

**IN THE HIGH COURT OF LESOTHO
(HELD AT MASERU)**

CIV/APN/201/2019

In the matter between:

PINKIE MOSOOANE

APPLICANT

And

MRS. LETSIKA - THE MAGISTRATE

1ST RESPONDENT

ADV. P. TSENOLI

2ND RESPONDENT

JUDGMENT

CORAM	:	Honourable Justice Makara
DATE (S) OF HEARING	:	21 st and 22 nd June, 2019
DELIVERED	:	22 nd June, 2019

SUMMARY

The Applicant wrongly approached this Court praying that it sets aside a sentence imposed by the Court of first incidence instead of appealing against the sentence – application resultantly dismissed without an order on costs.

ANNOTATIONS

Statutes & Subsidiary legislation

1. Criminal Procedure and Evidence Act 1981

MAKARA J

[1] This is in essence a Criminal Review Application in which the Applicant applied for the intervention of this Court by ordering in Rule Nisi terms that:

The decision of the Magistrate made on the 20th June 2019 be reviewed and set aside, and that this should operate with immediate effect pending finalization of this matter;

[2] It should be clear that the 2nd Respondent vehemently opposed the application and asked for its dismissal.

[3] In the background the proceedings were primarily authored by the decision of the Trial Magistrate that the Applicant be committed to prison from the 20th to the 24th June 2019. This was in consequence of the binding over Summons issued by the Magistrate after considering a complaint presented to her by the 2nd Respondent.

[4] On the day on which the Applicant appeared before the Trial Court as summoned, the complainant evidentially supported, explained under oath that the Applicant had on the 3rd June 2019 disturbed the peace of the complaint by verbally abusing him.

[5] It emerged as common cause that the complaint is an Advocate in this jurisdiction and in that capacity the Master of the High Court had mandated him to assume duties of an Administrator over the

Estate of the Late Tebello Tlelase who is incidentally the mother of the Applicant.

[6] Ex-facie record of proceedings, the Applicant initiated her altercation to the 2nd Respondent by accusing him of embezzling the proceeds of the deceased's Estate. In the process, the 2nd Respondent sought to mitigate the encounter by suggesting that she approaches either the Police or the Master of the High Court to ventilate her grievance, the drama took place nearer to the till counters inside the Pick 'n Pay Store in Maseru.

[7] In the circumstances, the 2nd Respondent experienced humiliation and attack against him personally and in his professional standing – hence his resort for the binding over intervention by the Magistrates Court.

[8] It also appears from the record that according to the Applicant she apologized to the 2nd Respondent about the disturbance she had caused to his tranquility. This is attested to by a plea made by the complainant to the Magistrate to the effect that if she finds that the apology tendered by the Applicant is genuine, she could impose upon her a suspended sentence but hastily cautioned that imprisonment would have a deterrent effect.

[9] Thus, the Magistrate had to be guided by the provisions under section 341 of the Criminal Procedure and Evidence Act 1981. They provides that;

(1) *Whenever a complaint on oath is made to a Magistrate that any person is conducting himself violently towards or is threatening injury to the person or property of another, or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault, whether the conduct occurred or the language was used or the threat was made in public or private place, the Magistrate made in public or private place, the Magistrate:-*

(a) *may order that person to appear before him, and if necessary may cause him to be arrested and brought before him; and*

(b) *shall thereupon enquire into and determine upon the complaint and:-*

(i) *may place the parties or any witnesses threat on oath; and*

(ii) *may order the person against whom the complaint is made to give recognisances with or without sureties in an amount not exceeding 6 maloti to keep the peace towards the complainant and refrain from doing or threatening injury to his person or property and*

- (c) *may, upon the enquiry, order the person against whom the complaint is made or the complainant to pay the costs of and incidental to the inquiry.*
- (2) *If any person after having been ordered to give recognisances under this section refuses or fails to do so, the Magistrate may order him to be committed to gaol for a period not exceeding one month unless the security is sooner found.*
- (3) *If the conditions upon which the recognisances were given are not observed by the person who gave the same, the Magistrate may declare the recognisances to be forfeited, and any such declaration of forfeiture shall have the effect of a judgment in a civil action in the Subordinate Court of the district.*

[10] In seeking to interpret the section, Mrs. Lephatsa argued in the main, that; the Magistrate committed the procedural error which warrants a review by this Court by simply imposing a term of imprisonment without having firstly ordered the Applicant to pay recognisances in the amount not exceeding 6 Maloti. She then submitted that this was *sine qua non* to a consideration of imprisonment.

[11] On the contrary the 2nd Respondent contended that the word “if” in sec 341(2) of the Criminal Procedure and Evidence Act 1981, denotes that the Magistrate had the discretion to consider making the order for payment of recognisances. In the instant case, she did not have basis for so ordering. This according to her is demonstrated by the

fact that in the circumstances, she found it judicially befitting to proceed in terms of 341 (2) of Criminal Procedure and Evidence Act of 1981 by imposing a term of imprisonment upon the Applicant.

[12] The Court repetitively cautioned the Counsel that it is being ceased with criminal review proceedings which are premised upon the procedural improprieties reflected from the record of proceedings. In the same vain it further cautioned that if the sentence imposed was being challenged, thus it should have been approached by way of appeal and not review.

[13] The Court sustained the interpretation assigned to section 341 (2) of Criminal Procedure and Evidence Act 1981 advanced for the 2nd Respondent. This is so despite their appreciation that binding over proceedings are basically intended for keeping of peace between the complainant and the offender. This notwithstanding, the Court must be guided by the parameters prescribed in this section. It is in that recognition that it upholds the interpretation assigned to section 341 (2) for the 2nd Respondent.

[14] It would appear that there would be merit in the case brought by the Applicant that if she had approached the Court by way of an Appeal since her case is mainly founded upon her complaint that the sentence was ruinously determined.

[15] It is regrettable that the Applicant failed to convince the 2nd Respondent that her apology was genuine and for the Counsel to have amicably resolved that question.

[16] It should be projected that at the commencement of the hearing, the Applicant applied for an amendment by introducing a prayer that this Court grants an order staying the sentence pending finalization of this matter. The move was vigorously opposed by the 2nd Respondent. He strenuously submitted that the Court should exclusively be guided by the existing prayers. The Court has in vain suggested the counsel to amicably resolve the matter, so it remained bound to let justice follow its cause by following the dictates of adversarial litigation.

[17] In the premises, the Application is dismissed without any order of costs.

E.F.M. MAKARA
JUDGE

For Applicant : Mrs. Lephatsa from Lephatsa
Attorneys & Consultants

For 2nd Respondent : Adv. Tlapana instructed by E.M. Sello
Attorneys