

**IN THE HIGH COURT OF LESOTHO**

**Held at Maseru**

**CRI/S/0001/2020**

**CR/114/18**

In the matter between:

**RETŠELISITSOE NTEE**

**ACCUSED**

And

**DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**JUDGMENT**

Neutral citation: Retšelisitsoe Ntee vs Director of Public Prosecutions LSHC 118  
Crim (27 May 2022)

**CORAM:** T. J. MOKOKO J

**DATE OF HEARING:** 17 MAY 2022

**DATE OF JUDGEMENT:** 27 MAY 2022

## SUMMARY

*High Court - Matter committed to High Court for sentencing - Whether High Court can enquire into the irregularities committed by the trial Court - **Section 294(3)(a) and (b) of the Criminal Procedure and Evidence Act, 1981.***

## ANNOTATIONS

### Cases

1. *Letšaba v Magistrate Leribe and Another LAC (2000-2004)*
2. *Molapo v D.P.P. 1997-1998 LLR 197*
3. *S v Hlakwane 1993(2) SACR 362(0)*
4. *S v Maseko 1993 SACR 579(A)*
5. *S v Radebe 1988(1) S.A. 191(1)*

### Statutes

1. *Constitution of Lesotho 1993*
2. *Criminal Procedure and Evidence Act 1981*
3. *Sexual Offences Act 2003*

## MOKOKO, J

### **A. INTRODUCTION:**

[1.1] The accused person herein was jointly charged criminally with another, at the Mohale's Hoek Magistrate Court on the 15<sup>th</sup> May 2018, with contravention of the provisions of **Section 3(2) of Sexual Offences Act, No.3 of 2003**, it being alleged;

*“ That upon or about the 10<sup>th</sup> May 2018, at or near **Ha Rasekhamoli** bar in the **Mohale's Hoek** district the accused did unlawfully and intentionally commit an unlawful sexual act against **'MATANKI MPHAMO**, a Mosotho female, by having sexual intercourse with her without her consent, and did thereby commit the offence aforesaid”.*

[1.2] The record of the proceedings reflects that on the 15<sup>th</sup> May 2018, both accused were before court and were duly charged. The accuseds were taken to hospital for mandatory HIV tests. The accuseds' rights, especially the importance of utilising the office of the Legal Aid were explained to them, considering the seriousness of the offence they were charged with, and the possibility of long sentence in the event they were convicted. The accused were then granted bail. On the 12<sup>th</sup> August 2019, the prosecutor informed the trial court that **A2** had absconded, therefore the matter will proceed with **A1** alone. The matter was accordingly remanded to the 22<sup>nd</sup> October 2019 for hearing. The accused was found guilty as charged. The accused was ultimately committed to the High Court for sentencing in terms of **Section 32(a)(vii), of Sexual Offences Act, 2003**, as there was proof that the Accused knew his HIV status as far back as 7<sup>th</sup> October 2016. It is worth

mentioning at this stage that the accused has been in custody, awaiting his sentence since 22<sup>nd</sup> October 2019 to date. (Approximately 2 years, seven months).

**B. SUBMISSIONS:**

[2] **Mr. Masiphole** for the accused submitted that:

- (a) On the 5<sup>th</sup> May 2018, when the two accused persons appeared in court, their right to legal representation was explained to them in a very cursory and superficial manner. It was never explained in sufficient details that it was absolutely necessary for them to secure legal representation of their choice or in the alternative to seek services of the Chief Legal Aid Counsel. That regard being had to the seriousness and complexity of the case, it was incumbent upon the trial Magistrate to have been more detailed in explaining these rights, because the offence with which the accused stands charged attracts a death penalty, in instances where the accused knew about his HIV status when he committed the offence.
- (b) The right of the accused to legal representation is also interwoven with other rights such as to call witnesses and the right to cross-examination of the crown witnesses. The accused's right to cross-examine the crown's witnesses and to put his defence to the crown witnesses was superficially explained to the accused by the trial Magistrate. That the trial Magistrate failed to explain to the accused, the nature, purpose and the importance of cross-examination.

- (c) The trial court did not order the prosecution to furnish the accused with the prosecution witnesses' statements, to enable the accused to prepare his defence, therefore this failure resulted with the accused being ambushed in his trial. That the accused's right to a fair trial, as provided by **Section 12 of the Constitution of Lesotho 1993** was violated.
- (d) Lastly that this court should invoke the provisions of **Section 294(3) (b) of the Criminal Procedure And Evidence Act 1981**, which provides that, when a person is brought before the High Court pursuant to **Sub-Section (2)** the High Court shall enquire into the circumstances of the case.
- (e) That the appropriate order in this case would be to set aside the proceedings, and not order a trial *de novo*, because the irregularities complained of were of a serious nature, therefore vitiated the entire proceedings.

[3] On the other hand **Advocate Motšoane** for the Crown submitted that:

- (a) Crown conceded that the trial Magistrate failed to explain to the accused his right to legal presentation, especially taking into account the seriousness of the offence the accused was charged with. Crown further conceded that the trial Magistrate should have explained to the accused in detail and clear terms that, in the event that he was convicted, he was likely to serve a long sentence or face death penalty. That this omission on the part of the trial court, was so serious that it vitiated the entire proceedings.

- (b) Crown conceded that failure by the trial Magistrate to ensure that the accused was furnished with the prosecution witnesses' statements, interfered with the accused's right to fair trial as the accused was ambushed in trial. Crown further conceded that this failure was so serious that it vitiated the entire proceedings.
- (c) Lastly that in the event the court passed sentence on the accused, the court should take into consideration HIV results, because the mere fact that the trial Magistrate committed this case to the High Court for sentencing, in terms of **Section 32(a)(vii) of Sexual Offences Act**, meant that the trial court had an occasion to lay its hands on the HIV test results of the accused, otherwise the Magistrate would not have invoked the provisions of **Section 32(a)(vii) of Sexual Offences Act, 2003**. This submission was made on the basis of the fact that HIV tests results of the accused could not be found.

**C. ENQUIRY INTO THE CIRCUMSTANCES OF THIS CASE**

- [4] Having heard submission of both **Adv. Masiphole** – Counsel for the accused and **Adv. Motšoane** – Counsel for Crown, the court has to make a determination whether to sentence the accused, or to enquire into the circumstances of this case. This court holds a view, that it is in the best interests of justice to make the necessary inquiries into the circumstances of this case. **Section 294(3)(a) and (c) of the Criminal Procedure and Evidence Act, 1981** provides that: -

*“When a person is brought before the High Court pursuant to **Sub-Section (2)**, the High Court-*

- (a) shall enquire into the circumstances of the case; and*
- (b) otherwise may decline to proceed and make such orders and give such directives as it may consider appropriate for the purpose of dealing with the question of that person’s guilt”.*

The court therefore makes the necessary enquiries into the circumstances of this case, as submitted by both Counsel for the accused and the Crown respectively;

***The right to Legal Representation.***

*The salient question for determination is whether the accused was sufficiently advised of his right to legal representation, taking into account the seriousness of the offence he was charged with.*

[5] The Remand Court Record:

- (a) “On the 15<sup>th</sup> May 2018, the accuseds appeared before a remand court, and were subjected to a mandatory HIV test. The charge was read to them in a language they understood. Their rights were explained, the importance of exercising Legal Aid right was specifically explained due to the seriousness of the crime and possibility of long term sentencing should they be found guilty (of 8*

*years imprisonment without option of a fine) legal aid right was explained". I hold a view that the remanding Magistrate, Chief Magistrate **M. Kolobe**, did explain to the accused their right to legal representation, especially taking into account the seriousness of the offence they were facing. Chief Magistrate **Kolobe**, went further to advise the accused that in the event they were found guilty, they were likely to face 8 years imprisonment. Chief Magistrate did not stop there, he went further to advise the accuseds to approach Legal Aid.*

[6] Trial Court Record:

- (a) On the 22<sup>nd</sup> October 2019, the accused was before court, and the trial Magistrate says the following:

*"Charge is read and explained to him. He understands it. He is advised of his right to legal representation".*

Accused pleaded not guilty.

- (b) Crown called four witnesses, and the first was the complainant. At the end of the complainant's testimony the trial court reflects the following:

*"The court advised the accused about purpose of cross-examination, and he is informed that it is to put his defence to the witness".*

- (c) The complainant was cross-examined by the accused, and his defence was that sexual intercourse with the complainant was consensual. The accused did not cross-examine other crown witnesses.



(d) The prosecutor then informed the court, he had gone through the medical form with the accused, and the accused had agreed that the medical form be handed in, as part of the crown's evidence.

[7] I hold a strong view that the trial Magistrate did not advise the accused of his right to legal representation, when the trial started. It was not enough for the trial Magistrate to merely state, that the accused was advised of his right to legal representation. The trial Magistrate ought to have explained to the accused what this right entails, so that the accused could appreciate and understand fully the importance of exercising this right. The trial court unlike the remand court, failed to advise the accused that, he was facing a serious offence, which would attract a long sentence, if the accused was found guilty. The trial Magistrate should have advised the accused to approach the office of the Chief Legal Aid Counsel, in the manner that the remand court had previously done, as reflected above.

[8] The importance of the Right to Legal Representation.

In the case of **S v Radebe 1988(1) S. A. 191(T) Goldstone J at (196 F/I)**, had this to say:

*“If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the*

*complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right, but he should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of the judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the absence of legal representation per se or the absence of the suggested legal advice to an accused per se will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend upon its own facts and peculiar circumstances “.*

[9] Bearing in mind the words of **Goldstone J in Radebe Case** (*supra*), the trial Magistrate had a fundamental and constitutional duty towards an unrepresented accused, who was facing a serious offence. The trial Magistrate failed to advise the accused about the seriousness of the offence, and the sentence the accused was likely to have in the event of conviction. The trial court should have afforded this accused a reasonable time within which to secure the services of the legal practitioner. And failure on the part of the trial Magistrate to do this, having regard to the serious nature of the offence facing the accused, resulted in unfair trial, which resulted in a complete failure of justice.

[10] In the case of **Letšaba v. Magistrate Leribe And Another LAC (2000-2004)** the following principles were laid down: -

- (a) An accused person's right to legal representation must be explained at the commencement of the trial as failure to do so might result in substantial unfairness.
- (b) If an accused person is indigent and desirous of legal representation, he/she must be told about avenues open in regard to securing legal representation.
- (c) It should be the accepted practice for judicial officers to apply the aforesaid procedural requirements, especially when an accused is charged with a serious crime.
- (d) The nature and importance of cross-examination is not always obvious to an accused and thus the court should assist by advising of the need to put the nature of his defence.
- (e) At the close of prosecution's case, the court must inform the accused of his right to call witnesses in his defence.

[11] In the **Radebe case** (*supra*) the judicial recognition of the positive content of the right to legal presentation was given by the decision of the Transvaal Full Bench. **Goldstone J** at *Page 194 G/11* pointed out that:

*“For many years our courts have insisted that unrepresented accused be told of their rights and, insofar as may be practicable should be assisted by the presiding officer”.*

At *Page 195(B)* **Goldstone** stated that:

*“.....a general duty on the part of judicial officer is to ensure that unrepresented persons fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place”.*

[12] I have found that the trial Magistrate failed to adequately inform and advise the accused, about the right to legal representation. I want to align myself with the words of **Goldstone J** in **Radebe** (*supra*) that it is a general duty of the judicial officers to ensure that unrepresented persons fully understand their rights, and that in the absence of such understanding a fair and just trial may not take place.

[13] I have also observed that the trial Magistrate, unlike the remand court, failed to advise and inform the accused about the availability of the offices of the Chief Legal Aid Counsel, if he could not afford the services of the private legal practitioner. I wish to refer to the **Radebe** (*supra*) at *Page 196(F/1)* where **Goldstone J** stated that depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right, but he should be given a reasonable time within which to do so. He should also be informed in appropriate cases, that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of the judicial office to do so, may result in an unfair trial which there may be a complete failure to justice.

[14] The trial record reveals that at the end of the crown’s case, the prosecutor informed the court that, the crown and the accused have looked at the

medical report, and had both agreed that, it should be handed in as part of evidence. The trial court was not informed, nor did the trial court enquire as to what the accused was consenting to. The prosecutor failed to inform the court what the accused admitted, and in the same token the trial Magistrate failed to enquire from the accused what he was admitting. I hold a strong view that failure on the part of the trial Magistrate to make the enquiry as to what the accused was admitting, resulted in a complete failure of justice.

[15] The Right to cross-examine Crown's witnesses and to put accused's defence to Crown witness.

**Mr. Masiphole** submitted that the right of accused person to legal representation is also interwoven with other rights, such as to call witnesses and the right to cross-examine crown witnesses. He went further to state that the accused's right to cross-examine crown witnesses, and how to put his defence to them was superficially explained to him by the trial Magistrate. That the accused's defence to the charge was that he had an affair or relationship with the complainant, and that on the day in question, the complainant had consented to having sexual intercourse with him. That it was not for the first time they had sex on the day in question. That they had sex on one day prior to the one in question at the accused's home, and that the accused even accompanied her from his house up to **Chief Lerotholi's** place. He stated that the good defence of the accused, was not put to **P.W.1** elegantly, and the trial Magistrate's rejection of the accused's evidence in that regard was based on his failure to do so.

[16] I must emphasise that it has always been settled law that an accused person, who is not legally represented, should be assisted by the trial court and informed of his rights. The accused should be advised of his right to call witnesses, and the court should assist the accused person how to cross-examine the crown witnesses. The court should further advise the accused person about the purpose of the cross-examination. I want to borrow the words of the court in the case of **S v. Hlakwane 1993(2) SACR 362(0)**:

*“The accused should inter alia, be informed of an onus resting on him/her, advised of his/her right to call witnesses to give evidence and be assisted by the court, if necessary, to subpoena witnesses”.*

[17] **In S. v. Maseko 1993(3) SACR 579(A)**

The court stated that the accused should also be assisted by the court when he/she cross-examine state witnesses and it is unfair to expect that he/she is able to perform as competently as an experienced legal practitioner. The court should guard against too easily drawing adverse inferences against an unrepresented accused who fails to put material allegation to state witnesses.

[18] **At Page 9 of the record of trial court, the following is recorded by the trial Magistrate:**

*“The court advised accused about the purpose of cross-examination; and he is informed that it is to put his defence to the witness”.*

I hold that the trial court had an important role to play at that stage, by assisting the accused person how to cross-examine the crown witnesses. The trial court should always be mindful that the accused is not equipped with the skills that are necessary for putting his defence to the crown witness

completely and elegantly. And failure to do so on the part of the trial court affects the accused's right to fair trial.

[19] **Mr. Masiphole** submitted further that the trial court did not order prosecution to avail the accused with prosecution witnesses' statements, to enable the accused to prepare his defence. That this resulted in the accused being ambushed in his trial. He referred this court to the case of **Molapo v. D.P.P. 1997-1998 LLR 197**.

[20] In **Molapo v. D.P.P., Ramodibedi J** as he then was had the following to say at Page 207: -

*“In prosecutions before the High Court, an accused person (or his legal representatives) should ordinarily be entitled to the information contained in the police docket relating to the case prepared by the prosecution against him, including copies of the statements of witnesses whom the police have interviewed in the matter, whether or not the prosecution intends to call any such witnesses at the trial”.*

[21] I would like to borrow the words of **Ramodibedi J** in the case of **Molapo v. D.P.P. (supra)** at Page 204, where he stated that, a trial cannot be fair, just and balanced if the prosecution is allowed to keep relevant material such as witness statement close to its chest and thereby hope to spring a surprise on the defence for the purposes of securing a conviction. It certainly cannot have been the intention of the framers of the constitution to place the accused at a disadvantage in relation to the prosecution.

[22] Having looked at the record of the trial court, and the submissions made by the accused's Counsel, **Mr. Masiphole**, and the Crown Counsel **Adv.**

**Motšoane**, I conclude that the accused's complaint that the trial Magistrate's failure to ensure that the accused was availed with prosecution witnesses' statements, has merit as it violated the accused's right to fair hearing- **Molapo v. D.P.P.** case (*supra*).

[23] The accused's complaint that his right to cross-examine the crown witnesses and to put his defence to the crown witnesses was superficially explained to him by the trial Magistrate, has merit. The trial Magistrate at *Page 9* of the trial record, recorded the following:

*“The court advised accused about purpose of cross-examination, and he is informed that it is to put his defence to the witness”.*

In the case of **S. v. Maseko 1993(3) SACR 579(A)** the court stated the accused should also be assisted by the court when he/she cross-examines state witnesses, and it is unfair to expect that he/she is able to perform as competently as an experienced legal practitioner. The trial record does not reflect that the trial Magistrate made an attempt to assist the accused when cross-examining **P.W.1**. I need not say more than this.

#### **EFFECT OF IRREGULARITIES ON THE PROCEEDINGS:**

[24] This court concludes as follows:

(a) That the trial Magistrate failed to adequately advise and encourage the accused about his right to legal presentation, because of the seriousness nature of the offence the accused was charged with. The



trial court should have advised and encouraged the accused to secure the services of the legal practitioner and if he could not afford the services of the private legal practitioner, he should have been given a reasonable time, within which to exercise this right. And I believe this move would have been motivated by the fact that the accused was facing a serious offence and was likely to receive a long sentence in the event that he was convicted. Failure on the part of the trial Magistrate in this regard, violated the accused's right to fair trial – **Letšaba v. Magistrate Leribe And Another LAC (2000 – 2004) 785 (supra)**.

- (b) That the trial court failed to order the crown to avail the accused with the prosecution witnesses' statements. The effect of this was that the accused was ambushed in his trial and this resulted in substantial unfairness (**Molapo v. D.P.P.**) *supra*.
- (c) That the trial court failed to exercise its important role in assisting the accused to cross-examine the prosecution witnesses. This failure on the part of the trial Magistrate resulted in substantial unfairness – **Letšaba v. Magistrate Leribe And Another(supra)**. The Court therefore holds the irregularities complaint were of a serious nature to vitiate the proceedings of the trial court.
- (d) The court feels it should mention once again that Crown Counsel, **Adv. Motšoane**, conceded that all the accused's complaints have merit as they were of a very serious nature, to the extent that they went to the root of this matter. Crown Counsel further submitted that,

the serious nature of all the irregularities complained of, vitiated the trial court proceedings.

[25] The court is mindful of the two broad categories of irregularities, namely;

- (a) *(i) Irregularities which are so serious in nature to vitiate a trial; and*  
*(ii) Irregularities of a less serious nature, in respect of which the court can separate the good from the bad and is then able to consider the merits of the case.*

With category (i) irregularities, there is no consideration of the merits, and therefore, no decision need not be reached on the priority of the conviction and acquittal. Whereas, in category (ii) there is a consideration of the merits and need to reach a decision on the propriety of the conviction and acquittal.

- (b) The irregularities complained of in casu are in relation to constitutionally granted rights, especially in terms of **Section 12 of the Constitution of Lesotho of 1993**. Special reference is made in **Section 12(1)(2)(a)(b)(c)(d)** and **(e)** thereof. I must at this juncture state that in terms of **Section 2 of the Lesotho Constitution 1993**, the constitution is the supreme law of Lesotho.
- (c) The irregularities complained of as fully submitted by **Mr. Masiphole** fall under category (i) – irregularities which are so serious in nature to vitiate a trial. What this means is that this court at this stage must enquire as to whether the accused was afforded a fair trial as envisaged by **Section 12 of the Constitution**. It was the duty of the

trial Magistrate to have protected and secured the rights of the accused in terms of the constitution as fully held in the **Letšaba case**. The court therefore holds that the irregularities complained of were of a serious nature to vitiate the proceedings of the trial court.

**D. DISPOSITION:**

[26] I find that because of the non-compliance with her duties in conducting this trial – **CR/114/18**, there has been substantial unfairness resulting in a complete failure of justice. However, the court is duty bound to balance the rights of the accused, the victim of the crime and society at large. The court holds a strong view that there is a *prima facie* case for the accused to answer, even though his right to legal representation and other rights were overlooked by the trial court, especially in *casu*, where the accused was facing a serious offence. The conviction imposed on the accused in **CR/114/18** is accordingly set aside and the accused must be released from prison forthwith; and the trial should start *de novo* before a different Magistrate.

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**T. J. MOKOKO**  
**JUDGE**

**FOR THE ACCUSED:**

ADV. B.M.R. MASIPHOLE

**FOR THE CROWN:**

ADV. M.P. MOTŠOANE