CRI/APN/186/90
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IN THE HIGH COURT OF LESOTHO

In the matter between:-

KHANO NTENE — Applicant
MPALI-PALI LEROTHOLI — Applicant

and

R E X

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 12th day of July, 1990

This is an application for bail made by the applicants. They have filed affidavits in which they depose that they are prepared to stand trial. They allege that they know nothing about the robbery with which they are charged. The application is opposed by the learned Director of Public Prosecutions on the grounds that there is a likelihood that the applicants will interfere with Crown witnesses who are accomplices. Secondly, that investigations are not yet complete. Thirdly, that there is a likelihood that the applicants will abscond regard being had to the gravity of the offence with which they are charged.

At the hearing of this application, Mr. Mokhobo, Crown Counsel, virtually abandoned the first two grounds because there was altogether no evidence why the Crown alleged that it was

/2....

likely that the applicants would interfere with Crown witnesses. The offence with which the applicants are charged was committed on the 19th September, 1989 and the applicants were arrested in May, 1990. There was no evidence that during that long period before they were arrested they ever attempted to threaten or to influence witnesses in any way.

Regarding the allegation that the investigations were not yet complete, Mr. Nathane, Counsel for the applicants, pointed out that it is trite law that the liberty of a subject cannot be impaired simply because the police are not through with their investigations. He referred to the case of S. v. Bennett, 1976 (3) S.A. 652 at p. 655 where Vos, J. said:

> "In my view the State cannot merely arrest in order to complete the investigations. There must be a reasonable possibility that the accused will interfere with the investigations."

Mr. Mokhobo submitted that because of the gravity of the offence and the severe punishment the applicants are likely to abscond. I agree that in this country robbery has become a very serious offence because a minimum sentence of ten years' imprisonment is now prescribed by law. It has become almost as serious as murder with extenuating circumstances because in the latter people are often sentenced to imprisonment for a period of less than ten years.

In Kok v. Rex, 1927 N.P.D. 267 at p. 269 Tatham, J. said:-

"As was said in In re Robinson, 23 L.J. Q.B., 286, the test to govern the discretion of the Court is the probability of the prisoner's appearing to take his trial, and in applying that test the Court will not look to the character or behaviour of the prisoner at any particular time, but will be guided by the nature of the crime charged, the severity of the punishment which may be imposed, and the probability of a conviction."

Again in Ali Ahmed v. Atterney-General, 1921 T.P.D. 461 the headnote reads as follows:

"Section 109 of Act 31 of 1917 (similar to our section 109 of the Criminal Procedure and Evidence Act 1981) gives the Supreme Court jurisdiction to admit any accused to bail at any time. An accused charged with rape applied for bail before the preparatory examination had been commenced. The police authorities and the Attorney-General were opposed to the granting of bail on the grounds, inter alia, that it was not certain that the accused would stand his trial, that the accused was a man of means, which made his chances of escape the easier, and that as the penalty might possibly be death, no extradition could be obtained if the accused reached Portuguese territory. Held, that under the circumstances, bail should be refused."

In the instant case I have already agreed with the Crown that robbery is a very serious offence. The next question which I have to consider is the probability of a conviction. Because no preparatory examination has been held and I have no record of

the statements of witnesses. This makes my task very difficult because I shall have to rely on what the representative of the D.P.P. says about the kind of evidence they have. In his opposing affidavit Mr. Sakoane Peter Sakoane deposes that he is a Crown Counsel and as such a representative of the Crown in criminal matters. He confirms that the Crown has accomplice witnesses and that they are confident with that evidence the applicants will be convicted. I shall assume for the purposes of this application that Mr. Sakoane has made this statement with a full sense of responsibility and an objective assessment of the evidence the Crown has against the applicants.

As far as I am aware Lesotho has no extradition treaty with the Republic of South Africa. I have often pointed out that to cross the river which is the border between our two countries does not require a passport because this river can be crossed at any point without a boat as it has very little water during a greater part of the year. To walk from the Central Charge Office to the border can hardly take one more than thirty minutes, which means that even if the conditions on which applicants were released on bail were that they should surrender their passports to the police and report themsleves twice a day at the Central Charge Office, that would not in any way stop them from absconding if they so wished.

/5.....

In the circumstances I reluctantly refuse the application. I feel that the Crown has had a very long time to do their investigations and for that reason if within forty (40) days from the date of this judgment the Prosecution fails to commence the trial the applicants may renew this application.

J.L. KHEOLA
JUDGE

12th July, 1990.

For Applicants - Mr. Nathane

For Crown - Mr. Mokhobo