CRI/APN/321/91
CRI/APN/330/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

REMAKETSE SEHLABAKA	1ST APPLICANT
TEBOHO CHAKA	2ND APPLICANT
MOTHOBI MOTHOBI	3RD APPLICANT
MONONTSI MALIEHE	4TH APPLICANT
v	
DIRECTOR OF PUBLIC PROSECUTIONS	RESPONDENT

Before the Honourable Chief Justice Mr. Justice B.P. Cullinan on the 25th day of October, 1991.

For the 1st, 2nd and 3rd Applicants:		Mr. B. Sooknanan
For the 4th Applicant	:	Mr. B.M. Khasipe
For the Respondent	:	Mr. G.S. Mdhluli, Director of Public Prosecutions

JUDGMENT

Cases referred to:

(1) McCarthy v R (1906) T.S. 659;
(2) Kaspersen v R (1909) T.S. 639;
(3) Grobler v The Attorney-General (1915) TPD 9;
(4) R v Wessels (1915) OPD 22;
(5) R v Louw (1918) CPD 358;
(6) Sangadavan & Ors. v R (1919) NDP 413;
(7) Ali Ahmed v Attorney-General (1921) TPD 461; (1921) TPD 587;
(8) Ex Parte Van Niekerk (1925) OPD 43;
(9) Kok v R (1927) NPD 267;
(10) Heller & Anor. v Attorney-General (1932) C.P.D. 102;
(11) Perkins v R (1934) NPD 276;
(12) Maserow v Attorney-General & Anor. (1941) WLD 43;
(13) Hafferjee v. R (1932) N.P.D. 518;

(14) Mahomed v R (1942) NPD 22;
(15) Ex Parte Taljaard (1942) OPD 66;
(16) R v Radowsky (1943) CPD 194;
(17) R v Gcora (1943) EDL 74;
(18) R v Fourie (1947)2 SA 574 (O);
(19) Ex Parte Qutani (1946) EDL 173;
(20) R v Mtatsala And Anor. (1948)2 SA 585;
(21) R v Lee (1948)2 SA 593; (1948)1 P.H., H.30;
(22) Leibman v Attorney-General (1950)1 SA 607 (W);
(23) R v Grigoriou (1953)1 SA 479 (T);
(24) S v Kantor (1964)3 SA 377 (W);
(25) Lobel and Another v. Claassen (1956)1 SA 531 (W);
(26) S v Essack (1965)2 SA 161;
(27) S v Perumal (1967)3 SA 725 (D);
(28) S v Smith & Anor. (1969)4 SA 175 (N);
(29) S v Lulane & Ors. (1976)2 SA 204 (N);
(30) S v Bennet (1976)3 SA 652 (C);
(31) S v Nichas & Anor. (1977)1 SA 257 (C);
(32) S v Hudson (1980)4 SA 145 (D);
(33) Moletsane v R (1974 - 1975) LLR 272;

This is an application for bail pending trial. On 21st October, 1991 I refused the application, reserving my reasons, which I now give.

The first three applicants initially made joint application, the fourth applicant subsequently making a separate application. Both applications have now been consolidated. The four applicants are jointly charged with the murder of Constantinus Toloko Kimane upon or about the 10th September, 1991 at or near Sekamaneng in the district of Maseru.

The learned Director of Public Prosecutions Mr. Mdhluli

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opposes the application. An affidavit has been filed by Mr. Leaba Thetsane, Senior Crown Counsel, who is empowered by a general delegation to exercise on behalf of the Director functions otherwise exercised by the Director in person. Mr. Thetsane deposes that he interviewed the two investigating officers in this case, who have filed affidavits, and that he fully associates himself with and endorses the averments made therein. He further deposes that,

> "It is my considered opinion and advisedly so, that the interests of justice and the proper administration of justice will be highly prejudiced if the applicants are liberated on bail."

Lt. Col. Tsabo Ngatane, the Officer In Charge of the Criminal Investigations Department for Maseru District, is the leader of the team investigating the killing of the deceased. He has filed an affidavit. It reads in part thus:

> "3. According to police investigations the deceased was fatally shot by his killers in Maseru district on the 10th September 1991. Preliminary police investigations have established that two types of firearms were used to shoot the deceased.

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4. At the time of his death the deceased was employed by the Barclays Bank PLC as manager of the Maseru Branch of the said bank.

5. Investigations so far conducted clearly show that the death of the deceased was connected with the position which he held with the Barclays Bank. Our investigations indicate that the plot to kill the deceased was hatched by some members of the Lesotho Union of Bank Employees which said union had organized a strike of employees of two of the commercial banks in Lesotho, namely the Barclays Bank PLC and Standard Chartered Bank, at the time of the deceased's death.

6. Investigations under my control and supervision which have not yet been concluded clearly indicate that the applicants, each or the other or all of them, were in various degrees either as instigators or counsellors, perpetrators

or accomplices involved in the killing of the deceased. Consequently the applicants have been arrested and charged with the unlawful and intentional killing of the deceased.

7. Two of the applicants held the positions of present and vice-president of the Lesotho Union of Bank Employees. One other applicant was employed at the Barclays Bank as a clerk and was also a member of the Lesotho Union of Bank Employees (Lube). The fourth applicant was not employed at any banking institution. He was employed as a driver by a medical practitioner practising at Leribe.

8. The two applicants who held the positions of present and vice president of Lube are influential persons. I honestly believe that if they are released on bail at this stage of police investigations they will hamper investigations which have reached a very advanced and delicate stage. I

believe that if the applicants were to have access to certain witnesses who have not been interviewed by the police this would have a detrimental effect on the conduct of police investigations.

9. One of the crucial witnesses in the case concerning the death of the deceased is an accomplice witness who had close connections with two of the applicants other than the president and vice-president of Lube. My investigations point out at the two applicants as the persons who procured accomplices who took part in the murder of the deceased.

10. Some of the prospective prosecution witnesses have not been traced. The police are still following leads concerning their whereabouts. It is essential that the police should locate the said witnesses before they come into contact with any of the applicants and if they are granted bail at this stage I am apprehensive that they may reach the

prospective witnesses before the police get to them.

11. The police have so far not been able to trace the whereabouts of the firearms which were used to shoot the deceased. My investigations reveal that the firearms, the finding of which would go a long way to establish the prosecution case against the applicants, have been hidden by one of the applicants. I believe that the police are about to make a break-through in tracing the whereabout of the firearms in question. It is my considered opinion that if the applicants are released on bail they may dispose of the firearms before the police can lay their hands on the firearms and thus thwart the efforts of the police in obtaining the firearms.

12. Investigations of the team which I am leading are proceeding and I consider that they are about to be concluded. The police will do their level best to ensure that investigations are concluded with due

dispatch and the applicants brought to trial as soon as possible. I reiterate that according to our investigations all the applicants are implicated in the murder of the deceased.

13. I have consulted the Director of Public Prosecutions to advise him as to how investigations are proceeding. I have also advised him of our (the police) attitude to the application for the release of the applicants on bail.

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14. Having regard to the circumstances of the case we are investigating I submit that it will not be in the interest of justice to admit the applicants to bail at this point in time but more particularly having regard to the sensitive stage which the police investigations have reached."

Another affidavit in opposition has been filed by Major Nathnael Ntoi, a member of the investigating team, wherein he deposes that, in respect of Lt.Col. Ngatane's affidavit, "I

wish to associate myself, confirm and endorse each and every averment as if specifically made by me".

The founding and replying affidavits filed by the applicants indicate that the first and second applicants, had been a Teller in Barclays Bank, Mafeteng and a Check Clerk at Standard Bank, Maseru, respectively, and are members of L.U.B.E. The affidavit filed by Lt.Col. Ngatane indicates that they hold the posts of President and Vice President of L.U.B.E. but I cannot say that those are their respective posts. The third applicant deposes that he is a Clerk in Barclays Bank, Leribe and a member of L.U.B.E. The fourth applicant deposes that he is employed by a medical practitioner as a driver at Leribe.

In their founding affidavits the applicants depose that they were arrested and detained on 18th September (the third applicant on 17th September) and were jointly charged with the murder of the deceased on 24th September. They are presently in custody at Maseru Central Prison. With regard to their alleged participation in the death of the deceased, the applicants depose as follows:

First Applicant: "... Toloko Kimane ... was also an employee of Barclays Bank in Maseru. He

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died sometime in the middle of September, 1991 .... I do not know the said Kimane's killers nor did I have anything to do with matters concerning his death."

Second Applicant: "... Mr. Kimane ... was an employee of the Barclays Bank in Maseru. The said Kimane died about two or three weeks ago under the circumstances unknown to me. I have heard, however, that he was killed by some people. I have no connection whatsoever with his death, and I do not even know who his killers are."

Third Applicant: "... Mr. Kimane ... was also an employee of the Barclays Bank at Maseru. He died about three or two weeks ago. I verily aver that I have had no contribution to the murder of the said Kimane."

Fourth Applicant: "... I know nothing about the death of the deceased."

In reply to the affidavits in opposition, the first applicant deposes, with regard to his alleged complicity in

particular, as follows:-

> I vehemently deny that I had any part in any plot to kill anyone, let alone the deceased. Furthermore, I have no knowledge of any plot to kill deceased by our union and to the best of my belief there never has been such a plot, nor would such a plot have even been contemplated by our union. I deny that I was ever an instigator or counsellor, perpetrator or accomplice involved in the killing of the deceased. ..... I deny that I know the whereabouts of any firearms that were used to shoot the deceased. It is strange that the police do not say categorically that I am the person who has hidden any firearms. I deny any implication in the murder of the deceased."

The second and third applicants depose that they wish to associate themselves with the contents of the first applicant's replying affidavit and ask that its contents apply to them as if they had each specifically sworn thereto. The third applicant additionally deposes:

> "I deny that I ever procured accomplices who took part in the murder of the deceased."

The fourth applicant replies in part thus to the opposing affidavits thus:

> "Save to mention that there is no disclosure as to what part I took I aver that this is not the time to emphasise that I took part in the killing of the deceased since proof of the same is the issue of trial."

There are other issues raised in the affidavits in reply but the above extracts suffice for the moment. As to the law applicable, the South African authorities in the matter generally commence with the decisions in McCarthy v R (1), to which the learned Attorney for the fourth applicant, Mr. Khasipe, refers, and Kaspersen v R. (2). In the latter case the Court (a very strong one, Innes C.J., Mason & Curlewis J.J.) dealt with an application for bail after a preliminary examination on a charge of murder. Innes C.J. (Mason & Curlewis J.J. concurring) observed at pp.640/641:

> "As was pointed out in *McCarthy's* case (1), the court is unwilling that accused persons should be detailed in gaol, where it is reasonably clear that they will appear to stand their trial in due course. But one of the elements which must weigh with us in considering that question is the gravity of the offence with which any particular accused is charged, and the

> *prima facie* circumstances connected with it which are revealed by the preliminary examination. A man is always more likely not to stand his trial, where the indictment against him involves the risk of his life. And where the charge, upon the face of the papers, is serious, and clear, that is an important circumstance which the Court will take into consideration. I have a very distinct recollection of *McCarthy's* case; the facts there were not such as to make it probable that the accused would be convicted of the serious crime with which he was charged. I do not wish to say a single word which might seem to prejudge the present case. But the papers are before us; they have been referred to by counsel for the applicant; and I must say that upon the face of them there is evidence of deliberation, and that is a weighty factor in connection with this application. Then we have the fact that the Attorney-General, who is responsible for the administration of justice, informs the Court that in his opinion the interests of that administration require that the accused should remain in custody. It would require very special facts to justify the Court in overriding the position created by all these circumstances; and I do not think such facts are present here. The accused will be tried probably within six weeks from now. His detention in gaol will not be very long; and under all the circumstances we think that this is not a case in which we can interfere, and that the application must be refused."

Those dicta were in part quoted by Curlewis J. in the case of Grobler v The Attorney-General (3), where the learned Judge in refusing to grant bail to the accused, a Member of Parliament, upon a charge of high treason, observed at p.13,

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that

> ".... as pointed out by the Chief Justice in the case of Kaspersen, it is an element which the Court must take into consideration, whether the Crown objects or consents to the accused person being released on bail."

In the same year (1915) the Court in the case of R v Wessels (4), refused to grant bail where the accused, again a Member of Parliament, was committed on a charge of high treason. Maasdorp C.J. (Fawkes & Ward J.J. concurring) observed at p.19:

> "The Court does not think this application ought to be granted. We have the petition before us, which discloses hardly anything in favour of the application, and we have the fact that the Attorney-General opposes it. That would not in itself be conclusive, but it does throw the onus upon the applicant to give us some reason why the application should be granted; but the applicant does nothing. Apparently one of the reasons he advances for this application is that he wants to attend Parliament. I do not know whether that is a reason which we can consider in the matter. What we have to consider is the likelihood of his being present to stand his trial, and about that matter he keeps judiciously silent; he says nothing about that except that he is confident of his own innocence, and is not therefore likely not to stand his trial. If he could make us confident of his innocence, that would afford some *prima facie* counter-case to that of the Crown, and we would consider it."

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The case of R v Louw (5) concerned a charge for murder. Searle J. refused bail, observing at p.359:

> "The Court is always reluctant to refuse applications of this character and there is no doubt that the Court more often than not even in cases of murder does grant bail where there is no opposition. There are, however, cases in which the Court has refused bail in murder cases. The case quoted by the Attorney-General seems to me to be very much in point. The same sort of considerations that weighed in that case weigh here. From the portions of the preparatory examination referred to in argument and without going narrowly into the evidence I think that this is certainly a serious case. Although the statements for the Crown may be rebutted, the case at present seems strong. I do not wish to say anything that may prejudice the accused, as other facts may emerge and may put a different complexion on the case. The Attorney-General informs the Court that in his opinion the interests of justice require that the accused should not be admitted to bail. The considerations put forward in favour of granting bail are not strong enough to outweigh what the Attorney-General has said. The present application will be refused but the applicant will have leave to apply again if he can make a stronger case."

The case of Sangadavan & Ors v R (6) followed, in which the Court (Dove Wilson J.P., Tatham J. and Matthews A.J.) held, in effect, that in bail applications the Court could take cognizance of a statement by the prosecutor. The statement by the prosecutor in that case was no more than that, "to release

the men would defeat the ends of justice".

The gravity of the offence and the severity of the punishment were once again considered in the case of Ali Ahmed v Attorney-General (7), a case of rape, where the facility of absconding to a neighbouring country and the lack of extradition were canvassed by the Attorney-General, who opposed the application for bail. Gregorowski J. observed at p.464:

> "In the face of these facts the question is whether the Court ought to overridetheview of the Attorney-General and of the police, and, although no preliminary examination has been held and the case has not been entered upon, to release the accused on bail. I must say it is a thing one is very loath to do to keep a man in gaol when he may be innocent; when the charge may be simply trumped up. But on the other hand it is a serious responsibility to take, when there is this charge, when the police authorities and the Attorney-General oppose the application and say they cannot consent to his being released on bail, for the Court to interfere, and I am not prepared to interfere. I think that until the preparatory examination has been held, or at any rate entered upon, so that one can form some idea as to the nature and circumstances of the charge, this application ought to be refused. I think the application must, therefore, be refused. Of course it does not prevent the applicant from again coming to Court at some later stage."

There followed the case of Ex Parte Van Niekerk (8), a

case of murder where the accused had spent three months in prison awaiting trial on a charge of murder and his confinement was telling upon his health to such an extent that he was in imminent danger of a serious breakdown. The Attorney-General opposed the application for bail and Blaine J., relying upon the above dicta in Kaspersen (2), no doubt considering the depositions at the preparatory examination, refused bail.

The aspect of tampering with Crown witnesses was consdered in the case of Kok v R (9), to which Mr. Khasipe refers, where, in granting bail upon a charge of theft of £2,000 from a bank, Tatham J. observed that, "There is no evidence that the applicant had in fact attempted to tamper with any of the Crown witnesses". It seems to me, however, that the learned Judge disregarded the particular ground on the basis that the prosecutor had deposed that, "To prevent his (the accused) doing so (tampering with Crown witnesses), he was arrested before the investigations were completed". Tatham J. observed at p.269:

> "If this passage means that the object of arresting the applicant was to prevent his frustrating the investigations, and not to ensure his standing his trial, I do not think it is a proper proceeding."

Heavy reliance was again placed upon the Attorney-

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General's attitude in the case of Heller & Anor. v Attorney-General (10), where the two accused, arrested on a non-capital charge, were refused bail by the Magistrates Court and the Supreme Court. Watermeyer A.J.P. (Centlivres A.J., as he then was, concurring) observed at p.104:

> "In exercising our discretion we have to place considerable reliance upon what the Attorney-General says. We cannot ask him to disclose to us the name of the informant or the nature of the information received from him. He can refuse this on the ground of State privilege. He is the highest official in charge of prosecutions, and the Court is bound to place great reliance upon and great trust in what he says."

and further on at p.104:

> "... of course this is not a final decision of the matter, because prisoners against whom charges are made should not be kept waiting for any unreasonable time before they are committed for trial. If these investigations by the police take time which appears to the applicants unreasonable, they can again make application to the Court to be admitted to bail, and if they show that the investigations have taken an unreasonable time the Court will reconsider the matter."

There followed the case of Perkins v R (11) where the accused, charged with murder, was of "excellent character, financially sound and a man of substance", owning immovable

property, and had himself surrendered to the police after the killing, was nonetheless refused bail. Matthews A.J.P. (Hathorn J. and Carlisle A.J. concurring) observed at p.277:

> "... the first principle is whether or not the facts show that the accused is likely or unlikely, if admitted to bail, to appear to stand his trial. In judging of that likelihood the Court will ascribe to the accused the ordinary motives that sway human nature; see STRATFORD, J., in *Ali Ahmed v. Attorney-General* (7) at p.590. That is why the Court will be guided by the nature of the charge and the penalty which in all probability would be imposed and the other surrounding circumstances of the particular case. The accused has to satisfy the Court that he will appear to stand his trial and that the probability of his not doing so is remote; see WESSELS, J., *ibid*, p.589. As was pointed out by INNES, C.J. in *Kaspersen v. Rex* (2) at p.641, a man is always more likely not to stand his trial where the indictment against him involves the risk of his life. It follows that bail is not often granted where an accused is charged with murder; *the circumstances must be exceptional for bail to be granted.*" (Italics supplied)

Watermeyer A.J.P. considered the accused's financial standing. In particular he considered the accused's actions in voluntarily giving himself up to the police. He continued at p.278:

> "... But these facts show no more than the applicant's state of mind immediately after the occurrence and do not much

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> assist as to the likelihood or not of his appearing to stand his trial when he has had time to reflect. There is a further circumstance, that the Attorney-General in opposing the application has stated from the Bar that on the information before him there is a risk that the applicant would not appear to stand his trial.
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> The applicant not having discharged the *onus* which lay upon him in this respect the Court cannot exercise its discretion in his favour. The application must therefore be refused."

In Maserow v Attorney-General & Anor. (12) Murray J. refused bail to an accused charged with a number of offences of housebreaking and theft. In the course of his judgment he observed at pp.45/46:

> "The fact that there is no allegation on behalf of the Crown that the applicant will not stand his trial is not conclusive in the matter. That, although it may be of importance, and possibly the most important consideration in regard to the grant or refusal of bail, is, ... by no means conclusive."

Murray J. was referred to the case of Kok (9). He observed at p.47:

> "That case and the later case of *Hafferjee v. Rex* (13) were quoted to me in support of the proposition that the evidence before the magistrate and before this Court does not show sufficiently that there has been an actual attempt to stifle

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> the investigation or to influence the Crown witnesses, or that the circumstances are not such from which it may reasonably be inferred that the accused will in fact do something so as to interfere with the proceedings or the witnesses. But I have not been able to find any case decided in our Courts where it was held necessary for the Crown, to succeed in resisting the application for bail, to show that there has been in fact an actual attempt to influence the witnesses or to smother the sources of information which the prosecution is attempting to develop or to produce proof of actual facts from which the probability of such conduct should be inferred. It seems to me that if a statement is made by a responsible police officer and vouched for by the public prosecutor, or, as in this case, by the Crown prosecutor, to the effect that *there is a reasonable possibility* of such conduct on the part of an accused person, if allowed to be at large before the termination of his preparatory examination, the Court should not, even in first instance, insist upon the proof of some actual step towards interference with the course of justice;" (Italics supplied)

The influence of the Attorney-General upon the proceedings was again considered in Mahomed v R (14). There the Attorney-General, opposing an application for bail in respect of charges of fraudulent practices, filed an affidavit where he deposed *inter alia*, that having examined the police docket and although he was "not at this stage prepared to disclose the nature of the sworn information therein contained", such information militated against the release of the accused. Hathorn J.P.

(Selke & Broome J.J. concurring) observed at p.23:

> "We are satisfied that the Attorney-General, like the Court, has no wish to detain the applicant in gaol unless it is necessary in the interests of justice, and we accept his statements without insisting upon being more fully informed. If we were to so insist, the disclosure of information in the possession of the Attorney-General might well have the efect of destroying the efficacy of the investigations.
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> I do not think the decided cases are of much assistance in the circumstances. Once the Court accepts the Attorney-General's statements, *that is an end of the matter*. *Heller and Another v. The Attorney-General*, (10), shows how much the Court relies upon and trusts the Attorney-General; so does *Hafferjee v. Rex*, (13)." (Italics supplied)

The Court in Ex Parte Taljaard (15) refused bail on a charge of murder after a preparatory examination. Fischer J.P. observed at p.68 that,

> "In determining the question we are concerned with, stress is laid, in all cases, on the nature of the charge, because of the likelihood that arises in a case where the charge is a very serious one, e.g., murder, the accused may elect rather to forfeit his bail than stand his trial."

The learned Judge President then considered the aspect of the drunkenness of the accused, which the accused intended to

raise in his defence at the trial. This, I consider, is one of the earlier examples of the evidence at the preparatory examination being considered upon a bail application. In any event, Fischer J.P. concluded at p.69 that he was "unable to say that the charge will be necessarily reduced as alleged in the petition." He continued:

> "But I have before me also the argument of the Attorney-General, that the case is still under investigation. This has reference not to a vague allegation of a general seeking for further evidence but relates to a specific witness, who, it appears from the record, was probably on the scene about the time of the alleged crime and who would be able to speak to the condition of the accused. This witness has as yet not been found. Obviously this consideration must weigh with the Court. As is pointed out in *Gardiner & Lansdown*, the Court, while not bound thereby, must of necessity attach great weight to the attitude adopted by the *Attorney-General*."

There followed the case of R v Radowsky (16) where the Court refused an application for bail upon a charge of theft. De Villiers J. observed at p.195:

> "The position as outlined by the Senior Public Prosecutor and by the Senior Officer in charge of the Criminal Investigation Department is that they only want the applicant committed to gaol for a short period so that they can complete certain investigations, and that if bail

> is granted the fact of the accused being at large for the brief period involved would defeat the object of these investigations. It has been consistently laid down that where the Crown takes up that view, and particularly if the *Attorney-General's* representative supports it, that fact should carry weight with the Court."

In the case of R v Gcora (17) however, Pittman A.J.P. granted bail in a case of murder, against the opposition of the Solicitor-General, of whom Pittman A.J/P. said at p.76:

> "He does not take up the attitude, that there are any circumstances known to himself, which it is not desirable should be disclosed to the Court, and consequently the Court is in as good a position as himself to judge of the cogency of the considerations, which animate him in opposing the application."

I observe in that case, however, that the accused had himself displayed his anxiety for an early trial, discounting the risk of his absconding, and also that he had then been in prison for six months and would not be tried, at the earliest, for a further three months.

The approach of the Court in Radowsky (16) was repeated in R v Fourie (18), a murder case where bail was refused, Fischer J.P. observing at p.576:

> "I agree with the view expressed by my brother PITTMAN in the case of *Rex v. Gcora* (17) that the Court is not bound by what the Attorney-General thinks, but notwithstanding the *dictum in that case, the Courts have hitherto paid considerable respect to the views expressed by the* Attorney-General, and no doubt through him of those of the police. I shall do so in the present case, for I do not think that the Attorney-General's opinion rises from a mistaken view of the facts, or over-emphasis of the wrong facts."

The dicta in Maserow (12) were followed in Ex Parte Qutani (19), where Gardner J., in considering the opposition to the grant of bail in a murder case (involving 15 accused), observed at p.176 that,

> "... the opposition here is not based on any fear that the accused will not appear. It is that the accused, if liberated, will tamper with the Crown witnesses and so interfere with the course of justice. That is the opinion of the *Solicitor-General* and the prosecutor in the magistrate's court. The view of these officials must not be brushed aside lightly. I confess that that opinion impresses me in this case."

Counsel for the applicants in Qutani (19) submitted that the Crown had made "no allegation that the accused have interfered with witnesses". Gardner J. observed at pp.176/177:

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> "I do not think it is necessary for the Crown to produce some actual step by the accused towards interference with the course of justice. It appears to me that *well-founded fears* are enough: see *Maserow v. Attorney-General & Another* (12) at p.47 in particular); and if I may say so, I respectfully concur with the reasons given by MURRAY, J." (Italics supplied)

In the case of R v Mtatsala And Anor. (20) the Court granted bail in a murder case, despite the opposition of the Solicitor-General. As Lewis J. observed, the relevant passage in the affidavit of the Solicitor-General's representative was "somewhat cryptically worded". It read:

> "That your deponent verily believes that in view of the seriousness of the charge against the accused and the severity of the possible sentence that may be passed the granting of bail to the applicants is likely to prejudice the ends of justice."

It transpired that the Solicitor-General's representative did not have "information in his possession, the details and the source of which for reasons of public policy he does not consider it desirable to disclose to the Court, but which induces him to the *bona fide* conclusion that the accused, if granted bail, intend to abscond". Under the circumstances Lewis J. adopted the above-quoted dictum of Pittman A.J.P. in Gcora (17).

As to the aspect that a person charged with a capital offence is likely to abscond, Lewis J. observed that with regard to the case of Ali Ahmed (7),

> "... the language of Wessels, J.P., ... seems to show that he doubted whether it could be said to be
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> > "true as a presumption of law that a man, who is likely to be found guilty of murder and who would be executed for such a crime, would not wish to stand his trial".
>
> But I am not prepared to go to the length of holding that such a consideration standing by itself is conclusive, however material it may be as an element to be weighed with the other circumstances of the case. If it is to be regarded as *per se* conclusive, it must follow that in no case where a person was accused of murder and where a strong *prima facie* case had been made out against him at the preparatory examination could he hope to obtain bail. If this be the law, innumerable cases in our Courts, where bail has been granted in cases of murder, must have been wrongly decided."

Lewis J. considered the dictum of Newton Thompson A.J.P. in the case of R v Lee (21) at p.594 that

> "for treason and murder bail would only be given in exception circumstances."

Newton Thompson A.J.P. had adopted the dictum of Matthews A.J.P. in Perkins (11) reproducd above, namely,

> "It follows that bail is not often granted where an accsued is charged with murder; the circumstances must be exceptional for bail to be granted."

That was the view of the full Bench of the Natal Provincial Division, and as to that dictum Lewis J., sitting in the Eastern Districts Local Division, had this to say in Mtatsala (20) at p.591:

> "The learned Judge must, I think, be taken as referring to the practice of his own Court; if his words are to be understood as of general application, it may be pointed out that in this Division, where during the course of a year very many cases of murder come before the Court for trial, ... it is the rule rather than the exception for bail to be granted."

Lewis J. considered that there was nothing in the dicta of Innes C.J. in Kaspersen (2), or Curlewis J. in Grobler (3), to support the particular dictum contain in Perkins (11) or Lee (12). With regard to the dicta of Innes C.J. in Kaspersen (2), reproduced earlier in this judgment, Lewis J. observed at pp.590/591:

> "INNES, C.J. made it clear that "very special facts" were requred to be proved - and it must be taken that this meant that the accused must prove them - to override the position *created by all the circumstances*, i.e. not merely that the

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> charge was one of murder, but that there was a strong *prima facie* case against the accused, that there was evidence of deliberation on his part, and *in particular* that the *Attorney-General* saw fit to oppose the application in the interests of the administration of justice. It is only then, as it seems to me, that the accused can be called upon to prove the "very special facts" or the "exceptional circumstances" necessary to justify the Court in "overriding the position created by these circumstances" and in granting his application."

Ultimately Lewis J. granted bail in Mtatsala (20). I observe however that an anomalous situation arose, in that, contrary to the Solicitor-General's opposition, the local prosecutor, who, as Lewis J. observed, was "more familiar, one may assume, than the Solicitor-General with local circumstances and conditions", had no objection to bail being granted and "does not appear to have any the least apprehension that the grant of bail in this case is likely to defeat the ends of justice."

There followed the case of Leibman v Attorney-General (22) wherein Millin J. observed at p.609 that,

> "the very fact that a person is charged with a crime which may entail the death penalty is in itself a motive to abscond. But that fact is not enough. If it were otherwise - if that fact were regarded as enough - no person charged with a capial

> offence could ever hope for bail, and yet bail has in many cases been granted to persons charged with capital offences. The Court looks at the circumstances of the case to see whether the person concerned expects, or ought to expect, conviction. If it is found on circumstances disclosed to the Court that the likelihood of conviction is substantial, that the person ought reasonably to expect conviction, then the likelihood of his absconding is greatly increased. Thus the Court goes into the circumstances of the case, that is, the evidence at the disposal of the Crown. Where there has been a preparatory examination that is the material which is used. Where no preparatory examination has yet been held the Court has to consider such material as is furnished to it by the accused himself (the applicant) or by the *Attorney-General* or his representative."

Thereafter Millin J. placed the same construction on the dicta of Innes C.J. as had Lewis J. in Mtatsala (20) observing at p.610 that,

> "All that he (the accused) has to show in the first instance is that there are facts rendering it unlikely that he will abscond or otherwise interfere with the administration of justice."

Millin J. granted bail, in the amount of £5,000, on a charge of murder, observing at pp.612/613 that it could not be said that the case against the accused was so strong as to make it unlikely that he would stand trial. In particular he

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observed at p.614:

> "There is no affidavit that the *Attorney-General* or any adviser or assistant of his is in possession of evidence which it is not desirable to disclose to the Court but which would render it likely that the applicant would tamper with the witnesses or endeavour to abscond. If there were such an affidavit, it would be a matter *for the most serious consideration*, but there is not. It is true that the *Attorney-General* opposes the application. Some weight is attached to that bare fact, but there is no reason to think that there are grounds in existence for refusing bail to the applicant which have not been disclosed to the Court." (Italics supplied)

The case of R v Grigoriou (23), was another murder case, where application was made for bail after a preparatory examination. Ramsbottom J. (Lucas J. concurring) observed at p.480:

> "In the present case the *Attorney-General* does not put forward any special grounds for opposing the application. He does not put forward any facts upon which a suggestion can be founded that the applicant would, if admitted to bail, tamper with the witnesses, nor does he put forward any special facts from which he asks the Court to say that there is any special likelihood of the applicant absconding if he were admitted to bail."

and further on at p.480:

> "It seems to us that we must exercise the caution which was referred to by by SIR JAMES ROSE-INNES, C.J. in *McCarthy's* case. The *Attorney-General* is the person who is responsible for bringing people to trial. The *Attorney-General* has opposed this application and the Court must be very careful not lightly to over-ride the opinion of the *Attorney-General*"

Ramsbottom J. considered that the preparatory examination disclosed "a strong *prima facie* case" and observed at p.481:

> "In the circumstances in which the applicant finds himself it is, in my opinion, necessary for him, if he wishes to be admitted to bail, to do something more than say that he will not abscond and that he does not intend to tamper with the witnesses. He has not disclosed his defence either by cross-examination at the preparatory examination or in his petition. He contents himself with the bald statement that he is not guilty but no indication has been made of what his defence may be.

In the case of S v Kantor (24), a case of sabotage, the accused had been granted bail but was re-arrested under the provisions of section 104 of the Criminal Procedure Act, 1955 (see section 115 of the Criminal Procedure and Evidence Act, 1981). The State applied for his committal pending trial. Cillie J. observed that "to an extent the Court is guided by the same considerations which are relevant in an application for bail" and committed the accused to gaol. Cillie J.,

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observed at p.378:

> "The Court considered what weight was to be attached to the evidence on behalf of the State in view of the refusal to disclose the names of informers and associates, as well as the details of the alleged preparation. It was appreciated that the non-disclosure made it difficult for the respondent to refute the charge that he is about to flee. But where a Court must decide whether the ends of justice would be defeated if an accused person is allowed his freedom while awaiting or standing trial, the fact that the sources and particulars of information that he is so preparing to abscond are not disclosed in the interest of justice or public safety, cannot mean that the effect of that information must be ignored. This question was considered in *Heller and Another v. The Attorney-General* (10) and in *Lobel and Another v. Claassen, N.O.* (25)"

Bail was granted in the case of S v Essack (26), but that was by no means a capital case. Miller J. observed at p.162:

> "The presumption of innocence operates in favour of the applicant even where it is said that there is a strong *prima facie* case against him, but if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the Court would be fully justified in refusing to allow him bail. It seems to me, speaking generally, that before it can be said that there is any likelihood of justice being frustrated through an accused person resorting to the known devices to evade standing his trial,

> there should be some evidence or *some indication which touches the applicant personally* in regard to such likelihood." (Italics supplied)

Bail was granted by Miller J., despite the Attorney-General's opposition, of which the learned Judge observed at p.163:

> "I do not for one moment overlook that the very fact of opposition by the Attorney-General is a weighty consideration. This has been emphasised in several cases. The Attorney-General occupies a highly important and responsible position, and if he opposes bail the Court will keep that circumstance very much in the foreground of its consideration of the matter. But this is not to say that whenever the Attorney-General opposes such an application the Court will refuse to allow bail, for opposition might often be justifiably offered out of considerations of caution."

Miller J. refused bail on a charge of murder, however, in the case of S v Perumal (27), that is, before the preparatory examination had been completed, in which application the accused had said he was innocent, but had given no details of his defence. Milne J.P. dealt with a second application, after the preparatory examination had been concluded, the Attorney-General opposing the application. The learned Judge President considered and analysed the evidence disclosed at the

preparatory examination, and indeed a statement made by the accused to a magistrate. concluding that there was a strong *prima facie* case of murder, without extenuating circumstances. Thereafter Milne J.P. refused bail on the ground that the accused was likely to abscond, in view no doubt of the case against him.

The principles applicable in bail applications were once again considered in the case of S v Smith & Anor. (28) where the oft-quoted dictum of Harcourt J. (Shearer J. concurring) at p.177 reads thus:

> "The Court will always grant bail where possible and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby."

In the case of S v Lulane & Ors. (29), to which the learned Attorney for the first three applicants, Mr. Sooknanan, refers, Didcott J. refused bail in a case of murder involving 34 applicants, after conclusion of the preparatory examination. As to the evidence disclosed therein the learned Judge considered the weakness of some evidence of identification and concluded at p.213 that, as to the State's case against eight accused in particular, he had "no reason to believe in its

strength". He rejected the suggestion however that the accused whose identification appears meagre should, for that reason alone be treated differently from their companions". The Attorney-General opposed the applications, on the ground that the accused were likely to flee if released. Didcott J. adopted the relevant dicta in Mtatsala (20), Leibman (22) and Essack (26) observing thus at p.211:

> "He (Counsel for the Attorney-General) atempted to persuade me that the attitude of the Attorney-General was *per se* a reason to refuse bail. I do not agree. Although the opinion of the Attorney-General always commands respect because of his experience and the responsibilities of his office, it seems to me that, once it is evident that he is not better informed than the Court, it is in as good a position as he to assess the likelihood or otherwise that an accused person will abscond."

Ultimately the learned Judge at p.213 considered that there was "a real and substantial likelihood" that the accused would abscond if freed and refused bail, granting bail however to three of the 34 accused, one of which three was a cripple and the other two were schoolboys aged 16 and 17 years.

There followed the case of S v Bennet (30), to which Mr. Sooknanan refers. That case concerned a charge of price maintenance, where Vos J. granted bail (in the amount of

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R15,000). The State opposed the application, mainly on the basis of possible interference with witnesses. Vos J. oserved that the Attorney-General had opposed the application on the basis of information "from his own officials or investigating officers", but at the time could not have considered the information contained in the applicant's affidavit, filed but half an hour before the proceedings, at least "to the same extent as the Court did". Vos J.observed at p.655:

> "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 substituted for the Court's discretion."

The learned Judge continued,

> "In my view the State cannot merely arrest in order to complete the investigation. There must be a *reasonable possibility* that the accused will interfere with the investigation. See Swift, Law of Criminal Procedure, 2nd Ed., p.150." (Italics supplied)

Vos J. then quoted with approval the dicta of Tatham J. in R v Kok (9) at p.269, reproduced in part earlier in this judgment, and continued thus:

> "In the instant case the applicant has not intefered with the investigations thus far. Indeed no such allegation is made on behalf of the State, the allegation being that he *may* interfere with the investigation. According to Mr. *Harwood* it is only in view of the new facts discovered that the risk of intereference arises. Indeed Mr. *Harwood* says the State does not know who the witnesses may be. It appears to me that, as applicant has thus far not interefered with the investigation, the proper approach should be that, unless the State can say that there is a real risk that he *will*, not merely *may*, interfere, there does not appear to me to be a reasonable possibility of such interference."

The case of S v Nichas & Anor. (31) decided by a full Bench of the Cape Provincial Division, is of particular interest in that it drew a distinction between an appliction for bail before trial and one made during or after trial, in a Magistrates' Court. Diemont J. (Theron & Grosskopf JJ. concurring) observed at p.263:

> "Where the application is made during the course of the trial or at the conclusion of the trial, the magistrate will know what the nature of the offence is and under what circumstances it was alleged to have been committed; he may have some knowledge of the accused's personality and background and he may be able to assess the risk in granting bail. But where, as in this case, the application was made two days after the appellants' arrest, before any charge had been framed and while the police investigations were still in an embryo state, the magistrae could have

> little or no knowledge of the matter. *In such circumstances the Court must give great weight to the views of the Attorney-General*, who may well be in possession of witness' statements, of confidential documents and of the accused's records." (Italics supplied)

The case of S v Hudson (32) was an appeal from a Magistrates' Court against the refusal of bail pending trial on a charge of dealing in a relatively large quantity of dagga cigarettes. Thirion J. was concerned mainly with the risk of the accused absconding and dismissed the appeal, observing in particular at p.148:

> "Where an accused applies for bail and confirms on oath that he has no intention of absconding due weight has of course to be given to this statement on oath. However, since an accused who does have such an intention is hardly likely to admit it, implicit reliance cannot be placed on the mere say-so of the accused. The court should examine the circumstances."

Turning to local authority, I have considered the case of Moletsane v R (33) decided by Cotran J. (as he then was) in 1975. In that case the accused, with 48 other co-accused, had been summarily committed to the High Court for trial on a charge of high treason, alternatively with sedition, alternatively with an offence under the Internal Security

(General) Act no.37 of 1967. The Crown opposed the application, the Acting Attorney-General filing an affidavit in which he deposed that the applicant was unlikely to stand trial, owing to the gravity of the offence and the strong possibility of conviction and that there was a real possibility of the accused interfering with state witnesses. Cotran J. observed at p.273:

> "Section 99 of the Criminal Procedure and Evidence Proclamation provides that an accused person may be admitted to bail by a Subordinate Court except on a charge of sedition, murder, high treason, and aggravated robbery. The release on bail on such offences is the exception rather than the rule, though the High Court appears to have powers under the provisions of section 109 to admit accused persons to bail even in respect of the offences above mentioned. There must, however, be good reasons for departing from this rule, and the *onus* of showing special facts rests on the accused. Surrender of a passport does not, in my judgment, necessarily prevent an accused walking across our extremely open borders. In a recent case before me (*Rex v. Szezepaniak*, (32)) the requirement of reporting daily to a police station was no deterrent to an accused who was determined to escape and did so."

The learned Judge was unable to form any independent opinion as to the likelihood of conviction, as there no evidence, such as the record of a preparatory examination, before him, on which to base any opinion. He observed further

at p.279:

> "Here the Acting Attorney-General has refused to disclose his source of information and the applicant is unable to rebut the allegations, but that does not necessarily mean that the court's discretion *must* be exercised in an accused's favour. Equally, if every time the State expects the courts invariably to comply then there is no need for a High Court."

Cotran J. then quoted with approval the dicta of Cillie J. in Kantor (24) at pp.378/379, quoted in part earlier in this judgment. The accused had spent 14 months in prison, but the learned Judge took cognizance of special features in the case, namely, that 49 accused were involved, "with some 388 alleged conspirators, some of whom have fled. Many witnesses had perforce to be interviewed. It does not strike as if the State was either tardy in their investigations, or inexpeditious in their prosecutions". Furthermore, the learned Judge observed, the trial was about to commence in about three weeks and in all the circumstances he refused bail "not without reluctance", observing that,

> "if there is any inordinate delay in the commencement of the trial occasioned at the instance of the Crown, the applicant may renew his application."

That completes a summary of the relevant authorities. Before proceeding further I observe that the relevant legislation to which Cotran J. referred in Moletsane (33) is now to be found in sections 99(1) and 109 respectively of the Criminal Procedue & Evidence Act, 1981 (and see also section 106(1)). Under sections 99(1) and 106(1) a Magistrate is empowered to grant bail in all cases "other than sedition, murder, attempted murder, armed robbery or treason". Under section 109, of course, the High Court may grant bail in such cases. The fact that a Magistrate may not grant bail in such cases, however, and that they are reserved for the discretion of a Judge, must surely indicate that they are grave offences and that bail should not be granted readily therein. Whatever about sedition, treason and armed robbery however, it cannot be said to-day, of murder and attempted murder, that, "The release on bail on such offences is the exception rather than the rule". I appreciate that that was said by Cotran J. 16 years ago, and while that still may be said in respect of sedition, treason and armed robbery, quite the converse to-day applies to the offences of murder and attempted murder. The fact of the matter is that there has been a steady but nonetheless alarming increase in homicide over the last 10 years, and the High Court consistently deals with approximately 450 bail applications in murder cases each year - indicating a homicide level of approximately 500 cases each year. To-day the refusal of bail

in a murder case is the exception rather than the rule. Indeed, that was apparently the situation as far back as 1915 in the Cape Provincial Division, when Louw (5) was decided.

But even if that were not the case, while it is trite that the onus rests upon an accused in a bail application, I must respectfully disagree with the dictum of Cotran J. that there is an onus upon the accused in the case of offences excepted under section 99, simply because such offences are so excepted, to show "special facts" as to why he should be granted bail. The fact that bail in such cases is reserved for the discretion of a Judge, cannot, in my view, indicate any more than that, as I have said, bail should not be granted readily. Indeed, in cases of murder the learned Innes C.J. in McCarthy(1) at p.659 was prepared to put it no higher than this:

> "The Court is always desirous that an accused 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. In cases of murder, however, *great caution is always exercised* in deciding upon an application for bail." (Italics supplied)

Thereafter the question of "special facts" arose in Kaspersen (2), as Lewis J. observed in Mtatsala (20), only

upon consideration of all the circumstances in the former case, and not because *per se* the offence involved was one of murder.

There is another aspect arising out of the authorities cited which requires elaboration, namely the dicta of Tatham J. in Kok (9) at p.269 earlier quoted. Tatham J. observed that it was not "a proper proceeding" to arrest an accused "to prevent his frustrating the investigations". Vos J. in Bennet (30) at p.655 approved that dictum and went on to observe that,

> "... unless the State can say that there is a real risk that he (the accused) *will*, not merely *may* interfere, there does not appear to me to be a reasonable possibility of such interference."

When one considers the indefinite nature of the words, "real risk", the use therewith of the word, "will", rather than "may", seems to me, with respect, to be an exercise in semantics. It may well be that in Kok (9) there was no 'reasonable possibility' that the accused would interfere with the witnesses, hence Tatham J. considered the accused's arrest not proper. If it is the case, however, that bail will not be granted where there is a reasonable possibility that the accused will interfere with witnesses, then I cannot, with respect, see anything to prevent his arrest in the first case under such circumstances, see e.g. the case of Radowsky (16).

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Another matter which arises, is that all the authorities quoted refer to the Attorney-General as having charge of prosecutions in the Republic of South Africa. That power in Lesotho is generally vested in the Director of Public Prosecutions, subject, that is, (under section 6(3) of the Criminal Procedure & Evidence Act, 1981) to the direction and control of the Attorney-General. In any event, I consider that the references to the Attorney-General in the authorities quoted bear full application to the Director of Public Prosecutions.

I turn then to consider the facts of the case before me. The affidavit of Lt. Col. Ngatane indicates that Crown's main ground for its opposition to bail is the aspect of interference with witnesses. Another ground is the risk of the disposal of the firearms involved.

Taking the latter point first, it is clear that this particular ground is not levelled at any particular accused, because, as the Director has informed the Court from the Bar, the Crown does not know which accused hid the murder weapons, and this matter must be investigated further. I confess that it is difficult to conceive of circumstances whereby the investigating officer can say that his investigations reveal that one of four accused hid the murder weapons, yet he cannot

say which accused did so. I observe that it is allged that the third and fourth applicants "procured accomplices who took part in the murder of the deceased". That suggests that such accomplices played a physical part in the killing of the deceased, with at least two firearms it seems, and it is then difficult to appreciate why such accomplices were not involved in the hiding if not disposal of the firearms. In any event, I see no need to decide on the issue, in view of other aspects.

With regard to the first ground, that is, the risk of interference with witnesses, there is no allegation of any previous interference or attempted interference. That however is not conclusive - see the cases of Maserow (12) and Qutani (19). It proves convenient to repeat what Lt. Col. Ngatane avers in paragraph 8 of his affidavit:

> "The two applicants who held the positions of president and vice president of Lube are influential persons. I honestly believe that if they (the first and second applicants) are released on bail at this stage of police investigations they will hamper investigations which have reached a very advanced and delicate stage. I believe that if the applicants were to

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> have access to certain witnesses who have not been interviewed by the police this would have a detrimental effect on the conduct of police investigations."

That averment as I see it, in the context of the affidavit as a whole, reveals "a well-founded fear", as Gardner J. put it in Qutani (19), of interference with witnesses, or a "reasonable possibility" thereof, as Murray J. put it in Maserow (12) and as Vos J. put it in Bennett (30).

As to the third and fourth applicants, there is the allegation that they procured accomplices, and in particular, "an accomplice witness". That phraseology seems to me to indicate that the Police seek the accomplice as a prospective Crown witness. Lt.Col. Ngatane's affidavit indicattes that the Police are trying to trace prospective prosecution witnesses (including no doubt the accomplice). The affidavit then reads,

> "It is *essential* that the police should locate the said witnesses before they come in contact with *any* of the applicants and if they are granted bail at this stage I am apprehensive that they *may* reach the prospective witnesses before the police

get to them." (Italics supplied)

I regard the use of the word, "may", as indicating that the eventuality may not occur, as the police "may reach the prospective witnesses" before the applicants might do so, if released. The language in the above passage indicates in my view, however, again in the context of the affidavit as a whole, "a well-founded fear" or "a reasonable possibility" that the applicants will reach the witnesses first and will influence them.

The first applicant in his replying affidavit does little more than deny that he has interfered or will interfere with any witness. He avers that he was arrested on 18th September, 1991, and (if disposed to such interference), "had ample opportunity to interfere with witnesses prior to that date". If that were the case, of course, his release would only compound the mischief. The second and third applicants associate themselves with the first applicant's replying affidavit.

As to the fourth applicant, he avers that "the investigators' fears are baseless as they do not even give an iota of my attempt to do what they fear". But that aspect, as I have said above, is not conclusive.

There is then the opposition of the Director of Public Prosecutions and the affidavits filed by a Senior Crown Counsel and two senior police officers. As I observed earlier, to refuse bail in a murder case is to-day the exception rather than the rule. This is basically because it is only in the rarest of murder cases that the Crown opposes an application for bail. Indeed I cannot recall any such application before me which the Crown opposed.

It is trite that the Director's *ipse dixit* cannot replace the Court's discretion. But then in the circumstances of this case it certainly cannot be said that the Court is in as good a position as, much less a better position than the Director, to assess the reasonable possibility of interference with witnesses. There has been no preparatory examination and to adopt the dicta of Diemont J. in Nichas (31),

> "... the police investigations (are) still in an embryo state, (and) the (Court) could have little or no knowledge of the matter. In such circumstances the Court must give great weight to the views of the Attorney-General who may well be in possession of witness' statements (and) of confidential documents ...".

The Director concedes that the affidavits filed by the Crown do not contain any allegation that the accused will abscond. But as Murray J. held in Maserow (12) at pp.45/46:

> "The fact that there is no allegation on behalf of the Crown that the applicant will not stand his trial is not conclusive in the matter."

As Matthews A.J.P. observed in Perkins (11) at p.277:

> "... the first principle is whether or not the facts show that the accused is likely or unlikely, if admitted to bail, to appear to stand his trial ... The accused has to satisfy the court that he will apear to stand his trial and that the probability of his not doing so is remote."

As I see it, the Court has not alone a discretion, but an obvious duty in the matter. Just as the Director's *ipse dixit*,or that of the prosecutor, in any opposition to the grant of bail, cannot be a substitute for the Court's discretion, the same inevitably applies where the Crown does not oppose bail. Speaking of a Judge's reluctance on appeal, to interfere with a Magistrate's discretion in refusing bail, Murray J. in Maserow (12) observed at p.46 that,

> "There may, of course, be cases where for instance the public prosecutor would be prepared to admit the accused to bail and the magistrate in a spirit of obstinacy refuses to grant bail."

I do not interpret the learned Judge's observation to mean

that a refusal to grant bail in such circumstances is *per se* 'obstinate'. While the Court invariably grants bail where the Crown has no opposition thereto, I do not see that any rule in the matter is thereby established: there may possibly be a case where a Court might be justified in refusing bail where the Crown offers no opposition to the grant thereof (see e.g. C. Chatterton on Bail: Law And Practice (1986) at p.41, p.49 and p.50 n.1). Similarly, I do not see that the Court should decline to consider "the first principle", namely, the likelihood or otherwise of an accused appearing to stand his trial, simply because the Crown has not raised such aspect in the papers before the Court. It is the Court's inherent duty to determine such likelihood.

The charge in the present case is one of murder, and to adopt the dictum of Innes C.J. in McCarthy (1), "a man is always more likely not to stand his trial where the indictment against him involves the risk of his life". This consideration always operates, no matter what assets or family ties or obligations the accused may have. It is for that reason that "in cases of murder great caution is always exercised in deciding upon an application for bail". It is a notorious fact that it is a matter of relative ease to cross the borders of Lesotho in mountainous regions, without detection. As Cotran J. observed in Moletsane (33), surrender of a passport, or

repeated reporting to the police, does not necessarily prevent escape.

There are other aspects of the case. The Director submits that this is no "run of the mill" murder. It is a matter of concern that the number of murder cases before the High Court each year is so great that the description used by the Director is not inappropriate. The allegation by the Crown in the present case is that of a plot by members of a Trade Union to kill a senior member of the management of a commercial Bank, during the course of a strike. It is alleged that accomplices were procured and that more than one firearm was used. The allegation as to the manner of the commission of the offence is not denied: the applicants say that they know nothing of the offence. Even though a preparatory examination has not been held, Lt.Col. Ngatane's affidavit on the point constitutes, as Innes C.J. observed in Kaspersen (2), "evidence of deliberation, and that is a weighty factor in connection with this application". Even the very rank of the investigating Police officers indicates the gravity of the offence charged: it is my experience that not infrequently a Police Trooper is given charge of murder investigations, at least in rural areas. There is also the evidence that the accomplices and prospective witnesses are hard to trace; that, in respect of the accomplices at least, may indicate that they have already left

the country, a course which the applicants, if released, might well decide to follow.

In response there are the applicants' affidavits, the relevant statements whereof I have set out above. Mr. Sooknanan and Mr. Khasipe take the position that their clients can do little else but deny the allegations. Those denials constitute blank denials however. The founding affidavits in my view reveal a reluctance to state even the date when or the place where the deceased is alleged to have met his death, despite the fact that all four applicants are well acquainted with the particulars on the charge sheet. The first two applicants make no reference to the senior posts held by them in L.U.B.E. Again, there is no reference to the senior position held by the deceased in management in Barclays Bank, but merely to the fact that he was "an employee of Barclays Bank in Maseru".

As the authorities indicate, the Court on an application for bail is always loathe to express any opinion on the outcome of the trial. Nonetheless, as Millin J. observed in Leibman (22),

> "Where no preparatory examination has yet been held the Court has to consider such material as is furnished to it by the

> accused himself (the applicant) or by the Attorney-General or his representative".

Invariably in bail applications before committal to the High Court for trial, some facts are disclosed by the applicant to enable the High Court to assess the case against him. The present affidavits, in the Director's submission, and in my experience, are of the barest detail. Mr. Sooknanan submits that it is premature to expect the applicants to reveal a defence of alibi. I can only say that that is a matter for the applicants. As matters stand however, as Maasdorp C.J. observed in Wessels (4),

> "We have the petition before us, which discloses hardly anything in favour of the application, and we have the fact that the Attorney-General opposes it."

Again, as Ramsbottom J. said in Grigoriou (23),

> "He (the accused) contents himself with the bald statement that he is not guilty, but no indication has been made of what his defence may be."

Those authorities were cases where preparatory examinations had been held. Nonetheless, in view of the contents of the affidavits filed by the Crown, I consider the

above dicta applicable.

There is no doubt that the Crown on the other hand has not disclosed any source of information or details of the offence involved. As Cillie J. observed in Kantor (24), however,

> "... the fact that the sources and particulars of information ..... are not disclosed in the interest of justice or public safety, cannot mean that the effect of that information must be ignored."

The South African authorities indicate that the onus of proof is upon the applicant, though on a balance of probabilities. There is opinion to the contrary. In his work entitled "Bail - A Practitioner's Guide" (1986) J. Van Der Berg observes thus at p.11:

> "Our courts have viewed the bail application as just another application in which the applicant has to show that he is entitled to the requested relief. This approach is certainly sound in respect of civil law but cannot be accommodated in a criminal justice system which purports to uphold the basic principle that an accused is innocent until proven guilty, and which requires that in principle the state should in the criminal process shoulder the entire burden. The question of fundamental principles of criminal justice transcending the procedural principle of convenience, namely that he who seeks relief bears the onus, has never been properly considered by our courts."

/...

I see no need to decide on that question however. I consider in any event, in the light of the Crown's affidavits and all the surrounding circumstances of this case, which I have detailed, that there is in the least an evidential burden upon the applicants, which they have failed to discharge.

In all the circumstances I am satisfied that, if the applicants are released, there is a reasonable possibility of interference with Crown witnesses, and that it is likely that the applicants will abscond. I am accordingly satisfied that it is likely that the administration of justice will be prejudiced by the release of the applicants.

The Director has informed the Court that he hopes to have the accused committed for trial before the High Court, apparently summarily, next month. In all the circumstances the application is refused.

Delivered At Maseru This 25th Day of October, 1991.

B.P. CULLINAN
CHIEF JUSTICE