CRI/APN/428/90

IN THE HIGH COURT OF LESOTHO

In the Application of :

JIMMY NHLAPHO

v

R E X

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L.Lehohla
on the 31st day of January, 1991

The applicant has once more moved his application for bail before this Court; his two prior applications having been refused. The Crown maintains that the applicant's insistence to be granted bail is abuse of Court process.

It seems that the basis of the applicant's further attempt to persuade this Court to grant him bail is that since his arrest in April 1990; no preparatory examination has been held in respect of the crime of murder he is alleged to have committed; nor has a date been fixed for the summary trial made mention of in paragraph 5 of Mr. Thetsane's affidavit dated 24th January 1990 (which I think should read: 24 January 1991 as reflected in the date stamp).

The applicant is a South African pass-port holder and a citizen of that country resident at Sebokeng.

He faces a murder charge committed in the course of robbery. He has been in custody since his arrest in April.

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The applicant has two wives one of whom is a Mosotho resident in Lesotho. Seven minor children were born in the marriage to the applicant's Mosotho wife. The applicant avers that he has a home in Lesotho and some businesses at Bela-Bela in the Berea district.

The Crown opposes the granting of bail to the applicant on the grounds that he would abscond and that indeed he previously absconded in respect of a House-breaking offence committed in Mohale's Hoek in Lesotho.

The applicant counters by stating that in respect of CRI/APN/134/90 he had averred in paragraphs 4 and 5 that he had been in Mohale's Hoek on 10th April 1990 for his formal monthly remands in respect of the Housebreaking charge when he got arrested by the Mohale's Hoek police for Murder, and further; that he has been on bail on the housebreaking charge since 7th March 1990 and has never breached any of the conditions imposed.

Detective Sergeant Jonase's response to these averments is that he admits them in his paragraph 4.

It is therefore a point of some curious amazement that the same sergeant should in CRI/APN/428/90 paragraph 4 state for the first time that the applicant had absconded to Sebokeng prior to 10th April 1990 in respect of the housebreaking offence and only came back to be arrested after he had been enticed by the police who told him that the applicant's vehicle allegedly involved in the carrying out of the housebreaking offence and kept by the Court could only be released to him if he came to Lesotho to identify and claim it.

Miss Moruthane asked that the deponent Jonase be allowed to give oral evidence . The Court wished to know if the deponent was readily available but it turned out that he was attending some court business in the subordinate court in Mohale's Hoek. The Court asked if the sergeant went there even though the Crown counsel had advised that

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he would be required in this Court. The Crown counsel said indeed the sergeant did so. The Court wished to know the applicant's counsel's attitude to the application that the hearing be postponed. The applicant's counsel stated that the application for postponement was opposed. The Court upheld the applicant's counsel's objection.

I agree with the applicant's counsel's submission that it would entitle the Court to refuse bail if there was proof of prior attempt on the applicant's part to abscond, and that in the circumstances of this case the Crown's effort to furnish proof to that effect was frustrated by sergeant Jonase's self-contradiction. I agree with Mr. Nathane that the fact that a man faces many charges is no ground for refusing him bail, the proper ground for refusing him bail being perhaps that he has been convicted of such offences.

However as was stated in CRI/APN/323/90 Tebello Tlebere vs Rex (unreported) where the words of Elyan J were cited with approval in Jack Mosiane and Others vs Regina HCTLR 1961-65 page 25 at 27 :

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

I agree entirely with the above view.

Mr. Nathane for the applicant submitted that the charge sheet shows that the applicant is facing a Murder charge and nothing else. But I have observed that Mr. Thetsane's affidavit filed in opposition of the release of the applicant on bail states that the murder was committed in the course of a robbery.

Murder /alone is a serious crime. An added element of robbery in the commission of murder would tend to

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aggravate whatever sentence is likely to be imposed should conviction stand in the circumstances so far considered to be relevant in this application.

If official statements on which substantial reliance can be placed are before the Court to the effect that reasonable possibility exists that the applicant would not stand trial, then the Court cannot very well brush aside such statements, thus proof of any actual attempt to abscond will not be demanded.

As stated in Tlebere above at 4 the view expressed above is in conflict with that expressed by Vos J. in S. vs Bennet 1976(3) SA2652 at 655 and 656 read with R. vs Kok 1922 NPD 267 at 269 and referred to in CRI/APN/151/86 Moholisa & An. vs R (unreported) for the proposition that :

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

The Court has taken a serious view of the fact that the applicant is not a citizen of Lesotho and that his home country has not entered into any extradition treaty of any form with Lesotho and therefore that should the applicant abscond and take refuge in his country there will be no way of securing his presence in Lesotho to stand trial.

Mr. Nathane suggested that stringent conditions could be imposed in order to ensure that the applicant would stand trial. In my view short of imposing conditions which amount to denial of bail the fact that there is ease of mobility for the applicant to foil his trial by just fording the Caledon or scaling the fence constituting the border between his country and this territory does not speak favourably for his release.

Indeed in Schalvyk vs Rex CRI/A/53/81 the magistrate refused bail to the applicant a citizen of a foreign country charged with theft of vast sums of money from

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Lesotho. The applicant went on appeal and Rooney J imposed what he cosidered to be stringent conditions including the seizure of the appellant's passport. A few days afterwards and before he could stand trial the appellant had absconded to the Republic of South Africa.

Mr. Nathane referred me to an unreported case CRI/APN/34/91 Khaliphile Wiseman Gogo vs. R. where a Transkeian was granted bail yesterday in respect of the murder of a Lesotho citizen. Among the stringent conditions I am told the applicant was to fulfil is that he should pay M1,000.00 bail deposit.

In the case CRI/APN/177/87 Isak Johannes Enslin v. R. decided by this Court on 23rd July 1987 a citizen of South Africa was granted bail in the sum of M5,000-00 and a further stringent condition was that he should report himself daily at the Central Charge Office in Maseru between specified hours. The Registrar's file shows that the recorded proceedings that day were entered by Mr. Nathane who was then an Assistant Registrar of this Court. Suffice it to say the wisdom of granting bail on stringent conditions to a citizen of a foreign country that does not have any agreement or extradition treaty with Lesotho was tested further on that occasion regard being had to the fact that the offence committed was much less serious than murder, and further that it was committed before the coming into effect of the minimum Penalities Order of 1986. Far be it from me though that once a man is shown to be a foreigner, and that his country has no extradition treaty with ours, that disintitles him from being released on bail. The point I wish to only emphasise is in such circumstances the Court is entitled to show less enthusiasm to incline to an applicant's plea in such circumstances because clearly the administration of justice will be frustrated should the applicant decide not to stand trial. No legitimate approach can be embarked on to put his government under the necessity to hand him over to the jurisdiction of the Court where he allegedly committed the offence. I cannot

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view such tragic eventuality and real possibility with relish.

The reason why the instant application was refused in each of the occasions it was moved has not changed; namely, that should he abscond this Court will not have means of enforcing applicant's appearance to stand trial.

Furthermore there seems to be incontrovertible merit in the statement of Miller J. in S. vs Fourie 1973(1) SA 100 - 101 that :

> "It is a fundamental requirement of the proper administration of justice that an accused person stand trial and if there is any cognizable indication that he will not stand trial if released from custody, the court will serve the needs of justice by refusing to grant bail, even at the expense of the liberty of the accused and despite the presumption of innocence".

Thus as in Tlebere above -

> "if proper considerations have been established that proper administration of justice will abort if bail is granted then it is only logical that it be refused".

I have time and again expressed my inability to understand what Miller J. meant by cognizable indication on the basis of whose existence/that the applicant will abscond, bail should be refused. I can boldly say, hopefully with a minimum of error, that absence of extradition treaty between this country and the country of an applicant seeking to be freed on bail in this territory would seem to fill the bill.

The bail application is accordingly refused.

J U D G E

31st January, 1991

For Applicant : Mr. Nathane

For Respondent : Miss Moruthane