

IN THE HIGH COURT OF LESOTHO

In the matter between:

NTHABISENG MAPESI MAKOA E

1ST APPLICANT

And

REX

1ST RESPONDENT

**Review Case No.139.2013
Review Order No.2/2014**

**CR.NO.66/2013
In the district of Qacha'sNek**

Order on Review

Delivered by the Honourable Mr. Justice E.F.M. Makara
On the 29 January, 2014

[1] This is one of the many sad cases in which the accused could be guilty of the offence with which he was criminally charged. This notwithstanding, the Court is disturbed by two procedural dimensions which in its view should render the proceedings and the sentences to be both set aside.

[2] The case came before me on automatic review. The Applicant was charged before the Qacha'sNek Magistrate Court for having contravened Sec. 9 (1) of the Proclamation No. 32 of 1937 as amended by Sec. 67 of the Counterfeit Currency Act No.11 of 1979. The content of the charge read:

In that upon or about the 30th day of April, 2013 and at or near Standard Lesotho Bank Qacha's Nek, and in the district of Qacha'sNek, the said accused was found in possession of Counterfeit currency knowing or having good reason for believing it to be a counterfeit currency. To Wit: South African R100.00 notes bearing Serial No. BG4803197D to the amount of R161, 000.00 and did commit the offence as aforesaid.

[3] The accused who appeared in person pleaded guilty to the charge. Thus, the provisions of Sec.240 (1) (b) of the Criminal Procedure and Evidence Act 1981 were followed. This was after the prosecution had accepted the plea. Consequently as enjoined by the section, the prosecution made an outline of the fact which would be evidentially presented before the Court had the plea been otherwise.

[4] At the end of the outline the accused was basically asked to confirm whether the facts stated were true and he responded in the affirmative.

[5] The Court identifies procedural defects in the proceeding on two levels. Firstly, the learned Magistrate hasn't in *verbatim* words recorded how he had conveyed to the accused his right to a legal representation. There is *ex facie* the record no indication that the Magistrate had bothered to draw to the accused his right to the availability of the Legal Aid Services if, perhaps, he had explained that he was financially incapacitated to engage a lawyer. Thus, the Court has not been placed in a clear perception that the accused had satisfactorily been appraised about his constitutional right to a legal representation. A legal position that Magistrates should place on record the words which they employ in appraising the accused about the right has repetitively been over-emphasized. Unfortunately, it more often than not emerges that some Magistrates never follow the many judgments of this Court in which they are detailed to record the explanation in *verbatim* terms.

[6] It has been stated that the rationale is for this Court to be in a good position to interpret if the explanation advanced was sufficient to have conveyed the message such that the accused had made an informed decision.

[7] It was in the instant case imperative for the Magistrate to be perceived as having properly explained to the accused his right to a legal representation and its parameters. This is so considering the likelihood of a serious punishment which a conviction could attract. Amongst a *plethora* of case law decision which elucidates the procedural delegation of the Magistrates is **Phomolo Khutlisi v Rex 1993-94 LLR – LB 18.**

[8] A foundational idea behind the requirement for a comprehensive explanation on the subject of legal representation is basically an endeavour to uphold the fair trial right in the Constitution.

[9] Another procedural defect in this case is that at the end of the outline, he didn't explain to the accused the essential requirements in the charge. This would have empowered him to have made an informed decision on the question of the correctness of the summarized facts presented by the prosecution.

[10] The end result is an unfortunate one that the proceedings and the sentence are set aside. It is ultimately, directed that the case should proceed *de novo* before a different Magistrate. This should be so within at the most two (2) months starting from February 2014.

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

Copy: The Director of Public Prosecutions
The Chief Magistrates
The Magistrate – Qacha'snek

All Magistrates
All Public Prosecutors
The Director of Prisons
O/C Police –Qacha'snek