

IN THE HIGH COURT OF LESOTHO

In the Application of :

TEBOHO MOTSEKI

Applicant

vs

R E X

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on
the 3rd day of April, 1995

The applicant is facing a charge of robbery allegedly committed on 24th February, 1995 involving a sum M2250-00 of which Mieleu Philipus Pieter a citizen of Holland was forcefully and unlawfully deprived on pain of injury or possibly death in the event of him offering resistance to the unlawful order that he should part with the above amount. The events are said to have taken place at Butha Buthe Reserve.

The application for the applicant's release on bail is strenuously opposed by the Crown which relies on the affidavit of Detective Trooper Molibeli and the supporting one of Crown's Chief Attorney Mr. L.L. Thetsane.

Mr. Thetsane's affidavit is to the effect that there is *prima facie* evidence supporting the charge against the applicant. It goes further to render support to the legitimate fears of Trooper Molibeli the investigator in the robbery case that the

applicant if released will either abscond or surely interfere with crown witnesses.

The first form of apprehension is based on the fact that the applicant is a member of a gang of notorious pickpockets of which two who are facing the same charge as the applicant are still at large.

It is further alleged on behalf of the Crown that the applicant has been evading arrest by police hence his arrest only on 27th February, 1995 while the robbery took place on 24th February, 1995. The Court's difficulty with this assertion is that it is not clear when the initial attempt if any was launched to arrest the applicant.

The second form of apprehension is based on the fact that the investigator alleges that an accomplice in the case has already been threatened by the applicant whilst they were still together in detention and that the witnesses who saw the robbery are afraid of the applicant and fear that if released he will go for them as indeed he told them that if he should be arrested he would hold them responsible.

I must point out that while this second form of apprehension has caused me a lot of anxiety which ordinarily should persuade me against granting bail, I am constrained from disobliging the applicant in his prayer for bail because evidently Trooper Molibeli's evidence in this regard is hearsay. There is not even

the slightest suggestion by the Crown that any of the witnesses who told Trooper Molibeli the allegations set out above is unavailable to testify to the truth of the version that the applicant threatened any of them in connection with adverse evidence they are likely to adduce against him at the impending trial. Because of the premium that the courts place on protection of witnesses from threats calculated to detract from the proper course of justice, this Court would be inclined to accommodate the Crown's hearsay evidence if it was disclosed what, if reasonable, hampers its witnesses at all from giving direct evidence of their purported fears so staunchly set out by Trooper Molibeli and ardently shared in by Mr. Thetsane.

It is trite that the onus in a bail application is on the accused. Indeed J. van der Berg in his book styled *BAIL - A PRACTITIONER'S GUIDE 1986* at page 10 says

"It is generally accepted that the onus is upon the accused to convince the Court upon a balance of probability that it should exercise its discretion in favour of granting bail"

The applicant's Counsel did not make light of Mr. Thetsane's views in the latter's opposition to the granting of bail. Indeed Mr. Fosa did not allude in his criticism of Mr. Thetsane's stand to the commonly used statement that the "Attorney General's or Director of Public Prosecutions' *ipse dixit* is not binding on the Court's discretion to grant bail" even though appropriate regard should be paid to the Crown's opposition in the light of the fact that such opposition is usually not lightly embarked upon. In this regard it should equally be considered that Mr. Fosa's

argument that the applicant be granted bail likewise derives from a deep sense of responsibility.

In CRI\APN\323\90 Tebello Thabo Tlebere vs Rex (unreported) at page 2 this Court quoted with approval the proposition in R vs Kok 1922 NPD 267 at 269 that

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

and further that :

fear of interference with crown witnesses would be well founded if there is proof of prior attempt to interfere".

I must repeat that a mere allegation by a witness who has not been interfered with and who does not disclose the reason for absence of first hand evidence to that effect does not meet the criterion set out above.

Consequently bail is granted as the Court is of the opinion that the applicant has discharged the onus cast on him.

But the Court's attitude in coming to this conclusion should not be understood to make light of the dictum by Elyan J in Jack Mosiane and Others vs Regina HCTLR 1961-62 at page 27 that :

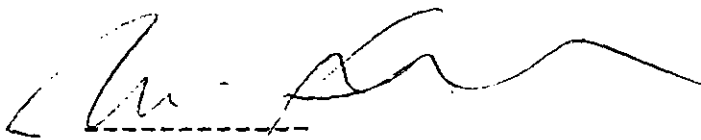
"If official or police statements on which substantial reliance can be placed are before the Court to the effect that a reasonable possibility exists of such conduct on the part of an accused as would influence witnesses or potential witnesses - persons whom the police may want to interrogate - or tamper with them, or deny sources of information, the Court cannot very well brush aside such statements, and proof of any actual attempt will not be demanded".

I wish to lay emphasis on the phrase that "proof of any actual attempt will not be demanded" in a fitting case.

Thus because the applicant's success is only technical and therefore should not necessarily imply that what is alleged the accomplice and those other crown witnesses said was false I propose to lay down suitable conditions to meet the applicant's case.

These are that

- (a) Payment of M500-00 cash deposit.
- (b) Production of surety acceptable to the Registrar in the sum of M500 (not being cash).
- (c) Surrender of passport (if any) to Butha Buthe Police.
- (d) Report at Butha Buthe Police station every Monday, Thursday and Saturday between 6 a.m and 12 noon.
- (e) Refrain from interfering with crown witnesses and or hampering police investigations.
- (f) Not to venture beyond 10 Km radius of his residence without police prior notification.
- (g) Attend remands; and
- (h) Stand trial.



J U D G E
3rd April, 1995

For Applicant : Mr. Fosa
For Respondent: Mr. Ramafole