

IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) NO. 3/2011

In the matter between:

FUSI KHOALI

APPLICANT

and

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

CORAM: RAMODIBEDI, P
HOWIE, JA
TEELE, AJA

HEARD: 11 APRIL 2012

DELIVERED: 27 APRIL 2012

SUMMARY

Application for bail pending appeal – refused by trial court - application launched afresh before Court of Appeal – No material change of circumstances warranting exercise of this Court’s jurisdiction.

JUDGMENT

HOWIE, JA

[1] After being sentenced in the High Court on 30 November 2010 to imprisonment consequent upon his conviction for murder, the

applicant applied to that court for bail pending appeal against his conviction and sentence. His application was launched on 12 April 2011 and refused on 3 June 2011. Refusal was ordered because in the view of the trial Judge (Hlajoane J) there were no prospects of success on appeal and it was a settled principle that the applicant should begin serving his sentence as soon as possible.

[2] The applicant did not seek to appeal against that refusal. That was understandable in the light of this Court's decision in Makhoabanyane Motloung and Others v Rex 1974-75 LLR at 380. Instead, he launched the present bail application before this Court. That was on 20 September 2011. The thrust of his application was that as the relevant office of State responsible for the preparation of the record would be unable to provide the completed record in time for the hearing of the appeal, as the applicant put it, "at the time I had contemplated", there had been a change in circumstances such as justified the consideration by this Court of the application.

[3] The record was not prepared in time for the hearing of the appeal in the October 2011 session of this Court and is not available yet. On the face of it this is an undesirable state of affairs but the reason for the delay is not the subject of the present enquiry. The real issue is whether there has been a material change in the applicant's situation since the refusal of bail on 3 June 2011. That there must be not merely a change but a material change was held in Motloung's case, supra, at 384 A-B citing South African authority. That that is what is required to give this Court jurisdiction to grant bail where the trial court has refused it is now declared in rule 12 (5) of the Court of Appeal Rules.

[4] The South African cases did not involve an application pending appeal but pending trial. The incidence of material change must therefore be assessed in the light of the finding by the trial Judge that there were no prospects of success (which finding, for present purposes, must stand) and that the appeal is taking longer to come to court than the applicant expected.

[5] This is not a case in which bail was refused because in the trial court's view the appeal would very soon be heard. In that event there would have been some broad indicator by which to measure at least temporal change. Essentially, bail was refused because there were thought to be no prospects of success and nothing has changed in that respect. There is no reason, furthermore, to think that the appeal will not be ready for hearing in the next session of this Court.

[6] I do not think on these facts that there has been a material change in the applicant's situation such as confers jurisdiction on this Court to entertain the application. The application is therefore dismissed.

C.T. HOWIE
JUSTICE OF APPEAL

I agree:

M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

I agree:

M.E. TEELE
ACTING JUSTICE OF APPEAL

For the applicant : Adv P.R. Thulo
For the respondent : Ms. H. Motinyane