

CRI/APN/358/89

IN THE HIGH COURT OF LESOTHO

In the Application of:

PETER MPHO KHORORO Applicant

and

THE DIRECTOR OF PUBLIC

PROSECUTIONS.....Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 6th day of February, 1996.

This is an application for bail pending trial. The application is opposed by the Respondent. The parties have duly filed affidavits.

Briefly stated, it is common cause from the facts disclosed by affidavits that, on or about 9th September, 1989, the applicant, a taxi operator between Lesotho and Germiston in the Republic of South Africa, was arrested and kept in a cell by the Lesotho police on a suspicion that he had been involved in the

commission of a crime of robbery at 'Moteng in the district of Butha-Buthe. He was, on the following day, released by the police.

On 19th September, 1989 the applicant was again arrested by the police in connection with the same charge of robbery. He was kept at Butha-Buthe male prison, where he and 4 others were awaiting their trial.

The applicant's co-accused were subsequently released on bail. He too was desirous of being released on bail.

In his affidavits, the applicant averred that his home was at a place called Makakamela ha Rampai in the district of Buthe-Buthe, where he had his parents and the rest of his family. If released on bail he would not, therefore, abscond out of Lesotho and leave his relatives.

The applicant assured the court that he would abide by whatever bail conditions that might be imposed by the court and stand his trial. Indeed, he was in the Republic of South Africa when, on 19th September, 1989, he learned that the Lesotho police were looking for him in connection with the robbery case and returned to Lesotho on his own accord.

It is significant that the answering affidavit was deposed to by D/W/O Khobatha, one of the police investigating officers. The Respondent himself filed no affidavit in this matter. He did not even aver that he believed the facts disclosed by the affidavit of D/W/O Khobatha.

I am not convinced that, in a case of this nature, it is sufficient for the Respondent, who is the Director of Public Prosecutions, to intimate his objection to the application and rests. He must, like everybody else, file an affidavit stating the grounds upon which he basis his objection. It has often been said, and rightly so in my opinion, that the objection by the Director of Public Prosecutions must be carefully considered by the court and not lightly discarded; after all he is a responsible officer charged with onerous duties (S. v Essack 1965(2) S.A. 161; Soola v. Director of Public Prosecutions 1981(2) L.L.R. 277). Where the director of Public Prosecutions gives no grounds for his objection, the court cannot, in my view, properly refuse bail simply because he raises an objection which he does not support by evidence.

Be that as it may, in his answering affidavit D/W/O Khobatha averred that the applicant was a

citizen of the Republic of South Africa. He was not being honest with the court in his averment that his home was at Makakamela ha Rampai in the district of Butha-Buthe and he was, therefore, a citizen of Lesotho. As proof thereof, the deponent attached the applicant's travel document number R016 3605 and Identity Card number 570504 569 9088 as annexure "A", collectively. If he were to be released on bail, the applicant would certainly abscond and return to the Republic of South Africa from where he would never come back to stand his trial in Lesotho, thus frustrating the administration of justice.

According to the deponent, the applicant was, on 19th September, 1989 escorted back to Lesotho by a certain Trooper Saba. The deponent denied, therefore, the applicant's averment that, on the day in question, he returned from the Republic of South Africa to Lesotho on his own accord.

It is significant to mention that no affidavit was filed by Trooper Saba to confirm the averment of D/W/O Khobatha that, on 19th September, 1989, the applicant return to Lesotho under his escort. Regard being had to the fact that the Republic of South Africa and Lesotho had no extradition agreement, I consider it doubtful that the applicant could have been escorted from the former country to face a

criminal charge in the latter country. In any event, the point could not be resolved by the conflicting affidavits of the applicant and D/W/O Khobatha.

I am, however, prepared to accept as the truth D/W/O Khobatha's story, corroborated by documentary evidence (annexure "A"), that the applicant is a citizen of the Republic of South Africa and reject as false the uncorroborated suggestion of the applicant that he is a citizen of Lesotho.

The basic ground upon which the application is opposed is that, if released on bail, the applicant will abscond out of the jurisdiction of this court and, therefore, fail to stand his trial with the resultant frustration of proper administration of justice.

I entirely agree with Miller, J in S. v. Essack 1965(2) S.A.161 where at p.162E the learned judge observed :

"It seems to me, speaking generally, that before it can be said that there is any likelihood of justice being frustrated through an accused person resorting to the known devices to evade standing his trial, there should be some evidence or some indication which touches the applicant personally in regard to such likelihood. General observations applicable to a certain group of persons are undoubtedly relevant and entitled to some weight if the applicant is a member of that group, but they can

never be conclusive in themselves. Each case must be considered on its merits but I am inclined to agree with counsel for the State that if the offence is of the type which experience shows usually leads to the accused effecting his escape through the familiar and well known routes and if it appears moreover that his association with others who have effected their escape when similarly charged is sufficiently intimate to show a probability that he would follow suit, that might be sufficient ground for refusing bail. While accepting those considerations as being entitled to reasonable weight in the scale, one must not overemphasise their importance for to do so would lead to the conclusion that no person charged with offences of this nature and to whom routes of escape might conceivably be available to adjoining territories, can ever be released on bail."

In the present case. I have, for reasons already stated, expressed the view that it is doubtful that the applicant was, on 19th September, 1989, escorted from the Republic of South Africa to Lesotho by Trooper Saba. The applicant may well have been testifying to the truth, when he averred that, after learning that the Lesotho police were looking for him in connection with the robbery charge, he returned, from the Republic of South Africa, to Lesotho and went to Butha-Buthe police station; not under arrest, but on his own free will. That would not, in my view, depict the applicant as a person who had in mind not to stand trial for the robbery charge.

Assuming the correctness of my view, I find it quite difficult to comprehend how it can justifiably be averred that this same person will, if released on

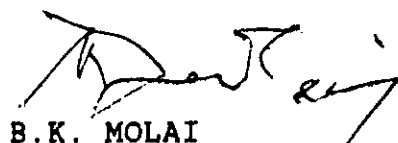
bail, go out of the jurisdiction of this court and never return to stand his trial in Lesotho. Moreover, it must be borne in mind that it is common cause that the applicant operates a taxi business between Lesotho and the Republic of South Africa. It seems to me unlikely that if, he were released on bail, the applicant would abscond and fail to stand his trial, thus jeopardising his business.

The applicant bears the onus of proof that, if released on bail, he will not abscond and fail to stand his trial which onus he must discharge on a balance of probabilities. I am satisfied that he has, in the present case, discharged that onus. The applicant is accordingly released on bail, subject to the following conditions:

- (1) He must pay M500 deposit;
- (2) Report to the nearest police station (Butha-Buthe) on the last Saturday of every month;
- (3) He must not interfere with crown witnesses;
- (4) He must attend remands and stand his trial.

Payment of the M500 deposit must be made at the

office of the magistrate court and not at the office
of the Registrar of the High Court.



B.K. MOLAI

JUDGE

6th February, 1996.

For Applicant : Mr. Mohau,

For Respondent: Mr. Thetsane.