

IN THE HIGH COURT OF LESOTHO

In the appeal of :

MOKONE NKHEEA Applicant

v

R E X Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M. P. Mofokeng  
on the 21st day of November, 1983

The application for condonation of late noting of an appeal was filed in this Court on 12th day of October, 1983. It was then set down for hearing on the 17th October 1983. On that day it was apparently postponed to the 24th October 1983. It is not recorded on the file as to who requested such a postponement. On the 24th October, 1983, Advocates Mlonzi and Peete appeared for the Applicant and Respondent respectively before the Chief Justice. It is recorded on the file on that day that the papers were "insufficient to determine whether an application should be granted". The application was then postponed to the 31st October 1983 to "enable Mr. Mlonzi to file new adequate papers." On the 31st October 1983 Mr. Mlonzi requested that the application (original) be postponed sine die.

/An application

An application (undated) for condonation of late noting of appeal was filed of record on the 8th November 1983 and is set down for hearing for the 21st November 1983 in "respect of criminal case No. 94/83 held at Thaba Tseka's Magistrate Court on the 11th August 1983." However, a copy of the record of the proceedings now enclosed in the file before me, relates to "case no 112/1983." The previous application related to that case whereas the present application relates to an entirely different case. However, it shall be assumed that the present application is a revival of the one which was postponed sine die.

The application should have been made on petition. (Selebalo & Another v Rex, 1967-70 L.L.R. 101 at 102B).

Attached to the affidavit of the applicant are his reasons for appeal. It is not necessary for me to comment thereon in detail except to draw attention to a decision of this Court in the case of Mokheche v Rex, 1980(1) L.L.R. 139 at 140 where it was held that a ground of appeal such as "the conviction is against the evidence and weight of the evidence" is not valid because it does not sufficiently specify the issues of law or fact or of both which are being challenged. It does not also comply with the rules of the Subordinate Court Rules which require that there must be a written statement setting out clearly and specifically the grounds on

/which

which the appeal is based and that such a statement shall be lodged with the clerk of the Subordinate Court .

It is therefore imperative that the papers are properly and adequately drawn before presentation to the Court.

I have quickly perused the record of the trial case. In my view quite a number of the allegations made by the applicant in his affidavit would seem to hold water. Another Court may easily come to an entirely different conclusion than that arrived at by the learned magistrate. In other words, there are prospects of success in the appeal. It would appear, prima facie, that inadmissible evidence was incorrectly received on numerous occasions. It is a pity, and such a waste of time, that this Court is only asked to consider the question of whether or not to grant the application sought and not go straight away into the merits of the appeal itself. Many months will, no doubt, go by before the appeal proper is heard and disposed of. In any event, the learned magistrate still has to comply with the Rules of the Subordinate Court.

The reasons for the applicant's delay have been adequately explained especially in his circumstances. His affidavit, moreover, did not stand alone. It is supported. On the other hand there is no opposing affidavit from the Respondent.

/For the

For the above mentioned reasons the application for late noting of an appeal is granted.

Mr. Tsotsi makes an application for bail in terms of the provisions of Section 109 of C. P. & E Act 1981 which reads:

" The High Court may, at any stage of any proceedings taken in any Court in respect of an offence admit the accused to bail."

If I understood him properly, he bases his application on the following grounds:

- (a) It is the first time a bail application is made in this matter.
- (b) The length of time that will elapse between now and the actual hearing of the appeal especially if the applicant turns out to be successful. The applicant will have been greatly prejudiced.
- (c) There are special circumstances present here. The trial was heard before the Thaba-Tseka subordinate court which is deep in the mountains and it will necessitate a long journey by a vehicle or travelling by air, all of which will be very costly to the applicant.

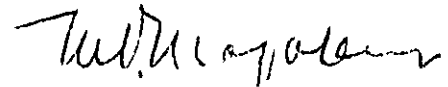
There is no doubt in my mind that the High Court possesses inherent jurisdiction to allow bail in all cases in which it has not been excluded by law. However, as rightly submitted by counsel for the applicant, the application must be made to it in the first instance, and not to have been made before. The court quite appreciates the special circumstances of this case. But for these circumstances, it must

/be clearly

be clearly understood that if a matter is already before a magistrate the remedies under section 106 of the C. P. & E. Act (supra) should first be exhausted before a High Court is approached under Section 109.

Bail is then granted to the applicant and certain conditions are also imposed.

The Crown does not oppose the granting of the application for bail and the conditions imposed thereon.



J U D G E  
21st November, 1983

For the Applicant : Mr. Tsotsi

For the Respondent: Mr. Pitso