LESOTHO

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CRI/REV/23/2019

In the matter between:

KABELO RATIA	**APPLICANT**
And	
THE LEARNED MAGISTRATE RANTŠO	**1ST RESPONDENT**
CLERK OF MASERU MAGISTRATE COURT	**2ND RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS	**3RD RESPONDENT**
ATTORNEY GENERAL	**4TH RESPONDENT**
THE PUBLIC PROSECUTOR	**5TH RESPONDENT**
THE INVESTIGATING OFFICER	**6TH RESPONDENT**

CORAM: **S.P. SAKOANE J.**
HEARD: **8 and 29 AUGUST 2019**
DELIVERED: **11 SEPTEMBER 2019**

SUMMARY

Issuance of Summons – appearance in court and remand in custody absent summons – refusal by magistrate for defence lawyers to raise issue of illegality of remand – whether remand in custody absent a summons containing a charge lawful – duty of remanding court to entertain question of lawfulness of accused's remand in custody – Criminal Procedure And Evidence Act, 1981 sections 121, 123, 334 and 337, Police Service Act, 1998 Schedule 1.

ANNOTATIONS

CITED CASES:
Master v. Slomowitz 1961 (1) SA 669 [1]@672 A-C

President of RSA & Others v. M & G Media Ltd 2012 (2) SA SO (CC) para [28]-[29]

R v. Lerotholi and 4 Others LSHC 135 (19 November 2007)

S v. Swart 1969 (3) SA 138 (T.P.D)

STATUTES:
Criminal Procedure and Evidence Act No.7 of 1981

Police Service Ac No.7 of 1998

BOOKS:
Du Toit et al (1998) Commentary On The Criminal Procedure Act (Butterworths)

Steytler N. (1997) Constitutional Criminal Procedure (Butterworths)

JUDGMENT

I. INTRODUCTION

[1] The applicant appeared before the Maseru Magistrate's Court on 5 August 2019 following a telephone call by the police to do so. He was remanded in custody on a charge of robbery. He then launched this application on an urgent basis to seek the following relief:

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"That a rule nisi be issued returnable on the date to be determined by this Honorable Court calling upon 1st, 2nd, 3rd and 4th respondents to show cause, if any, why an order in the following terms shall not be made:

a) The periods and modes of service stipulated by the Rules of Court be dispensed with on account of urgency.

b) The applicant be released from Lesotho Correctional Service pending determination hereof.

c) Alternative to prayer b) Applicant be released by the Honourable Court upon such terms and conditions as would secure his attendance to trial.

d) The remand of applicant into Lesotho Correctional Service by 1st respondent is reviewed and set aside as is unlawful.

e) That Respondents be ordered to pay costs only in the event of contesting this application.

f) That Applicant be granted further and/or alternative relief.

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That prayers 1(a), (b), (c) and (d) operate with immediate effect as an interim relief."

[2] The application was moved on 8 August 2019 in the presence of Crown counsel for the respondents. I granted his release in terms of paragraph 1(b) above and postponed the matter for hearing on the merits to 14 August 2019. I also ordered that the prosecutor and the investigating officer be joined as respondents.

[3] On 14 August the applicant's counsel appeared before court. There was no appearance for the respondents. This was ostensibly because a notice of withdrawal of opposition by respondents had been filed on 12 August.

The matter was then postponed for argument by the applicant to the 29 August.

II. MERITS

[4] The applicant avers in the founding affidavit that:

4.1 On 16 July 2019 he appeared before the Magistrate Court after being telephonically ordered to do so by the Matela Police. The police had previously arrested and subjected him to torture and forced him to eat his faeces.

4.2 At that previous occasion, an attempt was made to remand him but, his Counsel objected and the Magistrate obliged him on the basis of visible injuries and also that his arrest was then found to be unlawful.

4.3 He was told then to come back to court on 1 August 2019 when the prosecutor informed the Magistrate that the charges were being withdrawn.

4.4 On 2 August he received another call from a person who identified himself as an officer in charge of Matela Police Station. This person stated that he had received summons

requiring the applicant to appear before the Magistrate Court on 5 August 2019. No details of the summons were given.

4.5 While preparing to go to fetch the summons from the police on 5 August 2019, he got another call that he was wanted at the Magistrate's Court. He immediately contacted his lawyer and was advised to rush to court "and get what the summons were about."

4.6 On arrival at court he found his lawyer who approached the prosecutor to enquire if the latter had a copy of the summons as the Clerk of Court had told them that summons are not kept in the Criminal Registry. The prosecutor told the applicant's counsel that he was going to remand the applicant and would have to raise any objections in court.

4.7 Upon arrival in the Magistrate's Chambers, the Magistrate immediately read the charge. Counsel then sought to address the Magistrate, but she told counsel that she was there to remand and not to grant bail. Upon counsel informing the Magistrate he was only raising the issue about summons, the Magistrate said she did not have summons in front of her and

only acted on the basis of the charge sheet. She did not even give counsel a chance to inform her how the applicant was before court.

4.8 The applicant says he was remanded in custody without being afforded an opportunity to explain how he came to appear before the Magistrate. He was not even asked whether he understood the charge.

4.9 The applicant avers further that the Magistrate committed an irregularity by refusing counsel an opportunity to raise objections to his remand and to enquire into the lawfulness and justification of summons issued.

4.10 The applicant then submits that he was deprived of his liberty unlawfully. No legal provisions authorizing his detention were identified.

III. DISCUSSION

Statutory provisions

[5] Section 121 of the **Criminal Procedure And Evidence Act No.7 of 1981** provides, in relevant parts that:

"(1) The clerk of the subordinate court shall, upon or after the lodging of any charge, at the request of the prosecutor, issue and deliver to the messenger of the court a summons to the person charged to appear to answer the charge with as many copies as there are persons to be summoned.

(2) Except where specially provided otherwise by any law, the service upon accused persons of any summons or other process in a criminal case in a subordinate court shall be made by the prescribed officer by delivering it to the accused personally.

(3) If –

(a) any person fails to appear at the hour and on the day appointed for his appearance, and the court is satisfied upon the return of the person required to serve summons that he was duly summoned;

(b) it appears from evidence given under oath that he was duly warned to appear or that he is evading service of the summons; or

(c) it appears from evidence given under oath that he attended but failed to remain in attendance,

the court in which the criminal proceedings are conducted may issue a warrant directing that he be arrested and brought, at a time and place, stated in the warrant, or as soon thereafter as possible, before the court or any magistrate.

(4) In any case in which the accused is ordinarily resident in Lesotho it shall be regarded as a sufficient summons to attend the court if the accused is duly warned through his chief or headman to appear, and proof of the warning shall render the accused liable to the penalties prescribed in sub-section (3) in the event of his failure to appear at the appointed time.

(5) When the person in question has been arrested under a warrant referred to in sub-section (3), he may be detained thereunder in any gaol, lock-up or other place of detention or in the custody of the person who is in charge of him, with a view to securing his presence at his trial, but the court may release him on a recognizance, with or without sureties, for his appearance at his trial and for his appearance at the enquiry referred to in sub-section (6).

(6) The court may in a summary manner enquire into the person's failure to obey the summons or his failure to remain in attendance, and unless it is proved that the said person has a reasonable excuse for the failure or evasion, may sentence him to pay a fine not exceeding 30 maloti or to imprisonment for a period not exceeding one month."

[6] Section 123 provides as follows:

> "(1) Except where the accused is warned under section 121 (4), in all summary trials in any subordinate court, the charge shall be entered upon the summons, containing the name of every accused person, the offence with which he is charged and the necessary particulars thereof concisely stated.
>
> (2) At the trial the charge shall be read out to the person charged, who shall be called upon to plead thereto, and his plea shall be recorded thereon.
>
> (3) The accused or his legal adviser may at all reasonable times inspect the charge as stated in the summons."

[7] Section 334 (4) provides that:

> "Any policeman may, subject to the rules of court, serve any notice or document under this Act as if he had been appointed deputy sheriff or deputy messenger or other like officer of the court."

[8] Section 337 reads thus:

> "Any summons, writ, warrant, rule, order, notice or other process, or communication which is required or directed to be served or executed upon any person by any law, or left at the house or place of abode or business of any person pursuant to any law, in order that that person may be affected thereby, may be transmitted by telegraph, and a telegraph copy served or executed upon that person, or left at his house or place of abode or business, shall be of the same force and effect as if the original had been shown to, or a copy thereof served or executed upon that person, or left, as the case may be."

Interpretation of provisions

[9] Section 121 is couched in mandatory language to say that a summons must be delivered personally to the accused by the prescribed office and a return of service that the accused was duly summoned must be made: **S v. Swart** 1969 (3) SA 138 (T.P.D). The default position is that a statement under

oath must be given that the accused was duly warned to appear by the prescribed officer, his chief or headman.

[10] None of the mentioned persons were clothed with power to issue a summons, serve it or warn the accused to attend court including a police officer let alone one who is involved in the investigation of the offence or who has interrogated the summonsed accused. The express mention of messenger of court, prescribed officer, chief and headman is a *numerus clausus*. Therefore, inclusion of a police officer would have to be by express showing that the police officer has been appointed a deputy sheriff or deputy messenger of court under section 334 (4). Otherwise, the police have no powers to warn an accused, by telephone or otherwise, to appear in court.

[11] I consider that issuance of a summons is a judicial process and not an executive process. Where a non-custodial method of securing the attendance of an accused to court such as a summons is adjudged preferable against the custodial method of arrest and detention in custody or jail, an accused person must be dealt with in accordance with the purpose of the non-custodial method and not be subjected to the coercive and liberty-constraining method. In short, a summonsed accused must not be remanded in custody and thus, burdened to seek his liberation through bail.

The constitutional protection of the right to liberty imposes such a duty: Steytler **Constitutional Criminal Procedure** (Butterworths) p.52

[12] Section 123 provides for the general rule in relation to the procedural requirements for dealing with the charges entered upon summons. The summons must contain the name of the accused, the offence and its particulars. The accused's legal adviser has the **right to inspect the charge as stated in the summons**. This entails the duty to raise objections in regard to the validity or otherwise of the charge and the summons.

[13] Section 337 provides for transmission of a summons be telegraph. A copy served or executed upon the person of the accused is as good as service or execution of the original. A telephonic message does not comply with the prescripts of the section: Du Toit et al, (1977) **Commentary On The Criminal Procedure** (Juta) p.33-2

[14] Just as an unlawful arrest cannot lead into a lawful detention, ergo a remand in custody done on the strength of non-existent or invalid summons. The remanding court has authority, regardless of any jurisdictional limitation to grant bail, to entertain the question of the lawfulness or otherwise of the accused's remand in custody if the court detects a fatal defect in the

procedure to set the law in motion: **R v. Lerotholi And 4 Others** [2007] LSHC 135 (19 November 2007).

Application of law to facts

[15] These being motion proceedings, the affidavit of the applicant constitutes both pleadings and evidence. He has deposed to facts within his knowledge and fully explained how they fall within his personal knowledge: The **Master v. Slomowitz** 1961 (1) SA 669 [1] at 672 A-C; **President of RSA And Others v. M & G Media Ltd** 2012 (2) SA 50 (CC) para [28]-[29]. There is no basis in law and fact to disbelief his evidence. I, therefore, accept the veracity of his version.

[16] It is a matter of shame that the applicant had been tortured and forced to eat his faeces by the Matela police and nothing was done to bring them to book. This type of conduct bespeaks of the most despicable, sadistic behaviour and savagery to which men and women in uniform have stooped, contrary to their oath under the **Police Service Act No.7 of 1998**. The police have reached the worst of police brutality even surpassing the Gestapo and apartheid police. This record must not be allowed to remain in the annals of the history of the Lesotho Police Service. The Commissioner and the Police Authority must act.

[17] The police's oath of office enjoins them to **truly** serve:

> "without favour or affection, **malice or ill-will**, and that I will to the best of my power and with **due regard to the Constitution**, cause peace to be kept and preserved, maintain law and order, **prevent all offences against the person** and property, detect offences, **apprehend offenders and bring them to justice**: and that while I continue to hold that office I will to the best of my skill and knowledge discharge all the duties of that office faithfully according to law."
> [Emphasis added]

[18] I have gone through the provisions of the **Police Service Act, 1998** with a fine toothcomb and have not found a scintilla of authorization lie about issuance of summons, torture suspects and offenders – let alone force them to eat faeces. This despicable conduct completely destroys the image of the police as a service and constitutes a negation of humanity and a spit in the face of the values of our Constitution. It is not a mere disciplinary offence but a serious crime. A police officer who engages in such conduct is nothing but a criminal in uniform. He/she must be rooted out without much ado and face the full might of the law.

[19] The applicant, who is a victim of criminal conduct by the police, was hoodwinked into attending court by the very police. They had no moral authority or right in law to do so. True to their colours, they perpetrated a lie to their victim who, undoubtedly, had been traumatized and was afraid that should he disobey them, he might have to eat his faeces.

[20] I consider that the police set the law in motion on the basis of a lie that summons had been issued for the applicant to face justice. The prosecutor and the Magistrate gave effect to this lie and even denied the applicant's lawyer his right to inspect the summons which were supposed to contain the very charge on which his client was remanded in custody.

[21] The very manner in which the prosecutor and the Magistrate reacted to counsel when he asserted his right to be given the summons shows that they, like the police, were determined to deprive the applicant of his liberty wittingly and on purpose. The manner in which the prosecutor and Magistrate dealt with the matter points to a symbiotic relationship that existed between the court, the prosecutor and the police. No separation of functions and system of checks and balances were observed. The applicant's right to liberty was trampled upon and the very machinery of the law and justice subverted.

[22] To repeat the *dicta* in **Lerotholi** (supra),:

> "...a Court of law including a remanding court in particular should always be astute to secure means by which it is able in exercising its functions, to ensure that the citizen's liberty is protected not only from actual but more importantly from potential inroads emanating from wanton acts of the Executive's agents. This is more so necessary when one has regard to the fact that the state wields more power than can be prevailed against with relative ease by an individual whose rights

happen to be unlawfully trampled upon, be it unwittingly or on purpose."

[23] The only reasonable inference to be drawn from the behaviour of the prosecutor in the matter is that he knew about the telephone call by the police conveying the fake news about issuance of a summons. Hence the prosecutor's unhelpful attitude in the matter when counsel sought to be shown the summons. The Magistrate's judicial antenna should have got the signal that something was wrong once counsel sought to find out the summons. This failure of the Magistrate to get the signal seems to have been caused by the Magistrate's misplaced preoccupation with jurisdictional limitations to entertain the question of bail whereas the issue counsel sought to be heard on was lawfulness of the remand process and not bail.

IV. DISPOSITION

[24] A lie was used to get the applicant to attend court for a remand in custody. There was no summons issued for him to attend court. But even if there had been such summons, it could not be communicated telephonically. Thus, the applicant's attendance at court and his remand in custody were procured illegally and unlawfully.

Costs

[25] The respondents opposed the matter and argument on the opposition to the granting of the *rule nisi* was heard. The Crown lost the argument and thereafter decided not to contest the merits. This it did only on the day it ought to have filed its opposing prayers. The Crown did not tender any costs that the applicant incurred up to the stage of the withdrawal of its opposition. I do not see any good reason why the Crown must not pay the applicant's costs up to the very day the matter was set down for argument.

Order

[25] In the result, the following order is made:

1. The application is granted.

2. The interim order for release of the applicant is confirmed.

3. The remand of applicant into Lesotho Correctional Service by 1st respondent is reviewed and set aside.

4. Respondents must pay the costs of the application jointly.

5. Such costs to include the costs of the employment of two counsel.

[26] The Registrar must send copies of the judgment to the Police Authority who is the minister of police as well as the Director of Public Prosecutions for necessary action against the Matela police.

S.P. SAKOANE
JUDGE

For the applicant: N.J. Mafaesa, K. Letuka and
R. Mothobi instructed by T. Mahlakeng & Co

For the respondents: M. Mapesela