CIV/APN/280/92

IN THE HIGH COURT OF LESOTHO

In the Application of:

NTHABISENG MAMABULA MOLAPO — Applicant

and

OFFICER COMMANDING (MASERU) (C I.D.) — 1st Respondent
ATTORNEY GENERAL — 2nd Respondent

JUDGMENT

Delivered by the Hon. Mr. Justice W.C.M Maqutu, Acting Judge on the 23rd day of February, 1994.

This is an application for the release of a motor vehicle and a passport which was lodged on the 31st July, 1992 as a matter of urgency. This application was supposed to be heard on the 10th August, 1992. It has had several postponements, consequently it was only being heard on the 17th February, 1994 The Notice of Set-Down was filed of record on the 16th February, 1993 The Respondents in this matter are Officer Commanding C I D and the Attorney General

The police are empowered by Sections 51 and 52 the Criminal Procedure and Evidence Act of 1981 to seize property which may afford evidence of Commission or suspected Commission of an offence. If the property is not required at the trial the property shall be returned to the person from whom it was seized. In this case applicant's motor car has been in police custody for over four years. Although the applicant was charged with theft almost four years ago, no criminal trial has commenced to this.

There is no dispute that on the 10th May, 1990, Captain Sempe of the Royal Lesotho Mounted Police seized a 1990 Oppel Motor car Registration Number C.5707 from Applicant's husband. There is no dispute that this car belongs to Applicant and that Captain Sempe was investigating a case of theft of money that Applicant was alleged to have stolen

Applicant was arrested and appeared before a Maseru Magistrate on the 23rd January, 1991, was charged with theft of money from the Lesotho Agricultural Bank and was released on bail. The case was remanded to several court days (during which remands) Applicant attended On the 3rd April, 1992,

Applicant was excused from attending any remands.

Applicant in bringing this applicant in July, 1992 wanted his motor vehicle back together with her passports. At paragraph 11 of her founding affidavit Applicant avers

> "My said vehicle is kept in the open at Maseru C.I.D. and deteriorates daily. Unless it is released to me for safe keeping I am likely to suffer irreparable harm and prejudice."

She also wants her passport because she has been confined in Lesotho for over two years She wants to cross the border to collect goods she intends to sell

Captain Roselyn Sempe made an opposing affidavit on behalf of the Respondents in which she stated at paragraph 8 that:

> "Our investigations have revealed that the vehicle was purchased by the applicant with money which she allegedly stole from the Lesotho Agricultural Development Bank The vehicle is going to form part of the evidence against applicant in a criminal case she stands charged with "

Mr Matabane for Applicant in his argument said he could not comprehend the kind of exhibit the motor car would make He felt Respondents were obliged to give some indication of how they were going to go about the matter Mr Matabane felt the Respondents were hiding behind bare allegations Mr. Letsie for the Crown in response said they were not obliged to disclose their evidence.

The court ordered counsels for both parties to go and find out what was going on in the Magistrate Court where the criminal proceedings are pending against applicant The court felt obliged to do so because counsel for respondent was a trying to supplement his case by alleging what did not appear in the papers. In terms of Rule 8 (11) and (12) of the High Court 1980, the door was closed to the Respondent's unless they made an application for the filing of further affidavits. Something that might be unconscionable after so many years when applicant had filed the final affidavit on the 7th October, 1992 The Notice of set-down which appointed 17th February, 1994 had been filed of record on the 16th February, 1993 Applicant had waited for a whole year just to be heard The Court felt finality had to be reached in this

application

Nevertheless I felt that criminal proceedings are the bed-rock on which law and order and the stability of society from which other human rights rest Without encouraging laxity and insensivity that could lead to the perpetration of oppression with impunity by the Crown, I felt the court was entitled to know the facts surrounding the delay of the criminal case against applicant Relying on Rule 59 of the High Court Rules in my discretion I allowed Applicant and Respondent to go and find out from the Magistrate Court what is the fate of those criminal proceedings. The view I take is that the Rules of Court are made for the Court not the Court for the Rules. See Shill v. Milner 1937 AD 101 at 105 where de Villiers J.A made a similar comment in respect of pleadings I considered the interests of justice made such a course necessary without allowing either party to supplement its case

Mr. Letsie for Respondents felt the Crown was free to bring the accused to trial when it was convenient for it to do so. Part X Section 141 of the Criminal Procedure and Evidence Act of 1981 seems

clearly to require the accused to be brought to trial without delay. The fact that pressure to proceed with the trial immediately (somewhat gets reduced when the accused is given bail) does not alter the fundamental principle Section 141(2) of the Criminal Procedure and Evidence Act of 1981 provides·

> "If the person is committed for trial or sentence before the High Court is not brought for trial . after 6 months from the date of his commitment .. he shall be discharged from imprisonment for the offence in respect of which he has been committed."

If even a convicted person can get a discharge after 6 months if nothing is done, then it is clear that the right to a speedy trial is in our law greatly respected While being granted bail (somewhat takes away urgency) Trollip J in Riddock v. Attorney General Transvaal 1965 (1) SA 817F states even where no time limits are set.

> "the whole policy of the Act is that an accused must be brought to trial without undue delay "

We must never forget that the maxim JUSTICE DELAYED IS JUSTICE DENIED is not an empty pious

declaration It is an article of faith in our judicial system.

The Court felt itself unable to prejudge the question whether or not the Crown will be able to prove that the motor car was bought with stolen money as Mr. Matabane for Applicant wanted it to do It was not able to make up its mind on the Respondents' submission that the Crown's case might be prejudiced by a premature disclosure of the nature of the evidence against her There are circumstance where the Crown care might be gravely prejudiced. Nevertheless, the Crown could be well advised to note the following remarks from Roper J. In Kabe and Others v Attorney General and Another 1958(1) S.A 300 at 303 G.H where he said

> "I find it difficult to see any substance in this ground. The Crown case must be disclosed to the accused in the main trial in full in due course, and it cannot be kept secret "

Although the court felt the circumstances of the case might be special, the Court could not understand why the trial did not place it between July, 1992 and

February, 1994 The Crown was obliged to see that trial took place in order to prove its good faith Counsel for Respondents disclosed from the bar that the file was lost I asked him why an affidavit to this effect was not filed This was all the more necessary because Respondent's counsel was claiming a new file was being constructed That is the reason I asked both parties to go to the Magistrate court to find out what had happened to the criminal case.

While I felt since the Applicant's passport was taken away from her because an order of the Magistrate and she should get it from the Magistrate I was sensitive to the fact that her liberty and freedom to travel were restricted by the unavailability of her passport The words of Roper J. came to mind where he said.

> "In the present application, the liberty of the subject is involved, and it is clear in my view that the Crown is not entitled to deprive a subject who has not been convicted and is, therefore, presumed innocent of his liberty unless that course is clearly justified by some provision of the law "

The Applicant cannot go to the Republic of South

Africa (as she claims) because she has no passport Therefore, she cannot buy and sell goods on which she expects to live. Counsel for Respondents did not seem to attach much importance to the rights of Applicant This was so despite the clear policy of our law and tradition that an accused person must be brought to trial without delay

Mr. Letsie counsel for Respondents brought the prosecutor of the case from the Magistrate Court and insisted that I should hear directly from Mr Shelile what had happened to the Criminal case. The court was reluctant to hear Mr Shelile, but Crown Counsel insisted that hearing Mr Shelile was the logical outcome of the Court's Order to both counsel that they should find out what had happened to the criminal case against applicant. The Court was obliged to hear Mr Shelile

Briefly Mr Shelile told the court that Applicant was charged with on the 23rd January, 1991 and was released on bail. At one time Applicant went to have a baby The case was remanded several times because the file had been returned to the police after the accused had been charged. The file never came back

Mr Shelile said he had last seen the file when the accused first appeared in Court. The result of all this was that the case against the accused was withdrawn

Mr. Shelile the public prosecutor did not have any doubt that the case against the Applicant had been withdrawn.

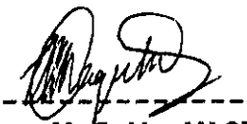
It became inevitable to conclude that there were no more any grounds to keep the Applicants vehicle. The criminal case against Applicant having been withdrawn Crown Counsel had to concede that his vigorous opposition for the Application could no more be sustained. To quote from the Miller J.A in the case of Ikaneng Makakole v The Officer Commanding C.I D. Maseru and Another C. of A (CIV) No. 18 of 1985 (unreported)

> "In short, what was visualised by the legislature was purposeful detention If a stage is reached when detention appears no longer purposeful, there can surely be no point in the continued detention of the property "

The application is granted and

(a) First Respondent/and or officers subordinate to him are directed to release to applicant her 1990 Opel C.U M. registration number C5707 together with Applicant's Lesotho Local Passport Number H153347

(b) Respondents are directed to pay the costs of this application.



W C.M. MAQUTU
ACTING JUDGE

23rd February, 1994

For Applicant Mr Matabane
For Respondent Mr Letsie.