**CRI/APN/153/2000**

# IN THE HIGH COURT OF LESOTHO

In the matter between:

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| SEJA-BANNA HLASOA | 1ST APPLICANT |
| SELUMANE FOPHISI | 2ND APPLICANT |

and

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| THE DIRECTOR OF PUBLIC PROSECUTIONS | RESPONDENT |

## Reasons for Judgment

**For Applicants : Mr. M. Mathafeng**

**For Crown : Mr. T. Kotele**

**Delivered by the Honourable Mr. Justice T. Monapathi on the 20th day of April 2000**

On the 11th April 2000 I proceeded to hear this application for bail and heard address by Applicants' Counsel Mr. Mathafeng. After that I made my ruling.

Mr. Mathafeng had filed a two page document of skeleton submissions, of

two paragraphs, which he called "heads of argument filed on behalf of Applicants". It was obviously a going through the motions exercise which was disappointing. In the heads cases such as MATIME v REX 1971-73 LLR 49, S v CASKER 1971(4) 504, CASSIM v REGIONAL MAGISTRATE PRETORIA 1962 (2) SA 440 were cited most perfunctorily inasmuch as their legal significance was not elaborated. Perhaps something more should have been said about MALEFETSANE SOOLA v DPP CRIP/APN/39/8 if the case reported as SOOLA v DIRECTOR OF PUBLIC PROSECUTIONS 1981(2) LLR 227 was meant. It surely should have been more than what was said which was that:

> "The fear of prosecution that the applicants face a serious charge is unfounded. The prosecution has no justification for substituting itself as the arbiter."

It is because the case is a good authority for the proposition that the Director of Public Prosecutions must like others support his statement in which he opposes bail.

That this Court requires Counsel to file heads of argument is a sound policy that should be constantly followed by Counsel without making pretences. Preparation of heads teaches and practices Counsel in the art and technique of writing. That brings about control and discipline to the proceedings. The other result is saving of time of presentation of submissions in Court. Therefore written submissions ought to take more of the Court's time than oral submission. This

appears to be a global trend. It has to be emphasised that at a high level a good lawyer will be a good writer and not necessarily a good speaker.

There was no appearance by the Crown. Mr. Kotele just appeared later after I had made my ruling. He said he had been before Mr. Justice Peete's Court. He properly conceded that had not had the presence of mind to have suggested that in the meantime the instant matter be stood down because he had preferred to start with the matter in the other Court. Mr. Mathafeng had looked around and waited for at least forty five (45) minutes after which he strongly felt that he should be heard even in the absence of the other side. Having received no explanation I agreed.

The charge that caused the remand in custody of the Applicant was about the murder of one Letseme Mothoale. The murder was said to have occurred on the 3rd May 1999 at or near Tsime in the district of Butha Buthe. The circumstances surrounding the deceased's death were not stated by either side. Incidentally neither Applicant stated whether he had known the deceased. The First Applicant only said that on the 26th January 2000, he was with Mahlo Tsotetsi, Lethoba Sekhamane, Motlalepula Tsotetsi when they set out to look for the livestock of one Tsotsi Tsotetsi which had been stolen by armed thieves at his cattle post (vide paragraph 4 of founding affidavit). He said furthermore that they were arrested

while still searching for the said livestock. To their dismay it was alleged that they had killed the deceased, as in the charge sheet, in May 1999. He said he verily averred that he knew nothing about the death of the deceased (vide paragraph 5 of founding affidavit).

Still on the question of the circumstances of the deceased's death the Second Applicant had these to say. He wished to confirm what the First Applicant had said in so far as it related to him. This he said despite the fact that nothing had been said by the First Applicant about this Second Applicant. In a similar manner this Applicant did not say whether he knew the deceased or not. Similarly, again, he said nothing about the circumstances of the killing of the deceased.

Still, furthermore, on the question of the circumstance of the deceased's death one would have expected to hear more from the answering affidavit through the investigating officer who was No.7456 D/Tpr Kotsana of the Lesotho Mounted Police Service. This would necessarily advert to whether or not there was a *prima facie* case against the Applicants. It is important because it has been held that even if the State's case is weak where a *prima facie* case exists an accused can still be denied bail if it is deemed to be in the interest of justice. See S v DLHAMINI 1997(1) SACR 54 (W). It came out as disappointment of a serious kind therefore when nothing came close to revealing the existence of a *prima facie* case.

The police officer's affidavit was used to support the opposition to release of these Applicants. Having admitted that the Applicants were arrested on the 26th January 2000 he wished to reveal the circumstances leading to the arrest of the Applicants. It came out to be nothing towards indicating the circumstances of the death of the deceased and neither was there a suggestion, as one would have expected as to how this linked with or connected the Applicants. It once again begged the question of the existence of a *prima facie* case.

D/Tpr Kotsana said that the investigations revealed that immediately after the commission of the offence the Applicants could not be found at their places of residence whereas the police had usually and on the said occasion visited these homes with intention of arresting them. I thought this would have been a useful statement if it was enlarged to show what steps were taken, may be through the chief, and whether members of the Applicants households were contacted in the process of looking for the Applicants. If sufficient, this could have gone towards showing that the Applicants were likely to abscond or were unreliable. But it would certainly not indicate the circumstances of the death of the deceased.

In paragraph 5 of First Applicant D/Tpr Kotsana it was noted and accepted that the Applicants were at their cattle posts but

"To our dismay when the police got to there the Applicants were to no

avail, until they were arrested on the date in question."

As to how this would assist in the inquiry it was not to be clarified. Perhaps one would have expected to be shown its significance from the *ipse dixit* of Crown Counsel Adv. Napo Rantsane as contained in his supporting affidavit. It was not to be. I came to this aspect later on in the judgment.

One of the grounds for refusal of the application was to be gleaned from paragraph 8(b) of D/Tpr Kotsana's affidavit in which he said:

> "Furthermore to add that the first applicant still stands another murder case CR number which is 4/98 (See Annexure "A" attached thereto). He was already not attending remands on the aforementioned case and I have a fear that the same consequences might result."

This, in my view, was an unfair imputation of a propensity on the part of the First Applicant which ought not to be allowed. Besides that the Second Respondent had not been co-accused in the charge nor had he therefore committed the alleged transgression. I found it difficult to accept the reason as being sound or the ground as being good. It appears that in South Africa factor such as above, for example or other evidence, from which inference can be drawn that an accused had abused

prior grant of bail by indulging in criminal conduct unconnected with the charge in question, can be taken into account. See S v PETERSEN AND ANOTHER 1992(2) SACR 52(C)

I looked at the attitude of the Crown through the supporting affidavit of Advocate N. Rantsane. Instead of showing the way in which the administration of justice would be hampered Advocate Rantsane merely said:

> "I have read the docket in which the applicants charged with murder. I have also had the opportunity to interview the investigating officer in the matter. It is my humble submission that if released on bail, the applicants will hamper the course of justice."

How and in what manner and on which grounds? More should have been said even by way of a brief summary and in an attempt to show that the scale (in the balance) ought to be tilted towards sacrificing the liberty of the Applicants by their non-release as against the proper administration of justice. See S v BENNET 1976(3) SA 652. As to the weight to be attached to the Attorney General's (Director of Public Prosecutions in Lesotho) *ipse dixit* See S v BENNET (supra) at 654H - 655A-B. The statement by the Director of Public Prosecutions perforce has to be a little articulate in order to carry a certain weight. See Mofokeng J's remarks in

SOOLA v DIRECTOR OF PUBLIC PROSECUTIONS (supra) at page 279 (second paragraph).

I concluded that there were no good grounds for the opposition of the release of the Applicants and their admission to bail. The Court consequently made the following Order:

> "Applicants were admitted to bail on those conditions as suggested except that they should report at Butha-Buthe Police Station every fortnight "on Fridays between 8.30 am and 4.30 pm. To attend on remands and on days appointed for trial."

T Monapathi
Judge

**Judgment noted by Adv. K.K. Mohau for Counsel**