

IN THE HIGH COURT OF LESOTHO

In the matter of:

KOLEKILE SIMON NGATWENI - Appellant

v

R E X - Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M. P. Mofokeng on
the 19th day of December, 1983

The proceedings before me are pursuant to section 108(a) of the Criminal Procedure and Evidence Act 1981 against the refusal by the Magistrate of the Subordinate Court, Maseru to release the appellant on bail pending his trial.

It would appear that on the 5th December, 1983 the appellant appeared before the Subordinate aforesaid charged with contravening Section 90(1) of the Road Traffic and Transport Act No.8 of 1981 in that he operated a motor vehicle (fully described in the charge-sheet) recklessly or negligently upon a public road and in the process collided with a pedestrian.

Appellant, personally applied for bail which was refused. It had been mentioned and it was not disputed that he was a foreigner. The Court was also
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informed that the pedestrian involved in the accident was in a critical condition. However, the applicant was advised by the learned presiding magistrate, to "renew his bail application" on 20th December 1983 to which date the matter was postponed. That date has not arrived.

On the 6th December 1983 i.e. the following day, Advocate Ramahlodi appeared in the same Court and made an application for bail. The advocate suggested a number of conditions to which the applicant could be ordered to adhere as also a surety and the amount payable. It was repeated that the appellant was a foreigner. The prosecution did not oppose the application. However, the learned magistrate regarded this application by advocate Ramahlodi as a direct challenge to her previous ruling because she simply gave this ruling:

" The defence must note an appeal if it feels aggrieved about the order made on 5th December, 1983 regarding the bail application."

It is this ruling which has given rise to the present appeal.

An accused is entitled to make application for bail until sentence is pronounced. In fact the learned magistrate recognised this fundamental right of an accused person, by advising him to renew his application for bail at a later stage. What happened when advocate Ramahlodi appeared in Court the following day on behalf of the accused was merely to exercise that right and not to challenge the ruling that the learned magistrate made which
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was not an absolute refusal and of which the appellant was aggrieved and was therefore appealable in terms of section 108(a) of the Criminal Procedure & Evidence Act (supra). The appeal is against his second refusal.

It does not seem to me that the learned magistrate inquired what conditions could be imposed to make certain that the appellant would consider it more advantageous to himself to stand his trial rather than to abscond and estreat bail. (See R v du Plessis, 1957(4) S.A. 463(W). On the other hand there is fear that there is a danger of the accused absconding to a neighbouring country with which there exists no extradition treaty and in such circumstances the application for bail will be refused. (R v Grigoriou, 1953(1) S.A. 479(T)). The fact that the prosecution did not oppose the application is neither here nor there as it is the discretion of the presiding judicial officer which matters. It is the interest of justice and the liberty of the subject which are at stake and must be carefully balanced.

It is contended in the first ground of appeal that the learned magistrate erred in holding that the applicant is not a citizen of Lesotho. Well, this information came from the applicant himself that he was a foreigner. It thus became common cause.

It was also contended that the learned magistrate had erred in refusing bail because of the critical condition of the victim. It were far better if this information came to court by some formal way even if it is by an affidavit because such information may mean either liberation or incarceration. The learned magistrate upon

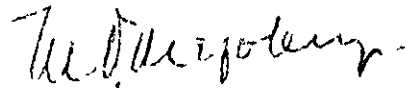
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receipt of such information is guided by the provision of section 103 of the Criminal Procedure and Evidence (supra). She, therefore, did not err in the application of that section.

The other grounds have been dealt with in the cause of the judgment.

The appellant did not satisfy the Court a quo that if given bail he would return and stand his trial and not abscond and this fear was aggravated by the fact that the appellant is a foreigner who lives in the Republic of South Africa, a country with which there exists no extradition treaty. In the premises it has not been shown that the learned magistrate has exercised her discretion capriciously.

The appeal is dismissed.



J U D G E.

19th December, 1983.

For the Appellant : Adv. Ramahlodi
For the Respondent : Adv. Bosiu