CRI/APN/147/02

IN THE HIGH COURT OF LESOTHO

In the matter between:-

LESOLI MAPHATHE PETITIONER

vs

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

JUDGMENT

CORAM : HON. MR JUSTICE S.N. PEETE
DATE : 1ST AUGUST, 2002.

This is a petition for bail in terms of the provisions of section 109 of the Criminal Procedure and Evidence Act No.9 of 1981 as amended which as amended reads in full:-

> *"109. Subject to section 103 of this Act, the High Court may at any stage of the proceedings taken in any court in respect of an offence admit the accused to bail.*

Power of Court to detain the accused on a charge of murder, rape, robbery etc.

109A.1Notwithstanding any provision of this Act, where an accused person is charged with-

(a) murder under the following circumstances-

(i) ... ...

(ii) ... ...

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

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".

The charge upon which the petitioner was remanded or committed to custody on the 4th March 2002 reads as follows:

"That the said accused is charged with the crime of murder:

In that upon or about the 11th day of February 2002 and at or near Victoria Hotel in the district of Maseru the said accused did unlawfully and intentionally kill one Maile Mosisili and thus commit the crime as aforesaid.

The petitioner is alleged to be aged 25 years and resides at Stadium Area in the City of Maseru; the deceased, it is common cause, the son of the Prime Minister of Lesotho.

In his petition, the petitioner alleges that he was arrested on the night of the 27th February 2002 on a charge of murder of Maile Mosisili; but he solemnly avers that he is innocent of the crime because on the night of the 11th February 2002 he had been to a wedding feast at the residence of one Mr Moeketsi Sello and that later that evening he had gone into the town center to withdraw some money at an Automatic Teller Machine (ATM) buy some cigarettes; after which he went to Victoria Hotel to see his girlfriend whom he did not find. He then went off with an unknown girl and when passing the National State Security Offices he saw a group of people and a police vehicle parked by; when inquiring, the unknown girl told him that a person had been shot that very night next to the Maseru Club. Petitioner states that he went home and slept; he continues to state that on the morning of the following day, he heard that Maile Mosisili "*had passed away killed by unknown people.*"

He goes on to say that on the 27th February 2002 while he was at Victoria Hotel, he was arrested by police upon the charge that he had killed Maile Mosisili – which deed he solemnly denies having perpetrated.

He states further that he is citizen of Lesotho and a holder of a Lesotho passport, and he undertakes to pay M250.00 cash bail deposit, not to interfer with the crown witnesses nor hamper police investigations and that he undertakes to report himself at Pitso Ground Police Station.

The Director of Public Prosecutions had filed "*notice of intention to oppose*" and has used in support of his objection the affidavits of Inspector Sello Mosili and **Lindiwe Maqutu – Moorosi**.

Inspector Mosili states in his sworn affidavit that he is the chief investigating officer in this murder case. He states that he has a strong *prima facie* case against the petitioner who was seen at the scene of crime prior to the killing of the deceased and that a gunshot had been heard after the deceased was seen walking past the said place. He continues to state that his investigations show that the petitioner had later emerged from the Maseru Club forest and approached four "*night girls* (prostitutes who frequently ply their trade in that vicinity); and that on the 27th February 2002 one of the girls called him by telephone from Victoria Hotel and pointed the petitioner as the person she saw emerging from the forest on the night of the 11th February 2002. The petitioner was then arrested.

He states that *"the petitioner's release on bail will place this witness's life in danger because the petitioner knows her and that other potential witnesses are presently under police protection due to the fact that they have been receiving threats from unknown people."*

Mrs **Lindiwe Maqutu – Moorosi**, the Principal Crown Counsel in her supporting affidavit states-*ipsi dixit*:-

> *"On the ground of the gravity of the offence with which the petitioner is charged – together with the sentence that may be imposed if the Petitioner is convincted, I consider that this is a case where Petitioner should not be admitted to bail."*

Under our Constitution a person charged with a criminal offence is presumed innocent until proven guilty or pleads guilty to the offence charged. Section 12 reads:-

> *"12. (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*
>
> *(2) Every person who is charged with a criminal offence -*
>
> *(a) shall be presumed to be innocent until he is proved or has pleaded guilty."* (my emphasis)

Section 6 of the Constitution also reads:-

> *"6. (1) Every person shall be entitled to personal liberty, that is to say, he shall not be arrested or detained save as may be authorized by law in any of the following cases, that is to say-*

(a) ... ...

(b) ... ...

(c) ... ...

(d) ... ...

(e) *upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Lesotho;*

(f) ... ...

(5) *If any person arrested or detained upon suspicion of his having committed, or being about to commit, a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."* (my underline)

It is my view that these important constitutional provisions should be read *purposively*: that is, whilst upholding the fundamental presumption of innocence of the accused till proven guilty and right to personal liberty, the Constitution *itself* envisages a situation where a person may be detained as authorized by law under a reasonable suspicion of having committed a criminal offence under the law of Lesotho. Care must be taken not to defeat

the purpose of this constitutional provision by "importing", so to speak, the presumption of innocence underscored in section 12 because the presumption of innocence relates to trial of the accused and not to his liberty pending trial. The import of this evidential presumption under section 12 *jurisprudentially* and *procedurally* is to place the *onus* upon the prosecution to prove evidentially beyond a reasonable doubt that the accused committed the offence charged and it is not for the accused to prove that he did not commit such offence. It is an evidential exercise during trial.

On the other hand, in an application for bail – which is a proceeding *sui generis* – there is no trial as yet about the guilt or innocence of the accused; the inquiry is centred upon the following-

(a) whether the accused has been lawfully detained;

(b) whether there exists reasonable suspicion that he committed the offence charged;

(c) whether, pending his trial, his release will not prejudice the interests of justice in that -
   (i) he could abscond and not stand his trial;
   (ii) he could interfere with crown witnesses or hamper police investigation.

(d) whether the court can strike a balance, as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice -

> **S v Essack** 1965 (2) SA 161, for example, the court in its discretion can impose bail conditions that will guarantee the accused's presence at trial; our courts usually lean in favour of the liberty even where there is strong *prima facie* case against the accused – **Mohlouoa v Rex** – 1982 (1) LLR 117.

These are considerations which the court must bear in mind always in a bail inquiry along with, more importantly, the particular circumstances of the case and of the accused.

In this case, it is important to note that

(a) the petitioner is facing a charge of murder;

(b) the investigations, so the Court was informed, are almost complete, if not completed;

(c) what remains is for the Director of Public Prosecutions to indict and prosecute as expeditiously as possible.

It seems to me that under our Constitution, the detained person's right to bail is not as clearly defined as it has been in the South African Constitution whose section 35 reads-

> *"Everyone who is arrested for allegedly committing an offence has the right ... to be released from detention if the interests of justice permit."* See **S. v Schietekat** – 1998 (2) SACR 707 at 711

Under section 6 (5) of our Constitution the right to bail only becomes active (enforceable) if the detained person "*is not tried within a reasonable time.*" Legal phrases "*if the interests of justice permit*" or "*within a reasonable time*" are nebulous ones and have not been defined and indeed, as I have already stated, much depends upon the particular circumstances of the case and manner in which the presiding judge exercises his judicial discretion in the matter. Each case (or offence) always has its own uniqueness thus its own special peculiarities; for example a robbery or rape can be characterised by the most gruesome aggravation like torturing of a hapless victim etc.

That this case has some public profile, admits no doubt, namely, that the deceased was the son of the Prime Minister. The Court cannot and should not close its eyes to that fact, which however should be seen and be placed in its own proper perspective. Bail should not be denied because the Prime Minister's son has been killed, but that can be a factor to consider if that very fact would prompt or influence or induce, *rightly or wrongly* the petitioner to abscond fearing perhaps that because of the nature of the offence some robust sentence may be imposed if he is convicted. Indeed, during argument I even posed a hypothetical question: would this court grant bail if the petitioner was the Prime Minister's son? I give no answer to this question!

It is also rather unfortunate and ironical that as of now the South African law enforcement agencies are reluctant or in fact refuse to cause the extradition or repatriation of fugitives who have committed grave offences like murder upon the reasoning that since murder is no longer a capital offence in the

Republic of South Africa, but still is so in Lesotho, a murder fugitive will not be extradited or repatriated from South Africa – which country, I daresay, then may unfortunately turn into "*a safe haven*" for murderers fleeing from the neighbouring states! Indeed this may become an indirect incentive to flee our jurisdictions. Again I do not think this court should rely on any past experiences whereby suspects who had fled from Lesotho into South Africa were clandestinely returned through "*covert*" cooperations between the Lesotho and South African police personnel. Legality of such operations is highly questionable and I go as far as that.

In my view, in this case I am inclined to refuse bail *at this stage* because of the following:-

(a) a serious offence has been committed in circumstances as contemplated under 109A 1 (iii) as amended (*supra*).

(b) the criminal investigations are complete.

(c) *expeditious* and *prompt indictment* and *prosecution* of the case would be more conducive to the interests of justice than releasing the petitioner on bail.

Duty-bound as I am to do, I earnestly exhort the Director of Public Prosecutions, investigations being complete, to indict this petitioner singly or with others within a month and set the case for hearing.

Mr Maieane asked me in his brilliant elocution to the Court to strike down the new Criminal Procedure and Evidence (Amendment) Act No.10 of 2002 as being unconstitutional in that its effect is to cast the *onus* on the petitioner (accused) to show that "*exceptional circumstances exist which in the interests of justice permit his release*" and he argues that this is inconsistent with Section 12 of our Constitution which presumes the innocence of the detained person till he is proven guilty.

My fair reading of the last leg of the amendment is that the Court is enjoined by this new law to detain in custody persons charged with serious offences like murder, rape, robbery which are committed under certain prescribed circumstances. The policy behind this law perhaps reflects the Lesotho Parliament's attitude to the seriousness (gravity) of such offences and its revulsion and aversion to their perpetrators being released on bail pending trial.

Under this amendment, in my view, the accused only bears an *evidential burden* to show on a balance of probabilities that his release is permitted by the interest of justice. He is not at all being asked to prove his innocence in any way nor is the court competent at this stage to inquire into the innocence or guilt of the petitioner. See **S. v Schietekat** (supra) at page 713.

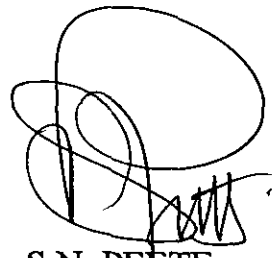
I therefore hold that the amendment has no bearing to section 12 of the constitution and hence it is not necessary to decide upon its constitutionality.

I should perhaps mention that the imperative provisions of section 3 of the new **Speedy Court Trials Act No.9 of 2002** which came into operation on

the 11th April 2002 stipulates that the indictment should be filed "*within 90 days from the date on which an accused first appeared before a judicial officer.*" See also see also Section 4 (remands) and section 5 (commencement of trial) section 9 (delay) section 12 (dismissal of charges for non-prosecution).

Delay in the prosecution of criminal trial is a current problem that has been recognized and condemned even by this Court and the Court of Appeal of Lesotho. **Justice delayed is a denial of justice**. The police, the Director of Public Prosecutions and the Registrar of the High Court **MUST** see to it that this case is set for trial at an earliest possible date as directed.

In the circumstances, bail application is refused but without prejudice to the right of the petitioner to approach this court now under section 5 of the Constitution of Lesotho if he has not been indicted and his case set down for hearing as I have directed.



S.N. PEETE

JUDGE

For Petitioner : Mr T. Maieane
(Instructed by K.E.M. Chambers)

For Respondent : Ms Dlangamanda