

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CRI/REV/0018/2021

In the matter between:-

NKOANE KHOACHE

APPELLANT

AND

**THE MAGISTRATE FOR THE DISTRICT
OF THABA-TSEKA MR. TAPOLE**

1ST RESPONDENT

**THE CLERK OF COURT – THABA-TSEKA
MAGISTRATE COURT**

2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS

3RD RESPONDENT

Neutral citation: Nkoane Khoache vs Magistrate Thaba Tseka & 2 Others
[2022] LSHC 157 Crim/Rev (12 July 2022)

CORAM : M. P. RALEBESE J.

HEARD : 01 JUNE 2022

DATE OF JUDGMENT: 12 JULY 2022

SUMMARY

Review of criminal proceedings of a Magistrate Court – Application not opposed – Failure by a magistrate to use a sworn interpreter in recording Sesotho proceedings in English - Failure by a magistrate to advise applicant of seriousness of the offence and possible penalty – Failure by a magistrate to advise applicant of the right to legal representation on date of trial – Applicant informed of the right to legal representation and the right to legal aid counsel upon arraignment– No allegation of prejudice or miscarriage of justice – Application dismissed.

ANNOTATIONS

CITED CASES:

LESOTHO

Lephoso Kobile v Director of Public Prosecutions CRI/APN/472/2006

Litsoane v Director of Prosecutions and Another (CRI/APN/758/2004) [2005] LSHC 113 (20 May 2005)

Sofe v Magistrate Tapole and Another (CRI/APN/262/05) (CRI/APN/262/05) [2005] LSHC 221 (24 October 2005)

Thamae Lenka v Rex 2000 – 2004 LAC 832 (C of A (CRI) No. 2 of 2004

Tsehle v Magistrate, Mafeteng and Another (CRI/APN/68/2009) (CRI/APN/68/2009) [2009] LSHC 33 (07 July 2009)

SOUTH AFRICA

Director-General Department of Agriculture, Forestry and Fisheries for the Republic of South Africa v Nanaga Property Trust (Represented by its Trustee (Case No: 4689/2014) (unreported)

Turnbull-Jackson v Hibiscus Coast Municipality and Others [2014] ZACC 24

STATUTES:

High Court Rules No.9 of 1980

Interpretation Act No. 19 of 1977

Subordinate Courts Act No.43 of 1988

Subordinate Court Rules Legal Notice No. 132 of 1996

Subordinate Court (Amendment) Rules Legal Notice No 76 of 2006

BOOKS:

Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa, 4th Edition

Oxford Advanced Learners Dictionary of current English 4th Edition, Oxford University Press

JUDGMENT

Background

“Prejudice is the determining factor in review proceedings¹”

1. This is an unopposed application for review of criminal proceedings of **Thaba-Tseka Magistrate Court**. The applicant as the accused in the court *a quo* was charged, convicted and sentenced to fifteen (15) years imprisonment for contravening **Section 8(2)** read with **section 32 (a)** of the **Sexual Offences Act No. 3 of 2003** in that upon or about the 22nd day of June 2015, and at or near **Ha Thetso, Moreneng** in the district of **Leribe** but where **Thaba-Tseka Magistrate court** has jurisdiction, he unlawfully and intentionally and under coercive circumstances had an unlawful sexual act with one **M..... M.....**, a Mosotho female child aged about eleven (11) years by inserting his penis into her vagina.

¹ Tsehle v Magistrate, Mafeteng and Another (CRI/APN/68/2009) (CRI/APN/68/2009) [2009] LSHC 33 (07 July 2009)

2. Applicant has in the main prayed for review and setting aside of the conviction and criminal proceedings in **CR/180/19** of **Thaba-Tseka Magistrate Court** for the reason that his trial was not conducted in accordance with fairness and justice on the grounds as outlined in the founding affidavit.

3. On the hearing date, the court raised an issue with the record of proceedings which was hand written and not legible to enable the court to appreciate some of applicant's grounds of review. Applicant's counsel conceded that the record was not legible and decided to abandon the ground that would require the court to refer to the details of the record of proceedings. He therefore decided to proceed with the grounds which would not require the court to scrutinise the hand written record. The grounds of review retained by applicant are dealt with hereinafter seriatim.

Failure to use a sworn interpreter

4. The first ground is that the record of proceedings is in English language despite the fact that the proceedings were in Sesotho and there was no sworn interpreter in court. It is applicant's case that it was irregular for the magistrate to translate Sesotho language used in court to English language as he was not a sworn interpreter; that such interpreted evidence is inadmissible as interpretation is not a mere translation which can be done by a magistrate.

5. **Advocate Habasisa** for the applicant submitted that on the strength of **Lephoso Kobile v Director of Public Prosecutions**² and **Litsoane v Director of Public Prosecutions and Another**³ the magistrate did not record the actual evidence of the witnesses who testified in Sesotho; that what the magistrate recorded in English was his own understanding of what the witnesses had said; and that was not evidence at all. He argued that the proceedings would have better been recorded in Sesotho where there was no interpreter.
6. It should be pointed out that the decisions in **Kobile**⁴ (supra) and **Litsoane** (supra) have been overtaken by events as they were both decided before the promulgation of **Subordinate Court (Amendment) Rules**⁵ (hereinafter referred to as **Legal Notice No 76 of 2006**). **Legal Notice No 76 of 2006** amended **Rule 63 (5)** of the **Subordinate Court Rules**⁶ by inserting *paragraph (b)* which reads:

“It shall be competent in civil and criminal proceedings for a presiding officer to record evidence in English without the assistance of an interpreter where all parties understand Sesotho and the services of the interpreter cannot be secured without undue delay, expense or inconvenience.”

Applicant’s submission that the absence of an interpreter vitiates the proceedings falls off as being without substance as it is now competent for magistrates, pursuant to the foregoing amendment, to record evidence adduced in Sesotho in English without the help of an

² CRI/APN/472/2006

³ (CRI/APN/758/2004) [2005] LSHC 113 (20 May 2005)

⁴ The case was decided on the strength of **Thamae Lenka v Rex 2000 – 2004 LAC 832 (C of A (CRI) No. 2 of 2004)**. Maqutu J. therein clearly indicated in paragraph that he could not rely on the provisions of Legal Notice No.76 of 2006 which was published on 9th June 2006 while the judgment of the magistrate court was dated 5th April 2005 as the legal notice could not apply retrospectively.

⁵ Legal Notice No 76 of 2006

⁶ Legal Notice No. 132 of 1996

interpreter where all parties understand Sesotho. Furthermore, it would be improper for the magistrate to have recorded the proceedings in Sesotho as suggested by **Advocate Habasisa**, in view of *section 7 (1) of Subordinate Courts Act⁷ No.43 of 1988* which provides that:

“Subject to the exceptions provided in this order or in any other law in force in Lesotho, the proceedings in subordinate courts in all criminal cases and the trial of all defended civil actions shall be carried on in open court, and not otherwise, and the pleadings in civil cases and the record of proceedings in civil as well as criminal cases shall be in the English language.” (My emphasis).

7. The second ground is that it was wrong for the magistrate to have relied on the provision of **Legal Notice No.76 of 2006** in order to avoid interpretation of Sesotho to English by a sworn interpreter as the Legal Notice has since been set aside as null and void. **Advocate Habasisa** relied on the case of **Kobile** (supra) for this proposition.

8. The court is not persuaded by this submission as the expressions by **Maqutu J.** in **Kobile’s** case (supra), wherein he said **Legal Notice No.76 of 2006** was *null and void* for being *ultra vires* the powers of the **Chief Justice**, were *obiter dicta* and therefore have no binding effect. In that case, **Maqutu J.** had already disposed of the case and issues that were before him when he expressed his views regarding **Legal Notice No.76 of 2006**. His views were a mere opinion and did not constitute a *ratio decidendi* for the decision he arrived at in that case. **The South African Constitutional** Court defined

⁷ No.43 of 1988

obiter dicta in the case of **Turnbull-Jackson v Hibiscus Coast Municipality and Others**⁸ in the following words:

“Literally, obiter dicta are things said by the way or in passing by a court. They are not pivotal to the determination of the issue or issues at hand and are not binding precedent. They are to be contrasted with the ratio decidendi of a judgment, which is binding.”

What was said by **Maqutu J. regarding Legal Notice No.76 of 2006** was just an opinion that had no bearing on the determination of issues that were before him. The expressions therefore, respectfully, do not qualify as a binding precedent.

9. The other ground was that the magistrate ought to have informed applicant at the stage before he pleaded that he had the right to legal representation. It is applicant’s submission that the magistrate failed to advise him sufficiently of his right to legal representation for trial purposes.

10. It should be pointed out that the record of proceedings of the Magistrate Court annexed to the pleadings in relevant parts reads as follows:

“On the 25th June 2019 the accused is before court. Charge is read and explained to him. His rights to bail and legal representation explained to him, as well as his right to demand Legal Aid representation.

Accused: - I understand and I apply for bail.”

⁸ [2014] ZACC 24 at paragraph 61. See also **The Director-General of The Department of Agriculture, Forestry And Fisheries for the Republic of South Africa v Nanaga Property Trust (Represented by its Trustee (Case No: 4689/2014 at paragraph 6 (unreportable)** where it was said: “The nature of an obiter dictum is that it does not bind any other court, even lower courts. It is a mere expression of an opinion upon points of law which is not necessary for the decision of the case. At most it is valued as a reasoned statement which may well influence another court in future decisions, but it is not binding on such other courts.”

It is clear from the record that the applicant was informed of his right to legal representation and the right to Legal Aid representation. For applicant to submit that he ought to have been informed again on the date of hearing of this right would be to expect too much of a magistrate and to overemphasize applicant's right to legal representation more than what it ought to be. It is my considered view that it was sufficient for the magistrate to have informed and explained to the applicant of his right to legal representation on the day he was first arraigned, which seems to have been about five months before the date of his trial. The magistrate was under no obligation to overstress the right on the date of hearing as applicant had clearly indicated on date of his arraignment that he understood the rights as they were explained to him (See **Tsehle v Magistrate, Mafeteng and Another** (supra)). I find applicant's submission in this regard as untenable.

11. A further submission by applicant was that the magistrate did not inform him about the seriousness of the offence he was facing; and that should he be convicted he would not have an option of a fine. Applicant's point is that he had been charged with contravention of *section 8(2)* read with *section 32(a)* of the **Sexual Offences Act**, but the particulars of *section 32* which deals with penalties were not explained to him. He said if he knew the particulars of *section 32*, he could not have proceeded without a service of a lawyer, and that failure by the magistrate to make him aware in that regard, prejudiced him.

12. It is evident from the record of proceedings in the court *a quo*, that the charge was not only read, but it was also explained to the applicant. From the reading of the charge and as it was clearly explained to the

applicant, it is undoubtedly, *prima facie*, a serious offence for a man aged 43 years to have inserted his penis into the vagina of an eleven year old girl under coercive circumstances. It is not clear what other aspects or details of the seriousness of the offence the magistrate was expected to have explained to applicant. In circumstances, I find the following remarks of **Monpathi J.** in the case of **Tsehle**⁹ (supra) apposite *in casu*:

“I have already remarked about the exaggerated need to conscientize the accused person of offences allegedly committed as if they are complex. For example, I indicated to Counsel and I took judicial notice that our upbringing in this country has taught us of the immorality of men or boys having sex with other men or women without mutual consent. To conscientize means to make aware of the immorality or irreligiousness or downright illegality. This must be unfortunate or it is to carry coals to Newcastle or to high-handedly presume that people of our community are naively unaware of such basic wrongfulness. That the sentence is serious is perhaps what should inevitably be part of the reading of the charge.”

The applicant in **Tsehle** (supra) had also been charged with an offence under the **Sexual Offences Act** in the Magistrate Court, and he had raised the argument that the magistrate had not informed him of the seriousness of the case he was facing. **Monpathi J.** dismissed the submission as unfounded and expressed the foregoing view which I fully endorse. I find the alleged prejudice by applicant; that he failed to avail himself a lawyer because he did not appreciate the seriousness of the offence he was facing, tenuous. Applicant ought to have construed from the reading and explanation of the charge to him that it was *prima facie* serious enough to warrant the exercise of the right to seek legal representation which had duly been explained to him.

⁹ At paragraph 13

13. As regards failure by the magistrate to explain to the applicant, that upon conviction, he would not be sentenced to pay a fine, it is my considered view that to expect a magistrate to detail the tenable sentence where the offence charged is created through a statutory enactment would be to place an unnecessary heavy demand on that magistrate. It should be borne in mind that whenever a law is publicised in a Government Gazette it is presumed to be in the public domain. In terms of *section 6* of the **Interpretation Act**¹⁰ “*Every Act shall be a public Act and shall be judicially noticed as such.*” The word “*public*” has been defined in **Oxford Advanced Learners Dictionary of current English**¹¹ to mean “*open or known to people in general*”. The reasonable inference therefore is that applicant, was aware that the **Sexual Offences Act** prescribes heavy penalties of which a fine is not one of them.

14. Furthermore, applicant cannot submit that he reasonably expected a fine to be

a tenable sentence for a sexual offence alleged to have been committed under coercive circumstances against a minor girl of eleven years, where there had been a penetration into her vagina. The magistrate in the circumstance of this case cannot be faulted for failure to tell applicant that the offence he had been charged with could not attract a sentence of a fine. To expect the magistrate to have done so would be to expect that magistrate to bring the owls to Athens.

¹⁰ No. 19 of 1977

¹¹ 4th Edition, Oxford University Press

15. The findings I have arrived at on each of the points raised by the applicant are

further justified by the fact that applicant has not in his papers alleged the actual prejudice he has suffered or the miscarriage of justice that was actually occasioned by any of the grounds of review that he has raised. Applicant has instituted review proceedings, and it is incumbent upon him to prove mistrial; gross irregularities or illegalities; prejudice; or real and substantial injustice in the proceedings before the court a quo, if this court is to exercise its discretion to interfere with the decision of the magistrate. (Vide: **Herbstein and Van Winsen**¹²).

16. Furthermore, *section 8 (2)* of the **High Court Act**¹³ which relates to appeals but has been held to also apply to reviews¹⁴ provides that:

"... Notwithstanding that a point raised might be decided in favour of the accused no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in proceedings, unless it appears to the High Court that a failure of justice has resulted therefrom."

In casu, applicant in his founding affidavit has merely outlined circumstances upon which he alleges the magistrate has erred. Nowhere does applicant aver that but for the alleged irregularities, there could have been a different result in his trial (see **Sofe v Magistrate Tapole and Another**¹⁵).

¹² Page 931 where the learned authors wrote " The Supreme Court does not have inherent jurisdiction to interfere with the proceedings in the magistrate's court if there is no allegation of injustices or irregularity.

¹³ Act No.5 of 1978

¹⁴ **Makula and Another v Motinyane (CRI/APN/720/03) (CRI/APN/720/03) [2004] LSHC 65 (23 April 2004)**

¹⁵ (CRI/APN/262/05) (CRI/APN/262/05) [2005] LSHC 221 (24 October 2005)

DISPOSITION

17. In the final analysis, this court finds that there were no fundamental irregularities by which the proceedings of the court *a quo* could be said to have been tainted. Applicant has failed to prove a miscarriage of justice and prejudice in his trial in the court *a quo*.

18. The application is accordingly dismissed.

M. P. RALEBESE J

JUDGE

For the applicant : **Adv. Habasisa**
For the respondents: **No appearance**