

IN THE HIGH COURT OF LESOTHO

In the matter between:

NKOZANA MOTHUNZI

APPLICANT

vs.

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

J U D G M E N T

To be delivered by the Honourable Mr. Justice G.N. Mofolo
on the 14th day of November, 1996.

This matter has come to this court by way of an application in which the applicant sought bail on the following terms:-

1. Payment of M100-00 cash deposit.
2. Not to interfere with crown witnesses.
3. Report at Butha-Buthe Police every last Saturday of the month.
4. Attend remands and
5. Stand trial.

The application was opposed. According to Tpr. Letsoela the application was opposed amongst other things because:

Ad. paragraph 4 of Tpr. Letsoela's affidavit

Applicant had deliberately decided not to disclose any information leading to his arrest, thus misleading this Honourable Court.

By the above paragraph it does seem the deponent means that the applicant though a citizen of the Republic of South Africa did not disclose this fact nor did the applicant disclose the fact that he was arrested in Sebokeng in the Republic of South Africa.

Because it was doubtful whether the applicant was a citizen of South Africa or Lesotho or held dual citizenship the court decided to hear the applicant on this issue.

It was applicant's evidence that his home is at Matsatsaneng Ha Mopeli in the Butha-Buthe district but that as his father worked in the Republic of South Africa he (the applicant) was born in the Republic of South Africa and is, by reason of birth, a citizen of South Africa though his roots were at Matsatsaneng Ha Mopeli aforesaid. According to the applicant, he had done all his schooling in Lesotho and held a Lesotho passport which has since got lost.

In 1985 his parents had separated with his mother returning to her maiden home in the Republic of South Africa and the applicant had followed her there. From time to time he had been visiting his father at Matsatsaneng. In his cross border visits he had been using special permits but this would no longer be necessary as shortly he would be in possession of a South African passport which he intended handing in if he is released on bail.

Applicant was not able to say why, knowing that he had committed a crime in Lesotho, he left for South Africa where he

was arrested by the police.

In defence of this slip by the applicant, Mr. argued that all that applicant did was to return home going back to the Republic of South Africa applicant was home expecting to be found there as the police found him. was therefore no fear that applicant, if released on bail, would not be apprehended to stand his trial because it was a common feature of the applicant that he lived in Lesotho and the Republic of South Africa at known and ascertainable locations. In any event, so went Mr. Makotoko, the court could, if it wished, confine applicant to the magisterial district of Buthe-Buthe.

It was argued on behalf of the crown that the crime of which the applicant is charged is a very serious one with the prospect of a conviction looming large and the applicant might be tempted to jump his bail and return to the Republic of South Africa to which applicant's counsel replied that such fear need not now be entertained as there were extradition arrangements between Lesotho and the Republic of South Africa. The court has satisfied itself that there are such arrangements and Ms. Motanyane for the Crown has conceded that ^{such} arrangements are in place.

This court must mention at this juncture that it has been submitted to this court that applicant's co-accused has since been released on bail though Ms. Motanyane for the Crown has contended that circumstances favoured the other accused in

granting him bail while applicant's circumstances were different and mainly because applicant holding dual citizenship it was a risk allowing him on bail as it was not certain where, if released on bail, he would be found. There was evidence before this court of where the applicant can be found in Lesotho or in the Republic of South Africa. moreover, should the applicant abscond to the Republic of South Africa, as the court has shown, legal processes are now in place to bring the applicant to trial as the police did by arresting applicant in Sebokeng and bringing him to Lesotho. This ground of opposition therefore falls off.

This court has read papers appertaining to this application and has formed the view that the charge which the applicant is facing is grave enough to induce this court in not granting bail. However, as the court has pointed out, another co-accused has been released on bail ostensibly because the crown did not consider the charge that serious. Accordingly, if the charge was not serious for applicant's co-accused, one does not see how it can be serious for the applicant notwithstanding this courts observations.

In S. v. DE ABREU, 1980 (4) S.A. 94 where a Portuguese who had several businesses in Maseru was arrested in Bloemfontein for several offences while in transit through the Republic of South Africa to Portugal: on applying for bail McEwan, J. remarked at p.100.

"It has been emphasised in many cases that the fundamental principle is in favour of the liberty of the subject and that bail should only be refused if

there is a real danger that justice will not be done.

And while it has also been said the attitude of the Attorney-General in bail applications is to be given due regard.

(vide MTATSALA, 1948 (2) S.A. 585 (E))

ESSACK, 1965 (2) S.A. 161 (D):

BENNETT, 1976 (3) S.A. 652 (C)

such opposition to bail has been said to be neither conclusive nor binding on the court (vide MTATSALA's case above: further, that courts are enjoined to guard against the tendency to regard this ipse dixit of the prosecutor (or an investigating officer) as grounds for refusing bail (KONIG v. A.G., 1915 T.P.D.:


LOUW, 1918 C.P.P. 358;

BAKER, 1965 (1) S.A. 821 (W.)

It has also been said it is totally improper to treat release on bail as a substitute for accused's right to be brought to trial within a reasonable period - see Andrews (ed.) Human Rights in Criminal Procedure - A Comparative Study (1882) 51 - notwithstanding that an unreasonable delay is also unfair to witnesses - see STEYTLER, 1985 SACC 168 at 169; MAMBA, 1966 (1) PH H188 (C) though these are matters which fall within the competence of the Attorney-General and needn't influence the court in granting or refusing bail.

Having considered factors and circumstances relevant to the applicant the applicant is granted bail on following conditions:-

1. Applicant is to pay M500-00 in cash to the Clerk of Court. Butha-Buthe.
2. Applicant is to find 2 independent sureties in the sum of M2.00-00 each:
3. Applicant is to surrender his travel documents and especially his passport and identity document to the Clerk of Court. Butha-Buthe.
4. Applicant is under no circumstances to leave the magisterial district of Butha-Buthe except by leave of this court.
5. Applicant is to report himself daily between the hours of 6.00 a.m. and 6.00 p.m. to the Officer Commanding or his Deputy at Butha-Buthe Police Station.
6. Not to interfere with crown witnesses and
7. Attend remands and
8. Stand trial.



G.N. MOFOLO
JUDGE

8th November. 1996.

For the Applicant: Mr. Nakotoko
For the Crown: Ms. Motanyane