 2011.
- [21] He recounts that he took further steps to have his case reviewed by the **Pardons Committee** and he decided also to instruct counsel. He complains that when he finally received a visit from the new **Pardons Committee** on the 18th March 2013 comprising of **Chief Masupha**

Seeiso, Mrs Khalema and Mr Peete Lerotholi to his great surprise
“...they told me that they were no longer willing to attend to and/or proceed with my case because I had sued them.”

[22] He continues:-

“...They in fact went on angrily and in an openly hostile manner to tell me that I was actually wasting my money on lawyers and that they operate in a special way and were not bound by any order from the courts; he says that these remarks of the Pardons Committee left him a total wreck and in a state of utter devastation...”

[23] He laments in his affidavit that *“...I am by reason of my continued and indefinite incarceration, likely to deteriorate mentally and actually recede into abysmal darkness of insanity. This in my humble view would amount to inhumane treatment contrary to the provision of our constitution not to mention international treaties to which our country is a signatory....”*

[24] He informs the court that there are some inmates in Mohale’s Hoek who have been living in conditions similar to his for well over twenty years! This situation, if it exists, is certainly and totally unacceptable in the new democratic Kingdom of Lesotho.

[25] It must be here noted that despite having filed their “*notice of intention to oppose*”, none of the Respondents have filed any answering affidavits or raised any point of law over this important constitutional matter; this at best can be described as “*cavalier*”.

[26] Few observations need to or must be made:-

- (a) Lesotho is a democratic Kingdom in which principles of the “*rule of law*”, and of “*access to justice*” operate and “*the right to be heard*”³ apply to every person in Lesotho.

- (b) All prisoners in Lesotho lawfully convicted and sentenced still enjoy
– though to a certain limited extent – certain human rights; they are not and should not be the “*forgotten lot.*”

[27] The Court has carefully read the unchallenged founding affidavit made by the applicant under oath and has taken a rather dim view to the fact that none of the respondents have deemed it fit to file any answering papers to refute or controvert the rather serious allegations made by the applicant, As a Constitutional Court, this Court is the “**Upper Guardian**” to everyone including prisoners whose human rights are being or likely to be infringed. The Court must never shirk this sacred duty.

³ Section 19 of the Constitution.

[28] The “*Special Verdict*” “...to be kept in custody in some prison pending the signification of His Majesty’s Pleasure...” does not mean an incarceration for life but this detention should involve periodic or regular evaluation of the prisoner’s mental condition.

[29] Regular medical check-ups were indeed necessary because in the particular circumstances of this case, the trial Judge in passing judgment and in making a committal order even remarked that eight years after the fateful night, the accused “*seemed normal*”

[30] The following Order is therefore made by this:-

“(a) Within 30 days from today the applicant LIRA JOHN RAMAISA should be medically examined by “one experienced medical practitioner” to establish-

(i) the present mental condition of the said LIRA JOHN RAMAISA, and

(ii) the suitability of his release or further detention upon whatever conditions.

(b) the said Medical Practitioner to make an independent evaluation and submit a Report to the Registrar of this Court on or before 25th April 2014 (unless an extension is requested).”

(c) The said LIRA JOHN RAMAISA to be presented before this Court on the 25th April 2014.

JUSTICE S.N. PEETE

JUDGE OF HIGH COURT

I concur:

JUSTICE T. MONAPATHI

ACTING CHIEF JUSTICE

I concur:

JUSTICE A.M. HLAJOANE

JUDGE OF HIGH COURT