CRI/REV/0020/18

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the Matter Between:-

SEHLOHO MPETSANE	**1ST APPLICANT**
MOABI SEKEITI	**2ND APPLICANT**
EREMANE MOCHOANE	**3RD APPLICANT**

AND

THE MAGISTRATE- MR. KHOELI	**1ST RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTION	**2ND RESPONDENT**
CLERK OF COURT- BOTHA- BOTHA	**3rd RESPONDENT**
MINISTER OF POLICE	**4TH RESPONDENT**
LESOTHO CORRECTIONAL SERVICE	**5TH RESPONDENT**
COMMANDER – LDF	**6TH RESPONDENT**
ATTORNEY GENERAL	**7TH RESPONDENT**

JUDGMENT

CORAM : **HON. ACTING JUSTICE M. MOKHESI**

DATE OF HEARING : **10 DECEMBER 2018**

DATE OF JUDGMENT : **14 FEBRUARY 2019**

SUMMARY:

Practice: *Application for review of proceedings of the Magistrate Court in terms of which the applicants were convicted and sentenced for stock theft – Application launched two years after conviction and sentence – Role of the Magistrates when section 240 of the Criminal Procedure and Evidence Act 1981 is invoked.*

Held: Application for condonation should fail for being launched after a long delay.

Held further that the application should be dismissed.

ANNOTATIONS:

STATUTES : *Criminal Procedure and Evidence Act 1981*

High Court Rules 1980

CASES : *Attorney General, Transvaal v Botha (614/91) [1993] ZASCA, 159*

Cairns Executors v Gaarn 1912 AD 181

DPP v Lazaro Ntsoele C of A (CRI) NO. 16/2005

S v De Vos 1975 (1) SA 449 (0)

S v Fisher 1973 (4) SA 121

Seutloali v DPP C of A (CRI) 14/2006

AS PER MOKHESI AJ

[1] This application seeks to review the proceedings before Magistrate Court for the district of Botha-Bothe in terms of which the applicants were convicted and sentenced for stock theft. Each accused was sentenced to pay a fine of M15,000.00 or ten (10) years imprisonment in default of payment. The applicants are seeking orders in the following terms:

1. An order directing the 5th respondent to release the health booklets of applicants and all the records relevant to their admission and treatment at Queen 'Mamohato Memorial [Tšepong] and Botha-Bothe hospital to Registrar of this Honourable Court within seven days of the service of this application and or order.

2. An order directing the 3rd respondent to transmit the proceedings in CRI/T/BB/205/2017 to this Honourable Court within seven days of the service of this application and or order.

3. An order directing the release of the applicants from prison pending finalization of this matter.

4. Reviewing and setting aside the decision of His Worship Mr. Khoeli to remand the applicants in their tortured state as incompetent and of no legal force.

5. An order declaring the torture and ill-treatment to which the applicants were subjected during arrest and detention by members of Lesotho Defence Force as unlawful.

6. An order reviewing and setting aside the decision of 1st respondent to convict the applicant as irregular.

7. An order declaring the conduct of members of Lesotho Defence Force involved in the torture of applicants as being inconsistent with section 12(8) of the Constitution.

8. An order reviewing and setting aside the proceeding in CRI/T/BB/205/2016 as irregular and of no legal effect.

9. An order reviewing and setting aside the decision of the Senior Clerk of Court [Mrs Tšosane] for refusing to register the appeal of applicants as having exceeded her powers.

10. An order declaring that the police and soldiers under the command and supervision of 4th and 6th respondents are guilty of violating the provisions of section 8 of the Constitution y subjecting the applicants to torture or to inhumane and degrading treatment.

11. An order condoning late filing of this application.

12. An order declaring, in the event that the court is unable to deal with the reliefs sought in this notice of motion, that the application is referred to the constitutional court on an urgent basis and on the basis of direct appeal.

[2] Factual Background:

On 18th August 2016 at the place called Clarens in the Republic of South Africa thirty-one (31) sheep belonging to Johan Hendrick Naude were stolen. The complainant notified the members of Lesotho Defence Force (hereinafter LDF) stationed nearby. The members of the LDF followed the leads and on the 28th August 2016 the LDF military Intelligence Officers found the sheep at the village of Ha-Jesi in the possession of the accused. Following this discovery the accused were charged with stock theft and sentenced accordingly, after pleading guilty to the charges.

Before the Magistrate Court, the accused were charged with contravention of sections 13(3) (a) r/w s. 14 of the Stock Theft Act 4/2000 as amended by Act No. 5/2003. It being alleged that "on or about the 18th day of August 2016, and at or near ILL Paradiso Farm, Clarens, Free State, Republic of South Africa, the said accused did, each, or all acting together, wrongfully and unlawfully and intentionally steal thirty-one (31) sheep of the following description; All white ewes; All tattooed "KVL" and two (2) additionally branded "KVL" on their left cheek, and brought the same to Monontŝa in the district of Botha-Bothe and within the jurisdiction of this Honourable Court; the property or in the lawful possession of **Johan Hendrick Naude**, thereby committing the offence as aforesaid."

[3] The accused were brought to court on the 31st August 2018. Before the Magistrate, all accused pleaded guilty to the charge and were each accordingly convicted and sentenced to pay a fine of M15,000.00 or ten (10) years imprisonment in default of payment.

[4] In a nutshell, the outline of facts upon which the accused were convicted revealed that Mphale Mofokeng worked on the Farm by the name of ILL Paradiso, and that on the 18th August 2016 he had enkralled four hundred and forty one sheep. He had earlier noticed that four men had entered the farm, but only three of them had actually left the farm. He later on discovered that some sheep were missing.

The South African police were informed about the missing sheep on 23rd August 2016. Naude got a call from one Mokete who is a member of LDF that he had found four men and arrested them and that one of them had died. Naude proceeded to Botha-Bothe, Monontŝa where he discovered that out of thirty-one sheep, twenty-three had been recovered. According to Naude all sheep bore fresh ear-marks on both ears. Naude showed that the tattoos on the left ear and left cheek were still visible. These were "KVL" tattoos. His evidence showed that he had not authorized anyone including the accused to take his sheep, and that the value of the sheep was R75,000.00.

[5] Evidence of No. 53327 Private Mokete would show that he is a member of Lesotho Defence Force stationed at Ha-Napo Monontŝa, at the border of the district of Botha-Bothe and Orange Free State Province. He would say he got a call from Johan Naude reporting about his missing sheep. With this information he proceeded to follow the sheep tracks, which ultimately led him and his search party to accused 2, accused 3 and one Mahlomola Jessie who is deceased. He would testify that he found A2, A3 and Mahlomola Jessie driving seventeen sheep (17) and they stopped them and asked where they were taking the sheep, and the explanation they provided was unsatisfactory. He apprehended them with the aim of handing them over to the police.

Mokete would testify that he learned that A1 had gone ahead to the village of Ha-Ngoajane with some sheep. He then followed him where he found him in possession of six (6) sheep. All sheep had fresh ear marks.

[6] Evidence of Pitso Jessie would show that he knew all three accused and that on 23 August 2018 he had been woken up by LDF members who were in the company of Mahlomola Jessie. Seven sheep bearing fresh ear marks were singled out of the kraal.

[7] Fusi Sekeiti is the younger brother of A2 (second applicant). He would testify that on the date he could not remember in August 2016 his brother had stolen sheep from South Africa and had taken nine sheep(9) to A1.

[8] A veterinary doctor by the name of Rantlabole who examined the sheep after they were seized would say that the sheep bore fresh ear marks and still had their tattoos.

[9] No. 57102 Police Constable Motsapi was informed about the arrest of the accused and that one of them had died. The arrested suspects were handed over to him and he duly charged them as aforesaid.

[10] When the accused were brought to court on the 31st August 2016 they pleaded guilty to the charge, and were accordingly convicted and sentenced.

Following, their conviction and sentence, two years later, the accused launched this review application which seeks relief as outlined above. Although the applicants seek among others, relief declaring certain conduct unconstitutional, this court is of the view that since this is a review application its determination can be made without recourse to the Constitution. This issue will be dealt with in due course.

[11] The acts of torture which the applicants allege were perpetrated on them by members of LDF who arrested them are denied by Corporal Lehlokoe. In order to assail their conviction, applicants allege that they pleaded guilty under duress. This allegation is also denied by Corporal Lehlokoe.

Issue to be determined

[12] This application raises three critical issues which have to be determined, viz,

(i) Whether constitutional issues raised should be decided in this matter.

(ii) Condonation for lodging this application after two years from the date of conviction and sentence.

(iii) The role of judicial officers when accused pleads guilty to the charge in terms of section 240 of **the Criminal Procedure and Evidence Act 1981.**

[13] (i) Whether constitutional issues raised in this application should be dealt with by this court.

Among the relief the applicants are seeking from this court are prayers that the conduct of the police and members of the Lesotho Defence Force who arrested them be declared unconstitutional. The conduct which the applicants allege fall foul of Constitutional provisions are the assaults which they allege were perpetrated on them on arrest by the LDF members and the police. Since this application this is quintessentially a review application, this court is of the view that its decision can be made without reaching a constitutional issue. This matter

is capable of being decided based on well-established principles applicable to these kind of applications. Any constitutional questions which the applicants would want determined must be properly raised in an appropriate application. The doctrine of constitutional avoidance applies in this case. This doctrine postulates that where in any proceedings it is possible to decide a matter without reaching a constitutional issue that is the route to follow in resolving the matter. This doctrine was expressed clearly in the case of **S v Mhlungu [1995] ZACC4 at para. 59**, where **Kentridge AJ** (as he then was) laid down the general principle as follows:

> "I would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed."

(ii) Condonation:

No provision is made in the Rules for periods within which the proceedings of the Magistrate's Court can be brought to this court on review, however, it is generally accepted that an unreasonable delay in launching a review application will entitle a court to dismiss such application (**Mohlomi Seutloali v DPP C of A (CRI) 14/2006 (unreported) at para. 5).**

Since condonation application seeks to invoke the indulgence of the court there must be sufficient cause to more the court to exercise its discretion in condoning the delay. Thus in the case of **Cairns Executors v Gaarn 1912 AD 181 at 186** the court said the following regarding the granting of indulgence:

> "It would be quite impossible to frame an exhaustive definition of what constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the rules have purposely made very extensive, and which is highly desirable not to bridge. All that can be said is that the applicant must show...

"something which entitles him to ask for the indulgence of the court". What that something is must be decided upon the circumstances of each particular application."

[14] In their founding papers, applicants cites as their reasons for delay the following incidences:

(1) In January 2017 accused's counsel sought to appeal against their conviction and sentence, but the Clerk of Court refused to process the appeal citing lapse of time for lodging same. After the Clerk of Court refused to process the appeal, she directed that the application for condonation be made before the Magistrate. This was in view of **Rule 62 (1) (a) of the Subordinate Court Rules 1996**. In terms of the said Rule a convicted person desirous of appealing against his or conviction, or sentence "... shall, within fourteen days after conviction, sentence or order lodge with the clerk of the court a notice of appeal in writing..." It is clear that the purported appeal would have been lodged more than a year after conviction and sentence. Apparently upon realizing that they were in a predicament for non-compliance with Rule 62 (above), the applicants shelved their attempts at appealing their sentence and conviction. I say they shelved it because, they remained inactive for eight months, only to resurface in August 2018 (eight months later) with an application for review. They provide the following as reasons for seeking the indulgence of this court.

At para. 10.2 of their Founding affidavit:

> "10.2. For demonstrable reasons, I was unable to pursue the appeal. My lawyer demanded additional legal fees in order to file the present application. We had no capacity to afford the charged fees and we had to wait for some time for our relatives to raise the fees. I wish to indicate that we never sat back.... We however attempted to challenge it by way of

appeal but we were beset with attitude of the Senior Clerk of Court as set out above…."

In addition to these reasons the accused aver that they could not promptly persue their appeal because they feared victimization by the soldiers while in prison.

[15] Three reasons are advanced for the delay and those are;

(1) The Clerk of Court in refusing to process their appeal

(2) Fear of being victimized by the soldiers while in prison

(3) Impecuniosity.

[16] As for the reason (1) above as already said instead of applying for condonation for late filing of appeal, the applicants simply sat idle instead of following the rules and applying for condonation for late lodging of appeal. The Clerk of Court cannot be blamed for pointing out to the applicant's counsel what he should have known as a matter of cause that he had to apply, substantively, for condonation for late lodging of appeal before the magistrate. Instead of applying for condonation, applicants' counsel abandoned his quest for appeal. This therefore cannot be a sufficient cause for delay.

[17] (b) **Fear of reprisal for appealing**:

It is applicants' contention that they feared reprisal for appealing against their conviction and sentence. It is crucial to observe that the applicants are not saying that their arrestors threatened reprisal even when they were within the secure prison precincts. It strikes me as highly unlikely that the soldiers would threaten the applicants with reprisal should they exercise their right to appeal against their conviction and sentence, even when they were in a secure environment of the prison. This reason therefore falls to be rejected for being implausible.

[18] Impecuniosity of the applicants:

One of the reasons which the applicants posited as a predicate for seeking this court's indulgence is that, they were unable to pay for their legal fees, for purposes of lodging this review. It is important to note that the applicants are not telling this court why they could not lodge the application themselves as individuals as they have audience in this court in terms of **Rule 17 of the High Court Rules 1980**. They are further not saying why they could not make use of the services of Legal Aid Counsel. The same arguments were advanced in **Seutloali** (above at para.13) and were rejected. This is what the court had to say at para. 7(2).

> "That he could not launch review application for financial constraints on the part of his "parents", regarding legal representation. It is interesting to note that he pitches his alleged financial difficulty at the level of his parents. No attempt is made to explain why he could not personally afford the proposed review, if any. It should be remembered for that matter that there is legal aid in this country as provided for in **Legal Aid Act 1978**. In any event, there is not an explanation proffered why the applicant could not launch the application in person…"

[19] I share the same sentiments, in fact, in **S v Fisher 1973 (4) SA 121 at 123 A – B,** regarding impecuniosity, the court said "the fact that all his available funds were exhausted is thus no explanation for his not making his application in person earlier than he did, as he required no funds for the purpose of making these applications."

[20] The cumulative effect of the issues discussed above leaves me in no doubt that there is no sufficient cause for delay in lodging this review application two years after conviction and sentence. I am mindful of the fact that the courts are wont to be more lenient or accommodating in condoning delays in criminal matters (**S v De Vos 1975 (1) SA 449 (0),** but this case is not one of those where this court should be accommodating or lenient as the delay for launching the review was inordinately long and without justification.

[21] (iii) The Role of Judicial Officers when accused plead guilty to the charge

Assuming without conceding that the conclusion I reached that condonation should not be granted, I think even on the merits the odds are heavily staked against the applicants. To fully understand the various bases upon which the applicants attacked the learned Magistrate's handling of their case it is necessary to quote *verbatim* their founding affidavit:

At para.6

> "As could be seen from the record of proceedings, we were convicted on our fabricated and forced plea of guilty. The Magistrate did not undergo processes and procedures to ensure that our plea was in order. He simply committed us to prison. His conduct in this regard is revocable on review. He did not advise us of the option to change the plea after hearing a horrifying incident that claimed the life of Mahlomola Jessie."

At para. 8

> "It was the duty of the judicial officer to make a ruling that derivative evidence obtained as a result of the compelled testimony violated the right to a fair trial. The magistrate was best placed to take that decision. It ought to have been excluded from criminal proceedings against us in order to give effect to the right against self- incrimination."

[22] The two extracts brings into sharp focus the role of judicial officers when section 240 of the **Criminal Procedure and Evidence Act of 1981** is invoked. Plea of guilty procedure is governed by the provisions of section **240 of the Criminal Procedure and Evidence 1981. It provides** that:

> "240(1) If a person charged with any offence before any court pleads guilty to that offence or to an offence of which he might be found guilty to that charge, and the prosecutor accepts that plea the court may –

(a) If it is the High Court, and the person has pleaded guilty to any offence other than murder, bring in a verdict without hearing any evidence; or

(b) If it is a Subordinate Court, and the prosecutor states 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.

(2) Any court may convict a person of any offence alleged against him in the charge by reason of any confession of that offence proved to have been made by him, although the confession is not confirmed by any other evidence, provided the offence has, by competent evidence other than the confession, been proved to have been actually committed."

[23] The requirement in terms of section 240 (b) is that "...the outline of the facts of the case should be sufficiently detailed and clear to enable the trial court to appreciate all the circumstances of the offence and the moral blameworthiness of the accused. There is also a duty on the accused or his representative to ensure that admissions made in terms of section 273 (2) of the Act are precisely formulated." (**DPP v Lazaro Ntsoele C of A (CRI) No. 16/2005 at para. 4).**

[24] The role and duty of a presiding officer when section 240 (b) procedure is involved is not one of a passive umpire, he/she should assume an inquisitive approach in order to elicit sufficiently detailed information regarding the commission of the alleged offence, and for purposes of sentencing (**DPP v Ntsoele above at para. 5**).

[25] In requiring that the prosecution outline the facts upon which the accused considers himself guilty and for requiring the magistrate to ask the accused whether he accepts the outlined facts, section 240 (b) provides protection to the accused against unjustified plea of guilty to the offence. Where the outline of facts does not disclose the commission of offence by the accused, the magistrate

is enjoined to return a verdict of not guilty. The requirement of outline of facts and questioning of the accused by the magistrate provides a safeguard in this regard. (**See: Attorney-General, Transvaal v Botha (614/91) [1993] ZASCA 159, 1994 (1) SA.**

[26] Now, coming to the facts of this case, the learned Magistrate and the Prosecutor involved in this matter complied with the prescripts of section 240 (b). Evidence is clear that a certain number of sheep went missing on a farm at Clarens Free State, in the Republic of South Africa on the 18th August 2016. The said sheep were found in possession of the accused by members of Lesotho Defence Force, although three of them had already been slaughtered for consumption. The sheep had fresh ear-marks as confirmed by the veterinary surgeon. They had the complaint's tattoo marks. After the outline of facts, the magistrate enquired from the accused whether they accepted the facts as outlined, the accused replied that they accepted the facts. The facts as already said showed that barely five days after the sheep went missing in Free State they were found in the possession of the accused with fresh earmarks and the complaint's tattoo marks. This evidence proves beyond a reasonable doubt that the accused were guilty of the offence charged. It is important to note that the accused are not saying that the sheep belonged to them, they only seek to assail their conviction and sentence on the fact that the learned Magistrate should have changed their pleas of guilty to not guilty after the outline of facts revealed that one of the suspects died in detention, and that they pleaded guilty for fear of reprisal from the members of LDF, and further that they were convicted on compelled testimony. It is not correct that the applicants were convicted on the basis of their confessions, there is evidence *aliunde* that the applicants were found in possession of stolen sheep bearing fresh earmarks, and that the said sheep bore the complaint's tattoo marks. That one of the suspects died in detention is not the basis for assailing the conduct of the proceedings in the court a *quo*. The evidence adduced, in my judgment makes it plain that the accused could not have been pressured to plead guilty as the outline of facts proves beyond a reasonable doubt that the accused are guilty of the offence charged.

[27] In the result the following order is made;

The application is dismissed.

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M.A. MOKHESI AJ (MR.)

FOR APPLICANTS: **ADV C.J Lephuthing**

FOR RESPONDENTS: **ADV Lekena**