

CRI/APN/731/02

IN THE HIGH COURT OF LESOTHO

In the matter between

MAKHOATHI SHANI TEKESELA

APPLICANT

And

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. Guni
on the 27th September, 2002

This is an application for bail. This applicant in his affidavit does not say exactly where he is being detained. He claims that he was informed in the presence of his attorney at Maseru subordinate court that he is charged with the crime of robbery and was incarcerated. He avers that all along he had been informed that he is facing the charge of stocktheft. There

was never a time when the police gave him the impression that they are investigating a crime of robbery. It is only at the subordinate court that the prosecutor preferred a charge of armed robbery against him. This the applicant alleges was for the sole purpose of ensuring his incarceration longer than it would be normal in cases of ordinary stocktheft.

This application is opposed. The deponent of the opposing Affidavit Inspector Letoane has expressed fear that if this accused is released on bail he is likely to interfere with the investigations. The investigator has found that the people are afraid to give information which might cause them to be called as witnesses or lead the police to complete to their satisfaction the investigations of the case. The people seemed to fear reprisal from the accused. Furthermore there is a statute which authorises the court to detain the suspect who is alleged to have committed the offence charged with the use of firearm.

The prevalence of stocktheft in this country is spreading like wildfire. It has devastated the economy of this country. The parliament of Lesotho has appealed to the government to engage the assistance and support of the Lesotho Defence Force in its fight against stocktheives. The piece of Legislation which was enacted recently was intended to enable law enforcement agencies at least to contain if they fail to irradiate stocktheft altogether.

This application is made in terms of Section 109 CRIMINAL PROCEDURE and EVIDENCE ACT N0.9 of 1981. In terms of this section, this court has a discretion at any stage of the proceedings taken in any court in respect of offence to admit the accused to bail. Recently Parliament found it necessary to temper a little with that discretion. In cases where the firearm has been used in the commission of the alleged offence, the court is compelled to order the detention in custody of the accused person, unless there are exceptional circumstances which permit and justify the release of such

accused. The relevant portion of the amendment reads as follows:-

“109.A.(1) Notwithstanding any provision of this act, where an accused person is charged with.....

(C) robbery and the robbery involved

(1) the use of a firearm by the accused, -----
----. The court shall order that the accused person 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.” (My underlining.)

The applicant in his affidavits seems to be questioning the propriety of the charge preferred against him. He claims that the members of the Lesotho Defence together with the complainant arrived at his residence on 27th July 2002. There the complainant recognised and identified 4 sheep and 37goats as his.

Those identified animals were together with the applicant taken to MOFOKA POLICE STATION. At this police station the applicant found 275 sheep which the police have collected from his cattle post. Amongst this livestock the complainant recognised and identified 21 sheep as his.

After this search and find, the applicant was advised by the police to go home and to report himself at MABOTE POLICE STATION on Monday. The search and finding of the recently stolen livestock must have been conducted during the weekend. The offence of robbery is alleged to have been committed during the month of April 2002. The Act (CRIMINAL PROCEDURE and EVIDENCE (Amendment) Act 2002) was enacted on 23rd April 2002. The prevalence of the Commission of this type of offence put pressure on Parliament to enact this law. It is ironical that as the parliamentary debate on the subject matter of violent crimes went on, so was the commission of the alleged offence.

The perusal of the affidavits and annexures filed of record shows that this applicant has been accused on a few occasions of stocktheft. He claims that everytime he was accused of stocktheft he was always released. This time the prosecutor has with possible malace contrived to charge him with robbery for the purpose of securing his detention longer than normal.

The applicant is entitled to rely on the police previous practice. But he must also realise that if the practice has not been helpful for the purposes of enforcing the law such practice will be changed. The change was brought about by the passing of the statute. It was not of the personal making of the public prosecutor. The law was changed by Parliament. Perhaps it is a general feeling that since the thieves seem to over power herdboys by using firearms when they forciably take and remove from them the stock under their care the crime committed is therefore serious enough to warrant equally serious measures to contain it.

The criticism levelled against the police and/or public prosecutor does not help this application. It is the right of the prosecutor to choose to charge the accused of the offence disclosed by the facts in his or her possession. The applicant in his affidavit does not adduce evidence which satisfy the court that the exceptional circumstances exist which in the interest of justice permit his release. The choice of the charge to be preferred against the accused is the prerogative of the public prosecutor. The accused is in no position to challenge the authority and/motive of the public prosecutor. It is his/her exclusive right and previledge to prefer the charge disclosed by the facts before him or her.

The applicant herein is charge alone. His allegation of discrimination has no basis. There might have been others who were questioned by the police for their possession of the stock suspected of being stolen. Their case is not before court for the consideration. The circumstances surrounding their release is a matter between them and the police. There also

might be those occasions where as the applicant claims, he was told by the police that the livestock found in his possession is suspected of being stolen. What the police claim to be investigating is not necessarily the charge which the Public Prosecutor must prefer against the said accused. The explanation given by the public prosecutor that it is the perusal of the docket which disclosed to her that the firearm was used in the commission of the alleged offence; therefore she felt, correctly I must add, that the charge of robbery is a competent one in the circumstances. The said charge was not preferred purely for the purposes of securing the incarceration of this applicant. This applicant has directed his attack on the competency of the charge preferred against him. He has not shown as required under the statute that there are exceptional circumstances which justify his release. In this respect this application must fail.

The applicant has not shown to the satisfaction of this court that there are exceptional circumstances which would in

the interest of justice permit an order of his release. Therefore the application is dismissed.

K.J. GUNI
JUDGE



For applicant - Mr. Sello
For respondent - Ms. Nku