CRI/APN/641/95

IN THE HIGH COURT OF LESOTHO

In the application of :

TSELE RALEBITSO

vs

DIRECTOR OF PUBLIC PROSECUTIONS

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 21st day of December, 1995

This application has been brought to this Court by way of a notice of motion, for admitting the Applicant to bail pending appeal. This is in connection with an appeal filed on the 28th November 1995 against the decision of the magistrate of Maseru in his review of a Semonokong Local Court case number CR 45/95. The appeal is against both conviction and sentence in the matter which Appellant was charged with Abusive Language and Assault Common. He was on 14th November 1995 found guilty and sentenced to M1,000.00 or 1 year imprisonment by that local Court. The sentence was on the 16th November 1995 reviewed by the magistrate of Maseru and enhanced to M2,000.00 or 2 years imprisonment without the option of a fine. In the notice

/...

of motion 11th day of December 1995 was appointed for hearing of the application. My record reveals that it was subsequently brought before Court on the 14th December 1995 and then to today.

I recall quite well that I alerted Mr. Fosa as to a few problems that would confront him in this proceedings. First and foremost, it was the fact that the magistrate had in fact made a decision in which he refused the Appellant bail on the 29th November 1995. Normally and in accordance with practice and policy of the Court one would have thought that the matter would now come to this Court by way of an appeal against the magistrate's decision. This did not happen. This policy is followed despite the section 109 of the Criminal Procedure and Evidence Act 1981 which says : "The High Court may at any stage of any proceedings taken in any Court in respect of an offence admit the accused to bail". Even in the light of the wording of section 109 of the C. P. & E. an applicant would need to demonstrate good reasons why he would want to apply for bail in this Court not in a Subordinate Court. Amongst this would be a show of special circumstances. (See MAKHOABENYANE MOTLOUNG & OTHERS vs REX 1974-1975 L.L.R. 370) Due to the special circumstances of this appeal and the proceedings I am inclined to condone this irregularity or neglect by the Applicant. A perception therefore that

I would be reluctantly allowing the application would be a fair one. I had intimated to Mr. Fosa that one of the ways of curing the defect would be to file a late notice of appeal and then ask for condonation. That he did not do.

This morning my attention was brought to Review Order No.7 in REX v MOKHELE MOKHELE CRI/A/21/95 in which the learned Judge M. L. Lehohla had made a remark at page two of the Order, that :

> "Consequently this Court relying in its inherent powers treats this matter as if on review. Therefore this Court directs that his conviction be quashed. ....."

It is clear that the matter had come by way of appeal. I must confess that without a complete perusal of the record on which the decision was made one would find it difficult to really gauge all the matters fully, more especially the undelying facts. But I am satisfied that when certain factors are considered which do not squarely fall to be treated as an appeal, those factors constituting such irregularities which could not have been anticipated or were overlooked the matter can be treated as a review. In this Mokhele's appeal Mokhele's co-accused who had been convicted but had not appealed. It was clear that the

conviction could not be supported even against Mokhele's co-accused. Firstly because the offence of which he has been convicted was non-existent. Next, because the evidence amply showed that he was innocent throughout the entire investigation of the case, its prosecution and its conclusion. I am not satisfied that this decision has relevance to this matter of the application. It may have relevance to the matter of the appeal itself.

I have seen the magistrate's written comments on his refusal to admit the Applicant to bail. He spoke of the absence of prospects of success in the appeal. But he did not address the central aspect of the irregular summons procedure that the Applicant complained about. It may be the matter was not brought to his attention. The record will clear all the doubts. If the issue of the summons was brought to the magistrate's attention I would not agree with the magistrate's conclusion. It is a seriously arguable matter that the Applicant/Appellant could have been called by a civil summons to a criminal proceedings without proper notice. I do not decide now, whether to believe the Applicant at this stage. Although we still labour under the problem of the absence of the magistrate's recorded ruling on review and secondly on the absence of the Applicant's attitude (protest) as recorded against this alleged irregularity on the record itself, the point taken

by the Applicant would be a good point. I am not saying it is valid. It is a point on which, if it succeeds, can result in the appeal itself succeeding and the proceedings of the lower court and the magistrate's ruling being quashed and set aside respectively. It is also a question of whether if the point is demonstrated, it was *bona fide taken*. For the present purpose I would decide that there are prospects of success in the appeal.

I have pointed out another problem that would be in the way of the Applicant. It is the absence of the record. I agree that this would heavily weigh against the Applicant in the appeal itself but not for the purposes of the present proceedings. Once the matter of the existence of prospects of success was successfully investigated, as in the instant matter, the real importance of the record itself can only relate to the argument of the appeal on merits. This is how I have, therefore, considered this absence of the original record and the magistrate's comments on review. This I have done having borne in mind the special problem that the record was not available, it having been sent back by the magistrate to the local Court. I did not think this should weigh against the Applicant. This I also felt having observed that it did not have a disabling effect on the application for bail itself.

I am satisfied that although this Applicant's Counsel does not in his paper speak about intention to appeal against the magistrate's refusal or an appeal strictly speaking, it is clear that his action was consequent upon his dissatisfaction with that decision. I have said that despite the defect in procedure I was prepared to have matter condoned, in the sense, that it be treated as another application (a fresh one rather) but not as an appeal. I say that this Court relying on its inherent power and on the special circumstances allow this Applicant to bail and hereby imposes normal conditions on an application for bail pending appeal.

I therefore imposed the following conditions of bail:

(1) The Applicant shall pay in a cash bail deposit in the sum of M200.00.

(2) The Applicant shall attend on the hearing of his appeal whose date is fixed as 3rd May 1996.

(3) The Applicant shall report at Semonkong R.L.M.P. post once a month on the last Friday of the month between 8.30 a.m. - 4.30 p.m.

/...

(4) Applicant undertakes to have the record of appeal prepared and filed in this Court.

T. MONAPATHI
JUDGE