CRI/APN/614/93

IN THE HIGH COURT OF LESOTHO

In the application of

NDABE KHOARAI

vs

DIRECTOR OF PUBLIC PROSECUTIONS

JUDGMENT

Delivered by the Honourable Acting Mr Justice T Monapathi on the 9th day of February, 1994

This is an application for admission to bail pending appeal, against decision of the Magistrate's Court of Leribe of the 16th September, 1993

The Applicant had been charged with Housebreaking with intent to steal and theft The Applicant was charged with four co-accused. Applicant admitted guilt to the charge and was sentenced to a term of five (5) years imprisonment without an option of a fine. He was dissatisfied and filed an appeal.

It is also common cause that the Applicant approached the High Court on an application for leave to appeal out of time against his conviction and sentence This was made under application number CRI/APN/614/93 Leave was granted as prayed on the 23rd November 1993 Counsels are in agreement that in an application for condonation of late noting of appeal the Court has to look into and investigate if applicant has any prospects of success on appeal. The question at the present stage of the proceedings is Does this Court again have to look into whether there are prospects of success on appeal? If not what are other considerations that apply This will be answered later in the judgment.

Mr Mathe for Applicant has raised the following issue which he submits will show that there are prospects of success in the appeal, which entitle the Applicant to be admitted to bail pending his appeal They are the following Firstly, that the Applicant before the Court a quo was not allowed legal representation as he should have, and as it is his legal right and a basic right in terms of the constitution of this Country Broadly put, it means that the magistrate was duty bound to advise the accused of his right to such legal representation That the failure of the magistrate so to advise the accused renders that the proceedings null and void, and that as a result

they be started de novo Secondly in terms of section 240 (b) of the Criminal Procedure and Evidence Act 1981, the magistrate was enjoined to ask the accused person, who had pleaded guilty, whether he accepted the Public Prosecutor's outline of the facts (as after the accused's admission of guilt to the charge) or not. It is common cause that there is no record of a statement in the proceedings that this had been done by the magistrate. Mr Mathe submitted that the effect of the omission by the magistrate, was such a serious irregularity, as a consequence of which the proceedings ought to be declared vitiated that they be commenced de novo, before a different magistrate

I am satisfied that the granting of bail pending appeal is not automatic As in an application for bail pending review, the considerations are the same, namely whether the ends of justice will be served or not

I am not prepared to accede to Mr. Sakoane's submission that by reason of the fact that the Applicant ought to have applied for bail before the magistrate a quo the application ought not to be entertained It will be observed that except for the fact that the Applicant came to Court on application for condonation of late noting of appeal or leave so to note appeal out of time, this would normally be a subordinate's Court matter But I

believe that, nonetheless, I would be empowered to entertain the application, when regard is had to section 109 of the Criminal Procedure and Evidence Act, 1981 (the C.P.&E ) which is unambiguous in its stipulation that "The High Court may at any stage of any proceedings taken in any Court in respect of an offence admit the accused to bail." In any event I am inclined towards exercising my discretion to entertain the application

I have taken a view that in addition to other factors such as the risk of absconding and the severity of sentence, prospects of success on appeal have significance I have found the following South African cases very persuasive. They are

S v WILLIAMS 1981 (1) SA 1171 (ZAD)
S v DE ABREU 1980 (4) SA 95 (W)

There were no addresses concerning other considerations except prospects of success on appeal, which engaged the whole of the Counsel's attention I supposed that Counsel felt that the application's success or failure did not turn on the other considerations Indeed Mr Sakoane remarked that there was this extreme likelihood that a Judge who is seized with the matter on appeal would have once more to inquire into the prospects of success That is true But that cannot be avoided. The whole

exercise is sanctioned by our rules of procedure

I am not unmindful and I endorse the following salutary principle as submitted by the Crown That in an application for bail pending appeal there is no question of innocence or liberty of the person because he has already been found guilty by a Court of competent jurisdiction, the Court having proved his guilty beyond a reasonable doubt Therefore the refusal of bail is the rule rather than the exception. There has to be very strong reasons See MAKHOABENYANE MOTLOUNG AND OTHERS v REX 1974-75 LLR 370 at 372 AC (HC)

Secondly, that the person having been tried by a competent Court he is presumed to have had a fair trial and ought to start serving his sentence forthwith See STEPHEN MEYER v REX CRI/A/4/77 (Unreported) A Botswana case of KHOMOTSO v DUMANE MOSHATA Criminal Appeal No 97 of 1986 has been referred to me by Mr. Sakoane I found that I could not resist an abundant quotation from page 6 of the judgment as follows

> "(1)that once a verdict has been returned, a further renewal of bail should be regarded as exceptional (see Practice Note published at (1974) 2 All E R 794) and (2) that in considering bail after conviction the first question to be addressed is whether there exists a particular and cogent ground of appeal and if there is no such ground bail should not be granted with

> regard to sentence merely in the light of mitigation to which the judicial officer has in his opinion given due weight, or in regard to conviction on a ground where he considers the chance of a successful appeal is not substantial, (4) the length of the period which might elapse before the hearing of an appeal is not of itself a good ground for granting bail but such period, if there is otherwise good grounds for bail, may be one factor in the decision whether or not to grant bail, but a judicial officer who is minded to take this factor into account may find it advisable to contact the Registrar in order that he may have an accurate and up-to-date assessment of the likely waiting time."

As said herein before Mr Mathe wanted to persuade me that the absence of the magistrate's statement is such an irregularity that it vitiated the proceedings I do not agree. The accused admitted guilt to a charge that he fully understood It cannot be speculated that he was not accepting the outline of the facts made by the public Prosecutor. Indeed up to now he does not question the contents of the statement nor the charge. If so he should have made a statement on Affidavit To agree to the submission would amount to taking technicalities too far That would result only in blinding this Court to a situation where real and substantial justice has in fact taken place That would also militate against the major policy of the said section 240, of the C.P &E namely to facilitate and assist accused persons in their desire to admit guilt to offenses they have committed Some accused person are full of remorse and want to clear their

consciences This is quite different a question from where the prosecutor's outline of facts does not disclose an offence I have had a look into the headnote of the following South African Cases. They are in Afrikaans, only the headnotes have been translated into English The cases are S v MKHIZE 1978 (1) SA 266, S v DAUD 1978 (2) sa 403, and S v BARON 1978 (2) SA 510 It appears that there is a difference from our Section 240 of the Criminal Procedure and Evidence Act, 1981. It looks like in terms of their Section 112 (1) (b) of their Act number 51 of 1977, that after recording of a plea of guilty the magistrate is enjoined to question the accused as to the facts and the basis of the charge, including on the elements of the charge I observe that there is a difference in procedure I am not therefore persuaded by the judgments.

It is proper how to deal with the other issue submitted by Applicant's Counsel There is absolutely no doubt that the protection of the accused's right to a free trial is to be found in the constitution (See Section 12 (d)) and the procedural laws of this Country This is borne out by quite a number of decisions of this Court See for example MOSOEUNYANE MOTHUNTSANE vs REX CRI/APN/48/86 (unreported) and LEHLOHONOLO PULUMO vs REX CRI/A/327/88 (unreported) But the important consideration nowadays and presently (Since most rights are enshrined on

broadly accepted) is how the rights are to be exercised and put into practice in practical cases

I believe that as a general rule a presiding Officer is not obliged to advise an accused person to seek legal representation It is not his duty I am persuaded however, that there are exceptional cases, where it is expected that he can give such an advice, or put the other way that he ought to have given such an advice It is still questionable, in my mind, whether it can be called a duty There are exceptional cases, for example, where an accused person has serious limitation of the mind or intellect or when a case is of a serious nature or where the accused appears clearly not to understand the nature of the proceedings At any stage in the proceedings it is to be expected that presiding officer should have given such advice These are exceptions The normal situation and what is expected of an accused person, is that he will ask to be afforded an opportunity to such legal representation The right of an accused persons to legal representatives is only violated where the accused asserts it but the Court proceeds with a trial despite a clear desire and request by the accused to procure legal representation

In the instant case, that is before the Court a quo, an

accused person in full understanding of the charge and the facts admitted guilt What would legal representation be for? This is even more questionable where he did not ask for one The accused person was not prejudiced It is contended that this is consistent with the greater policy of the Section 240 of C P &E. to afford a speedy mechanism for accused person, to admit guilt and receive the Court's verdict and sentence, which is only natural and to be expected in the nature of administration of justice At the same time it may even be the wish of the accused person to avoid the delay and the expenses of legal representation I do not think the decision in the unreported Court of Appeal case of KHUTLISI v REX - C of A CRI/NO 5 OF 1989 at page 7-8 has the effect suggested, namely, that in all cases where an accused person has not been advised of his right to such legal representation the proceeding are vitiated I do observe that in all cases where the proceedings were nullified, those were cases in which the accused person had himself asked to be afforded an opportunity for such legal representation but his request was refused Counsel has cited to me the following foreign cases which I have found particularly instructive and persuasive The cases are POWELL vs ALABAMA (1932) 287 US 45, GIDEON vs WAINRIGHT 327 US 335, MAPHANE vs STATE Botswana Court of Appeal No 12 of 1991

I made a finding that, in my view there are no compelling reasons nor are there prospects of success in the Applicants appeal which entitle applicant to be admitted to bail pending his appeal The application is accordingly refused

T. MONAPATHI
ACTING JUDGE

9th February, 1994

For the Applicant Mr Mathe

For the Crown Mr Sakoane