CRI/A/56/91

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

GERT. G.H PRINSLO ..... Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS ... Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 24th day of September, 1991.

On 25th June, 1991 the appellant appeared before the Subordinate Court of Maseru, for remand, on a charge of Fraud involving an amount of M251,000. The appellant, who was represented by a legal counsel, then made a verbal application for bail. The application was, however, opposed, again verbally, by the public prosecutor. The court proceeded to hear arguments at the end of which bail application was refused on the grounds that the appellant, who is not a citizen of Lesotho, was facing a serious offence. If he were to be released on bail there was, therefore, likelihood that the appellant would flee out of the country and the jurisdiction of the court.

On 26th July, 1991 the appellant noted an appeal,

presumably in terms of the provisions of S.108(1) of the Criminal Procedure and Evidence Act, 1981, against the decision of the Subordinate Court, on a number of grounds the gist of which was that the decision was bad in law.

In support of his contention that bail ought to be allowed, counsel for the appellant argued that the appellant, a 57 years old citizen of the Republic of South Africa and businessman lived at Bethlehem in the Orange Free State province of that country where he had a wife and four (4) children as his dependants. Although he had no assets in Lesotho the appellant, Mr. Chaolana and the ex-Major General Lekhanya were share-holders and co-directors in a certain Lesotho based company. His two co-directors were prepared to accommodated the appellant in Lesotho until the case against him had been disposed of. The appellant would not, therefore, flee out of the country and the jurisdiction of the court. If he were to be incarcerated in Lesotho the appellant's dependants would, however, be rendered destitute and his business activities, both in the Republic of South Africa and Lesotho, dislocated.

In reply the Respondent disputed the appellant's argument that he, Chaolana and Lekhanya were co-directors in a certain Lesotho based company. He had, in his possession, evidence that he could lead in rebuttal of the appellant's contention

that he was a member of the company of which Chaolana and Lekhanya were co-directors. The charge which the appellant was facing involved a huge amount of money and, for that reason, it was a serious charge. There was, therefore, a real possibility that the appellant would flee out of the country and jurisdiction of the court. Regard being had to the fact that there is no extradition treaty between Lesotho and the Republic of South Africa it would not be easy, if not impossible, to re-apprehend the appellant once he had crossed the boarder.

It has been argued that as the public prosecutor claimed to have, in his possession, evidence that he could lead in rebuttal of the appellant' contention that he was a member of a Lesotho based company the trial Magistrate ought to have heard such evidence. However, the public prosecutor did not lead the evidence and, in the circumstances, the Magistrate erred in deciding the application against the appellant.

I do not agree with this argument. It was the appellant who alleged that he, Chaolana and Lekhanya were co-directors of a Lesotho based company, a fact which was, however, denied by the public prosecutor according to whom he had, in his possession, evidence that he could lead in rebuttal of such allegation. On the well known principle of he who avers bears the onus of proof it was the appellant who had to adduce

evidence in support of the allegation he had made. Until the appellant had done so, the public prosecutor had no onus to lead evidence. To hold the contrary would amount to saying the public prosecutor had the onus to prove the negative.

The decision of the court a quo was criticised on the ground that bail was refused merely because the appellant came from the Republic of South Africa, a country with which Lesotho had no extradition treaty. this is, however, not borne out by the record of proceedings according to which that factor was considered together with other factors viz. the high likelihood of the appellant fleeing out of the country and the jurisdiction of the court due to the seriousness of the offence, against which he stood charge.

From the record of proceedings, it seems to me that the court a quo did consider the question that the appellant was a foreigner from a country with which Lesotho had no extradition treaty together with other factors to decide whether or not to release him on bail. The criticism levelled against the decision of the court on this ground has, in my finding, no substance and, therefore, unjustified. Even if it were true that the appellant was a co-director of a Lesotho based company with Chaolana and Lekhanya who were both prepared to accommodate him in Lesotho I frankly do not see how that, in itself, could stop him from crossing the boarder

and going to his home in the Republic of South Africa thus frustrating proper adminstration of justice.

It is significant to observe that the period within which an appeal may be lodged against the decision of magistrate, in a criminal matter is, in terms of Rule 1(1) of Order XXXV of the Subordinate Court Rules, 14 days. Although the provisions of Rule 1(1) of the Order specifically, refers to conviction and sentence, I can think of no good reason why they should not apply, with equal force, to the magistrate's decision to refuse bail. That being so, it is to be borne in mind that in the instant case the decision of the magistrate to refuse bail was made on 25th June, 1991. The appeal was only noted on 26th July, 1991 i.e. some 31 days after the decision to refuse bail had been made. The appeal was, in the circumstances terribly out of time and, therefore, irregular. Appellant has not applied for condonation of his late noting of the appeal which, in my finding, remains an irregularity.

It was argued, and rightly so in my opinion, that the magistrate had not complied with the provisions of the Subordinate Court Rules Order XXXV of which Rule 1 (3) reads, in part:

> "Upon an appeal being noted the judicial officer shall within seven days deliver to the clerk of the court a statement in writing showing -
>
> (a) .....

(b) the grounds upon which he arrived at any finding of fact specified in the appellant's statement as appealed against, and

(c) his reasons for any ruling of law ..."

The important question that immediately arises is whether or not, in the circumstances of this case, the magistrate was bound to comply with the provisions of the above cited rule of the Subordinate Courts Rules. In my view, the provisions of the above cited rule are binding upon the magistrate only where appeal is properly noted and, therefore, valid. Assuming the correctness of my finding that appeal was, in this case, noted out of time and, therefore, an irregularity it seems to me that there was no valid appeal. That being so, the answer to the question I have posted must be in the negative.

In the premises, I have no alternative but to come to the conclusion that this appeal ought not to succeed. It is accordingly dismissed.

B.K. MOLAI

JUDGE

24th September, 1991.

For Appellant : Mr. Phoofolo,

For Respondent: Miss Nku.