CRI/A/48/90

IN THE HIGH COURT OF LESOTHO

In the appeal of :

MATTHYS JOHANNES LABUSCHAGNE Applicant

vs

R E X

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai

on the 14th day of June, 1990.

This is an appeal against a magistrate's decision refusing to vary bail conditions.

In the interest of clarity it is, perhaps, necessary to mention that it appears from the record of proceedings that on 17th April, 1990, the appellant's vehicle with registration Numbers TC 33717 was travelling along the main South 1 public road when it knocked down a pedestrian, a little girl of about 10 years old, who passed away in the unfortunate incident. The appellant was, as a result, charged with culpable homicide alternatively contravention of Section 90(1) read with subsection (4) of the Road Traffic Act, 1981,

On 18th April, 1990 the appellant appeared before the Maseru magistrate for a remand and applied for his release on bail. In support of his bail application, he told the presiding magistrate that he was a divorcee: he resited at Moshoeshoe II on site 303 (a house) belonging to a certain Mr. Ramakatane rented

2/ through the .....

through the Lesotho Property Service; he was employed as a diesel mechanic by Evergreen Enterprises from 1987 up to 1992 and undertook to comply with bail conditions.

The public prosectuor informed the court that the crown did not object to bail application provided that the appellant was not released on his O/R (own recognizance). The bail application was accordingly granted on a number of conditions which included, inter alia, that the appellant would pay M200 cash deposit and surrender his passport to the clerk of the court. However, on 11th May, 1990 an application was moved before the same presiding magistrate for an order varying the applicant's bail condition relating to his passport in that the passport be returned to him and an alternative condition as to surety be given. Although the public prosecutor did not oppose the application for variation, the court turned it down in the following terms:

> "..... bail variation is duly denied. The bail conditions will stand as originally set out. This is because however much I may sympathise with the accused's predicament that he has to go to S.A. regularly on business, he is a South African himself working in Lesotho. Because we have no Extradiction Treaty with S.A. if he were to abscond we will have no way of apprehending him."

On 17th May, 1990 the appellant filed, with the Registrar of the High Court, a notice of motion (CRI/APN/164/90)

3/ in which he .....

in which he moved the court for, inter alia:

> "1. An order varying Applicant's bail conditions and directing that his passport lodged with the clerk of the subordinate court, Maseru in CRI/T/58/90 be returned to Applicant.
>
> 2. Directing that the applicant provide a surety acceptable to the Registrar of this Honourable Court to furnish security for the due attendance at his trial of the Applicant in a sum to be determined by the court."

A founding affidavit was duly filed in support of the appellant's application. When on 21st May, 1990 the application was placed before me for argument, I read through the founding affidavit. There was not the slightest doubt in my mind that the appellant was aggrieved by the decision of the magistrate requiring, as a bail condition, the surrender of his passport to the clerk of the court. It is, however, to be observed that S. 108 of the Criminal Procedure and Evidence Act, 1981 provides, in part:

> "108(1) where an accused person considers himself aggrieved
>
> (a) .....
>
> (b) by the magistrate having required excessive bail or having imposed unreasonable conditions, he may appeal against the decision of the magistrate to the High Court which shall make such order thereon as to it in the circumstances seems just."

There can be no doubt from the provisions of the above cited section of the Criminal Procedure and Evidence Act 1981 that if the appellant considered the surrendering of his passport to the clerk of the court as a condition for his release on bail unreasonable and was thereby aggrieved, his remedy was to approach the High Court by way of an appeal. He did not.

4/ Instead of .....

Instead of appealing to the High Court against the decision of the magistrate the appellant filed, with the Registrar of the court, the notice of motion in which he moved the court for an order, inter alia, varying the bail conditions and directing that his passport be returned to him. That, in my opinion, was contrary to the provisions of S. 108 of the Criminal Procedure and Evidence Act, supra, and therefore unprocedural. For that reason the application could not be entertained and I accordingly dismissed it.

I, however, ruled that If he really felt aggrieved by any of the bail conditions imposed by the magistrate the appellant was at liberty to approach this court in terms of the provisions of Section 108 of the Criminal Procedure and Evidence Act, 1981. Notwithstanding the ruling I have made on 21st May, 1990 it would appear that on the following day, 22nd May, 1990. the appellant filed, with the Registrar of the High Court, another notice of motion, CRI/APN/168/90, in which he moved the court for exactly the same order as in CRI/APN/164/90. Although subsequently sworn to, the founding affidavit in CRI/APN/168/90 was in identical terms with those in CRI/APN/164/90. However, the founding affidavit in CRI/APN/168/90 conveniently concealled the fact that CRI/APN/164/90 had, on the previous day, been dismissed. The appellant should not have concealed this fact.

Be that as it may, on 23rd May, 1990 CRI/APN/168/90 was placed before me for hearing on 28th May, 1990. Nobody moved the application before me on that day and wisely so in my opinion.

5/ As it has .....

As it has already been pointed out earlier, the appellant has now lodged an appeal to the High Court against the decision of the court a quo. The following grounds are advanced in support of the appeal.

"1. The court a quo misdirected itself in laying too much stress on the absence of an extradition treat between South Africa and Lesotho to the exclusion of other factors such as the gravity of the offence, the possible sentence to be imposed upon conviction and, consequently likelihood of Appellant being tempted not to stand trial.

2. The court a quo should have applied its mind to the fact that, it being common cause that traffic cases take on the average, no less than 2 years to be heard, it was unreasonable to expect the Appellant, in the circumstances of this case, to be without a passport when his work required him to travel frequently to South Africa and he has a widowed mother of 88 years of age living there and being entirely dependent on Applicant.

3. The court a quo misdirected itself in ignoring the fact that the public prosecutor, who is in contact with the police handling the case, did not oppose Appellant's application and, in fact, supported it to the extent of suggesting the amount of surety he would be prepared to accept.

4. The court a quo ought to have come to the conclusion that bail of M200.00, which it fixed, does not constitute even the slightest disincentive to a person bent on fleeing to South Africa to avoid standing trial."

What is abundantly clear in the record of proceedings before me is that when, on 18th April, 1990 he appeared before the court a quo for remand the appellant applied for his release on bail. The application was allowed. It must

6/ assumed, ...

assumed, therefore, that the court a quo did consider all the factors that it is accused of failing to take into account under the first ground of appeal. The first ground of appeal is, therefore, irrelevant.

As I see it, the truth of the matter is that the appellant was aggrieved by some of the bail conditions imposed by the court a quo viz. the surrendering of his passport and the imposition of a bail deposit in the amount of M200.00 which was considered to be too low. As stated earlier, the appellant's remedy in the circumstances, was to appeal to the High Court in terms of the provisions of S.108 (1) (b) of the Criminal Procedure and Evidence Act, 1981 rather than moving an application before the court a quo as he did on 11th May, 1990. The court a quo was a magistrate court and as such a creature of statute. It could lawfully do only the things it was empowered to do by statute. I am not aware of any statutory provision that empowers a magistrate court to vary bail conditions. If it did the court a quo would have acted ultra vires.

Be that as it may, I have allowed the appellant to rectify the position and he has now properly lodged the present appeal to the High Court. The question that arises for the determination of this court is whether or not the surrendering of passport and the imposition of the amount of M200-00 cash deposit as bail conditions were so unreasonable as to warrent the interference by the High Court.

In my view the conditions upon which an accused person, in the circumstances of the appellant, may be

7/ released .....

released on bail are the prerogative of neither the accused nor the public prosecutor but the presiding magistrate. That in fact, disposes of the 3rd ground of appeal. I am fortified in the view I have taken by the provisions of the Criminal Procedure and Evidence Act, 1981 of which S.106 (6) clearly reads:

> "(6) The magistrate may add to the recognisance any condition which he considers necessary or advisable in the interest of justice as to -
>
> (a) times and places at which and persons to whom the accused shall personally present himself;
>
> (b) places to which the accused is confined or where he is forbidden to go;
>
> (c) the surrender of passports or allied documents to the police or other designated authority;
>
> (d) prohibition against communication by the accused with witnesses for the prosecution;
>
> or
>
> (e) any other matter relating to the accused's conduct."
>
> (My underlinings)

I have underscored the words "the surrender of passport or allied documents" in the above cited subsection (6) of Section 106 of the Criminal Procedure and Evidence Act, 1981 to indicate my view that the magistrate is specifically empowered to impose, as a condition for bail, the surrendering of appellant's passport. Assuming the correctness of my view, in this regard, I am unable to find that by doing what the law empowers her to do viz. to impose, as a condition for bail, the surrendering of Appellant's passport to the clerk of the

court, the presiding magistrate has acted unreasonably.

As regards the amount of M200 bail deposit imposed by the court a quo, it is to be borne in mind that section 107 of the Criminal Procedure and Evidence Act 1981 provides:

> " (1) subject to subsection (2) the amount of bail to be taken in any case shall be in the discretion of the judicial officer to whom application to be admitted to bail is made.
>
> (2) no person shall be required to give excessive bail."

In the spirit of the above cited section of the Criminal Procedure and Evidence Act, 1981, it seems to me in deciding what amount of cash deposit is to be imposed as a bail condition the judicial officer must be realistic. He must always remember that the objective of bail is to prevent the accused person from going to gaol whilst at the same time safeguarding the interest of proper administration of justice. To achieve this objective the judicial officer must take into account the economy of the people living in his locality. If the amount of bail deposit were pitched too high it would defeat its own purpose in the sense that the accused would fail to raise it and, therefore, go to gaol. Likewise if the bail deposit were fixed too low, it would encourage the accused to jump bail and thus frastrate proper administration of justice.

Having regard to the fact that Lesotho is one of the poorest countries of the world, I am of the opinion that the bail deposit in the amount of M200-00 was within the reach of an average resident of Lesotho but at the same time not something that he would easily drain into the river. That

9/ being so, ...

That being so, I find nothing unreasonable in the court a quo imposing, as it did, a cash deposit of M200-00 as the appellant's condition for his release on bail.

The second ground of appeal viz. that traffic cases take long to dispose of and it is, therefore, unreasonable to expect the appellant to be without a passport for that period has no substance. For a variety of reasons it is not only traffic cases that take a long time to dispose off in this country. Other types of cases, e.g. murder, also take long to dispose of and yet the accused in such cases are almost invariably required to surrender their passports as a condition for their release on bail. The important reason behind this is to try to make it not easy for the accused to abscond and thus frastrate proper administration of justice.

From the foregoing it is clear that the question I have earlier posted viz. whether or not the surrendering of passport and the imposition of the amount of M200-00 cash deposit as bail conditions were so unreasonable as to warrent the interference of the High Court must be answered in the negative.

In the result, it is obvious that the view that I take is that this appeal ought not to succeed. It is accordingly ordered.

B.K. MOLAI
JUDGE

14th June, 1990.

For Appellant : Mr. Sello
For Respondent : Mr. Mokhobo.