

IN THE HIGH COURT OF LESOTHO

In the matter between:-

ATANG CHOCHA

Applicant

Vs

HER WORSHIP MRS NTELANE

1st Respondent

CLERK OF COURT

2nd Respondent

DIRECTOR OF PUBLIC PROSECUTION

3rd Respondent

ATTORNEY GENERAL

4th Respondent

JUDGMENT

Coram: Hon. M. Hlajoane

Date of Hearing: 24th February, 2015.

Date of judgment: 12th March, 2015.

Summary

*Application for review after cancellation of bail by the magistrate –
Accused having failed to arrive on time on date of hearing only to*

arrive late in Police Company on arrest – Magistrate justified in having cancelled bail.

Annotations

Statutes

Books

Cases

[1] The Applicant whom I will in this judgment refer to as the accused, appeared before the Resident Magistrate charged with contravening **section 68 (1) of the Penal Code 2010**. The allegations being that on or around the 17th May, 2013 at or near Leqele bus rank, he and another deliberately made false representation to one Pulumo Mothibeli that they were going to sell him a vehicle worth M80,000.00. The accused in so doing took the said amount from the accused and did not deliver the said vehicle.

[2] The accused was on the 19th August, 2013 admitted to bail on certain stipulated conditions. Accused did adhere to the bail conditions till the 21st November, 2013 when he made his appearance in Court with the Prosecutor Mr Tshabalala and they were remanded to the 18th December, 2013.

- [3] On the 18th December, 2013 the record show that the Prosecutor, this time Mr or Mrs Letsoela and the accused were before Court. The matter was postponed to 15th January 2014 for an update by Mr Tshabalala.
- [4] Again according to the record there is no minute showing that anything was done on the 15th January, 2014, but on the 10th March, 2014 Mr Khaile for Crown applied for warrant of arrest against the accused and the warrants were issued.
- [5] The accused in his papers has shown that he had been attending remands until sometime in February 2014 when they were informed that they would be told when next to attend remands. This he said was due to the fact that the Prosecutor who was seized with the matter was busy with funeral arrangements of his mother.
- [6] The record reveals that the accused was not able to explain to the Court the person whom he said told him not to come to Court. The Court seemingly gave him the benefit of doubt because his bail was not cancelled instead an additional condition was made of a surety in the amount of M4000.00 and

matter postponed to 3rd June 2014, and later to the 29th July, 2014. Accused was before Court when the matter was given the date of the 29th July.

[7] On the 29th July, 2014 the accused never came for his remand and case postponed to 26th August 2014 and no warrant of arrest was applied for.

[8] The record show that the accused was before Court on the 14th August, 2014 and was asked to plead in the presence of his legal representative. The case proceeded. The case was then postponed to 27th August, 2014.

[9] On that day set for hearing of the matter accused only came to Court in the afternoon at about 3:05pm according to the minute in the proceedings. He was in the company of a Police Officer as had been arrested for another case. His lawyer was not present.

[10] The case proceeded in the absence of his lawyer. At the stage when accused was to cross examine the witness that had given his evidence he told the Court that he wanted a lawyer whom he said was going to be available the following week.

[11] Before the case proceeded that day, accused had intimated that he could not manage to pay a lawyer. But after evidence was led he was then going to have services of a lawyer the following week. The Court was concerned about that change of heart. As a result the record shows that the magistrate cancelled accused's bail for fear that he was going to abscond.

[12] That order cancelling accused's bail is the one which this Court is being asked on review to cancel or set aside as irregular.

[13] Having given this background, I will now deal with the necessary affidavits filed of record. The Application was served on respondents after which an intention to oppose was filed, though not signed. Later on the opposing affidavit was filed together with a supporting affidavit. The opposing affidavit has not been signed by the deponent and has not been commissioned by the Commissioner of Oaths. Though deponent to the supporting affidavit has signed but it has not been commissioned.

[14] Counsel for the Applicant took a point *in limine* regarding the two affidavits as alluded to above. He argued that they should

not be considered as affidavits at all thus rendering the Application unopposed.

[15] The whole purpose of placing the record before the Court was to review the proceedings. I have gone through the proceedings and came to know how the case was conducted.

[16] What has been said about the opposing and supporting affidavits is true. The question then to be asked is, can it then be said the Court has to act as though it never went through the proceedings to be reviewed? My answer is no.

[17] Since I had occasion to go through the record and observed that the magistrate cancelled bail for the accused for fear that he was not going to attend further dates of hearing, the Court in the interest of justice considered the review. So that even in the absence of the opposing and supporting affidavits can still consider the review.

[18] Bail was cancelled after accused had failed to make his appearance in Court only to come late in the afternoon under Police escort for another alleged offence.

[19] The Court thus on review considers the cancelling of accused's bail still in accordance with real and substantial justice as she wanted to make sure that accused was put at a place where he was going to be able to attend Court.

[20] I therefore find that the magistrate cannot be faulted for having cancelled accused's bail under those circumstances.

The Application is thus dismissed and there will be no order for costs in a criminal case.

[21] The Court was however not amused by the manner at which Counsel for the Respondents handled this matter. Mr Mokuku only came in to rescue the situation as he happened to be before me for another case.

A. M. HLAJOANE
JUDGE

For Applicant: Adv. Ntsene

For Respondents: Mr Mokuku