CRI/APN/636/96

IN THE HIGH COURT OF LESOTHO

In the matter between

DAVID LELINGOANA JONATHAN **APPLICANT**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi, Acting Judge,
On the 24th day of January, 1997.

This is an application for an order releasing the Applicant on bail pending his trial on a charge of High Treason arising from an alleged coup attempt on 29th February 1996. The Applicant is charged together with one Matsoso Bolofo and others.

The application is opposed by the Director of Public Prosecutions.

In paragraph 7.2 of his founding affidavit the Applicant explains his participation in the alleged offence in the following words :-

> "7.2 On the said 29th February, 1996 I was in the company of the said Bolofo, Molapo and others at Radio Lesotho where Bolofo took over the broadcasting gadget or gargets from the staff and began to broadcast an announcement to the effect that the government of Lesotho had been replaced by a new government, or words to that effect. It is common cause that this statement by Bolofo had no basis in fact and whilst I cannot dissociate myself from it, I respectfully submit that it amounted to nothing but a prank albeit an expensive one in the sense that it must have caused a great deal of alarm, disarray and such like sentiments and fears."

At the commencement of the hearing of the matter before me on 8th January, 1997 both Mr. Sello for the Applicant and the Learned Director of Public Prosecutions Mr.Mdhluli agreed that the answering affidavit of the Senior Investigating Officer, one Thai Makara filed in CRI/APN/374/96 of this Honourable Court be considered in this matter in as much as it concerns the same matter. The Applicant in the said CRI/APN/374/96 was one Makara Sekautu who is one of the present applicant's co-accused in the treason charge. The parties agreed therefore that it would not be necessary for the Respondent to file additional opposing affidavits in the matter. I accordingly endorsed the parties' agreement and admitted the said Answering Affidavit of Thai Makara as evidence in the matter.

Thai Makara deposes in part as follows in paragraphs 5 and 6 of his answering affidavit:-

"5. (c) In the course at (sic) my investigations I have established that the announcement that was made by Matsoso Bolofo on the 29 February 1996 was so made pursuant to a conspiracy among the applicant and others to take over the government of the country through unconstitutional means. There is evidence that when Matsoso Bolofo took over Radio Lesotho on 29 February 1996 he did so in fulfillment of a conspiracy in which the applicant participated. The applicant as a conspirator in the plot to topple the constitutionally elected government of the country knew that Bolofo would make announcement that was broadcast over Radio Lesotho on the 29 February 1996.

(d) During investigations I have also obtained evidence that the applicant and others had prior to the 29th February 1996 approached certain members of the security forces to solicit their assistance and support in removing from power through unconstitutional means the government of Lesotho. The date on which Bolofo and others invaded Radio Lesotho premises in Maseru had been agreed by the applicant and his conspirators. It was by design that Bolofo's announcement was made on the 29 February 1996. The conspirators of which the applicant was one had agreed in advance of the procession to which the applicant refers that such a procession would be a prelude to the announcement the conspirators intended to make.

(f) (sic) Further, through investigations I have ascertained that the announcement that was made by Bolofo was not made in jest. It was made as a clarion call to security forces and the populace to come out in support of the cause of action on which the conspirators had embarked. The conspirators seriously believed that the security forces would come out in support of their unlawful cause. On 29 February 1996 the applicant was waiting in the wings to form a new government if their plan had succeeded. I state that the conspirators were deadly serious in their intention to take over unconstitutionally the government of the country.

A photocopy of the statement that was published by Bolofo over Radio Lesotho on 29 February 1996 is annexed marked "TM1'. I state that the statement clearly indicates that Bolofo and his co-conspirators, of which the applicant was one, intended to seize power through unconstitutional means.

6.

In considering the applicant's application I submit that this Honourable Court will take into account the serious nature of the crime of which the applicant is charged. While I concede that the applicant has every right to make an application for admission to bail the very nature of the crime he is alleged to have committed militates against his application being granted. The intention of the applicant and his co-conspirators was to upset the constitutional order of things in Lesotho and there is no assurance that the applicant will not continue to engage in subversive activities if he is granted bail. I ask this court not to admit the applicant to bail."

Now Section 109 of the Criminal Procedure and Evidence Act 1981 provides as follows:-

"109. The High Court may, at any stage of any proceedings, taken in any court in respect of an offence, admit the accused to bail."

The use of the word "may" clearly indicates that the court is vested with a discretion in the matter. Authorities are however legion that in

exercising the discretion conferred by the said section the guiding principle is to uphold the interests of justice by balancing the reasonable requirements of the state with the requirements of our law as to the liberty of the subject.

In this regard I am mainly attracted by the principle stated by Miller J in S v Essack 1965 (2) S.A. 161 (D) at 162 C to the following effect:-

> "In dealing with applications of this nature, it is necessary to strike a balance, as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice ..... The presumption of innocence operates in favour of the applicant even where it is said hat there is a strong prima facie case against him, but if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the court would be fully justified in refusing to allow him bail."

I further respectfully agree with the learned judge that the attitude of the Director of the Public Prosecutions is a factor to which the court should per se attach weight in balancing the probabilities in the matter. I am mindful however that the ipse dixit of the Director of Public Prosecutions is not conclusive.

The onus of proof in a bail application is on the applicant to show that the grant of bail will not prejudice the interests of justice.

As I see it the main consideration in a bail application is whether the Applicant will stand trial and not abscond. The seriousness of the offence charged consequently becomes one of the factors for consideration in view of the likelihood that a man will abscond rather than be hanged. Thus a possibility of a severe sentence is in itself a potential inducement to an accused person to flee.

Mr. Sello cautions that the seriousness of the offence is determined by circumstances of a particular case and not by the label given to it. He developed his argument by conceding that the actions of the Applicant do amount to the offence of treason but that this should be viewed as a "clumsy *pathetic and childish deed" which would not merit a severe sentence.*

For my part I consider that High Treason is a very serious offence indeed. In this regard it suffices to refer to section 297 (1) (b) of the Criminal Procedure and Evidence Act 1981 which provides as follows:-

"297 (1) Subject to sub-section (2) or (3), sentence of death by hanging -

(b) may be passed by the High Court upon an accused convicted before or by it of treason or rape."

Such is the seriousness of the offence of High Treason therefore that an accused person charged with the offence faces a possibility of hanging in the discretion of the trial court. I consider therefore that the inducement to flee is very great in a case such as this.

Diemount J in S v Mhlawli and others 1963 (3) S.A. 795 expressed similar remarks in the following terms at page 796 :-

> "It has been said by the courts on several occasions that where the inducement to flee is great - as in this case - and where no extradition from the neighbouring protectorate would be possible - again as in this case - the court will not readily grant bail if the Attorney-General opposes bail."

I am further mainly attracted by the remarks of my Brother Molai J in dealing with a bail application on a charge of High Treason in Shadrack Ndumo v The Crown 1982 - 1984 LLR 169 at 171 to the following effect:-

> "It cannot be seriously disputed that charges of High Treason, Sedition and Contravention of the Internal Security (General) Act 1967 are serious charges."

The learned Judge concluded that in the event of a conviction the sentence was "likely to be a commensurately serious one" and that, "that being so, the existence of the incentive to abscond must obviously be greater now than it was at the time when the applicant had not been served with any charge."

The following remarks of the Learned Judge are apposite to the case before me and I respectfully adopt them in toto. He states at page 171 :-

> "Moreover, the offences against which the applicant and his co-accused are allegedly charged are political ones. It must be borne in mind that people who commit these political offences are more often than not people of high political morals and ideals who commit them not for personal gains but because of their strong political, view-points or beliefs. Offences of this nature may carry for a certain section of the community very little or no social disgrace at all. They may even carry approval. There is therefore great incentive for political offenders to jump bail and avoid standing trials in order to gain freedom to disseminate their view points more efficiently."

Indeed there lies the danger.

I observe that such is the seriousness with which courts view the offence of High Treason that in the legal history of Lesotho, albeit a short one, (the first Treason case in this country was R v Moerane and ors. 1974-75 LLR 212) but nevertheless a very important history, no court in this country has ever granted bail to a person charged with the offence. This must not be understood to mean however that treason is not bailable or that applications for bail must of necessity be thrown out willy-nilly. Each case must of course be decided on its own particular circumstances and merits.

In Makalo Moletsane v Rex 1974-75 LLR 272 Cotran J (as he then was) dealing with a bail application pending trial on a charge of High Treason had this to say at page 273"

> "The release on bail on such offences (i.e. sedition, murder, high treason and aggravated robbery) is the exception rather than the rule, though the High Court appears to have powers under the provisions of section 109 to admit accused persons to bail even in respect of the offences above mentioned. There must, however, be good reasons for departing from this rule, and the onus of showing special facts rests on the accused."

This case was followed by my Brother Molai J in the case of Shadrack Ndumo (supra). I respectfully associate myself with the approach of the Learned Judges.

There is a further factor which I should mention which greatly influenced this court in the decision that it has arrived at. It is this. The court was informed by both counsel that the trial against the Applicant and his co-accused has been set down for the 4th day of February, 1997. Indeed the Learned Director of Public Prosecutions has given an undertaking that this trial will take precedence over all other criminal matters. That is welcome news indeed in as much as this court disapproves of long incarcerations of accused persons without trial.

In Sekhobe Letsie v Director of Public Prosecutions C of A (CRI) No.3 of 1991 (unreported) Ackermann JA had occasion to remark adversely about long delays in criminal prosecutions. This is what he said at pages 23 - 24 :-

> "It is in the public interest that justice be not delayed. Confidence in the judicial system, particularly in the criminal

> justice system, is of paramount importance for the ethos of justice and human rights and, indeed, for the general well-being of society. It is a notorious fact that loss of confidence in the working of the judicial system tempts people to take the law into their own hands. Justice must not only be done, it must manifestly be seen to be done. Undue delay in finally disposing of a criminal case, where the accused is languishing in goal, can lead to the perception that there is an ulterior motive behind the delay. I hasten to add that, on the facts presently before us, there is no indication whatsoever that this is in fact so. Nevertheless there is always a danger that such a perception can arise. It therefore behoves a criminal justice system, and particularly one that prides itself on upholding international human rights standards in its system to do everything reasonably in its power to prevent such a perception from developing."

I respectfully agree with these remarks which are apposite to the case before me.

However, as earlier stated the trial in the present matter will now hopefully take off on the 4th February 1997 although naturally this may not be enough consolation for the Applicant. I consider that it would be irresponsible for the court to release the Applicant in a serious matter such as this with only a week to go before the date of hearing of the trial. I remain unpersuaded that the Applicant will stand trial if released on bail at this stage.

I also remind myself of the remarks of Diemount J in S v Mhlawli and others (supra) at page 796 to the following effect:-

> "It seems to me that where the charge relates to a crime affecting the public safety - treason, sabotage or membership of an unlawful organisation - the factor of public safety may well be relevant."

I consider therefore that the release of the Applicant on bail is likely to endanger public safety. In this regard I have not lost sight of the fact that there are obviously Applicant's co-conspirators out there waiting in the wings. I have also borne in mind that according to a photocopy of the statement published by Matsoso Bolofo over Radio Lesotho on 29th February, 1996 Annexture "TM1" the said Matsoso Bolofo made the announcement on behalf of, inter alia, leaders of political parties. The veracity of this shall of course be determined in due course at the treason trial itself. Suffice it to say that this court is not prepared to release the Applicant in these circumstances and risk the possibility of the Applicant and his co-conspirators regrouping and trying their luck once more to the detriment of public safety. Indeed politicians are known for their resilience. It is in their nature that they will keep trying even against grave odds until they hopefully achieve their goal.

Taking all the above mentioned factors into consideration cumulatively I have come to the conclusion that the administration of justice will be prejudiced by the release of the Applicant at this stage. Accordingly the application for bail is hereby refused. I shall however not close the door finally on the Applicant's face.

The Applicant is therefore free to renew his application if there is any inordinate delay in the commencement of his trial occasioned at the instance of the Crown.

M.M Ramodibedi
ACTING JUDGE
24th January, 1997

For Applicant : **Mr: Sello**

For Respondent : **The DPP, Mr. Mdhluli**