

**IN THE HIGH COURT OF LESOTHO**

**CRI/APN/669/2012**

In the matter between:

**MAKHAOLA MAKHOTLA**

**APPLICANT**

**And**

**THE MAGISTRATE (THABA-TSEKA)  
MR. KOLISANG**

**1<sup>ST</sup> RESPONDENT**

**CLERK OF COURT  
(THABA-TSEKA MAGISTRATE COURT)**

**2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Coram** : Honourable Acting Justice E.F.M. Makara

**Dates of Hearing** : 25 March , 12 April, 2013

**Date of Judgment** : 20 January, 2014

**Summary**

*Application for a review of the criminal proceedings in before a Resident Magistrate for the District of Thaba - Tseka and for an order setting them aside and directing that they be heard de novo before a different Magistrate – The applicant unrepresented before the Trial Court - The Court finding that the Magistrate had conducted the proceedings in violation of the procedural rights of the applicant in that*

*the record of the proceedings is not showing that the Magistrate had in verbatim terms comprehensively explained to him his right to a legal representation or the availability of the Legal aid services – The Magistrate having further failed to explain cross examination and its tactical significance to the applicant – The said procedural defects held to exist – Thus, the proceedings are set aside and it is directed that they be timeously commenced before another Magistrate.*

#### CITED CASES

**CR / 107/ 2012 Rex v Makhaola Makhotla, Mots'oene v Rex 1999 – 2000 LLR 331, S v Mashinyana 1989 (1) S A 592, Senate Mots'oene v Rex CRI / A / 23 / 98, Phomolo Khutlisi v Rex 1993 – 1994 LLR & LB (CA**

#### STATUTES

**Criminal Procedure and Evidence Act 1981  
Legal Aid Act 1978  
The Constitution of Lesotho**

#### **MAKARA A.J.**

#### **Introduction**

[1] This is the Notice of Application proceedings in which the applicant has approached the Court asking for it to review, correct and set aside the judgement of the Magistrate Court of Thaba Tseka presided over by Resident Magistrate Kolisang in **CR / 107/ 2012 Rex v Makhaola Makhotla**. He has on the same note prayed for an order that the matter be heard *de novo* before a different Magistrate.

[2] The interventions are sought for on the basic ground that the proceedings were not procedurally conducted and that as such the applicants' *Due Process Rights* contemplated under **S 240 (1) (b) and**

**162 of the Criminal Procedure and Evidence Act 1981** had not been adhered to. The former provides:

If it is a Subordinate Court, and the prosecutor state the facts disclosed by the evidence in his possession, the court shall, after recording such facts, ask the person whether he admits them, and if he does, bring in a verdict without hearing any evidence.

[3] The Court doesn't appreciate the relevance of the latter section in this case and, therefore, its provisions wouldn't be quoted here.

It was indicated that the procedure complained about also amounted to a violation of their procedural rights under **Sec. 12 of the Constitution**. These are constitutionally called the *Fair Trial Rights* and are rooted in Common Law. The Section seeks to mandatorily render it imperative for the Law Enforcement State Agencies and the Courts to adhere to the prescribed procedures which are recognised to represent a pre requisite to the ultimate attainment of a substantive premised judgement. The jurisprudence behind is that the procedure is indispensable throughout the criminal justice system *viz* at the *pre trial, trial and post trial phases* in the processes. At present, the focus is on the procedural fairness followed in the proceedings before the Trial Court. It is precisely this which is being placed under scrutiny before this Court.

[4] The respondents have opposed the application and accordingly reacted to its founding papers. They have in essence maintained that the Magistrate had basically complied with the requisite *fair*

*trial procedures* and warned that the applicants were simply stringently applying the test for its compliance.

### **The Common Cause Basic Facts**

[5] The litigation has as a matter of common cause been occasioned by the manner in which the Trial Magistrate of the Resident Magistrate powers had administered the proceedings in which the applicants had appeared before him against the charge of *Stock Theft*. The Crown had apparently alleged that he had stolen the livestock animals belonging to the complainant. It has not been disputed that he had following the charge read to him by the Magistrate, pleaded guilty to it. The applicant was not represented by Counsel before the Court. There seems to be an agreement between the parties that a controversy exists between them on the question of whether or not the Magistrate had sufficiently explained the rights to a legal representation to him.

[6] It has transpired from the record before this Court that the Presiding Magistrate had used a *pro forma* in recording that he had *inter alia* explained the right to a legal representation to the applicant. One of the blank spaces therein is provided for the Presiding Magistrate to basically tick if the right of the accused to legal representation was explained to him. The Magistrate has responded to that by simply indicating that such a right had been

explained to the accused and that he had responded that he understood it.

### **The Issues for Determination by the Court**

[7] The stated factual landscape and the corresponding arguments thereof project the issues for consideration to centre around the question as to whether or not the Trial Court had, as enjoined by the law, facilitated for the *procedural rights* of the applicant. The resultant levels of inquiry being firstly if the papers reveal that the Magistrate had satisfactorily explained to the applicant his right to legal representation and secondly appraised him about the pre requisite elements for the outline to qualify a verdict of guilty against him.

### **The Arguments Advanced**

[8] The Counsel for the applicant motivated his case by primarily stating that *ex facie* the record before the Court inclusive of the affidavit filed by the Magistrate there is no indication that there was any comprehensive explanation given to the applicant concerning his right to a legal representation, cross examination and its purpose. Most significantly according to her, there is no suggestion that the essential elements of the offence were elucidated to him so that he could have appreciated whether or not such requirements existed within the outline made by the Prosecutor in terms of **Sec**

**240 (1) (b) of the Criminal Procedure & Evidence Act.** In this background, she submitted that there is a founded doubt that the applicant had tendered his plea of guilty on informed basis. She had for the guidance of the Court referred it to the case of **Mots'oene v Rex 1999 – 2000 LLR 331** where the Court in detailing the rights of the unrepresented accused had emphasized that such a person be accorded his fair trial rights under **Sec 12 of the Constitution** by having his right to a legal representation explained to him at the commencement of the trial and reduce that into a written form.

[9] On the contrary, it was contended for the Crown that the Magistrate had at the material development of the case **basically** provided the applicant with the explanations in question. According to him, that sufficed for the purpose of satisfying of the fair trial procedural imperatives. She in an endeavour to demonstrate that the Trial Court had complied with the basic requirement reinforced her argument by introducing a statement expressed in **S v Mashinyana 1989 (1) S A 592** where it was held:

A Court is not obliged to enquire from an undefended accused whether he wishes to have legal representation.

[10] She had, nonetheless, not hesitated to provide the Court with the appropriate case law literature on the subject for it to have proper perspective of the subject. The Court acknowledges her valuable contribution in that regard.

### **The Finding and the Decision of the Court**

[11] It should suffice to record that the record of the proceedings and the affidavit of the learned Magistrate do not reflect any clear message whatsoever, that the Trial Court had thoughtfully, systematically and comprehensibly explained to the accused his procedural rights within the purview of **Sec 12 of the Constitution**. This applies specifically to his constitutional right to a legal representation to a lawyer of his choice (with a qualification that such a Defence Counsel must be the one who shall be available on the appointed date for trial). The advice would have to further bring to the attention of the accused his alternative right to secure the Legal Aid Counsel under the **Legal Aid Act 1978**. On the same strength, the fiscal advantage of the latter intervention would have to be canvassed to him. There must also have been emphasis laid on the serious nature of the charge preferred against him and its possible consequence. In a nutshell, the strategic significance of the explanations would be the ascertainment that the accused would make an informed decision. This would ultimately be instrumental to the attainment of a *fair trial*.

[13] There is further no clear indication from the papers made available to the Court that the Trial Court had after the Crown had in summarized terms presented its case, bothered to illuminate to

the accused, the essential elements of the offence concerned. This portrays a doubtful question as to whether he had conscientiously pleaded guilty within the context that he admitted to have committed each and every essential act in the legal and technical sense. It has definitely long become trite law that a Trial Magistrate should furnish an unrepresented accused with a simplified version of that technical information to ascertain that he would tender his plea on informed basis. Otherwise, there would be a conceivable danger of a miscarriage of justice. The advice and the conversation thereof would have to be reduced to writing in compliance with the fact that a Magistrate Court is a Court of record and for the superior courts to determine in the event of a need, what had actually transpired so that it could intervene accordingly. The foundational thinking would be on procedural fairness as an integral component of *Fair Trial*.

[14] Understandably, the Trial Court would have to similarly approach the cross – examination so that it could, on the basis of the record of the proceedings, be visible that an unrepresented accused was appraised about the strategic importance of the procedure and its instrumentality in the advancement of his defence.



[15] It is disturbingly unfortunate that despite a *plethora* of the decisions of this Court that magistrates should thoughtfully, systematically and comprehensively explain to the unrepresented accused his right to a legal representation; some magistrates continue to demonstrate ignorance about that or simply attach little consideration to that constitutionally sanctioned procedural right. This Court has in recognition of the procedural significance of that right to the *Fair trial Constitutional Provision*, repetitively detailed with reference to local and foreign decisions that a Presiding Magistrate must record in almost *verbatim* terms, the words in which the explanatory message about the right was conveyed to the accused. The recording provides the Reviewing or the Appellate Court to judge *ex facie* the recording, if the words employed commanded a propensity for the accused to have appreciated the right and consequently made an informed decision on whether to proceed unrepresented or think otherwise.

[16] The *pro forma* used by the Magistrate in this case, doesn't satisfy the requirement. It is inconceivable to this Court that a *pro forma* could adequately address the expectation since it is readily designed for a general application. The implication being that all situations are similar. Each case would have to be assigned its own deserving recording since the responses of individuals cannot be the same irrespective of the diversities of the circumstances and the different levels of understanding by the individual accused persons.

There would have to be a revelation that there was a conversation between the Magistrate and the accused which resulted in a particular logical conclusion. It must be stressed that the alternative availability of the Legal Aid Services and its advantage should, where appropriate, be readable from the record of the proceedings.

[17] It is warned that the impugned *pro forma*, however, it may be a commendable initiative to guide the magistrates, lacks the appropriate content and comprehensiveness. Rather even more disturbing about it is that it deprives this Court of an opportunity to appreciate from the record of the proceedings, the actual conversation between the Magistrate and the accused person. It is of a vital significance that an individual Magistrate must demonstrate competency in the recording of the dialogue between himself and the accused in order to place the mind of the Court within its conspectus. This would signal the accuracy or otherwise concerning the recorded version of the conversation. This denotes the indispensability of the endeavour to record *verbatim* the true words employed in explaining to the accused his right to a legal representation.

[18] The Court elects to refer to a few selected cases in support of the position. It has already maintained that a Magistrate is obliged

on the subject of the legal to thoroughly explain to the unrepresented accused his rights to a legal representation and its incidentals. In **Senate Mots'oene v Rex CRI / A / 23 / 98** it was *inter alia* elaborately detailed that:

Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, and accused should not only be told of this right but should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to Legal Aid Board for assistance. A failure on the part of a Judicial Officer to do this, having regard to the circumstances of the case, may result in an unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the absence of legal representation per se will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend upon its own facts and peculiar circumstances.

[19] In **Phomolo Khutlisi v Rex 1993 – 1994 LLR & LB (CA)** Ackermann JA reiterated the view in these words:

It is important for the proper administration of justice, nonetheless, that an unrepresented accused, at the commencement of his trial, be informed of his legal rights, in regards to legal representation, and if he is indigent and desirous of legal representation, what avenues are open to his in this regard.

[20] It has throughout the decades emerged that the basic procedural mistakes under consideration more often ultimately frustrates justice. This is occasioned by the fact that experience has taught that it becomes a complex task for the law enforcement agencies to re organise the witnesses, re secure the exhibits and other logistics for a re commencement of the trial. The wish of the

Court is that our magistrates should, in the interest of justice, relegate these particular basic procedural mistakes to the museum of the antiques.

[21] It would be regrettable if any Magistrate would with reference to the record of the proceedings demonstrate failure to have comprehensibly communicated to the unrepresented accused his rights to a legal representation, the availability of the Legal Aid Service where necessary and the importance of cross-examination. The words used in that communication and the responses thereof being all recorded in a verbatim version.

[22] In the premises, the Court finds no alternative but to set aside the proceedings and direct that the case should be heard *de novo* before a different Magistrate. It is further ordered that the matter must forthwith be set down for hearing within a reasonable time to facilitate for the availability of the witnesses and the re-organisation of the necessary logistics.

**E.F.M. MAKARA  
ACTING JUDGE**

For the Applicant : Adv. Nthimo

For the Respondent : Adv. M. Ranthithi