CRI/APN/487/95

IN THE HIGH COURT OF LESOTHO

In the matter between :

MAJOOA MOFOKENG

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

JUDGEMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 17th day of January, 1996

This was an application for release of the Applicant on bail. It was opposed. I have heard Counsel's arguments Mr. Kolisang appeared on behalf of the Applicant. Miss Mokitimi appeared on behalf of the Crown.

It appeared to be common cause that this Applicant together with two others were charged with eight counts which includes three murders, one attempted murder, two charges of arson and malicious injury to property. It was clear that in one or two counts the Applicant may not have featured (as the Crown conceded) and that as a result of splitting there may be one or more irregular charges which were likely to be removed. But all in all the Applicant

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and his co-accuseds remain charged with serious offence by my estimation.

My understanding is that, in a similar manner to civil proceedings by way of application, a petition or a founding affidavit in a bail application constitutes both the pleadings and evidence. That is to say, not only must the affidavits or petition contain a semblance of a defence, there must be sufficient facts upon which a Court may act in determining whether to release an Applicant to bail in the context of or against the background of the charges and the circumstances surrounding the alleged unlawful acts.

Such sufficient facts including personal circumstances of the Applicant and circumstances which must be disclosed by the Applicant for the purpose mentioned. This assists the Court in the process of gauging the seriousness of the offence and in inquiring whether the Applicant has a **bona** fide defence to the charges and in finding whether in the circumstances the Applicant is likely to attend on remands and on days set down for trial. It is against this background that an undertaking is usually made by an Applicant, that is, to attend on remands and on days set down for hearing of the charges and not to interfere with potential Crown witnesses. It is against this background again, that the seriousness of the charges against an

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Applicant takes an acute form as a main consideration in assessing the risk of absconding by the Applicant. Hence the wisdom of showing the texts of the affidavits in the following paragraphs of his judgment to illustrate what the proper attitude of the Applicant should have been.

I have found this brief statement about the relevant considerations in bail application as being very handy. This is by J Vander Berg in his valuable work of Bail A Practitioners Guide 1st edition at page 59 at paragraph 68. It says:

> "In striving to strike a balance between the interests of the accused and the interests of the administration of justice the Court assesses the risks involved in releasing the accused from custody. The paramount considerations are:
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> (a) whether the accused will stand trial;
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> (b) whether the accused will interfere with State witnesses;
>
> (c) whether the accused will commit offences while on bail; and

(d) whether the accused's release will jeopardize law and order or State security.

In assessing these risks factors this Court will each time be faced with a number of additional considerations which may vary from case to case."

The first noticeable feature of the Applicant's founding affidavit is the remarkable way in which no disclosure is made of the personal circumstances of the Applicant nor the surrounding circumstances of the alleged charges. Nor is it stated what the Applicant's defence will be to the myriad of charges that are laid bare in the Annexure A to the Preparatory Examination sheet. These circumstances are relevant in connection with the test as to whether the accused might or might not stand trial. These circumstances include amongst others, the place of residence, family ties, possessions and employment. As to his personal circumstances he only said that he was a male adult of Ha Nqabeni in the district of Butha-Buthe. In an apparent endeavour to address other issues the Applicant said at paragraph 2:

"2.1 Applicant is one of the three accused charged with the murder of LITOLOANE NTILI and is at

present held in custody at the remand centre of the Government prison at Butha Buthe.

2.2 Sometime in September 1994 Applicant was in the company of Jabulani,, a co-accused when he hacked one Sentso Litoloane with a spade, after the said Sentso had slashed Jabulani's hand with a panga.

2.3 Applicant tried to intervene but to no avail."

This must initially be seen against the contents of the Respondent's deponent No. 5206 D/Tpr. Taole's affidavit at paragraph 5.6 where he said:

"5.6 My investigations, the evidence of which is contained the docket in my possession disclose that after burning Mzaefana's house, 'Manini in company of the Applicant and another co-accused by the name of TSELISO DLAMINI proceeded to the house of Matsie. At this time Dlamini was armed with a spade. Nowhere did Sentso attack Jabulani with a panga. The three accused went of rampage, this resulted in the killing of three innocent people who had gathered at Matsie's house and several others were assaulted by his group (including Applicant) where one of the people

even lost an eye."

5.7 "......... Sentso was heard by people who were there which people will testify at the trial pleading with (the) Jabulani and his co-accused to spare his life. Nevertheless that is where and how Sentso met his death.

5.8 My investigations disclose that it was when the Applicant and his group were satisfied with their mission that they proceeded to set Matsie's house on fire with some of the corpses still inside and left in jubilation.

5.9 According to my investigations the Applicant never attempted to intervene as Jabulani was attacking.

5.10 The Applicant and his co-accused after committing these unfortunate acts did not surrender himself to the police immediately it is only when the villagers were hunting for him with the sole motive of revenge that he surrendered himself to the police."

The Applicant's reply to the above quoted statements is

very brief and unpretentious. It is these features that make the reply very unhelpful when judged against the background of the statements contained in the above quoted paragraphs of Trooper Taole's affidavit. The reply reads as follows:

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AD PARA 5.6

3.1 I deny that I went on rampage with Dlamini and another person, nor was I involved in any way in the death of three innocent people.

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AD PARAGRAPH 5.7 - 5.10

The allegations are denied."

I have accepted that the aspect that the villagers having hunted down the Applicant until he surrendered, the still highly charged emotions in the village where the crimes occurred and the open undertaking by the villagers to exact revenge could not normally be ignored. But in this case my view was that the Crown was inclined to

exaggerate this factors. By this I mean that the Crown sought to persuade me that for that reason I ought to incline to refusing the Applicant's application. I agree with Mr. Kolisang in saying that this would amount to protective custody of the Applicant. None of these factors would be a ground for refusal to allow this Applicant out on bail.

I am in full agreement with Mr. Kolisang's submission that the Director of Public Prosecution's views while normally carrying great weight, his ipse dixit cannot be substituted for the discretion of the Court. [See also S v LULANE 1976(3) SA 652 (m) and S vs BENNET 1976(3) SA 652(c)]. In this case I have not looked at what the Director of Public Prosecutions says. He did not say anything. I have looked at the seriousness of the charges as disclosed by the informnation contained in the affidavit of Trooper Taole and the overall impression, the Applicant having made no attempt to gainsay the information, which shows that the release of the accused on bail is likely to affect the administration of justice. This is so because the Court, in exercising its discretion, is essentially performing a balancing act or a compromise as between the individual's right to freedom on the one hand and the interests of justice on the other hand, while leaning in favour of the Applicant's liberty.

I have had to consider this aspect of the delay in proceedings of the Preparatory Examination that had already been commenced in September 1995. Indeed if this delay is unreasonable this is something that this Court ought not to countenance. If there has not been any progress since September 1995 then the case of a continuing delay is borne out. It is unfortunate. But then I made an observation that not only would the contents of the Preparatory Examination be helpful to the Court and the Applicant, this delay becomes immaterial when the Court has ruled that it is wise that the Applicant renew his application by reason of the thinness or paucity of the information given. The better information that will come forth on fresh application will presumably be able to make a **prima facie** case that Applicant's release will not impede a proper trial and will show that it is unlikely that the interests of justice will be jeopardized.

As matters stood I declined to allow the application.

T. MONAPATHI
JUDGE

For the Applicant : Mr. Kolisang

For the D. P. P. : Miss Mokitimi