

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CRI/REV/0006/2021

In the matter between:-

KATLEHO TS'EHLA

APPLICANT

AND

HIS WORSHIP (MR. TAU)

1ST RESPONDENT

CLERK OF COURT -

MOHALE'S HOEK MAGISTRATES' COURT

2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS

3RD RESPONDENT

**Neutral Citation: Katleho Ts'ehla v. His Worship Mr. Tau and 3 Others
CRI/REV/0006/2021 [2022] LSHC 20**

RULING

In the matter for an application for review and stay of execution

Coram : Hon. Mahase J.

Date of hearing : 14th June, 2021

Date of delivery : 1st March 2022

Summary

Criminal law and procedure – Bail application – Refusal of same by Court – Accused rushing to High Court for review of such refusal of release on bail – The main criminal trial against the accused having not been prosecuted – Counsel for the applicant having not re-applied for release of his client after new circumstances had arisen – Conduct of the applicant's counsel resulting in

stalling the prosecution of the main trial – As a result the applicant is currently languishing in jail awaiting the final result of the review application – Court should strike a balance between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice.

ANNOTATIONS

CITED CASES:

- **S. v Essack 1965(2) S.A. 161**

STATUTES

- **Criminal Procedure and Evidence Act No. 9 of 1980**

BOOKS

- **Criminal Law and Procedure Through cases per (Hon. M.P. Mofokeng)**
- **Bail – A Practitioner’s Guide – per J. Van Der Berg.**

[1] **INTRODUCTION:-**

The accused/Applicant was charged in the Mohale’s Hoek Magistrates’ Court for having violated or for having contravened section 3 of the sexual offences Act No. 3 of 2003 read together with section 32(a) (vi).

[2] **Factual Matrix**

The applicant is currently incarcerated in the Mohale’s Hoek Correctional Services. Subsequent to refusal by Magistrate to grant him bail he filed an application before this Court in which he applies for review and stay of execution.

- [3] The facts as well as evidence surrounding this application have been summarized on behalf of the accused by his counsel in the written submission. Same are incorporated herein.
- [4] In a nutshell, the applicant is now challenging the first respondent's order refusing to grant him bail. He applied for release on bail in person after the Court had informed him about his legal rights to brief a lawyer of his choice and to his right to apply for release on bail.
- [5] The fact that at his first Court appearance the accused had appeared in person and that he applied for release on bail on that very day is a matter of common cause.
- [6] Also, of common cause is the fact that on subsequent other days, the applicant had then secured the services of the Legal Aid Counsel Adv. Mokhachane. The application for release on bail moved by the applicant before His Worship Magistrate Tau had then already been refused on the 19th January 2021. Refer to page 6 of the handwritten judgment in the original record of proceedings filed of record.
- [7] The applicant's counsel subsequently formally appeared before Court in respect of this case on the 16th March 2021. He is on record as having informed the Court that "he is yet to lodge an application for bail as new circumstances have arisen".
- [8] The case was then postponed to the 23rd March 2021 for "bail re-application". According to the record of the Court a quo, this matter was last dealt with by that Court on the 10th May 2021. The accused

was remanded back into custody to the 14th May 2021 for set down. This is the last Court minute.

[9] Counsel for the applicant Adv. Mokhachane, suddenly appeared before this Court to move the application styled “In the matter for an application for review and stay of execution”. This he did being well aware and alive to the fact that his client/applicant was still in custody because counsel had last informed the Court a quo that he would reapply for the release on bail as new/fresh circumstances have arisen. This has never been done to date.

[10] Counsel for the applicant, who is from the Legal Aid Office subsequently filed an application for review and stay of execution before this Court on the 7th May 2021. He moved his application on the 20th May 2021 before this Court. In that application, counsel has also moved this Court to grant an order that the applicant be released from custody pending the finality of this application.

[11] This Court ordered that counsel should prepare his written submissions in support of this application. Matter was then postponed to the 3rd June 2021 for prosecution of this application for review. Sadly, on that day, counsel for the application did not attend Court for no specified reasons.

[12] He next attended Court on the 14th June 2021. He then informed this Court that all the respondents had been served with notices of set down for prosecution of this application. However, this fact is not

supported by evidence in the form of returns of service because none have been filed of record.

[13] Be that as it may, it should be pointed out that the respondents have to date not filed any notice of intention to oppose the matter, despite service upon them of the notice of motion on the 10th May 2021. The crux of the applicant's case is that the learned Magistrate before whom he appeared for the first time did not explain to him as to what was meant by the Legal Aid Department as well as where to find it.

[14] He however concedes that his legal rights were duly explained to him. That explains why he is currently represented by Legal Counsel from the Legal Aid Office. Counsel for the applicant is on record as having last informed the Court a quo that he would wish to re-apply for his client's release on bail. He has never done that thereby having the criminal case "suspended" and not being prosecuted.

[15] This piece meal prosecution of criminal cases is unacceptable and untenable. There is nothing on record indicating that counsel for the applicant went back to Court to re-apply for the release of his client on bail. There is no order of Court whose effect is to stop the criminal proceedings from continuing until after the "none existing" re-application has been filed.

[16] The applicant has not been fairly advised by his own counsel as a result he is languishing in jail awaiting trial of the main charge reflected on the charge sheet in CR10/2021.

- [17] This is a clear case where Court processes are abused. In any case, what is submitted on behalf of the applicant in argument in relation to the fact that, when he first appeared before Court, the applicant was unrepresented has since fallen off and overtaken by subsequent events because ultimately the applicant was able to brief legal counsel of his choice from the Legal Aid Office.
- [18] The manner in which counsel for the applicant has handled this issue of bail in respect of the accused has also created unnecessary delay in the finalization of the prosecution of this serious criminal case thereby contributing to the increase in numbers of pending cases before that particular Court.
- [19] In the premises, it is the considered view of this Court that regard being had to all the surrounding circumstances of this case, all that counsel is trying to do is to secure the applicant's release from jail where he is incarcerated awaiting trial before the actual criminal case which has been preferred by the crown against his client is prosecuted.
- [20] There is therefore no judgment of Court whose execution should be stayed because the main case preferred by the Crown against the applicant has not ever been prosecuted.
- [21] In the instant application, there is no compliance with section 50 (b) of the Criminal Procedure and Evidence Act No. 9 of 1980; in that the

only record of proceedings before this Court is actually the original record of the Court a quo. The application has not been addressed to any particular person. It has not been addressed to the Registrar nor to any one of the respondents. In brief this application is defective and has been filed contrary to that section 50(b) supra.

[22] Also, there is nothing annexed to the founding affidavit indicating that the applicant has indeed been sentenced to any term of imprisonment after the main case was finally prosecuted. The attached original record of the Court a quo only indicates that, counsel for the applicant last appeared in Court before the first respondent on the 23rd March 2021 when he was informed the Court a quo that he would “lodge reapplication for bail as new circumstances have arisen”.

[23] However, and for not clear reasons, in her certificate of urgency filed of record, Adv. Pulane Moyeye, a legal officer/counsel in the Legal Aid says that the accused is already serving “a sentence in the Mohale’s Hoek prison as a result of the 1st respondent’s erroneous ruling”. This is not at all supported by the record of proceedings which has been filed by the same counsel nor is this supported by a copy of the committal warrant. Nothing has been said as to the length of term of imprisonment imposed upon the applicant.

[24] Also, it is alleged that one of the reasons why this application is urgent, is because the applicant “is also seriously ill and needs urgent medical attention that cannot be afforded to him by the prison authorities”. However, all the copies which are unmarked but are

annexed to the applicant's founding affidavit were issued in the year 2015, which is a period of four years before the applicant was arrested in the year 2019.

[25] The relevance of this outdated copies indicating the medical history of the applicant has not been explained in the founding affidavit. This is yet another attempt by the applicant to persuade this Court to have him released on bail before his case of having contravened section 3 (2) of the Sexual Offence Act (supra) has been prosecuted to finality.

[26] It is trite that in applications of this nature "it is necessary to strike a balance as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice". Refer to case of **S v. Essack, 1965 (2) S.A. 161.**

[27] In the instant application, the main trial against the applicant has not at all been prosecuted for the reasons alluded to above.

[28] Effectively, there is no judgment which this Court can stay because the main trial has not yet been prosecuted. It has already been indicated above that counsel for the applicant has rushed to this Court as he has done whilst on the other hand he has been recorded as having expressed an intention to reapply for the release of the applicant on bail for reasons therein shown on the minutes of the Court a quo dated 16th March 2021.

[29] The net effect of that conduct of the applicant's counsel, presumably acting on the instructions of his client, is to stop midway any prosecution of the main case whilst awaiting the outcome of the review application, because the original record of the proceedings in the Court a quo has been dispatched to the High Court.

[30] This amounts to an abuse of Court processes and a piecemeal prosecution of a criminal case. This Court frowns upon such behaviour. This application has no merit and it is accordingly dismissed.

[31] It is accordingly ordered that the Registrar of this Court should ensure that this order and the original record are send back to the Court a quo for the crown to urgently facilitate the prosecution of the main trial.

M. Mahase

Judge of the High Court

For the Applicant: Advs. Mokhachane and Moyeye

For the Respondents: No appearance