CRI/APN/151/86

IN THE HIGH COURT OF LESOTHO

In the matter of:

PHIRI MOHOLISA	1st Applicant
MPHO MOHOLISA	2nd Applicant
vs	
REX	Respondent

J U D G M E N T

Delivered by the Honourable Acting Judge, Mr. Justice M.L. Lehohla, on the 4th day of August, 1986.

This is a bail application brought on notice before this Court. In their founding affidavits the two applicants aver that they have been kept in custody since 6th June, 1986. Their arrest followed an allegation of armed robbery committed against the Metro in Butha Buthe.

Both applicants are Lesotho citizens. Each swears that he is the sole breadwinner in his household. They are both married. Applicant one avers that he has three dependants. Applicant two avers that he has two dependants. Applicants are both brothers aged 27 and 24 respectively.

The Crown opposes the bail application and has relied on the affidavit of the investigating officer Detective Trooper Mofilikoane in support of its opposition.

The grounds advanced by the deponent for his opposition are that evidence at the trial will reveal the

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complicity of the applicants in the commission of robbery with which they are charged.

Further that three fire arms were used in the robbery and only one has been recovered, thanks to the pointing out of that one by Applicant one, and that the amount involved is substantial footing up to M14,883.13 no portion of which has been recovered to date. The deponent has further indicated that an amount of about M2,000 was deposited in Applicant 1's **pass** book on the day of the robbery. It was further deponed that as potential Crown witnesses reside at Hlotse some fear existed that applicants if released would interfere with Crown witnesses.

It is further averred that while Applicant one is facing a case of robbery in Leribe Subordinate Court Applicant two has laid claim to a Toyota vehicle presently a subject of police investigations for theft.

The deponent verily believes that if released applicants would not only interfere with Crown witnesses but are likely to abscond and thus evade trial.

In argument Mr. Ramodibeli for the applicants submitted well thought out reasons in support of the release of applicants on bail. He referred me to S vs. Bennett 1976 (3) SA 652 at 655-6. In that case Vos,J. strongly stated that

> "In application for bail the State cannot arrest in order to complete the investigation

He further expressed the view that in such applications the

> "Attorney-General's ipse dixit cannot be substituted for the Court's discretion."

Relying for the authority of S. vs Bennet supra Mr. Ramodibeli submitted that it is not enough to make a general statement that applicants would abscond without the Crown laying solid foundation on the reasonable possibility that applicants would abscond.

The reasonable possibility to abscond as amplified in the text laid down by Vos, J. relying on R. vs Kok 1922 NPD 267 at 269 consists in evidence of prior attempt by accused to abscond. It seems also that fear of interference with Crown witnesses would be well founded if there is proof of prior attempt to interfere with such witnesses according to the views expressed in the two cases stated above. It has been urged on me that even if there is a risk that the Court takes in releasing an accused on bail the Court is at large to impose conditions to meet such risk. Seola vs D.P.P. 1981 LL.R 277 at 281. While I most heartily endorse the spirit on which these views are based and lengths to which Courts of law are to go in pursuit of jealously guarding the liberty of the subject, it is also incumbent upon me to consider, weigh and evaluate grounds advanced by the Crown in opposing the application for bail.

Apart from the arguments advanced in favour of granting bail to the accused, counsel for applicants has laid great store on the fact that the Director of Public Prosecutions

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has not filed any affidavit by way of registering his own opposition to the application. Furthermore he submitted that the charge preferred against the accused being robbery is triable before the subordinate courts. The mere fact that bail application relating to what is termed armed robbery is restricted to the High Court should not in any way constrict the exercise of the Court's discretion to grant bail, as indeed even in more serious crimes of murder the Court has always been granting bail.

In reply Mr. Lenono for the Crown submitted that the fact that D.P.P. has not submitted opposing affidavit should not be weighed against the Crown.

Relying on the authority of Makalo Moletsane vs. R 1974-75 LL. R at 272 Mr. Lenono argued that release on bail with regard to categories of offences not bailable before magistrates' courts is an exception rather than the rule. Section 88 of the CP & E and as amended in terms of Act 33/84 in Gazette No.42/84. It is in this regard that the onus is on the accused to show why discretion should be exercised in his favour, so the argument went on.

Regarding the argument based on the fact that the trial of this matter falls within the ambit of magistrate's court, Mr. Lenono while not denying that fact stated that there is high probability that after all this may be tried by the High Court on account of the fact that fire arms were used and substantial amount of money stolen.

Mr. Ramodibeli sought to indicate that the Makalo Moletsane case supra could not apply in the present matter because it was not having to do with robbery but High Treason. Unlike treason, robbery is triable in the subordinate court. Moreover nothing in the papers has been shown to suggest that the robbery referred to in this matter is of aggravated form.

My view of the matter is that on a proper consideration of the facts placed before it, although the absence of the DPP's opposing affidavit in an application opposed by the Crown is not without significance it should be remembered that in order for him to submit his own statement he relies on the statements of police and investigating officers. Nothing prevents him from handing down his powers to make representations before Court to representatives of the Crown besides himself.

Having said so much it remains to point out that as was said in Moletsane vs Rex supra at 274

> "the Court relies upon the police and counsel for the Crown not to make statements without a full sense of responsibility."

The applicants in this case have been in custody for well nigh two months. In the Makalo Moletsane case at the time of their application, the accused had spent 14 months in custody. Indeed any length of time spent in jail is a long time, yet one's sense of responsibility compels

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that practical obstacles to the Crown's efforts to bring the matter to trial as quickly as possible should not be either overlooked or taken lightly.

In McCarthy vs Rex 1906 T.S. 657 at 659, Innes C.J. said:

> The Court "is always desirous that an accused person should be allowed bail if it is clear that the interests of justice will not be prejudiced thereby, more particularly if it thinks upon the facts before it that he will appear to stand his trial in due course."

In S. vs. Fourie 1973(1)S.A. 100 at 101 Miller J. pointed out that

> "It is a fundamental requirement of the proper administration of justice that an accused person stand trial and if there is any cognizable indication that he will not stand trial if released from custody, the Court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence."

While Vos J. in the case referred to earlier boldly sets out factors which can justify refusal of bail as prior attempts by accused to either abscond or interfere with Crown witnesses Miller J. in S vs Fourie contents himself with the existence of cognizable indication of these factors as justifying refusal to grant bail.

In my view the existence of such indications requires proof. If no proof is established of their existence the

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Court remains with no other alternative but to grant bail.

In cases where bail was refused on the grounds that accused might flee I have found that usually, though not always, such cases are of a political nature where the Attorney General or the D.P .P. has in his possession information that he is disinclined to furnish to the Court on grounds of either State security or public safety. S. vs. MHLAWLI & OTHERS 1963(3) S.A. 795 and MAKALO MOLETSANE vs R. 1974-75 LLR 272.

In S vs Mhlawli & Others supra in refusing bail, the Court took into account an additional factor namely that

> "where the inducement to flee is great ..... and where no extradition from the neighbouring protectorate would be possible the Court will not readily grant bail if the Attorney-General opposes the application."

I have already indicated at least by implication that no question of either public safety or national security is involved or has been raised as likely to be endangered by applicants' release in the present case. The body of authority I have considered in preparing my judgment in this matter firmly shows that in the absence of proof that accused has previously attempted to commit acts disentitling him to the grant of bail then the Court should not refuse him bail.

Even in S vs. HLONGWA 1979(4)S.A. where as in the instant case the Court was referred to the investigating officer's opinion, there the Court having considered that, depending on the circumstances, the Court may rely on the

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investigating officer's opinion that the accused will interfere with State witnesses if released on bail and refuse bail even though his opinion is unsupported by direct evidence yet Howard J. at Page 114 in considering grounds for refusal to grant bail brought attention to the following:-

> if an accused released on bail
>
> (a) fails to appear at the place and on that date and the time
>
> (b) (i) appointed for his trial or
> (ii) to which proceedings relating to the offence in respect of which the accused is released on bail are adjourned, or
>
> (b) fails to remain in attendance at such trial or at such proceedings.

Although the above remarks by Howard J. seem to be begging the question they cannot per se be ignored if only to the extent that they point to the central theme of this judgment namely that unless accused has been proved to have committed a positive act which is at variance with his release on bail, he should be granted bail.

In the instant case as pointed above, the accused are citizens of Lesotho and do have families of which they are sole supporters in respect of each. Even if there can be risk of either of them or both committing acts confirming the Crown's fears and apprehensions, in S vs. Bennet supra Vos J. is adamant that it is up to the Court to impose ..

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conditions which should meet such risk. The fact that one of the weapons was discovered through Applicant one's agency cannot count against him but should rather count in his favour. That he is facing a robbery charge in Leribe is discounted by authorities cited. As for Applicant two, the fact that he lays claim to a Toyota vehicle, a subject of theft under police investigation, is too little to the point to be worthy of consideration.

That no amount of M14,883.13 has been recovered and that M2,000.00 was deposited in Applicant 1's pass book are factors which should be taken into account by the Court charged with the responsibility of determining accused's guilt in relation to the facts which will arise as evidence/ at the trial in due course. The main test to be applied in considering whether bail is to be granted or not, it seems to me, is whether accused will stand trial not whether at the end of the day he will be convicted. Vos J. in the case quoted above has rejected outright the submission that accused be kept in jail in order to afford the Crown an opprotunity to complete investigations. That the accused belong to the same village as the Crown witnesses cannot serve as a ground for refusing bail without proof that they will, and such proof can only have foundation on the basis that he has attempted interference with Crown witnesses. It does not sound proper that having refused to grant bail the Court should turn round and say should accused apply again his or her application may perhaps be viewed in a better light than previously. Bail should either be granted or refused. I am informed that applicants stay near the Hlotse

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Police Station.

I am not unmindful of the strong submissions made by the Crown in this application. The effect of the cognizance I give to them will be borne out in the next paragraph below.

Consequently both applicants are admitted to bail on the following conditions:

1. Payment of M300 cash deposit in respect of each applicant.

2. Production of one surety (acceptable to the Registrar) by each applicant binding himself in the sum of M300 (not cash) per surity.

3. Surrender of each his passport to the Hlotse Police Station.

4. Report by each applicant every day at Hlotse Police Station between 6 a.m. and 6 p.m.

5. Non-interference with Crown witnesses.

6. Attendance of remands and finally

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standing trial.

M.L. LEHOHLA

A C T I N G J U D G E

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For the Applicant: Mr. Ramodibeli

For the Crown : Mr. Lenono