

IN THE HIGH COURT OF LESOTHO

In the matter between:-

TSEKO KHASAKE

Applicant

and

ATTORNEY GENERAL
OFFICER COMMANDING C.I.D. (MOHALE'S HOEK)

1st Respondent
2nd Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 11th day of September, 1989

This is an application for an order directing the respondents to release forthwith to the applicant a certain motor vehicle with Reg. No. F 1283, the property of the applicant; and directing the respondents to pay costs of this application.

It is common cause that on the 3rd January, 1988 the applicant's vehicle mentioned above was seized by the Mohale's Hoek C.I.D. police on suspicion or allegation that the applicant's brother one Molefi Khasake used the same vehicle to murder one Jankie Sefuthi with it. The applicant and his said younger brother are jointly charged with the murder of the said Jankie Sefuthi and one Joseph Sefuthi.

The respondents are refusing to release the said vehicle on the ground that it is going to be used as an exhibit in the double murder trial the applicant and his brother are facing.

It is the applicant's contention that by refusing to release the vehicle the respondents are acting unreasonably inasmuch as they can easily take photographs of the said vehicle and release it to him. He is running a cafe at his home and is using that vehicle in connection with the said business. His family and that of his younger brother rely wholly on the said business as a means of their livelihood. The applicant avers that they are likely to suffer irreparable harm by the continued detention of his motor vehicle.

The first respondent has filed an affidavit in which he avers that the grant of the order sought by the applicant would seriously hamper the administration of criminal justice because the article he asks this Court to release to him will be used in evidence at the trial of the applicant and his brother on two counts of murder. He submits further that the motor vehicle in question is being retained lawfully in police custody in terms of section 55 of the Criminal Procedure and Evidence Act 1981.

Mr. Leaba Thetsane is the Crown Counsel to whom the prosecution of the criminal trial against the applicant and his brother has been assigned. He avers that he has perused the docket relating to this matter and has formed the opinion that there is a prima facie against the said applicant's brother on both counts of murder and

against the applicant on the count relating to the unlawful killing of the deceased Joseph Sefuthi.

He submits further that the evidence discloses that the motor vehicle in question was used by the applicant's brother, Molefi Khasake, in the alleged murder of Jankie Sefuthi and that it was also used to inflict certain bodily injuries on the deceased Joseph Sefuthi, before both the applicant and Molefi Khasake finished him off. The motor vehicle in question was used as a weapon to inflict grievous bodily injuries on the two deceased persons and that it is going to be used in the trial of the applicant and his brother.

The law on this subject is clearly set out in our Criminal Procedure and Evidence Act 1984. Mr. Pheko, attorney for the applicant, conceded that as far as the law is concerned there is no doubt that the 2nd respondent is keeping the vehicle lawfully. His contention is that the 2nd respondent is being unreasonable by refusing to take the photographs of the vehicle and to release it to the applicant. The applicant is suffering extreme hardship because his cafe business cannot be operated without the vehicle. He submitted that on the principles of equity this Court must grant the application.

Section 55 (1) and (2) read as follows:

- "(1) If Criminal proceedings are instituted in connection with any article referred to in section 52 (c) and such article is required at the trial for the purposes of evidence or for the purposes of an order of Court, the police official concerned shall, subject to the provisions of subsection (2), deliver such article to the Clerk of the Court where such Criminal proceedings are instituted or to the Registrar of the High Court, as the case may be.

- (2). If it is by reason of the nature, bulk or value of the article in question impracticable or undesirable that the article should be delivered to the Clerk of the Court in terms of Sub-section (1), the Clerk of the court may require the police official concerned to retain the article in police custody or in such other custody as may be determined in terms of section 52 (c)."

There is evidence before this Court that the 2nd respondent is keeping the said vehicle per instructions of the clerk of court of Mafeteng. Mr. Mohapi, counsel for the respondents has submitted that photographs of the vehicle in question are secondary evidence and that it would not be just to force the Prosecution to part with the vehicle because it is the best evidence they have. Section 17 of the Evidence in Civil Proceedings Proclamation No. 72 of 1930 reads as follows:

"Every party on whom in any case it shall be incumbent to prove any fact, matter or thing, shall be bound to give the best evidence of which from its nature such fact, matter or thing shall be capable; and no evidence as to any such fact, matter or thing shall be admissible in any case in which it was in the power of the party who proposes to give such evidence to produce, or cause to be produced, better evidence as to such fact, matter or thing, except by consent of the adverse party to the suit, or when such adverse party shall by law be precluded from disputing any such fact, matter or thing, by reason of any admission proved to have been made such party."

Be that as it may my difficulty is with regard to the order of disposal that the Court may be inclined to make at the end of the trial if the accused are convicted. In most criminal trials murder weapons are never returned to the accused person if he is found guilty. The usual disposal order is to order that the

weapon be destroyed or be forfeited to the State. Firearms are usually forfeited to the State. I do not know what the Court will do with the motor vehicle in question.

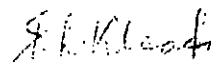
In a recent case of R. V. M. Ramarou CRI/T/24/87 (unreported) a motor car was used to murder one person and to cause serious bodily injuries to another. Photographs of the vehicle were taken and the vehicle was released to its owner who was not involved in the commission of the offence. In the present case the owner of the vehicle is involved in the commission of the offence according to the allegations by the respondents. I am of the opinion that it would be unwise to release the vehicle at this stage.

Regarding equity our law seems to be very clear as stated in the case of Lazarus v. Wessels, 1903 T.S. 509 where Sir James Rose-Innes is quoted as having said:

"The court cannot grant equitable relief, if by so doing it would be going contrary to a well-defined principle of the Roman-Dutch Law, or to some statutory provision."

I think in the present case the Court would be going contrary to the clear provisions of sections 52 and 55 of the Criminal Procedure and Evidence Act 1981 if it granted this application.

In the result the application is dismissed with costs.


J.L. KHEOLA

JUDGE

11th September, 1989.

For the Applicant - Mr. Pheko
For the Respondents - Mr. Mohapi.