CRI/T/44/2000

IN THE HIGH COURT OF LESOTHO

In the Application of :

MOKHERANE TSATSANYANE **Applicant**

vs

R E X **Respondent**

RULING ON BAIL APPLICATION

Delivered by the Hon. Mr Justice M L Lehohla on the 28th day of May, 2001

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The applicant herein applies for bail pending appeal to the Court of Appeal.

The application is opposed.

The applicant has attached his grounds of appeal to the notice of motion. I don't think it would be proper for me to react to the grounds of appeal as that is a matter outside the jurisdiction of this Court.

I however gathered from the applicant's replying affidavit at paragraph 5.5 a complete misconception of the law by the applicant who says :

> "I was convicted of theft simpliciter and *as accessory after the fact.* The principal offender was not identified".

This is a misconception because if the applicant maintains he was convicted of theft as an accessory after the fact he implies that he was charged with theft in the first place. But that is not the case. He has not been convicted as an accessory after any of the charges laid. He has been convicted of theft on the operation of the statute which provides an invisible verdict of theft where a charge of robbery has not been proved. See section 185(1)(d) read with section 343 of the Criminal Procedure and Evidence Act 7 of 1981.

Section 343 relates to receiving stolen property knowing it to have been stolen.

Indeed *Mr Mahlakeng* for the applicant on being shown the above state of affairs which was made plain in the judgment of this Court at trial owned up that he only came to realise the full and proper meaning of the above sections after he had prepared papers relied on in this application.

I find no difficulty in saying therefore under the circumstances the applicant cannot be said to have discharged the onus cast on him to demonstrate that he has prospects of success on appeal when plainly his train has lamentably left the metals. He is barking up the wrong tree if he maintains as shown in his affidavits that he has been convicted as an accessory after the fact. It is irrelevant therefore to seek to show that the applicant has not been shown to have tampered with the engine or chassis numbers because here he is convicted of theft simpliciter. It is a further misconception on his part to bemoan the fact that no evidence has been led to show who the principal offender is. Under operation of the statute relied on the thief is the one in whose unlawful possession another's property is found and no reasonable explanation is proffered for the possession.

Another aspect worthy of consideration in matters of this nature is provided in ***Rex vs Fourie*** 1948(3) SA 548 at 549 where Malan J 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 imposed be stayed pending the decision on appeal". Contrast supplied by me.

Mr Mahlakeng relying on a different portion of this judgment seemed to overlook the significance of the word *especially* appearing in the above quotation. In my view it merely supplies a contrast among cases where bail should not be granted. The phrase in which this word occurs lays down a general rule which is not at variance with the view expressed in the following sentence that an appellant who has been convicted is not entitled to have the sentence that has been imposed, stayed. While this is an attitude expressed in regard to a generality of cases, in serious cases this has to be observed with even greater vigour.

Bail pending appeal in my view is rather an exception rather than the rule. The underlying principle is that at this stage the presumption of innocence has fallen away and the convict has to serve his sentence.

In ***Rex vs Milne and Erleigh*** 1950(4) SA 601 at 602 Lucas J said in reacting to Malan J's dictum above :

> "That case did not decide anything more than this, that the mere fact that leave to appeal had been granted did not of itself entitle a convicted person to be allowed out on bail. It did not prohibit the granting of bail because the crime was serious".
>
> In the same breath Lucas J recognises at p. 603 that :

> "A number of tests have been suggested but in the end the question of granting bail is one in the discretion of the court. The court naturally, because it would otherwise have given this decision, believes that its decision is sound. It is, however, possible that the appellate Division might take another view".

The words of Lucas J are *ad idem* with sentiments expressed in ***Rex vs Kuzwayo*** 1949(3) SA 761 at 764 to the following effect :

> "We are aware that this Court is able to apply a proper test with greater ease than the trial Judge for the trial Judge must in the nature of things find it somewhat difficult to look at the matter from a purely objective stand-point; he has a natural reluctance to say that his own judgment is so indubitably correct that the Judges on Appeal will concur therein".

See also ***R vs Clewer*** (1953) 73 Cr. App. 37 where the reasoning in 2 is to the following effect :

> "It seems to me that if the trial Court is in a position that it can honestly say that the applicant will have a reasonable prospect of success on appeal that must indicate that there must be some doubt in the mind of the trial Court, and if such doubt does exist, then there should not have been a conviction, so that the very strict application of this rule, in my opinion, renders it difficult to conceive of cases where leave to appeal should be granted".

While the above cases tend to favour granting of bail pending appeal there is a plethora of local cases militating against such practice : See CRI/APN/614/93 ***Ndabe Khoarai vs Rex*** (unreported) at page 5 where it said :

> ".....in an application for bail pending appeal there is no question of innocence or liberty of the person because he has already been found guilty by a Court of competent jurisdiction, the Court having proved his guilt beyond a reasonable doubt. Therefore the refusal of bail is the rule rather than the exception. There have to be very strong reasons. See ***Makhoabenyane Motloung and Others vs Rex*** 1974-75 LLR 370 at 372 AC (HC).
>
> Secondly that the person having been tried by a competent Court is presumed to have had a fair trial and ought to start serving his sentence forthwith. See ***Stephen Meyer vs Rex*** CRI/A/4/77".

Indeed the notice of Appeal and grounds attached to it signify the applicant's zealousness in his intent to appeal. But that is not enough regard being had to the fact that in all cases where he has not been sentenced to death he is obliged to prepare the record of proceedings and pay for such preparation or at least a requisite amount of deposit to that effect. No proof has been furnished to this Court that in fact the applicant has done so. There is also a question of appeal fees that this Court has not been favoured with proof that they have been paid.

In paying particular regard to these details this Court shares the views expressed in ***Khomotso Kudubane Moshaga vs The State*** Criminal Appeal No. 197 (unreported) at p.4 by the Botswana Chief Justice to the following effect :

> "I say this because although bail in England is now governed by the Bail

Act, 1976 which came into force on the 17th April, 1978, certain fundamental precepts have emerged, generally by way of Practice Notes, and these make it clear -

> '(1) that once a verdict has been returned, a further renewal of bail should be regarded as exceptional (see Practice Note published at (1974) 2 ALL E.R. 974, and
>
> (2) that in considering bail after conviction the first question to be addressed is whether there exists a particular and cogent ground of appeal and if there is no such ground bail should not be granted; (I respectfully endorse and agree with this statement)
>
> (3) 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 the chance of a successful appeal is not substantial;
>
> (4) the length of the period which might elapse before the hearing of an appeal is not of itself a good ground for granting bail but such period, if there are otherwise good grounds for bail, may be one factor in the decision whether or not to grant bail.....".

I favour the attitude expressed by a sister Ex High Commission Territory Court as it depicts similar problems faced by Lesotho and provides a sound and ready solution thereto.

Saying this I cannot but point at the predicament Molai J was faced with in

CRI/APN/92/95 ***'Mamakoae Mokokoane vs Rex*** (unreported) at p.3 where the learned Judge said :

> "There was no definite proof that there would be inordinate delay in transcribing the record of proceedings. Her allegation that that would be the case was at the time, sheer speculation on which the court could not, in my opinion, properly rely".

The question of inordinate delay was a factor taken into account in ***Sekhobe Letsie vs Rex*** by the Court of Appeal after at least one Court of Appeal session had passed without the appeal being heard and without clear prospects that it would be ready for hearing in the next session.

Nothing averred in the instant application persuades me that the applicant should be freed on bail.

Consequently the application for bail pending appeal is refused.

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J U D GE
28th May, 2001

For Applicant : Mr Mahlakeng
For Respondent : Miss Maqutu