CRI/APN/597/98

IN THE HIGH COURT OF LESOTHO

In the matter between:

RASELEBELI MABOEE PETITIONER

and

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

JUDGMENT

Delivered by the Honourable Mr Justice S.N. Peete
on the 12th November, 1998

This is a petition for bail and is being opposed by the Director of Public Prosecutions. The Petitioner was arrested on the 28th September 1998 on a charge of murder it being alleged that on the 23rd September 1998 and at or near Mafeteng Charge Office in the district of Mafeteng, the Petitioner did unlawfully and intentionally k-ill Policewoman Serabele.

In his Petition, the Petitioner states that he is awaiting trial at the Mafeteng Local Prison facing the charge of murder as foresaid and the preparatory examination has not been held yet; he depones that he is desirous of being granted bail pending his trial so that he may be able to prepare for his defence adequately. The Petitioner also narrates the events that occurred at the Mafeteng Charge Office on the 23rd September 1998, and he states that on that day his Charge Office was besieged by "disgruntled armed soldiers" and it

was during this siege that the policewoman Serabele was fatally shot. He, the Petitioner, states that he was kidnapped at gun point and taken away by those soldiers. He says he was released at Matsieng and reported on duty on the 26th September 1998; he says he was arrested on the 28th September 1998 and given a murder charge. The Petitioner proclaims his innocence. He maintains that he has no intention of absconding, interfering with crown witnesses, hampering police investigations or prejudicing the administration of justice.

In his opposing affidavit No.1279 Lieutenant Matlosa in the main disputes that the petitioner was kidnapped by the soldiers as alleged and states that the petitioner had in fact joined forces with them when they were forcibly demanding weapons which were later removed from the armoury. He denies that Petitioner reported for duty as alleged. He says the deceased was shot by one of the co-conspirators of the petitioner. The deponent Matlosa avers that the offence with which the petitioner is charged is of a very serious nature and that if convicted he could suffer the ultimate penalty and for this reason the temptation to abscond is great.

It should be pointed out in deciding what weight should be attached to the affidavit of Lieutenant Matlosa the Court should be mindful of the fact that Matlosa is both the investigator of the case in which the petitioner is being charged, and the victim of the siege; he is also a prospective crown witness. His affidavit is not elegantly drawn; for example under para 14 of his affidavit it is stated -

"I admit para 6"

This is the very paragraph in which at (e) Petitioner states that he would never leave his beloved country and family for any reason.

Letlakane Ramaema, Crown Counsel appearing on behalf of the Director of Public Prosecutions, in his affidavit states-

> "We have a prima facie case in the matter and upon conviction applicant will get ultimate sentence according to the gravity of the case and the temptation of abscond and frustrate the ends of justice is great."

In an inquiry whether an accused person should be granted bail, the court has a judicial discretion to exercise in balancing the interests of administration of justice and those of the accused. In my view, an application for bail must always be treated in the light of the fundamental provisions of our 1993 Constitution of Lesotho. I quote them thus -

Section 12 (2) -

> "Every person who is charged with a criminal offence
>
> (a) shall be presumed to be innocent until he is proved or has pleaded guilty.
>
> (b) .....
>
> (c) shall be given adequate time and facilities for the preparation of his defence.

Section 6 (2)

> "If any person arrested or detained upon suspicion of his having committed, or being about to commit, a criminal offence is not tried within

> a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall then be released either conditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

These are important provisions which have been specially entrenched in our Constitution and guarantee the fundamental rights to liberty and to fair trial; our courts must always demonstrate vigilance required by these constitutional safeguards referred to above.

Presumption of innocence is a corner stone to fair trial and such presumed innocence also operates in bail applications - Essack - 1965 (2) SA 161; Smith, 1969 (4) SA 175. It is for the court to look at the facts or evidence as a whole and consider whether it will be in the interests of justice to grant bail to an applicant or not. In deciding that question a court will obviously look at the question whether the accused will stand his trial, or whether he will interfere with state witnesses and it is not a question of an onus of proof being upon the applicant (Matsoso Bolofo and Others vs The DPP - C of A (cri) No.8 of 1996). In matters of bail applications it is incumbent upon the Crown, if it opposes bail, to access to the court evidence or factual basis under oath setting out why the interests of justice require the continued pre-trial detention of the accused. This is particularly so where the Applicant for bail does go on oath and articulates reasons why the Court can be assured that he will stand his trial. Should the crown case be that he may well not do so or that one or more of the many numerus clausus of facts properly considered in a bail application, oblige the court exercise its discretion not to grant bail, such circumstances should be placed before the court in an acceptable form" - per Steyn P, in Bolofo's case (supra).

In this application, the Crown opposes the granting of bail mainly on the apprehension or fear that the petitioner will abscond and not stand his trial because he is facing a

charge of murder for which the petitioner will suffer ultimate sentence (of death) if convicted.

Gravity of the charge and probability of conviction are but some of the factors to be considered by the court (R.v Mtatsala and Another - 1948 (2) SA 585; Ndumo vs Rex - 1982 - 84 LLR 169. In this regard it must again be pointed out this is not a case where it is stated that the Crown Counsel has information in his possession, the details and the source of which for reasons of public policy he does not consider it desirable to disclose to the court, but it is an apprehension "or fear" confined to the facts contained in the police docket in his possession. It may therefore, be taken - to use the words of Pittman AJP in Rex vs Gcora 1943 EDC 74 at 76 - that

> "The court is in as good position as himself ..... to judge the cogency of the considerations which animate him in opposing the application."

His ipse dixit does not determine the likelihood. It is incumbent upon the crown not to rest upon mere apprehension or fear but it must show that it is reasonably likely that if granted bail the petitioner will abscond; in this application the petitioner's own statement on oath that he has no such intention is met with a bare denial. In considering an application for bail, the court must be wary not to go fully into the merits of the guilt or innocence of the accused. But where probability of conviction upon a serious charge is being relied upon the crown, the merits of the crown case and of the petitioner necessarily must be inquired into. I may pause here to refer to Mr Mda's argument that the petitioner's version may have a ring of truth when he says he reported on duty on the 26th and was arrested on the 28th September, 1998. If the petitioner collaborated with the soldiers who even shot and killed policewoman Serabele on the 23rd September 1998, it would be extreme foolishness, so Mr Mda contended, for the Petitioner to have gone back to the Mafeteng charge office only to be arrested.

I am prepared to say that the charge of murder which the petitioner is facing is a serious one - but I am not prepared to say it is also a political one as no such allegation has been made in the papers before the court.

Mr Mda has also submitted that in this application the presumption of innocence should take precedence over the assumption of guilt based on the prima facie case; he has also asked the court to take judicial notice of the fact that the SADCC peace keeping forces are present in Lesotho and that it would be folly on the part of the petitioner to flee to South Africa or any of the SADCC states in the subregion. There are persuasive arguments indeed and I was made to believe that some extradition arrangements between Lesotho and Republic of South Africa do exist and he further submits that there is absolutely no factual basis for the apprehension that there petitioner will not stand trial if granted bail.

I am not unmindful of what was said by Cotran CJ in Makalo Moletsane vs Rex - 1974-75 LLR 272 that the release on bail of a person accused of treason, sedition, murder or aggravated robbery is the exception rather than the rule and that in such circumstances the onus of showing special facts justifying a departure from the rule lies on the accused; a similar approach was followed by my brother Molai J in Ndumo v Rex - 1982-84 LLR 169. It should be noted that both these cases were decided upon prior to coming into operation of the 1993 Constitution of Lesotho in which the basic human rights to liberty and to fair trial are guaranteed. In any case, the High Court has unlimited jurisdiction and can grant bail even to accused persons charged with treason, murder, sedition or robbery. These is no rule stating that bail may be granted as a matter of exception. The decision to grant bail in all cases is a matter of judicial discretion, and it must be clearly pointed out that since the Court of Appeal decision of Bolofo vs DPP (supra) it seems the question of onus being on the applicant no longer obtains - the inquiry is now inquisitorial and investigative to find whether the granting of bail will prejudice the interests of justice (Constitution Section 6 (5)).

In this case it is not being stated by the Respondent that the bail is being opposed on the grounds that the crown has information that the accused is likely to abscond and that crown wishes not the disclose sources of that information. Granting of bail is being opposed on the only ground that since the petitioner is facing a murder charge committed in the circumstances deposed to, the petitioner is likely to abscond. I think the crown in its opposition should have gone further and put before court some factual basis (besides the gravity of the charge) that causes them to reasonably fear that the petitioner will abscond.

Many an accused charged with murder have been granted bail by the High Court sometimes even in cases where the Crown opposes. Each case must be treated on its own merits and particular circumstances and no hard and fast rule should be laid down. In the Republic of South Africa, there is in place a bail legislation to provide guidelines to the courts in matters of bail. We do not have such a law as yet. Granting of bail is matter for judicial discretion which, I should stress, is an integral part of the judicial independence which is very pivotal in the administration of justice.

In the circumstances of this case, I am inclined to grant the petitioner bail and impose stringent conditions that will cause him to stand his trial.

Bail is therefore granted subject to the following conditions:-

(a) That the petitioner should pay a bail deposit of M1,000.00

(b) That he provide 2 sureties in the sum of M5,000.00 each - not in cash.

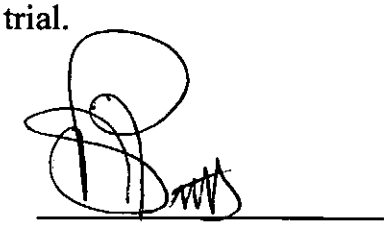
(c) That he surrenders his passport to the Registrar of the High Court and he is also barred from obtaining any passport whilst on bail and this to be communicated to Director of Immigration by the Registrar.

(d) That he should report every Friday of each week between 8.00 am and 4.00 pm to the Mafeteng Charge Office.

(e) That he should not leave the district of Mafeteng without written authority of Commanding Officer - Mafeteng.

(f) That he should not interfere with prospective crown witnesses or hamper the police investigation.

(g) That he should attend his remands and stands trial.



S.N. PEETE

JUDGE

For Petitioner : Mr Z. Mda

For Respondent : Ms Maqutu