CRI\T\44\95

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

MOITSUPELI JEFFERY LETSIE	Accused 1
PUSETSO MOORE MAKOTOANE	Accused 2
DANIEL NKANE MATEBESI	Accused 3

JUDGMENT ON APPLICATION FOR BAIL

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 19th day of February, 1996

On Tuesday 13th February, 1996 following sentences imposed after 4.30 p.m. the previous Friday, this Court heard respective Counsel's arguments from the bar moving the Court for some orders releasing the three convicted persons on bail pending appeals. These oral motions for bail were vigorously opposed by the Director of Public Prosecutions.

It is to be noted that when the Court was moved there were neither Notices of the intended appeals nor grounds in support of same.

Mr Sello appearing for accused 1 in moving the application for bail pending appeal drew the Court's attention to what he termed unusual events which took place on the day the sentences were imposed. These were the presence of the Minister

of Justice in Court, the pacing up and down of armed gendarmes in the Court's corridors, the fact of the Judge storming out of Court with the result that it was quite a task for him and all counsel to see him in chambers; the fact that when the accused went into the bakkie there were those gendarmes and that a group of people had stood by the gate around the Court premises clearly revelling and ululating at the accused's fate.

He accordingly invited the Court to indicate that to the best of its ability the Court administers justice in an even handed manner and without regard to pressure of revellers.

He stated that he applies not to beg but to assert his client's right in accordance with provisions of the Constitution of this Country. The learned DPP in his wisdom chose not to respond to the above observations. I think he should be commended for that as there is no evidence either oral or in the form of affidavit to support these remarks. I shall in due course refer to one or two of them where strictly necessary.

Mr Sello indicated that the sentence imposed on accused 1 is severe and invokes a sense of shock and that it has caused him and the accused a great deal of dismay. He invited the Court to remember that too heavy a sentence may be self-defeating in the sense that if the accused is thrown out of the society and turned into an animal, he would regrettably turn into one.

It was submitted on behalf of accused 1 that prospects

of success on appeal are not just good but exceedingly good. It was urged on the Court that it should be wary of refusing people bail, lest a message is thereby sent to revellers that even if the appeal succeeds the accused would nonetheless have felt the whiplash.

It was further submitted that accused 1 was convicted on the grounds that he desisted from checking his joint account in 661. It was argued that culpability was attributed to this omission which in the view of another court may amount to negligence regard being had to the fact that this was not accused 1's usual but rather casual account which he used but rarely.

It was further argued that the Court convicted accused 1 on the basis of a signature appearing on the document whose admission was later disallowed. Thus accused 1 was convicted on the evidence the Court had rejected. It was submitted that this might have been an oversight and not necessarily a misdirection which should be left to the Appeal Court to deal with.

It was further argued that the Court convicted accused 1 on the presumption that Financial institutions in South Africa of which Volkskas Bank is a pertinent member are not given to committing crimes.

It was submitted that the prospects of success on appeal are so bright that accused 1 would not risk leaving his wife and child in order to flee from justice.

Finally it was argued on behalf of accused 1 that experience has shown that it takes a long time to complete preparation of the record in the High Court for purposes of enabling the appeals to be heard without inordinate delay. It was stated that in Sekhobe Letsie the Court of Appeal took it upon itself to grant bail to an appellant to that Court when it appeared his record was taking too long to reach completion. Thus it would be desirable that the High Court should take the lead.

To avoid repetition Mr Phafane and Mr Nthethe for accused 2 and 3 respectively made common course with submissions as to the likelihood of another court reaching a different verdict from that of the Court a quo; and as to the unfairness that should occur to the accused, if on account of the likely delay in the preparation of the record pending appeal the accused languish in jail, should the Court of Appeal even impose partly or wholly suspended sentences in the event that it does not acquit them.

Mr Mdhluli for the Crown submitted that in view of the overwhelming evidence adduced to prove the guilt of all the accused it is inconceivable that any court can come to a different conclusion. He demurred at the submission, based on no evidence before Court that South African Financial institutions are apt to commit criminal acts. He indicated that the prima facie evidence in Marais' affidavit as to the fact that accused 1 operated account 661 well-knowing that the funds

therein were tainted remained unchallenged; and thus became conclusive at the end of the day. In agreeing with this submission I should indicate that the argument that accused 1 has been convicted of evidence that was rejected has indeed been neatly disposed of.

Reverting to the submission that the Judge stormed out of Court I wish to rely on Rooney J's brief Judgment in CRI\T\9\80 Rex vs 'Mota Phaloane to illustrate that after the High Court has imposed sentence on an accused person there is no room or occasion to serve as a basis for a complaint that a Judge did not linger around. The learned Judge's words are very instructive in this regard and should leave no illusion that on pronouncement of a sentence which is a final product of a criminal trial it is irregular to seek to make an application for bail from the bar. He says in an eight lined Judgment :

> "Mr. Erasmus moved the Court, from the bar for an order releasing the appellant on bail.
>
> The Court advised Mr. Erasmus that a formal application was required under the rules, but, that he should submit his arguments and the Court would indicate what its attitude to a formal application would be.
>
> After hearing Counsel the Court informed Mr. Erasmus that a formal application would be dismissed".

It is revealing that this Judgment was delivered on the same day that the main Judgment and Sentence were delivered i.e. 11th August, 1980. My perusal of this Judgment indicates that appearing for the Crown then, was none other than Mr. Mdhluli long before he became the DPP yet as shown above his arguments

carried the day. Hence I was momentarily taken aback when today he seemed to waver or resile from the stand he took in that distant past and sought to indicate that "In the Republic though, an application can be made from the bar". See page 9 of my notes. In this submission too the learned DPP was mistaken. In the Superior Courts of South Africa such is not the case at all.

However the learned DPP deserves some credit in that relying on his memory he did submit as follows :

> "I recall in an application for Phaloane after his conviction, in that case Rooney J. endorsed views expressed by the Crown that grounds should have been made and submitted beforehand". See page 9 of my notes.

It is therefore necessary to restate the proper procedure to follow in making application for release of accused persons on bail pending appeal. It has repeatedly been said by Superior Courts in Lesotho that the importance of following Rules cannot be over-emphasised.

Needless to say with regard to the fear that there is going to be a long delay before completion of the record to be placed before the Court of Appeal I find myself in exactly the same predicament with Molai J. in CRI\APN\92\95 'Mamakoae Mokokoane vs Rex (unreported) at p.3 where the Learned Judge says

> "There was no definite proof that there would be inordinate delay in transcribing the record of proceedings. Her allegation that that would be the case was at the time, sheer speculation on which the court could not, in my opinion, properly rely".

The learned Judge had indicated that the application was moved two days after sentence had been imposed. In the instant case it was moved three days after the imposition of sentences. In any event I have verified with the Registrar of this Court that transcriptions of the record have already started.

Again in the instant case in respect of accused 1 I was told that prospects of success were exceedingly good in the appeal that is proposed to be lodged. I am seized with neither the Notice of Appeal nor grounds. Thus I am not in a position to judge the probabilities of success on appeal. The same attitude applies in regard to the other two accused.

In response to the submission that sentences passed were severe the Learned DPP countered by submitting that they were not. I think there is merit in that counter-argument, taking into consideration that in CRI\T\60\78 R. vs Makalo Khiba the sentence imposed for looting Lesotho Electricity Company of upwards of R112,000-00, was upwards of 7 years' imprisonment (four to effectively be served), in CRI\T\8\80 Rex vs 'Mabonang Moahloli the sentence for looting Government of R113,542-40 was 9 years' imprisonment while in C. of A (CRI) No.1 of 1995 'Mamakoae Mokokoane vs R the sentence for looting Government of M91,000-00 the effective sentence was six years' imprisonment. The amounts looted in each of the cases cited above do not come to an eighth of the total amount stolen in the instant case. That the accused did not receive at least eight times the

sentences imposed would seem to strongly suggest that their sentences were disproportionately low.

Expressing the Courts' attitude generally about the fate of stolen monies once there has been proof of accused person's participation in the theft Rooney J. in 'Mabonang Moahloli above; and having been in no doubt that the accused was not alone in the scam said :

> "If she had accomplices it is impossible to say who they are or what they have done with any money they received. I refuse to lose sight of the fact that it was the accused who received the stolen money in the first place. She has failed to give this Court an acceptable account of what she has done with the money and it is reasonable to conclude that she has hidden it away with the intention of enjoying her wealth when she has served sentence". The same can be said of accused 1.

With regard to the submission that prospects of success on appeal are good, I find that in Mokokoane above they were said to be ample yet the Court of Appeal in dismissing the appeal said at p.6 :

> ".....the version deposed to by Appellant necessitates a quantum leap as regards credibility into the fanciful - indeed into the absurd. I say this because it is common cause that each month M15,200 of Government funds were stolen pursuant to an elaborate, carefully structured plan to defraud. Extensive documentation had to be prepared via official channels, using presigned forms for a fraudulent purpose. False cheques were prepared, presented and cashed and the funds misappropriated. In all this activity, Appellant, the senior accounting officer is the prime mover and the person who ultimately encashes the cheques. She would have the Court believe that she did so innocently and without knowledge that every month a fraud was being committed through documentation prepared and submitted by her as

> the person in-charge without her ever being aware that she was doing anything dishonest.....".

It should be borne in mind that the question of sentence is pre-eminently a matter for the trial court. Further that with regard to the question of bail pending appeal regard has, at this stage to be had to the fact that presumption of innocence falls away once conviction has been secured.

In CRI\APN\197\89 Mosala Lenka vs Rex (unreported) at p.10 this Court had regard to an important maxim that

> "it concerns the State that sentences of the court should be carried out" : interest reipublicae ut iudicium perseguutum sit".

I was referred to CRI\T\75\89 Rex vs Mahase as an authority to rely on in anticipation of the fact that the Court of Appeal might decide the appeal in the instant matter along the lines manifested in that case where sentences were wholly suspended. However I take the view that indeed each case should be treated on its own merits. Mahase was a lone looter and a lowly Civil Servant. In the instant case there was a scheme embarked on by senior officers to steal large sums of money.

I have had regard to Rex vs Fourie 1948(3) SA 548 at 549 where Malan J said :

> "It seems to me, especially in the case of a serious crime, that a convicted person should not be admitted to bail. He has been convicted and his sentence is in force, and the fact that he has noted an appeal or had a point of law reserved does not entitle him to ask that the sentence imposed be stayed pending the

decision on appeal".

It was submitted on behalf of accused 2 that PW4 Sehlots'oana Nts'ala's evidence as to the absence of vouchers is hearsay. But independent evidence of accused 2's secretary and Mrs Lekatsa vouches for the said absence.

I was referred to Rex vs Milne and Erleigh 1950(4) SA 601 at 602 where Lucas J reacted to Malan J's statement in Fourie above by saying :

> "That case did not decide anything more than this, that the mere fact that leave to appeal had been granted did not of itself entitle a convicted person to be allowed out on bail. It did not prohibit the granting of bail because the crime was serious'

In the same breath Lucas J recognises at p.603 that :

> "A number of tests have been suggested but in the end the question of granting bail is one in the discretion of the Court. The court naturally, because it would otherwise have given this decision, believes that its decision is sound. It is, however, possible that the Appellate Division might take another view".

In this Lucas J's words are ad idem with the passage appearing in Rex vs Kuzwayo 1949(3) SA 761 at 764 where it is said :

> "We are aware that this Court is able to apply a proper test with greater ease than the trial judge for the trial judge must in the nature of things find it somewhat difficult to look at the matter from a purely objective stand-point; he has a natural reluctance to say that his own judgment is so indubitably correct that the Judges of Appeal will concur therein".

See R vs Clewer (1953) 37 CR APP. 37 where the reasoning in (2) is to the following effect :

> "It seems to me that if the trial court is in the position that it can honestly say that the applicant will have a reasonable prospect of success on appeal that must indicate that there must be some doubt in the mind of the trial court, and if such doubt does exist, then there should not have been a conviction, so that the very strict application of this rule, in my opinion, renders it difficult to conceive of cases where leave to appeal should be granted"

Mr Sello stated that this should not dissuade a trial court from exercising its discretion to grant bail. That might be so provided there is a proper application for bail before court.

Even if before me there was a formal application (which is a sine qua non) in applications of this nature before Superior Courts the words of Monapathi AJ as he then was in CRI\APN\614\93 Ndabe Khoarai vs Rex (unreported) are telling at page 5 that -

> ".....in an application for bail pending appeal there is no question of innocence or liberty of the person because he has already been found guilty by a Court of competent jurisdiction, the Court having proved his guilt beyond a reasonable doubt. Therefore the refusal of bail is the rule rather than the exception. There have to be very strong reasons. See Makhoabenyane Motloung and Others vs Rex 1974-75 LLR 370 at 372 AC (HC).
>
> Secondly that the person having been tried by a competent Court is presumed to have had a fair trial and ought to start serving his sentence forthwith". See Stephen Meyer vs Rex CRI\A\4\77.

The learned Judge had recourse to the decision of the Botswana High Court in Kgomotso Kudubane Moshaga vs The State Criminal Appeal No.197 of 1986 (unreported) at p.4 where the following words appear :

> "I say this because although bail in England is now governed by the Bail Act, 1976 which came into force on the 17th April, 1978, certain fundamental precepts

have emerged, generally by way of Practice Notes, and these make it clear -

"(1) that once a verdict has been returned, a further renewal of bail should be regarded as exceptionsl (see Practice Note published at (1974) 2 All E.R. 974

and

(2) that in considering bail after conviction the first question tobe addressed is whether there exists a particular and cogent ground of appeal and if there is no such ground bail should not be granted;

(3) bail should not be granted with regard to sentence merely in the light of mitigation to which the judicial officer has in his opinion given due weight, or in regard to conviction on a ground where he considers the chance of a successful appeal is not substantial;

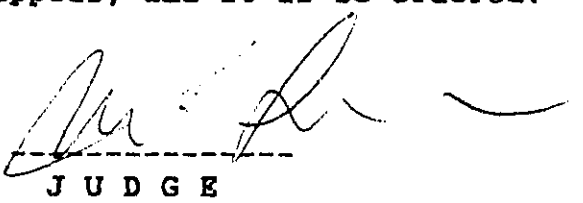
(4) the length of the period which might elapse before the hearing of an appeal is not of itself a good ground for granting bail but such period, if there are otherwise good grounds for bail, may be one factor in the decision whether or not to grant bail; but a judicial officer who is minded to take this factor into account may find it advisable to contact the Registrar in order that he may have an accurate and up-to-date assessment of the likely waiting time". (See Practice Note published at (1983) 3 All E.R. 608)

I am most impressed by this decision of the sister Ex High Commission Territories High Court and prefer it to all others cited above for the simple reason that it provides a ready and commonsense solution to irksome problems with which Lesotho is similarly faced.

May I finally, respond, in parenthesis to the view expressed that it was unusual for a Minister of Justice to be

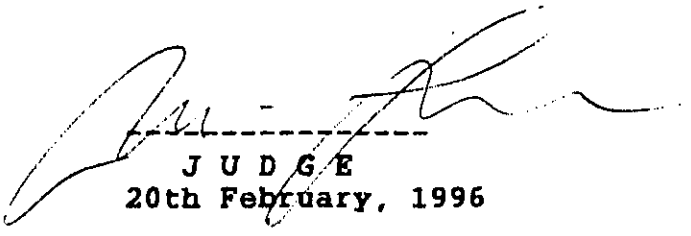
present in Court, by saying it could be as unusual as it is rare for it was not the first time in my Court to have a Minister listening to proceedings. I recall distinctly that on 13th November, 1989 in CIV\APN\138\89 Molomo Majara vs Mamabela Majara and 3 Others where Mr Sello was appearing for the applicant the then Minister of Justice etc. Mr. B.M. Khaketla was sitting in my Court. It was also drawn to the Court's attention that the accused were not in Court when bail was applied for. But it is a matter of common knowledge that bail applications are mostly moved in Judges' chambers in the absence of the accused. But I must hasten to indicate that in such instances the Court would have been favoured with proper papers. However, I think the observation is worth-noting as a salutary one if only to avoid instances where an undeserving applicant is accidentally freed on bail as was the case in Mahula vs Rex. I am certain that if he was in Court and was identified when his matter was called such a mistake would not have occurred.

I have taken the view that there is no formal application for bail pending appeal as well as that there is no proof of existence of notice and grounds of appeal. Acting on the assumption that such formal application, if any there was, would by and large rest on the submissions made on behalf of all the accused and therefore that it would be dismissed, I refuse to grant bail pending appeal; and it is so ordered.



J U D G E
19th February, 1996

P\S At the reading of this judgment a mistaken impression was created that the Botswana authority i.e. Moshaga vs The State above is a Court of Appeal decision whereas in truth it is a Botswana High Court decision. The mistaken impression created is deeply regretted.



J U D G E
20th February, 1996