CRI/APN/5/84

IN THE HIGH COURT OF LESOTHO

In the Application of :

BERNARD CHEMANE MAHASE Applicant

v

DIRECTOR OF PUBLIC PROSECUTIONS Respondent

J U D G M E N T

Delivered by the Hon. Acting Judge Mr. Justice J.L. Kheola on the 13th day of March, 1984

This is an application for bail pending the holding of a preparatory examination in which the applicant shall be facing a charge of double murder committed in the course of a robbery. In an application of this kind the onus of proof is on the applicant to prove on a balance of probabilities that his release on bail will not prejudice the interests of justice.

The applicant has filed an affidavit in which he says he shall not interfere with Crown witnesses, that he shall attend Court either in the conduct of a preparatory examination or for trial and he has also undertaken to comply with any conditions the Court may impose.

This application is strongly opposed by the Director of Public Prosecutions who has filed an affidavit in which he says that he has information that the applicant, if released on bail will interfere with witnesses. He furthermore believes that even if released subject to

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conditions not to interfere with Crown witnesses the gravity of the charge will certainly motivate the applicant to contact these witnesses either directly or indirectly so as to influence them not to testify.

His second fear is that in his view the likelihood of conviction is very great and this factor could influence the applicant to abscond in violation of any bail conditions imposed by the Court.

The investigation officer, Sgt. Khosi Justinus Mara has also filed an opposing affidavit in which he says that his further investigations had revealed that it would be unsafe and inappropriate to grant bail to the applicant because he is likely to abscond to the Republic of South Africa like his other companions who are being sought by the police. Further information revealed that the applicant is a wanted person in connection with various robberies committed in and around Maseru.

The third ground advanced by Sgt. Mara is that the gun used in the commission of the double murder has not been found.

The applicant has filed a replying affidavit in which he denies that he is likely to abscond to the Republic of South Africa and says that he does not know who his aforesaid companions are who are said to have absconded to the Republic of South Africa. If their names had been disclosed he could be in a position to reply to respondent's allegations.

He denies that he was involved in the commission of the double murder. He undertakes not to interfere with

/Crown

Crown witnesses. He says that he believes that the case for the Crown will depend on the evidence of one witness who half-heartedly identified him in an identification parade. He submits that it is likely that he may be acquitted.

I must confess that I do not understand the approach adopted by the Crown in opposing the grant of bail in this application. The only thing that the investigating officer has disclosed to the Court is that the applicant will abscond to the Republic of South Africa "like his companions who are being sought by the police". He has decided not to disclose the names of the so-called companions of the applicant and deliberately made it impossible for the applicant to refute his allegations. It was the duty of Sgt. Mara to disclose the names of the so-called companions of the applicant because he knew very well that the applicant would file a replying affidavit and he must have known that the Court would also expect him to place before it evidence that would enable it to come to a fair decision. In his replying affidavit the applicant says that he has no knowledge of the so-called companions of his and that if their names had been disclosed he would reply. Miss Moruthoane (for the Crown) argued this application before me after she had seen the replying affidavit of the applicant but she still decided not to reveal who the companions of the applicant were. I come to the conclusion that the Crown has failed to prove the existence and whereabouts of the companions.

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The second ground raised by Sgt. Mara is that the applicant is wanted by the police in connection with a series of robberies committed in and around Maseru. In my view this is entirely irrelevant and I see no reason why it was mentioned in the affidavit. If the Crown has sufficient evidence that the applicant was involved in those robberies they shall act as soon as the applicant is formally charged and brought before a Court of law for remand.

The third ground raised by the investigating officer is that the gun used in the double murder has not been recovered. He has not shown how the detention of the applicant is going to help in the search of the weapon used in the robbery. The applicant has been in prison since the 9th November, 1983 - a period of about 4 months - but the police have made no headway to recover the gun. I do not think that any further detention of the applicant is going to help them. (See Jessy K. Ramakatane v Rex - CRI/APN/40/79 dated the 27th September, 1979 unreported).

I now come to the opposition by the Director of Public Prosecutions. It has been pointed out in a number of cases that the Court must be careful not lightly to override the opinion of the Director of Public Prosecutions (see a resume of these cases in Jessy K. Ramakatane v Rex, supra). The apprehension expressed by the learned Director of Public Prosecutions is that because of the gravity of

/the offence

the offence the applicant is likely to abscond and also to tamper with Crown witnesses. I must point out that in numerous cases before this Court where people were facing murder charges applications for bail were granted because the Court has the power to impose certain conditions which tend to make it difficult for the accused person to abscond or tamper with witnesses e.g. imposition of a substantial amount deposit, the surrender of travel documents and daily reports at the Charge Office.

The Director of Public Prosecutions alleges that there is a great likelihood of conviction in this case. It may be that the evidence in the police docket before the Director of Public Prosecutions shows that the likelihood of conviction is substantial but the Crown has decided not to disclose any evidence on which they base their belief that the likelihood of conviction is substantial. The Court is in complete darkness as to what kind of evidence the Crown has against the applicant. On the other hand the applicant has disclosed that as far as he can see the Crown's case is going to be based on the evidence of a single witness who half-heartedly identified him in an identification parade. This allegation by the applicant was not refuted by the Crown. In considering the application I have to look at the circumstances of the case to see whether the applicant expects, or ought to expect conviction. On the evidence disclosed by the applicant to the Court it is clear that he does not expect conviction and for that reason it is unlikely that he will abscond or tamper with Crown witnesses.

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I must emphasise that an application for bail is not a trial in which the Crown is expected to put before the Court all the evidence it has against the accused person. The Crown is expected to give a summary of the evidence it has in the police docket as a basis on which the Court can base its decision. (See Leibman v Attorney-General 1950 (I) S.A. 607). In the present case there is practically no evidence on which the Court is expected to decide whether there is a substantial likelihood of conviction.

After thoroughly considering the affidavits of the Director of Public Prosecutions and the investigating officer I feel that not enough evidence has been disclosed to the Court in order to establish a reasonable likelihood that the interests of justice are going to be prejudiced if the applicant is released on bail.

The application is granted on the following conditions

(a) The applicant shall deposit with the Registrar the sum of R200;

(b) He shall report himself at the Maseru Central Charge Office every day between the hours of 8 a.m. and 1 p.m.; and

(c) He shall not tamper with Crown witnesses.

J. H. Kheola.
ACTING JUDGE
13th March, 1984

For the Applicant : Mr. Matsau
For the Respondent: Miss Moruthoane