CRI/APN/601/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

TSOTANG PELEA **APPLICANT**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 25th day of October 2000

This was an application for bail pending appeal. It was being opposed by Respondent. Applicant was convicted of the crime of murder by this Court on the 24th January 2000 and sentenced to a term of 5 years imprisonment. He has noted an appeal to Court of Appeal of Lesotho against this conviction and now seeks to be released on bail pending the hearing of his appeal. Since Applicant's appeal has not been enrolled for October 2000 sitting of the Court of Appeal his appeal may be heard in the March/April 2001 sitting of Court of Appeal.

Applicant further says that due to circumstances beyond his control the

record of the appeal was not finished timeously for filing to the Court of Appeal whose sitting was scheduled for October this year. Applicant said to date the record of proceedings to the appeal has not been finalized but all the same he had promised that the appeal would only come in the April 2001 session. He says this delay was being prejudicial to him as he wanted to know his fate soonest.

Applicant averred that he had prospects of success on appeal as it appeared fully in the annexure TP "1" (Notice of appeal and the grounds of appeal). Regard being heard to the circumstances explored in that annexure he respectfully averred that another Court would come to a different conclusion. He craved leave of this Court to incorporate the contents of annexure TP "1" as if specifically averred therein. The said notice of appeal as said included grounds of appeal which abundantly stated issues in some four pages most of which questioned the findings of the Court on questions purely of credibility of witnesses.

Applicant's Counsel, Mr. Mpaka, made submissions on the law in matters of bail pending appeal and he spoke about the following issues: Firstly that the statutory rights to bail does not apply in cases where an offender who has received custodial sentence lodges notice of appeal either against conviction or sentence or both. That the decision whether or not to grant bail in such cases is a question for the exercise of judicial discretion by the Court. He referred to the work of C Charterton in BAIL, LAW AND PRACTICE, London, Butterworths 1986 p59 par. 3.17 and p 60 thereof. He spoke about the discretion of the Court as explained in pages 59 and 60. He said the principle was that in considering bail pending appeal the Court will naturally take into account the increased risk of abscondment in view of the fact that the accused has been convicted and sentenced and was not merely awaiting the outcome of his trial. He referred in that regard to the work of Ferreira CRIMINAL PROCEDURE IN THE LOWER COURTS (1979) p.216

and secondly to BAIL PRACTITIONER'S GUIDE by J Van den Berg Juta & Co. Ltd Cape Town 1986 at p.118.

Secondly, Counsel further posed a question as to whether there exists strong and cogent reasons and if there was no such reasons bail should not be granted when there has already been a conviction. In that regard he referred the Court to the case of NDABE KHOARAI v D P P 1993 -1994 LLR and LB 1 at p 4.

Thirdly that bail should not be granted with regard to sentence merely in the light of mitigation to which the judicial officer has in his opinion given due weight or in regard to conviction on a ground where he considers a chance of a successful appeal is not substantial. This was about prospects of success.

And then fourthly, that the length of the period which might elapse before the hearing of Court of Appeal is not in itself a good ground for bail. It may be one factor in the decision whether or not to grant bail but the judicial officer who is minded to take this factor into account may find it advisable to contact the Registrar in order that he may have an accurate and up to date assessment of the likely waiting time. Counsel concluded that regard being had to the above it was submitted with respect that the Applicant had made out a sufficient case to be granted bail as prayed for in the notice of motion.

I then had submissions by the Respondent's Counsel Mr. Lenono. He started by saying of that the attitude of our Courts in applications of this nature has been reinstated in a number of times before in particular he spoke of the case of MAKHOABENYANE MOTLOUNG AND OTHERS v REX 1974-1975 LLR p.370 at 372(b) where the learned judge was said to have stated:

"Granting of bail pending appeal is not automatic from a superior

> court and very strong reasons indeed would be needed to justify a departure from this."

This authority was followed also in the case of MAMAKOAE MOKOKOANE v DPP CRI/APN/92/95. Counsel further submitted that in the case of STEPHEN MEYER v R CRI/APN/4/77 No.3 of the 27th June 1977 Cotran CJ, as he then was, said:

> "The principle under which the Court grants bail pending appeal are well known. It is not as readily granted as when the application is one for bail pending trial. To grant it is the exception rather than the rule for it is presumed that an accused having been tried by Court of competent jurisdiction had had a fair trial and ought to start serving his sentence forthwith."

With regard to this statement that an accused person had to start serving his sentence forthwith, I had earlier questioned Mr. Mpaka, as to what the policy of the Court was to be and what were the guidelines to the Court in a situation where an accused person is convicted and he goes to prison to serve a sentence of imprisonment. And then in such circumstances the Court is being asked to release him pending the hearing of appeal, the risk being abundant that the accused person would have to go back to prison and serve the remainder of the prison sentence. What the policy of the Court should be more especially on the prejudice to the accused himself and prejudice to the administration of justice. I reminded Mr. Mpaka that there is a remark about this factor in that work of Chatterton BAIL, LAW AND PRACTICE and I will comment about that remark later in my judgment.

Mr. Lenono argued further to say that in R v FOURE 1948(3) SA 508 at 549 which was quoted with approval in the case of MOTLOUNG (supra) where it was said:

> "It seems to me especially in the case of a serious crime that a convicted person should not be admitted to bail. He has been convicted and his sentence is in force and the fact that he has noted an appeal or had a point of law reserved does not entitle him to ask that the sentence be stet pending the decision of his appeal."

In similar judicial thinking in the case of MICHAEL MASEKO v R CRI/A/58/87 Sir Peter Allen J held that when a fairly long sentence, and in that case appeal was against a two year sentence, accused's bail should be refused. The Crown accordingly in the light of the last authority submitted that the doctrine of *stare decisis* dictated that this application must fail. It meant that judicial precedent indicated that in circumstances such as this one bail should not be allowed.

I accepted the Crown's argument that the very anchor of foundation of Applicant's contention seems to be perched on the credibility of Crown witnesses as I have already remarked. Outside that there are no special circumstances which he points out as entitling him to qualify for a departure from the general rule and to be released on bail.

The Crown further submitted that the onus lied on the Applicant to show that another Court may reasonably come to a different finding regarding the correctness of his conviction. I was not persuaded by Mr. Mpaka's argument that the question of the proximity of the Accused and the deceased when the fatal shot was fired indicated that there could have been an attack that the Accused warded off in self defence.

I indicated to Mr. Mpaka in no uncertain terms that I had found that there had been no attack from the deceased and that I did not believe that there was a knife involved in the attack. I was on the other hand persuaded that more than

anything else the Accused seemed to have attacked the deceased during a frenzy of serious provocation from the deceased. This fact of provocation if found as a defence overwhelmingly proved that there was an excuse of some kind in favour of the accused. And it was this very factor of provocation which the Accused insistently denied despite invitation from the Court that facts pointed out to the existence of such provocation.

In my mind I felt that had Accused take the chance he could have proved a defence that he acted through provocation, I would have found that he attacked the deceased not in self defence because he was severely provoked and he could accordingly take the opportunity of a defence of provocation. This he resisted despite invitation from the Court. This I say in response to the fact that another Court could find that the Accused was provoked but still that Court if it finds that there was a defence it could not mean that the Accused would completely be acquitted. He could still be convicted of another offence more particularly Culpable Homicide as this can be seen clearly from section 3 of the CRIMINAL LAW HOMICIDE AMENDMENT PROCLAMATION NO.42 of 1959 section 3 which says that if a person acts in a way that causes death in the heat of passion caused by sudden provocation he is guilty of Culpable Homicide only and not guilty of murder. The conviction would still be one that attracts a sentence of imprisonment.

The Crown further submitted quite correctly that there was also an *onus* on other aspect of whether prospects of success existed that another Court may reasonably interfere with the sentence imposed. In S v NDLOVU AND ANOTHER 1999 (2) SA at 645 at 650E particularly it has been said:

> "The first question arising in my view is whether the reasonable possibility exists of avoiding a sentence of imprisonment on appeal. In

> S v ANDERSON (supra) at 343(c) Fleming JP stated the question to be whether the appeal will succeed but on a lessor standard, whether the appeal was free from predictable failure to avoid imprisonment." (My underlining)

In this regard the Learned Judge referred to two extremes that is one on one hand where the appeal was likely to succeed and on the other hand where the Appellant would have no prospect of avoiding imprisonment and would therefore gain postponement not avoidance. In the latter event Learned Judge in my respectful view correctly held at 432F:

> "A Court will not allow bail procedures to frustrate punishment procedures which have been duly formalised. See S v HLONGWANE 1984(4) SA 79T at 102 E-G."

This underlines the issue that in applying for bail the main ground is that another offence will be substituted, then the question is whether when that other crime is substituted Appellant will still be liable to serve a term of imprisonment. If the answer is in the affirmative then there is no value in allowing the Appellant out on bail on that account. On submitting further Mr. Lenono said that in TSITA v REGINA 1959 HCTLR at 2 paragraph C today Elyan AJ said:

> "Of course the primary consideration in my opinion in an application such as this is always whether there would be on appeal be a reasonable prospect of success. In other words prospects of disturbing the conviction."

Even with regard to this consideration of the prospects of disturbing the conviction I go back to say that the grounds of appeal solely speak about matters about the credibility of witnesses. There is nothing by way of taking a point or even questioning any issue in a serious way other than about the conduct and demeanor of the witness which is primarily a question of credibility. The aspect of credibility is one which the trial court has the best opportunity of judging at the best of times.

The Crown finally submitted that the matter before this Court was an unprocedural one and it ought to be struck off on that ground. Mr. Lenono cited section 101(3) of the C.P.&E. Act 1981 which expressly provides that :

"Every written application for bail shall be in the form of petition."

Crown Counsel argued to say that in RATIA v R 1976 LLR 141 at 142 the Court stated that it could condone unprocedural applications only in exceptional circumstances and cast the onus on the Applicant to show such circumstances. The Crown contended that it was the same with the present application that the procedure was wrong and no exceptional circumstances were stated for the need to condone the unprocedural application. The Crown then submitted that on the basis of judicial authority referred to above and the special circumstances of the case the onus cast on the Applicant had not been discharged should accordingly fail.

This Court dealt with an application for bail pending appeal in MOTHIBELI LETSIE RAMALUMANE v DIRECTOR OF PUBLIC PROSECUTIONS CIV/APN/244/99, 16th August, 1999. In that case the Court agreed that based on flawed definition of accessory after the fact the Court on appeal would probably reach a difficult conclusion as to the crime with which the accused was guilty of. It was not that the Accused/Applicant would be acquitted. The Court found that this could not be a basis for good prospects of success on appeal.

The Court in RAMALUMANE'S case dealt with that issue which I have earlier referred to herein (at page 4) about the broad policy consideration when an accused has already served part of his sentence and yet wanted to be allowed out on bail pending appeal. I quoted from page 60 paragraph 3.17 of the said work of Clifford Chatterton in BAIL, LAW AND PRACTICE (supra). I emphasised from that statement that it had to be for exceptional reasons and in the interest of justice

that an accused may be released on bail. In addition that it would not be in the interest of just to have "an appellant taken back into custody over which he had been on bail." I also referred to R v FOURE (supra) in relation to the above consideration and to release on bail in serious crimes. See also S v DE ABBREAU 1980(4) SA 94(W) at 100 at H to note that the :

> "..... fundamental principle is in favour of the liberty of the subject and that bail should only be refused if there is a real danger that justice will not be done."

Even when the probability would be substitution of a conviction for another or a different sentence it cannot be said that justice will not have been done in refusing the appellant bail pending appeal.

I found that in the circumstances of the case my discretion would not allow release of the Applicant on bail hence the application must fail.

T. MONAPATHI
JUDGE

For the Applicant : Mr. Mpaka

For the Respondent : Mr. Lenono