

IN THE HIGH COURT OF LESOTHO

CRI/T/0032/2018

In the matter between:

REX

Plaintiff

VS

PITSO RAMOEPANA

Accused

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RULING

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**CORAM:** His Lordship Onkemetse Tshosa, PhD, Acting Judge

For the Crown: Adv. Shaun Abrahams with Adv. Nku

For Accused: Adv. K. Mohau with Adv. Letuka

**Delivered:** 10 December 2019.

**SUMMARY**

*Application to withdraw charges, section 278(3) of the Criminal Procedure & Evidence Act, murder charge, accused arraigned for two years and two months before the charges are withdrawn, constitutional rights of the accused -section 12 of the Constitution, accused ask to plead and be acquitted than withdrawal of charges*

## **Introduction**

1. This Ruling relates to an application by the Crown for withdrawal of the murder indictment against the accused. The indictment dated 14<sup>th</sup> April 2018 reads that Pitso Ramoepana, a Mosotho male adult of 51 years of age of Headman Tanki Mopeli under Chief Pontso Mathealira at St. Monica's in the District of Leribe (HEREINAFTER CALLED THE ACCUSED) IS GUILTY OF CONTRAVENING SECTION 40(1) OF THE PENAL CODE ACT NO. 6 OF 2010 in that upon or about the 5<sup>th</sup> day of September, 2017 and at or near Ratjomose Barracks in the District of Maseru, the said accused along with the late Bulane Sechele and Tefo Hashatsi, did perform an unlawful act or omission with the intention of causing the death of Khoantle Mots'omots'o, the said accused did commit the murder of the deceased Khoantle Mots'omots'o, such death resulting from their act or omission, the said accused did hereby contravene the provisions of the code as aforesaid.
2. From the record of proceedings, the accused was first arraigned before High Court on the 15<sup>th</sup> June 2018. Since then the case was mentioned on several occasions until it was brought before this Court on the 17<sup>th</sup> September 2019. On the 25<sup>th</sup> November 2019 the prosecutor made an application for withdrawal of the murder indictment against the accused.

## **Crown submissions**

3. In motivating the application, the Prosecutor submitted after interviewing the crown witnesses, he made a recommendation to the Director of Public Prosecutions that she should decline to prosecute the accused on the indictment of murder that he faces. The prosecutor further submitted that the Director of Public Prosecutions acquiesced in his recommendation. As a result, the Crown has declined to prosecute the accused on the indictment of murder and therefore makes an application to withdraw the indictment of murder and relied on Section 278(3) of the Criminal Procedure and Evidence Act No.7 of 1981.
  
4. The Crown Prosecuting Counsel also submitted that he has simultaneously recommended to the Director of Public Prosecutions that due to the nature of the offence, interest of justice and public interest as well as the need to finalize the matter there should be a formal inquest on the death of the former commander of the Lesotho Defence Force in terms of the Inquest Proclamation No. 37 of 1954. Further, in terms of Section 98(2) of the Constitution of the Kingdom of Lesotho, the Attorney-General exercises ultimate authority over the Director of Public Prosecutions and can take all necessary measures to uphold all laws. Furthermore, Section 20(1) of the Inquest Proclamation 1954 empowers the Attorney-General to direct that an inquest be held. According to the Prosecution, taking all the above provisions in totality, the Director of Public Prosecutions is empowered to direct the Acting Chief Justice to appoint this Court to conduct the Inquest.

## **The Defence Submissions**

5. After the Crown has made the application for withdrawal of the indictment, the defence requested the Court to give it an opportunity to take instructions from the accused since they had only been informed that the charge will be withdrawn in the morning and they needed time to reflect on the issue and its possible ramifications especially that the application for withdrawal is made after the accused has served two and half years in custody. The matter was postponed to 27 November 2019.
  
6. On 27<sup>th</sup> November 2019 when hearing resumed, although the accused through his Counsel did not expressly state whether or not he opposed the application but from the tenor of his submission it was clear that he was indeed opposing the application. The Defence commenced its submissions by indicating that the accused was arraigned on the 14<sup>th</sup> September 2017 on a murder indictment. The indictment as initially framed alleged that the accused shot the deceased several times all over the body. The defence wanted to have it put on record that they sought discovery of documents relevant thereto but discovery was refused, and subsequently applied to the High Court. The application to the High Court was unsuccessful. He appealed to the Court of Appeal at costs to him. But partial discovery was eventually made.
  
7. Further, according to the Defence, for the last two and half years the accused had been appearing in Court on numerous occasions even before the involvement of this particular Court in the matter and has incurred costs. The defence submitted that up until about a week before the

application for withdrawal of the indictment was launched he had been given the impression that this matter will proceed with or without counsel appearing on his behalf. On this point, the court needs to indicate, as it did during oral submissions, that the accused was mistaken about what the Court actually said. The court had indicated that if he appeared without counsel again, as has been the case in three previous hearings, the Court would exercise its discretion and order that counsel be appointed for him by the Registrar due to the seriousness of the charge. The order in question was made on 11 November 2019.

8. The defence also argued that the accused has applied for *pro deo* counsel and nothing has been done about it and is not sure whether the appearance of counsel on his behalf will be remunerated.
  
9. Further, the Defence submitted that it is concerned that the Director of Public Prosecutions wants to withdraw the charges at the 11<sup>th</sup> hour but the basis thereof is not clear or has not been provided and if wondered whether the defence can even apply for review, as the remedy suggested by the Crown, when they do not know then reasons for withdrawal. It argued that the Director of Public Prosecutions should not use Section 278(3) of the Criminal Procedure and Evidence Act to abuse the court process, and noted that the accused is a human being and needs to be treated like one.
  
10. The defence also raised the issue that the Criminal Procedure and Evidence Act of the Kingdom of Lesotho is based on the South African

Criminal Procedure Act and the latter specifically states that when charges are withdrawn against an accused before he pleads, the accused is not entitled to a verdict of not guilty at it is not, and wondered why the legislature in Lesotho decided not to include the provision on acquittal particularly where the Prosecutor has not provided reasons for withdrawal of the charge.

11. Finally, the defence submitted that the interests of justice and fairness to the accused under Section 12 of the Constitution require that the accused be treated fairly and demands that the matter be brought to finality and accused be asked to take a plea and then be acquitted of the charge so that they are done and dusted.

### **Analysis of the Arguments**

12. The main question is whether or not the Director of Public Prosecutions may withdraw charges against the accused before he takes a plea. The relevant provision of the Criminal Procedure and Evidence Act No. 7 of 1981 relied upon by the Crown is Section 278 (3), which declares:

“Nothing in this section shall deprive the Director of Public Prosecutions or the public prosecutor with his authority or on his behalf, of the right of withdrawing any charge at any time before the accused has pleaded, and framing a fresh charge for hearing before the same or any other competent court.”

13. It is abundantly clear from this section that the Director of Public Prosecutions or the public prosecutor with his authority or on his behalf has the right to withdraw charges against any person charged with a crime

before that person has pleaded. This is the right of the Director of Public Prosecutions or public prosecutor handling the case. The right is exercisable with respect to any charge. The rationale behind this is that the Director of Public Prosecutions or the public prosecutor as the case may be is the one who decides what charges he/she wishes to lay against any person. The Director of Public Prosecutions is the *dominus litis* in criminal cases in the Kingdom.

14. In *casu*, the public prosecutor has applied for the withdrawal of the murder indictment against the accused. There is no doubt whatsoever that the public prosecutor is entitled to withdraw the charge of murder against the accused. It is within his right to do so.

15. When he made the application for withdrawal of the charge, the prosecutor indicated that they want to withdraw the charges and then institute an inquest in terms of the Inquest Proclamation, *supra*. Despite the fact that the Defence argued that an inquest would be another investigation and in any case, it is a matter for subordinate courts, it was, however, agreed by the parties that the issue of an inquest is not part of the application and indeed the prosecutor said he mentioned it for information only. For the court, the issue of an inquest is not before the court and would not address it.

16. It would be clear from the above that the defence also raised several issues in opposing the Crown's application for withdrawal. On the issue of the period of two and half years in custody by the accused at cost to him, the Crown responded by arguing that the accused is in custody not only

for the extant charge but for other charges as well. For the Court, it is evident that there was some delay in commencing trial of the accused. The question would be whether or not the delay was unreasonable to warrant any remedy. But that would depend on the surrounding circumstances of the case such as the nature of the charge and the fact that a decision was taken that the current case and similar cases before the High Court should be heard not by local judges but foreign judges. Some delay would invariably take place.

17. The other issue raised by the Defence is that the Crown did not provide the basis for withdrawal of the charge. This takes us back to Section 278 (3) of the Criminal Procedure and Evidence Act. Does Section 278 (3) of the Criminal Procedure and Evidence Act require the Director of Public Prosecutions or prosecutor to provide the basis or reasons for withdrawal of charges? The language of Section 278 (3) of the Criminal Procedure and Evidence Act is quite clear. It does not require the Director of Public Prosecutions or prosecutor to provide the basis or reasons for withdrawing charges. The Director of Public Prosecutions or prosecutor has the right to withdraw any charge at any time before the accused has pleaded. Therefore, in making the current application, the prosecutor was not bound to provide the basis for withdrawal of the charge the accused is facing. This notwithstanding, in his response to the Defence submissions, the prosecutor provided the reason for withdrawal of the charge when he indicated that after reading witnesses statements they realized that they could not prove that the accused and the others mentioned in the indictment acted with common purpose.



18. There was a suggestion by the defence that failure by the prosecutor to provide a basis for the decision to withdraw the charge against the accused may be an abuse of power. On the basis of what I said above, I find no merit in the suggestion that the Director of Public Prosecutions abused her power. The Director of Public Prosecutions was merely exercising the power she has in terms of the law after assessing the Crown case and deciding that she cannot proceed on such a charge.

19. Another point raised by the defence is the fact that Section 278(3) of the Criminal Procedure and Evidence Act is based on the South African Criminal Procedure Act and while in the latter, where the State prosecutor makes an application for withdrawal of charges before a plea is taken the accused is not entitled to an acquittal whereas under Criminal Procedure and Evidence Act of the Kingdom the legislature omitted that provision. This submission challenged the wisdom of the Lesotho legislature for not having enacted a similar provision in the Criminal Procedure and Evidence Act. For whatever is worth, this Court can only recognize the power of the Legislature of the Kingdom to enact laws for the Kingdom as mandated by Section 70(1) of the Lesotho Constitution. It may never know why the Legislature of the Kingdom in exercising such power omitted from section 278(3) the provision relating to acquittal when charges are withdrawn unless one consults the *travaux preparatoire* of the Constitution. Suffices to say that, the intent of the Legislature is clear that under the existing scheme of Section 278(3) of the Criminal Procedure and Evidence Act withdrawal of charges before a plea is taken does not lead to an acquittal. In fact, subsection (3) thereof gives the Director of Public Prosecutions the power to frame a fresh charge.

20. There has also been a submission by the Defence that in the interest of justice and fairness to the accused as required by Section 12 of the Lesotho Constitution the matter should be brought to finality, therefore the accused should be asked to plead and then be acquitted of the charge. The said Section 12 of the Lesotho Constitution provides that if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within reasonable time by an independent and impartial court of law. Our understanding is that the defence is utilizing Section 12 of the Lesotho Constitution to submit that it is unfair for the Director of Public Prosecutions to withdraw the charge instead of allowing the accused to plead to the charge so that he should be acquitted.

21. The view of this Court is that there is no way it can call upon the accused to plead to the charge when the prosecutor, who is the owner of the case, has not said that he is ready to proceed with the case and has in fact applied for withdrawal of the case. Further, no authority has been cited in terms of which the court can order that the accused plead to the charge. Therefore, the court has been unable to find the alleged unfairness on the part of the Director of Public Prosecutions in withdrawing the charge against the accused.

22. There is the issue of remuneration of counsel referred to by the Defence for appearing on behalf of the accused. On 15 November 2019, the court exercised its discretion and made an order that counsel should be appointed for the accused to represent him during trial. This was in

anticipation that trial was going to commence on 25 November 2019 as per the court order of 15 November 2019 and that on three previous court hearings the accused was not represented and it would be risky to proceed with a murder trial when the accused is unrepresented. On 25 November 2019 when trial was due to commence the Crown applied for withdrawal of the charge. Therefore, on the basis of the court order made on 15 November 2019 counsel for the accused should be paid for appearing on behalf of the accused on the 25<sup>th</sup>, 27<sup>th</sup> November 2019 and today at *pro deo* rate.

23. In the circumstances, the Court orders as follows;

1. That the application for withdrawal of the murder indictment against the accused in terms of Section 278(3) of the Criminal Procedure and Evidence Act. No.7 of 1981 is hereby granted.
2. That defence counsel be paid for appearing on behalf of the accused on the 25<sup>th</sup>, 27<sup>th</sup> November 2019 and today at *pro deo* rate.
3. That payment in paragraph 23(2) be made within thirty (30) days of the delivery of the Ruling.

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**O.B. Tshosa, PhD**

**Acting Judge**