IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CRI) 03/20

In the matter between:

MOTSAMAI FAKO	**1st APPELLANT**
MOTS'OANE MACHAI	**2nd APPELLANT**
TS'ITSO RAMOHOLI	**3rd APPELLANT**

and

DIRECTOR OF PUBLIC PROSECUTIONS	**1ST RESPONDENT**
REGISTRAR OF THE HIGH COURT	**2nd RESPONDENT**
ATTORNEY GENERAL	**3rd RESPONDENT**

CORAM: DR K E MOSITO P
DR J W VAN DER WESTHUIZEN AJA
MTSHIYA AJA

HEARD: 12 OCTOBER 2020

DELIVERED: 30 OCTOBER 2020

Summary

The right to a fair trial is central in any reputable criminal justice system and recognized in the Constitution of Lesotho. Bias on the part of a court, or a reasonable apprehension of bias, can be fatal for a fair trial. A judicial officer who presided in bail proceedings is not automatically disqualified from presiding in the subsequent criminal trial. However, real caution is called for, because the reasons for the granting or refusal of bail could result in a reasonable apprehension of bias. In this case the appellants failed to show cause for real bias or a reasonable apprehension thereof.

JUDGMENT

VAN DER WESTHUIZEN AJA

Introduction

[1] The right to a fair criminal trial lies at the heart of any just criminal law system and is widely recognized in international human rights law, as well as the constitutions of recognized democracies. The required fairness includes that the judicial officer presiding in a trial must not be biased, or reasonably perceived to be biased.

[2] The criminal justice system of the Kingdom of Lesotho – like many others – provides that an accused person is entitled to apply for – and be released on - bail while awaiting the criminal trial, if certain requirements are met. The institution of bail is based on the basic principle that every accused is presumed innocent until

proven guilty and should not be incarcerated if not yet convicted, unless it is necessary for the proper functioning of the criminal justice system.

[3] This appeal against a decision of a judge of the High Court not to recuse himself when the appellants applied for his recusal deals with the relationship between the above-mentioned two.

Factual background

[4] The appellants, members of the Lesotho Defence Force, were accused of murder and attempted murder, as well as other offences, following on the fatal shooting of the head of the Defence Force.

[5] The first appellant applied for bail in the High Court of Lesotho. The application was opposed by the first respondent. All evidence was presented in the form of affidavits supporting the bail petition. Based on an analysis of section 109(A) of the Criminal Procedure and Evidence Act 9 of 1981, Hungwe AJ delivered judgment on 15 August 2019 and refused to grant bail.

[6] The criminal trial of the appellants was set down for hearing on 6 January 2020. On 6 January the appellants were arraigned. On the same day they requested the recusal of Hungwe AJ as the judge presiding in the criminal trial. The trial was postponed. The application was refused on 21 January. To this Court the appellants now apply for leave to appeal against the High Court's

ruling on the recusal. The first respondent opposes the application for leave and the appeal

Issues

[7] The following questions have to be answered:

(a) Is a decision to recuse or not to do so, embodied in a court order, interlocutory; and, consequently, is leave to appeal against the order necessary?

(b) Is it acceptable in law, from a fair trial perspective, that the judge or other judicial officer who adjudicates a bail petition and grants or refuses bail presides in the subsequent criminal trial of the same accused?

(c) If it is indeed established law that the fairness of the trial is not in principle jeopardized by the fact that the judge who decided on bail presides, does any aspect of the conduct of the judge in this case indicates bias, or could it give rise to a reasonable perception of bias on the side of the accused?

Leave to appeal?

[8] In the written heads of argument of both the appellants and the first respondent much space is devoted to the rule that interlocutory judgments are only appealable to this Court on a ground of appeal involving a question of law, but not a question of fact; and with the leave of the judge who heard the interlocutory application, or, if that is refused, with leave of this Court. The

appellants seek leave and the first respondent opposes the application for leave.

[9] I share the view put to counsel by my colleagues on this bench, during the hearing of oral argument, namely that a decision to recuse or not to recuse oneself from a criminal trial is not interlocutory. It is final. It does not depend on or await any decision, outcome, or development later in the same proceedings.

[10] Therefore leave to appeal is not necessary in this case. Issues such as whether questions of law or fact have been raised do not have to be determined. The appeal can proceed.

Bail and bias

Fair trial

[11] According to section 12(1) of the Constitution of Lesotho of 1993 if a person is charged with a criminal offence, "the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law". In the Constitution of South Africa 1996 the right to a fair trial is stated – with considerable detail – in section 35(3). In other Southern African jurisdictions, most reputable criminal justice systems in the world and international human rights instruments this right is clearly stated. In *S v Tyebela 1989 (2) SA 22 (AD)* at 296H the following was said: *"It is a fundamental principle of our law and, indeed, of any civilized society that an accused person is entitled to*

a fair trial. This necessarily presupposes that the judicial officer who tries him is fair and unbiased …".

[12] Section 12(1) of the Lesotho Constitution specifically requires a court to be not only independent, but also impartial. It is trite that bias on the part of a presiding officer could render a trial invalid. Actual bias is not the only problem. A reasonable apprehension of bias could also impact negatively on the fairness of a trial. Not only the impartiality of a judicial officer is crucial to the administration of justice, but also the perception of her or his impartiality. An assessment is necessary of what a reasonable litigant would think in the circumstances. (Counsel referred extensively to case law in this regard, such as *S v Basson 2007 (1) SACR 566 (CC*); and *S v Shackell 2001 (2) SACR 185 (SCA)*)

Appellants

[13] According to the appellants, in refusing to recuse himself, the judge in the High Court failed to understand properly their concerns about his conduct over a period, such as his alleged prior knowledge of the case; and remarks made in chambers.

[14] However, the appellants' main misgivings revolve around remarks by the judge in the reasons for refusing bail to the first appellant, as well as his reasons for refusing to recuse himself. He said that *"the defence … mooted on these facts is one of obedience to lawful orders and lack of intention to form common purpose in the shooting of the deceased"*. The judge also stated that *"by his own*

admission (the accused) was part of the gang or unit of military officers who took down the deceased"; "(p)etitioner and his accomplices say they boxed the General in, preventing him from driving away, in an effort to effect an arrest"; "(w)hat is not disputed is that one of the officers amongst petitioner's unit opened fire at General Mahao"; the petitioner *"states that he did not shoot, conspire with or assist in causing the death of …"* the general; and *"in the founding affidavit the petitioners all agree that they set out to arrest the deceased … on instructions from others of deceased's rank".* The following seems important: *"The petitioner has not suggested what defence he proposes to put forward at the trial."*

[15] Counsel for the appellants stressed that when the judge refused bail, he made several errors in his interpretation of the petition and the affidavits attached thereto.

[16] In summary, the appellants argue: *"The conspectus of these comments birthed applicants perception that the learned Judge is disqualified to preside over their case."*

Respondent

[17] The first respondent submits that the conduct of the appellants fosters the impression of resort to procedural ploys for the purposes of frustrating the criminal trial. He referred to, inter alia, other litigation initiated by the appellants.

[18] According to the first respondent, the remarks by Hungwe AJ do not show bias and could not result in a reasonable apprehension of bias.

Analysis

[19] Counsel for the appellants and the first respondent agreed that no general rule exists in the law of Lesotho that a judge or other judicial officer who presided in bail proceedings may not preside in the subsequent criminal trial. Each case must be decided on its own facts. Thus the appellants focused on specific aspects of the judge's conduct.

[20] It indeed seems that the judicial officer who presided in the bail proceedings is not automatically disqualified from presiding in the trial. The two proceedings are separate.

[21] In *Aubrey Cummings(2) v the State HMA 17-18 CA 36/17* in para [14] Mafusire J stated in the High Court of Zimbabwe: *"By reason of their training, experience, conscience and intellectual discipline, it must be assumed that judges are able to administer justice without fear or favour, and capable of judging a particular controversy fairly on the basis of its own circumstances."* The judge referred to South African authority like *President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147.*

[22] He stressed the importance of impartiality but stated that recusal is not just there for the asking. The learned judge referred to the High Court of Australia in *Re JRL: Ex parte CJL (1986) 161 CLR 342 [HCA*] at 352E-F: *"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearances of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."*

[21] However, in *Cummings* Mafusire J indeed recused himself from an appeal against a rape conviction, because he had presided in the application for bail pending the outcome of the appeal. The main reason for dismissing the bail application was that the appeal had no prospects of success on the merits. The judge stressed that the decision by him and the other judge on the appeal bench that he would recuse himself should not be taken as having set a precedent. The judges "*avoided tussling with Counsel purely so that justice might be seen to be done".*

[22] For the same judge who decided on bail to preside over the criminal trial can be fraught with danger. Real caution is called for. During the bail proceedings an accused's previous convictions may come to the knowledge of the presiding officer. Even though one wishes to assume that judges are fair because of their training, experience and conscience, previous convictions are normally withheld from a trial judge until after conviction. An accused may

also testify in the bail hearing; and his or her version during the trial may differ materially. One should not expect superhuman qualities from judges. They are people.

[23] A ruling to grant or refuse bail is appealable. Proper reasons must be given. Apart from findings on whether an accused is a flight risk, or likely to interfere with witnesses, prospects of success in the trial to follow is often a highly relevant consideration. A judge who grants bail based on a conclusion that the evidence of police officers, like the investigating officer, is weak, may pose concerns for the prosecution if the very same officers are crucial state witnesses. If bail is denied because of excellent prospects of a conviction in the trial, which the judge gives as a reason, the accused and those close to her or him are more than likely to perceive real bias when they see the same person who denied bail walking into the court room at the trial. “Oh gosh, look, it is that one again! We have no chance before this court!”, is a very possible reaction.

[24] Having said all the above, in this case the appellants’ grounds for a reasonable apprehension of bias are not convincing.

[25] Firstly, the utterances by the judge do not seem to go substantially further than what could be expected to be included in the reasons for any refusal of bail. No clear statement is made about the prospects of a conviction. Terms like “accomplices” are used in a fairly loose way. To emphasise the mention of “the

shooting of the deceased" – as the applicants do – takes the matter no further. After all, it appears to be common knowledge that the deceased is dead and that he was shot. The above-mentioned remark that the petitioner had not suggested what defence he proposed to put forward at the trial is linked to the significance of the judge's remarks. It would seem that the defence could be that the appellants acted on orders from one or more superior officers that the purpose was to arrest the general, that no common purpose was formed to commit murder, that a fatal shooting was not foreseen, and so on. On these the judge did not express himself strongly or at all in the bail judgment.

[26] Secondly, this Court can make no finding on the allegation by the appellants that the judge erred in his understanding of the facts stated in the bail petition and its affidavits. The petition is not in the record and thus not available to this Court.

[27] Between 15 August 2019 when the bail ruling was announced and the trial date of 6 January 2020 the appellants had ample time to appeal against the bail ruling based on errors or misdirection; or to take it on review if they were of the view that the judge did not apply his mind properly, or otherwise faulted procedurally.

Conclusion

[27] The appellants have not succeeded in showing bias or facts that could result in a reasonable apprehension of bias as far as the criminal trial is concerned in the reasons for the High Court's

dismissal of the a first appellant's bail petition. The appeal must fail. Because this is a criminal matter, no cost order would be appropriate.

Order

[28] The appeal is dismissed.

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DR J W VAN DER WESTHUIZEN

ACTING JUSTICE OF APPEAL

I agree

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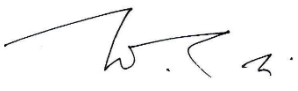
DR K E MOSITO

PRESIDENT OF THE COURT OF APPEAL

I agree



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N T MTSHIYA

ACTING JUSTICE OF APPEAL

FOR APPELLANTS: ADV S RATAU

FOR THE FIRST RESPONDENT: ADV CJ LEPHUTHING