CRI/APN/323/90

IN THE HIGH COURT OF LESOTHO

In the Application of :

TEBELLO THABO TLEBERE Applicant

V

R E X Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 31st day of October, 1990.

The applicant seeks to be admitted to bail by this Court on conditions that it may deem suitable.

The charge sheet Annexure "A" sets out that the applicant is facing a charge of armed robbery committed around 22nd May, 1990 at Barclays Bank Mafeteng where by means of a fire-arm the applicant is alleged to have induced submission in several of the Bank employees with the result that the Bank lost a sum of M400,000.00 stolen from those employees through use of threats applied to subject them to violence.

It was argued on behalf of the applicant that it was not enough to urge the Court to refuse bail on the ground that the applicant might interfere with crown witnesses. It was urged that short of producing positive acts to demonstrate that the applicant would interfere with Crown witnesses the crown's submission that the applicant will in

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fact do so should be rejected.

It was further argued that the crown's apprehension based on grounds similar to the above that the applicant would abscond should not be entertained.

The applicant's counsel submitted further that gravity of the offence alleged to have been committed by the applicant is not a complete ground for refusal to admit him to bail.

Relying on CRI/APN/151/86 Moholisa & Another vs Rex (unreported) wherein S. vs Bennet 1976(3) 65 2 at 655-6 and R. vs Kok 1922 N P D 267 at 269 were cited with approval for the proposition that

> "reasonable possibility to abscond consists in evidence of prior attempt by the accused to abscond".

and further that

> "fear of interference with crown witnesses would be well founded if there is proof of prior attempt to interfere"

Mr. Malebanye for the applicant further urged that even if it can be shown that release of the applicant on bail entails a manifest risk such risk can be met by imposition of such conditions as the court is at large to deem suitable and lay down.

In the words of Elyan J. in Jack Mosiane and Others vs Regina H.C.T.L.R. 1961-62 page 25 at 27:-

> "The main consideration in deciding an application for bail .... is whether the grant of the application is likely to prejudice the ends of justice, and whether from the circumstances of the case, such as the nature of the charge and the severity of the possible sentence, an accused, if released, is likely to appear and stand his trial."

To my mind this is the main issue upon which the decision to either refuse or grant the application should be based.

On the undisputed facts before me the applicant faces a

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charge of armed robbery. By all manner of means a very serious crime regard being had to the fact that a fire-arm was used to effect the robbery. Apart from this it is a question of law thus allowing for no exercise of judicial discretion that should the applicant be convicted at his trial for the alleged offence no less than ten years' imprisonment shall be imposed without any option of a fine. This again calls for very serious consideration whether faced with these odds in the event of a conviction the applicant can reasonably be expected to stand trial.

I may express my reluctance and constraint to consider the merits of or say anything which might savour of pre-judging the case, despite the inevitable temptation by both counsel to draw me to that end during their respective submissions. I wish therefore to confine myself to deciding whether in the light of the circumstances set out above the grant of release is likely to prejudice the ends of justice.

In the words of Elyan J. above:

> "The proper approach in cases of this kind is ..... that though the Court must safeguard the liberty of the individual, it must also safeguard the administration of justice .....Though I might add that generally the tendency is towards granting of release."

Even though it is trite that the Attorney-General's or the Director of Public Prosecutions' ipse dixit cannot be substituted for the Court's discretion the words of Elyan J. above at 27 however indicate that

> "If official or police statements on which substantial reliance can be placed are before the Court to the effect that a reasonable possibility exists of such conduct on the part of an accused as would influence witnesses or potential witnesses - persons whom the police may want to interrogate - or tamper with them, or deny sources of information, the Court cannot very well brush aside such statements, and proof of any actual attempt will not be demanded."

It should be clear then that contrary to the emphatic

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view expressed by Van J. in Bennett above and based on Kok referred to earlier that proof of prior attempt either to abscond or interfere with Crown witnesses is a necessary requirement to furnish before court before the application is refused the authority of Mosiane above relieves the crown of this burden.

It is common knowledge that on account of the regularity with which applications for bail are not opposed by the crown one can hardly be proved wrong for asserting that they are obtained in a manner that is reminiscent of the fabled Tom Tiddler's ground.

The crown has relied on the affidavits of Mr. Mokhoho a fairly experienced crown counsel and police officers who averred that they feared that if granted bail the applicant will either abscond or interfere with crown witnesses and thus defeat the ends of justice. "This" in the words of Elyan J. with whom I fully associate myself,

> "I need scarcely emphasise, is not that the Court can surrender its function to the representatives of the Crown. But that when such statements as I have indicated are before a Court in applications of this kind they cannot be brushed aside."

This view has a backing in the statement expressed in Makalo Molotsane vs R. 1974-75 L.L.R. at 274 that

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

While on the one hand Innes C.J. in McCarthy vs Rex 1906 T S 657 at659 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 ...."

Miller J. on the other hand in S. vs Fourie 1973(1) S ... at 101 pointed out that:

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> "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 of the liberty of the accused and despite the presumption of innocence."

I have in Mcholisa (unreported) above at page 6 expressed my perplexity in fathoming the meaning of cognizable indication. However the point I sought to highlight in citing Fourie above is that even at the expense of the liberty of the subject and despite the presumption of innocence if proper considerations have been established that proper administration of justice will abort if bail is granted then it is only logical that it be refused.

The final conclusion I have come to is that having considered the material placed before me and the arguments advanced in support of the respective contentions the ends of justice would be frustrated if the applicant were to be released on bail. Consequently the application is refused.

J U D G E.

31st October, 1990.

For Applicant : Mr. Nathane.
For Crown : No appearance.