CRI/APN/98/90

IN THE HIGH COURT OF LESOTHO

In the matter between:-

SAMUEL MOKETE TUMO Applicant

and

R E X

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 3rd day of April, 1990.

This is an application for bail pending trial made on behalf of the applicant who is charged with attempted murder alleged to have been committed on the 11th day of March, 1988. The applicant, who is a Captain in the Royal Lesotho Defence Force, was arrested on the 20th February, 1990. In his founding affidavit he avers that after his arrest he was detained at Maseru Maximum Prison where he was kept in solitary confinement till on the 7th March, 1990 when he was taken for a remand at Maseru Magistrate's Court on a charge of attempted murder.

/2.....

He avers that whilst in detention he was subjected to intensive interrogation by several members of the Royal Lesotho Defence Force in different groups. He was covered with several blankets over his head, naked and instructed to kneel on the cement floor covered with crushed stones for long periods with his hands handcuffed at the back.

On the 5th March, 1990 he succumbed to torture and agreed to go to the magistrate to "confess" his guilt to the offence charged. He avers that he was instructed to tell the magistrate what he had been told by his interrogators.

The application is opposed by the respondent on a number of grounds which are as follows:-

(a) The crime with which the applicant is charged is very serious.

(b) The investigations are not yet complete.

(c) Prior to applicant's detention witnesses were not forthcoming for fear of reprisals from the applicant, and that if applicant is released on bail witnesses will fear to come forward to give evidence.

(d) The applicant is likely to abscond if released on bail because the manner in which this crime was committed clearly shows that the applicant wished to conceal his identity.

The above grounds appear in the opposing affidavit filed by the respondent and he concludes by saying he verily believes that if applicant is released on bail he is likely to abscond and not to stand trial and/or interfere with Crown witnesses.

The respondent is basing his fear from the information he received from S/Sgt. Maluke who is the investigating officer in this case, and from the complainant, Mr. Moeketsi Mqedlana.

In his opposing affidavit S/Sgt. Maluke avers that the applicant is likely to abscond if released on bail because he has lost his job and is likely to leave this country to look for a job somewhere else outside Lesotho. He alleges that after the commission of the offence the complainant had to flee and took refuge in Johannesburg and only returned when he was told the applicant had been arrested. If the applicant is released on bail he is likely to threaten the life of the complainant or to intimidate him.

The complainant also deposes in his affidavit that after the commission of the offence with which the applicant is charged he fled because he was not feeling secure while his assailants were still at large.

The general principle is that the Court will always grant bail when possible, and it will lean in favour of and not against the liberty of the subject. In Meyer v. Director of Public Prosecutions 1977 L.L.R. 160 at p. 163 Cotran, C.J. said:

/4......

> "The courts, as well known, lean towards the liberty of the subject in bail applications pending trial, but it is necessary to strike a balance, as far as that can be done, between on the one hand the liberty of the individual, and safeguarding and ensuring the proper administration of justice on the other. (see Essack 1965 (2) S.A. 162 (c) at p. 162)."

The Crown has alleged that it is likely that the applicant will abscond and not stand his trial. In determining the likelihood that the applicant may abscond the Court has to look at the gravity of the offence and the possibility of a conviction. In Kok v. R., 1927 N.P.D. 267 at pp 269,270 Tatham, J. said:-

> "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."

In the instant case the crime with which the applicant is charged is not a very serious one. Attempted murder is a serious offence but not as serious as murder. We have had numerous cases of muder before this Court where the accused have been released on and the majority of them have stood their trials. I am of the opinion that in the instant case the gravity of the offence with which the applicant is charged cannot be relied upon as the ground on which bail must be refused.

Another aspect of the case which I have considered is the possibility of a conviction. According to the evidence in the papers before me it seems that the case against the applicant will heavily depend on the confession allegedly made by the applicant. In his opposing affidavit the learned Director of Public Prosecutions avers that at the trial the Crown is going to prove that the confession was freely and voluntarily made. On the other hand the applicant alleges that he was brutally assaulted or ill-treated and forced to make the confession. He alleges that it is all lies which he was instructed by his interrogators to tell to the magistrate.

While I cannot prejudge the outcome of the trial within a trial, I can only say that the mere fact that the applicant was detained in solitary confinement from the 20th February, 1990 to the 5th March when he finally made a statement is a factor which may weaken the case by the Crown that the confession was freely and voluntarily made. The period of detention was far in excess of that allowed by law and may be an indication that the applicant was unwilling to make the statement like he alleges in his founding affidavit.

There is no evidence that the complainant in the attempted murder saw or identified the applicant as one of his assailants. There is no indication in the papers before me that there were any eye witnesses or any circumstantial evidence which incriminates the applicant.

Considering the evidence disclosed by the Crown and the applicant in the papers before me, I am of the opinion that the possibility of a conviction is very remote. I must indicate that in his submission to this Court the learned Director of Public Prosecutions indicated that there were certain things which he ought to have disclosed in his affidavit but because of the urgency of the matter he was not able to do so.

The Crown has alleged that there is a reasonable possibility that if released on bail the applicant will tamper with Crown witnesses. The allegation by the Crown is that if the applicant is released on bail certain witnesses may be afraid to come forward to testify because the applicant is a very influential person. He is a senior officer in the military force. It is alleged that even the complainant will not feel safe. The complainant avers that he may even leave the country again because his life shall be in great danger.

The offence charged is alleged to have been committed in March, 1988. There is practically no evidence that between March, 1988 and the 20th February, 1990 the applicant threatened the life of any of the Crown witnesses. He never communicated with any of the Crown witnesses. The Crown has not placed before me any facts from which I may reasonably infer that the applicant is likely to tamper with Crown witnesses. The mere fact that the complainant is a timid person is not a sufficient ground on which bail must be refused. There must be evidence that the applicant has threatened to harm him.

In Hafferjee v. Rex 1932 N.P.D. 518 it was held that 'in a case where the most that could be said was that the accused, having regard to his alleged criminal conduct, was a person who might be likely to interfere with witnesses, that the Court should grant his release on bail in the absence of any evidence that he had in fact done or from which it could be reasonably inferred that he probably would do something of the sort.'

I am of the opinion that the Crown has failed to prove that there is a reasonable possibility that the applicant, if released on bail will tamper with Crown witnesses. I shall refer to some cases in which the lives of Crown witnesses were said to be in danger if accused persons were released on bail.

In Ex parte Nkete, 1937 E.D.L. 231 bail was refused where it was shown that the lives of two principal witnesses had been threatened and they were in terror of the accused.

In R. v. Phasoane, 1933 T.P.D. 405 it was shown that pressure had been brought to bear on an African woman to induce her to lay the blame on a person other than the accused who was a deposed African headman and a tyrannical person possessing considerable authority over his own people.

/8.......

The other ground on which the Crown is opposing the application is that the investigations are not yet complete. Under this heading the Crown must show that it is likely that the applicant will tamper with police investigations. As I have already stated above the offence with which the applicant is charged was committed almost two years before his arrest. There is nothing to show that during that period he hampered the police in their investigations in any way.

The learned Director of Public Prosecutions submitted that the investigations only started in earnest in February, 1990 when there was a change of Government. The applicant was a senior officer in the Royal Lesotho Defence Force and had some association with high ranking people in the Military Council. I do not think that during the reign of the previous Government there was a person who was above the law. To make an example, investigations were made and an inquest was subsequently held in respect of the death of a certain man who was shot and killed by the Chairman of the Military Council and Council of Ministers who was the highest ranking official in the Government. Police were not afraid to do their investigations in that case and I see no reason why they were afraid to do their investigations against a mere Captain in the Royal Lesotho Defence Force.

It seems to me that this ground must also fail because the Crown cannot merely arrest in order to complete investigations. There must be a reasonable possibility that the applicant will interfere with the investigation (S. V. Bennett, 1976 (3) S.A. 552 at p. 655).

In his affidavit S/Sgt. Maluke alleges that the applicant has been dismissed from the Royal Lesotho Defence Force and for that reason he is likely to go to another country to look for a job. He may decide not to come back to stand his trial. The applicant has denied this and has indicated he has received his salary for the months of February and March, including the risk allowance.

In S. v. Bennett, supra, at page 655 Vos, J. said:

> "Now, while I have the highest regard for the responsibility of the Attorney-General in this case, his opinion seems to have been formed on the information which he had: he did not, in my view, consider the information coming from the applicant and his counsel to the same extent as the Court did. Accordingly in my view, while not overlooking the weight to be attached to the Attorney-General's attitude, the Court is in a better position than he is to consider the case as a whole. In short, the Attorney-General's ipse dixit cannot be subtituted for the Court's ciscretion."

In the instant case I also have the highest regard for the responsibility of the learned Director of Public Prosecutions and I have known him not to oppose bail applications on frivolous grounds and I have given due weight to his reasons. Having considered the case as a whole I think I am in a better position to decide whether the applicant will or will not stand trial; and whether he will or will not tamper with Crown witness or interfere with police investigations. I have formed the opinion that he will not.

For the reasons stated above the application for bail is granted on the following conditions:

(a) He shall pay a cash deposit of M500-00.

(b) He shall find two sureties in the sum of M200-00 each.

(c) He shall surrender his passport to the police.

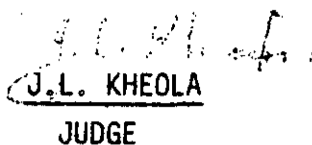
(d) He shall report himself at Maseru Central Charge Office every Friday between the hours of 7.00 a.m. and 12.00 noon.

(e) He shall not tamper with Crown witnesses.

(f) He shall not interfere with police investigations.

(g) He shall attend all remands and his trial.

(h) He shall not leave the town of Maseru without the permission of the police.



J.L. KHEOLA
JUDGE

3rd April, 1990.

For Applicant - Mr. Pheko
For Crown - Mr. Mokhobo.