CRI/APN/721/02

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MOLE KUMALO **PETITIONER**

And

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr Acting Justice T. Nomngcongo
On the 10th December, 2002

This application for bail was launched on the 25th July 2002 on a certificate of urgency and set down for the following day. It did not proceed that day. I assume the reason was that the state was going to oppose the application and they needed time to file their opposing papers. It was postponed to the 2nd August 2002.

For some reason, not apparent from the record it did not proceed on that day either. On the 3rd of September it is recorded simply "Mr Mda absent". The application was finally heard before me on the 11th November, almost two and half months from its launching. I may also indicate that when it was so launched the applicant had been in custody for no less than twenty days.

I pause here to ask what occasions the sudden urgency in moving this application. The brief history outlined above evinces a singular sense of leisureliness, yet when he moves court the applicant invokes urgency. I close the chapter by remarking that the court frowns upon being put on full alert when there is no imminent danger.

The applicant is charged with the murder of Maile Mosisili allegedly committed on the 11th February 2002. He was arrested on the 1st July 2002. Considering that the applicant is a member of the Lesotho Defence Force who lives within the Maseru urban Area at Makoanyane, this suggests to me that the investigations that led to his arrest could not have been easy. It is common cause that shortly after his arrest an identification parade was held. There he was identified by one Lineo Sello as the person who had asked her to lure Maile Mosisili (the deceased) to a place where he

(applicant) shot and killed him. As expected, it is categoritly denied by the applicant that he shot and killed the deceased or that he in any way participated in his murder as, at the time of the alleged murder, he was busy with his thesis for a Masters Degree.

The applicant says following his arrest he was severely tortured at the hands of the police. Of course, the police would never admit this sort of allegation and so it is denied by Inspector Sello Mosili in his opposing affidavit. (par 4 thereof). He was finally formally remanded in custody by a Magistrate on the 4th July 2002. One also gathers from para 5 (g) of the petition that applicant is charged together with one **Paka Mahao** a friend of his and another person who is a stranger to him. He says he was never in their company on the alleged night of the murder.

It is against this background that applicant asks this court to release him on bail. He assures the court that as a Lesotho citizen, a member of the Lesotho Defence Force with rather impressive academic credentials he would never leave his beloved country and family. He is neither desirous nor able to start a new life elsewhere. The administration of justice will not suffer or be prejudiced if he is released on bail.

In opposition to this application Inspector **Sello Mosili** raises several salient points: (1) Applicant was identified by Lineo Sello as aforesaid earlier. I must point out there that it is also alleged that Lineo Sello is well known to applicant. (2) Applicant pointed out a gun from his residence at Makoanyane – I cannot ignore suggestion here that it might be the murder weapon.
(3) Applicant pointed out the murder scene – the plain, though not stated suggestion being that applicant had guilty knowledge.
(4) Applicant also pointed out **Paka Mahao** as being his accomplice in the murder.

To this applicant replies that Lineo is not known to him. He produced the gun in question after interrogation regarding possession of a firearm which he freely admitted to having. He was actually led to the scene and not *vice-versa.* He never implicated **Paka Mahao.**

Having thus positioned themselves the applicant, and indeed the respondent approached this application as if the Criminal Procedure and Evidence (Amendment) Act 2002 Sec. 2 were applicable here. The section reads thus

> "2. The Criminal procedure and evidence Act 1981 is amended by inserting after section 109 the following new section:

"power of court to certain accused on a charge of murder, rape, robbery etc.

109. A(1) Notwithstanding provision of this Act, where an accused person is charged with :

(a) murder under the following circumstances

(i) the killing was planned or premeditated and the victim was.

(A) a law enforcement officer performing his function as such whether on duty or not at the time of the killing or is killed by virtue of his or her holding such a position.

(B) a person who has given or was likely to give material evidence with reference to any offence referred to in Part II of schedule I.

(ii) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit rape, robbery, stock theft, theft of a motor vehicle, and indecent assault.

(iii) the crime was committed by a person group of persons or syndicated acting in the purported execution furtherance of a common purpose or conspiracy.

(b) .....

(c) .....

(d) .....

(e) .....

> The court shall order that the accused person shall be detained in the custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release"

Thus argument presented was almost entirely devoted to showing whether or not "exceptional circumstances" exist which in the interests of justice permit the release of the applicant and touching on the constitutional implications thereof.

Now it is clear from the reading of the amendment that it is not just any of the crimes of murder, rape, or robbery for which it may be invoked. It is for those crimes, but in the special circumstances listed in it, namely that:

1. The killing was planned or premeditated, and the victim was a law enforcement officer about his duties or a person likely to give material evidence in a case involving certain offences.
2. The victim was killed in the commission on attempted commission of specified offences.
3. The crime was committed by a person or group of persons or syndicate in the execution or furtherance of a common purpose or conspiracy.

It is within these limited confines that an accused persons must be called upon to give evidence that "exceptional circumstances" exist warranting his release. Now, it has not been shown to me either on the charge sheet, the papers submitted for the applicant and the respondent or indeed in argument that the circumstances envisaged by the amendment exist. It follows therefore that this is an ordinary application in a case of murder unattended by the prescribed circumstances, so that the ordinary considerations in a case such as this are to be taken into account in deciding it.

The right to be admitted to bail is recognized by the Common Law, the Constitution of the Kingdom (sec.6 "5") and by Statute (sec. 109 of the Criminal Procedure and Evidence Act 1981). If an accused persons is able to prove that he will stand his trial and that the interest of justice or society as it is sometimes put, will not be prejudiced, then he must be released on bail. Thus it will be seen that it is a less onerous burden than proving the existence of "exceptional circumstances" as envisaged by the amendment earlier referred to. It seems to me however that especially in the case of opposed bail applications the crown, first of all must prove that it has a *prima facie* case. In its turn, the crown's

burden in this regard is lightened considerably compared to its normal proof "beyond reasonable doubt" required in a criminal trial proper. The reasons for this have been aptly put in **S. v Shietekat 1998 (2) SACR 707 at 713.**

> "Bail proceedings are *sui genesis.* The application may be brought soon after arrest. At that stage all that may exist is a complaint which is still to be investigated. The state is thus not obliged to produce evidence in the true sense. It is not bound by the same formality. The court may take into account of whatever information is placed before it in order to form what is essentially a value judgment of what an uncertain future holds." Per **Slomowits A. J.**

In the present case I respectfully adopt this approach what the state has presented before me as implicating the accused in the commission of the alleged murder falls far short of what may be called evidence in the true sense. The alleged pointing out of the scene of accident and the production of the murder weapon are as Mr Mda pointed out colourless and they most certainly do not meet the requirements of this type of evidence. The witness Lineo Sello is supposed to be well known to the accused, yet the police find it necessary to hold an identification parade. These are a very unsatisfactory aspects of the case that the state says it has against the accused. But that is not the proper approach at investigation level: These may just be leads yet to be followed up. They cannot

be thrown out of hand in a bail application. In the circumstances I am not prepared to say out right that the state has not made out a *prima facie* case. This then puts the ball in accused's court so to speak.

Accused says in motivating his application that he did not commit the offence and was not at the scene of crime. Against this state has adduced the sort of evidence I have just referred to above. He goes on to indicate that at the time of the alleged commission of the offence he was busy preparing his thesis for a Masters programme which he was due to present shortly. This is confirmed by a letter emanating from the relevant academic institution. His defence in short is one of an *alibi.* I doubt that more could be expected of an accused in these circumstances, especially one who is in custody and cannot be expected therefore to gave confirmatory evidence.

The accused says he has a mother whom he supports, he would never leave his beloved country for any reason, has no connection with any country outside Lesotho, and he has neither means nor desire to leave this country. None of this is denied by the state. The opposing affidavit of Inspector Sello Mosili is content with merely saying :

> " I have the considered opinion that if the petitioner is released on bail the gravity of the offence and the *prima facie* evidence against him will ensure that accused absconds (*sic*) and does not stand trial. I also have a real fear the witnesses relating to this case will be interfered with as the accused knows the crucial ones".

The supporting affidavit of Crown Counsel Ms L. Makoko merely echoes the above sentiments. It says

> "I have read the docket in which the applicant is charged with the crime of 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 applicant will hamper the course of justice. Upon conviction he will face a long jail sentence. I humbly request this honourable court (*sic*) not to grant bail as 'Mole Kumalo will abscond if granted such".

With respect what the deponents do here is to state the obvious that accused is facing a serious charge and from that draw all sorts of conclusions: That he will not stand, he will interfere with witnesses, he will hamper the course of justice. No attempt is made to lay a basis in fact for these conclusion including that conviction is a forgone. Why, Ms. L. Makoko says "upon conviction he will face a long sentence". *My underlining.* The objection to this kind of approach was stated thus by the Court of Appeal in **Jonny Wa Ka Maseko v Attorney General and another 1993 – 94, LLR & LB 207 at 228.**

> "It is insufficient merely to state a conclusion without supplying some information on which such conclusion or suspicion is based." Per **Ackermann J.A.**

As regards the conclusions of the D.P.P. represented by the deponent, Crown Counsel Ms L. Makoko **Steyn P. in Matsoso Bolofo & Others v The Director of Public Prosecutions p. 118 at 139.**

> "The attitude of the D.P.P. is a relevant consideration, however evidence is required in order to enlighten the court as to why he has adopted such a view".

And he quoted with approval **Didertt J. in S. v Limmane 1976 (2) 204 at 211 (N):**

> " Although the opinion of the Attorney General always commands respect because of his experience and responsibilities of his office, it seems to me that once it is evident that he is no better informed than the court, it is as good a position as he to assess the likelihood as otherwise that an accused person will abscond".

Among the considerations whether accused will abscond mentioned in **Bolofo**'s case (supra) at 137 are and I quote"

> "(a) how deep are his emotional, occupational and family roots within the country where he is to stand trial."

These the accused has met and answered squarely: he loves his country, he is a soldier and has a mother whom he supports.

"(c) what are the means that he has to flee the country"

He says and this is uncontroverted, that he has neither means nor desire to abscond.

I am also attracted to another consideration, still in **Bolofo's** case

"(j) how stringent are the conditions of his bail and how difficult, it would be for him to evade effective policing of his movements.

Now the applicant is a soldier who lives in the barracks. Surely it would be easy enough to police him in such an environment.

Finally it is said that the accused will interfere the witnesses "as the accused knows the crucial ones." As far as we know, there is only witness who is alleged to be known to the accused, Lineo Sello and that is denied anyway. Which are the other "crucial ones"? If it is Lineo surely the accused had ample opportunity to interfere with her in the period between the murder on the 11th February and his arrest on the 4th July, when he must have known that serious investigations were under way. There is not any indication that he did so.

I conclude that the applicant has discharged the onus of showing on a balance of probabilities, that the interests of justice will not be prejudiced by his release on bail and that he will stand his trial. I accordingly grant him bail on the following conditions:

(a) The accused to deposit M1,000.00 with the Registrar.

(b) The accused not to abscond, but to stand his trial and abide the judgment of this court.

(c) The accused not to interfere with crown witnesses in anyway.

(d) The accused not to hamper police investigations.

(e) The accused to report himself to the officer in charge at the Makoanyane barracks, daily between the hours of 6 a.m. and 12 noon.

(f) These recognizances be served upon such officer.

T. NOMNGCONGO
ACTING JUDGE

Mr. L. Thetsane - for Crown
Mr. Z. Mda - for Defence