CRI/APN/108/86

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

PHATELA MOSOTHOANE — 1st Appellant
LEKENA MATHIBELA — 2nd Appellant

and

REX

JUDGMENT

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

This is an application for bail made by the two accused charged with murder.

The application is brought on notice of motion. Service of the notice was effected on the Director of Public Prosecutions' office on 14th May, 1986, according to date stamp of the latter reflected on the papers. The matter was initially set down for 19th May, 1986. The Crown opposes this application.

While it would have been desirable to have had this matter resolved long before today it appears two factors have operated against such an eventuality, i.e.

(a) first the file placed before me is styled "dummy" - a nomenclature that denotes all the unsavoury

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consequences greatly demurred at in Rex vs Sechaba Sello (unreported) Review Order 15/86 at pages 8 - 10 relating to the proper upkeep of the records. Small wonder that bar the 2nd Applicant's replying affidavit all documents contained in my file are photocopies;

(b) secondly, due process. As indicated in (a) above, mine is a dummy file. Consequently as it bears no minutes by any Judge who dealt with the matter I had to rely on the information provided and confirmed by applicants' and respondent's counsel respectively that my brother Levy A.J. made an order on 8-7-86 that evidence be given on oath by the Crown in support of its opposition to this application.

Accordingly the first deponent Detective Sgnt. Jonase, under cross examination, swore that he had filed opposing affidavit in this matter in his capacity as an investigating officer; that he was aware of the post mortem report in it and that no preparatory examination has been held. He was neutral as to whether the applicants knew the Crown witnesses. He did not know if the Court is in a position to impose suitable conditions to allay his fears that applicants would either abscond or interfere with Crown witnesses in the event that the former are granted bail. He stated that he was not aware if the applicants ever attempted to either abscond or interfere with Crown witnesses. He further averred that he didn't

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know if, in Musetsi Thebe charged with and convicted of ritual murder, extenuating circumstances were established at least on appeal.

Deponent further averred that he would not think applicants would have spent a year in detention by 8th September, 1986, and maintained they were arrested in October, 1985. It was put to him that in his opposing affidavit he had not denied the fact that by 8th September they would have spent a year in custody. The deponent said he thought he had.

However, on the papers before me although in the applicants' affidavits, it was not so pointedly stated or stated in terms similar to their counsel's question nowhere has the deponent denied in his affidavit Applicant 1's averment ad Para.9 that

> "I together with the 2nd Applicant herein were arrested on or about 8th September, 1985, and have been in custody ever since without any progress to our case."

Applicant 2's averment in Para.4 reads

> "I am presently being kept in custody at Maseru Central Prison since 8-9-85 in connection with the alleged death of one Mats'eliso Thamae."

Nowhere was the crucial question of the date 8-9-85 denoting applicants' start of detention denied.

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Suffice it to say that in its opposition the Crown has relied on this deponent's affidavit and oral evidence given under cross-examination and that of Mr. Semapo Nkutu PEETE, the Director of Public Prosecutions.

In the papers the first deponent avers that applicants are charged with murder. He avers that the purpose for the killing was ritual.

He further stated that applicants committed the said crime together with four others who are at large except one of them who committed suicide after escaping from police custody.

Lastly, deponent asserts his opposition to the application on the grounds that the charge they are facing being ritual murder is very grave, and that in consequence of the reliable information he has applicants had clandestine contacts or meetings with those still at large prior to applicants' arrest, and that now that applicants are in custody witnesses who had otherwise been withholding information are now letting it spill as it were and further that as there are accomplices originating from the same village as that of applicants, the latter are more than likely to either abscond or definitely interfere with potential Crown witnesses.

The Director of Public Prosectutions' affidavit if any thing deriving from that of 1st deponent reiterates the averments therein and confirms the fears set out by the

first deponent.

In reply to the question put by the Court whether deponent would have known if applicants either tried to abscond or interfere with Crown witnesses, he said he would have.

Learned counsel for applicants submitted in argument that applicants have established that this is a fit case where bail can be granted. He pointed out that the investigating officer has failed to establish positive acts on which his fears are based.

Relying on S vs. Bennett 1976(3) 652 at 655 he pointed out that reasonable possibility that applicants will not may interfere with Crown witnesses must be shown before applicants can be denied bail. He further submitted that the Court must strike a balance between interests of justice and liberty of the subject.

The Court was referred to SOOLA vs. Rex 1981(2) LL.R Page 277 at 281 where in granting opposed bail to applicant facing a murder charge Mofokeng J. pointed out that

> "The Court will always grant bail where possible and lean in favour of and not against the liberty of the subject provided the interests of justice are not thereby prejudiced. The Court's duty is to balance these interests. Again the presumption of innocence operates in favour of the person seeking bail even where there is a strong prima facie case against him."

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Submitting that mruder is always serious and that courts are ever alive to cases of this nature, applicants' counsel referred me to 'Musetsi Thebe vs R. C. of A. (CRI) 3/84 (unreproted) where appellant was granted bail notwithstanding the fact that he was facing a serious murder charge in consequence of which extenuating circumstances were found to exist only at the Court of Appeal stage with one of the members of the Court dissenting on the issue.

Even before the ink had had sufficient time to dry on it, judgment in CRI/APN/151/86 PHIRI MOHOLISA & ANOTHER vs REX (unreproted) was referred to me. In that case, the applicants were granted bail in the face of strong opposition by the Crown. At Page 9 of that judgment in tackling the submission similar to the one in the instant case that because applicants belong to the same village as the Crown witnesses and therefore applicants are likely to interfere with the latter, the Court said

> "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 was further said at Page 7

> "The body of authority ..... 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."

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Mr. Thetsane for the Respondent referred me to KONG vs ATTORNEY-GENERAL 1915 T.P.D. 221 at 224 where De Villiers, J.P. had this to say:

> "The Court is always desirous that an accused 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."

Basing its argument on the foregoing quotation, the Crown submitted that owing to the nature and gravity of the offence with which applicants are charged they are unlikely to stand trial if released on bail and that there is real possibility of their interfering with State witnesses.

Arguing that each case must stand on its own merits, the Crown submitted that the Court should determine whether or not any reason exists precluding applicants from bail and referred to a passage in KONING vs ATTORNEY-GENERAL (supra) where Wessels J. said:

> "..... in order to determine this the Court must ascertain, as far as it can from the circumstances, what the penalty is likely to be which will be imposed on the applicant. If the penalty is likely to be a severe term of imprisonment, then the courts ought not to grant bail."

It was submitted that probabilities are that if applicants are convicted no extenuating cirumstances will be found owing to the nature of the crime charged.

This submission seems to be at variance with the observation made in MOHOLISA & ANOTHER vs REX supra at Page 9 to the effect that

> "The main test to be applied ..... is whether accused will stand trial not whether at the end of the day he will be convicted."

In CRI/APN/125/81 MANAMOLELA & 11 OTHERS vs REX Rooney J. pointed out that:

> "in exercising its discretion in an application for bail, the Court has to balance the presumption that the applicants are innocent against the interests of justice."

He regarded as worthy of consideration two factors which he set out as follows:-

(a) the gravity of the charge and the possible consequences in the event of conviction;

(b) the nature of the allegation itself.

The Learned Judge summed up his observations as follows:

> "People who are suspected of participating in murders of this nature are not unnaturally regarded with suspicion and fear. If such persons are permitted to move freely among the public while the truth of the allegations against them have not been resolved they may be in a position to exercise powerful influence over potential witnesses by their mere presence."

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Needless to state, the bail application in MOHOLISA & ANOTHER vs REX supra concerned people charged with robbery and not murder.

While taking note of the fact that in the celebrated phrase of Vos, J. in S vs. Bennett supra "Attorney-General's ipse dixit cannot be substituted for the Court's discretion", it is not without significance that the Director of Public Prosecutions has lent his hand in opposing the instant bail application. This factor is borne out in the ruling expressed in Moletsane vs Rex 1974-75 LLR at 274 where Cotran C.J. as he then was said:

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

It is in this connection that I think the objection by the Director of Public Prosecutions must be carefully considered and not lightly discarded. He is a responsible officer charged with onerous duties. I have weighed carefully his averments. But, as was said by Miller J. in S vs. Essack 1965(2) SA 161:

> "this is not to say that whenever the Attorney-General (Director of Public Prosecutions in this case) opposes such an application the Court will refuse to allow bail, for opposition might often be justifiably offered out of considerations of caution."

The Crown has sought to show by implication that because applicants have had secret meetings with those who

are still at large and unlikely to come and face charges they will likewise seek this means to effect their escape. Miller, J. succinctly rams the argument home by saying:

> "It seems to me ..... that before it can be said that there is any likelihood of justice being frustrated through an accused person resorting to the known devices to evade standing trial, there should be some evidence or some indication which touches the applicant personally in regard to such likelihood. General observations applicable to a certain group of persons are undoubtedly relevant and entitled to some weight if the applicant is a member of that group, but they can never be conclusive in themvelves. .... if the offence is of the type which ..... leads to the accused effecting his escape through familiar and well known routes and if it appears ..... that his association with others who have effected their escape when similarly charged is sufficiently intimate to show a probability that he would follow suit, that might be sufficient ground for refusing bail." (my underlining)

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

> "..... if there is any cognizable indications 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."

Diemont J. in S. vs. Mhlawli & Others 1963(3) SA said:

> "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 (in this case the DPP) opposes the application."

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I have considered the Thebe matter referred to above and found that the question of his youth played an important role in his being granted bail and finally being lucky to have had the majority in the Court of Appeal state that extenuating circumstances existed in his case.

The Crown has done all at its disposal to ensure that the trial be brought quickly. The fact that D.P.P. has ordered a summary trial bespeaks his endeavour to let applicants' matter supercede other pre-existing matters on the roll all in the name of ensuring a post haste dispatch of their trial.

There's no doubt in my mind that the authorities and principles relied on by Mr. Ramodibedi are very strong and in an appropriate case should carry the day; but the countervailing circumstances advanced by the Crown seem to me to have placed applicants not in the right ball park.

Accordingly I have decided that in exercising my discretion I should not admit applicants to bail pending their trial.

M.L. LEHOHLA
ACTING JUDGE

10.8.86

For Appellant: Mr. Ramodibedi

For Crown : Mr. Thetsane