

# **IN THE HIGH COURT OF LESOTHO**

Held at Maseru

**CRI/REV/0019/2021**

In the matter between:

**BULANE THAKALEKENA**

**APPLICANT**

And

**THE LEARNED MAGISTRATE –  
HIS WORSHIP MR TŠOSANE**

**1<sup>ST</sup> RESPONDENT**

**SENIOR CLERK OF COURT-  
CRIMINAL REGISTRY-MASERU  
MAGISTRATE COURT**

**2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL**

**4<sup>TH</sup> RESPONDENT**

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## **JUDGMENT**

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Neutral Citation: Thakalekena vs The Learned Magistrate – His Worship Mr Tšosane & Others [2022] LSHC 58 Crim (6 April, 2022)

**Coram** : His Honour Judge Keketso Moahloli

**Date heard** : 6 December 2021

**Date of order** : 17 December 2021

**Date of judgment** : 6 April 2022

## **SUMMARY**

*Criminal procedure – Appeal – Failure of Magistrate to warn an unrepresented accused that he is facing a serious charge which is punishable by a hefty mandatory minimum sentence – Reviewable irregularity – Circumstances under which Magistrate may conduct proceedings and record evidence in English without assistance of a court interpreter.*

## **ANNOTATIONS**

### **Cases**

1. *S v Dickson 2002(2) SACR 304 (C)*
2. *S v Maake 2011(1) SACR 263(SCA)*
3. *S v Mnguni 2002(2) SACR 294(T)*
4. *S v Ndlovu 2003(1) SACR 331 (SCA)*
5. *S v Ndlovu 2004(2) SACR 70 (W)*

### **Statutes**

*Penal Code Act 6 of 2010*

## MOAHLOLI, J

- [1] This is an application for the review and setting aside as irregular the proceedings and judgment of the learned Magistrate in CRI/T/MSU/0782/2021.
- [2] The accused therein, Bulane Thakalekena, was charged with contravening section 31(1) and (2) (a) and (b) read with section 109 of the Penal Code Act 2010, in that on 3<sup>rd</sup> July 2021 he committed the offense of aggravated assault of one Molefi Mosehle by stabbing him with a knife on the chest with the intention of causing him serious bodily harm.
- [3] The above cited provisions of the Penal Code provide:

### *“Aggravated assault*

31. (1) *A person who assaults another in circumstances where one or more of the factors contained in subsection (2) are present commits the offence of aggravated assault.*

(2) *The factors referred to in subsection (1) are –*

(a) *the intentional causing of serious bodily injury or any form of lasting physical disablement;*

(b) *the use of any form of instrument or substance, explosive or otherwise,*

with

*the intention of inflicting serious physical injury;”*

(c) – (h)

**“Penalties**

109. (1) *Upon convicting a person for an offence provided for in this Code, the court may impose such penalty in the manner provided for in this section.*

(2) *Upon conviction for an offence under any of the sections set out in the Schedule, a court may sentence the convicted person to a penalty in terms of a fine level of the Schedule up to the maximum penalty prescribed.*

(3).....

(4) *Where an imprisonment penalty is listed, then it shall not be open to a court to impose a fine in lieu of the penalty listed or to suspend the sentence.”*

**“SCHEDULE**

***Fines levels***

***PENALTIES***

*Level 1 : a fine up to M1000.00;*

*Level 2 : .....*

*Level 3 : .....*

*Level 4 : a fine between M10,000.00 and M15,000.00;*

*Level 5 : .....*

**Section:**

30. *Assault.....*

31. *Aggravated Assault: a fine under level 4 or imprisonment up to 8 years or both;”*

[4] According to the record of proceedings, the learned Magistrate read the charge to the accused and explained it to him in Sesotho. Accused said he understood the charge. The accused was then advised of his right to a representative of his own choice. He said he understood. The accused then pleaded guilty to the charge. The Crown accepted his plea, and proceeded to summarise the evidence of its witnesses. The accused accepted the evidence. The Magistrate found him guilty as charged, and sentenced him to a fine of M10000.00 or 10 years imprisonment.

[5] The Applicant claims that he was unfairly tried and convicted because (in his own words)–

(i) before the trial, the investigating officer had unduly influenced him to plead guilty by indicating that if he did, the court would give him a lenient sentence because he would not have wasted the court’s time. The prosecutor had reiterated the same sentiments when they spoke subsequently.

(ii) he did not have any intentions whatsoever of entering a plea of guilty until he was hurriedly forced and coerced to do so by the investigating officer and the prosecutor, to his greatest prejudice.

(iii) he was tried, convicted and sentenced on his first appearance at court, without being advised to at least engage the services of Legal Aid Counsel in view of the possible sentence for the charge levelled against him.

**[6]** The Applicant contends that on account of the hasty manner in which his trial was conducted, the following irregularities occurred, leading to a miscarriage of justice –

(a) as an unrepresented accused, the learned Magistrate did not advise him of the nature of the offence with which he was charged and the sentence it was likely to attract should he be found guilty and the importance of being legally represented in the circumstances.

(b) he was not given sufficient time to consider what plea to enter.

(c) the learned Magistrate did not bring it to his attention that it was possible for him to engage the services of Legal Aid if he could not afford a private lawyer.

(d) The learned Magistrate conducted the proceedings and recorded the evidence without using the service of a sworn interpreter.

**[7]** The Crown's legal representative informed me that they were not opposing this application, as they fully agreed with the ground for review raised by the Applicants. I nevertheless insisted that both counsel address me fully on the issues raised.

## ANALYSIS

- [8] It is common cause that the Applicant was charged with a very serious offence, attracting a steep statutory minimum sentence. It is also common cause that at no stage in the proceedings did the court alert him of this likely consequence. In *S v Mnguni 2002(2) SACR 294(T)* the court held that a warning must be given to an unrepresented accused to the effect that he faces the imposition of a minimum sentence if convicted. Similarly in *S v Dickson 2002(2) SACR 304 (C)* it was held that the magistrate's failure to warn the unrepresented accused that he was facing compulsory minimum sentences if convicted meant that the accused did not have a fair trial. Accordingly the proceedings were set aside.
- [9] In *S v Ndlovu 2003(1) SACR 331 (SCA)* the Supreme Court of Appeal of South Africa confirmed that where the state intends to rely upon the minimum sentence provisions a fair trial will generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial. The accused must be placed in a position to appreciate properly and in good time the charge that he faces as well as the possible consequences.
- [10] In the present case, even though it is stated on the charge sheet that the accused was being "charged with the offence of c/s 31(1) (2) (a) & (b) r/w sec 109 of Penal Code Act 6 of 2010" the record of proceedings does not tell us in what depth the magistrate explained this to the accused. The record does not say that the magistrate warned the accused that he was possibly going to be sentenced to not less than 8 years in prison if he pleaded guilty. The Crown agrees with the Applicant that this failure was a grave irregularity,

irrespective of the fact that the accused pleaded guilty and agreed with the summary of the evidence by the prosecutor.

[11] I fully agree with *S v Ndlovu 2004(2) SACR 70 (W)*, where it was held that the possibility of convictions and sentences being overturned because the accused was not properly advised of his rights and cautioned of the consequences of conviction can be much reduced if every charge sheet relating to an offence carrying a minimum sentence states so explicitly, and if every accused facing such charge(s) is advised of the minimum sentence(s) prior to the plea and is encouraged to obtain legal assistance. It is the duty of the presiding officer to inform, particularly unrepresented accused, of the implications of minimum sentences (*S v Maake 2011(1) SACR 263(SCA) at para 27*).

[12] Regarding the averment that the learned Magistrate committed a fatal irregularity by acting as an interpreter himself throughout the proceedings and not using a sworn interpreter, I wish to point out that this is allowed in appropriate circumstances by rule 63(6) of the Subordinate Court Rules 1996 (as amended by the Subordinate Court (Amendment) Rules 2006) which provides:

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



Unfortunately in *casu*, it is not clear *ex facie* the record of proceedings why the presiding officer decided to record the evidence in English without the assistance of a court interpreter.

[13] It was for the above reasons that I, on 17 December 2021, ordered that:

- “1. *The proceedings and subsequent decision by the First Respondent in CR: 0782/2021 Rex vs Bulane Thakalekena – Maseru Magistrate’s Court is reviewed and set aside as irregular.*
2. *The charge against the Applicant in CR: 782/2021 Rex vs Bulane Thakalekena – Maseru Magistrate’s Court should be tried de novo before a different Magistrate.*
3. *The Applicant should apply for bail at the trial court.”*

**KEKETSO L. MOAHLOLI**

**JUDGE**

**Appearances:**

For Applicant : Adv NF Masoabi  
For Respondents : Adv Motšoane

