CRI/APN/142/97

IN THE HIGH COURT OF LESOTHO

In the matter between

MOETI MOFOKENG **APPLICANT**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi

On the 9th day of June, 1997.

In this application it is sought to persuade the Court to release the Applicant on bail pending his trial on a charge of armed robbery involving an amount of M24 000-00 belonging to Framer's Supermarket at Pitseng in Leribe district on or about the 7th February 1997.

The application which is strenuously opposed by the Director of Public

Prosecutions was argued before me ont he 19th May 1997 and after hearing submissions from both sides I dismissed the application and intimated that reasons would follow today. These are the reasons:

In terms of Section 109 of the Criminal Procedure and Evidecne Act 1981 the High Court is vested with a discretion whether or not to grant bail to an accused person at any stage of any proceedings takne in any court in respect of an offence. The full text of that section is as follows:-

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

As this court stated in David Lelingoana Jonathan v Director of Public Prosecutions CRI/APN/636/96 (unreported) in exercising the discretion conferred by the said Section 109 of The Criminal Procedure and Evidence Act 1981 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. Moreover the court must always bear in mind that the presumption of innocence operates in favour of the applicant even where it is said that there is a strong prima facie case against him but that if there are indications that the granting of bail will defeat or frustrate the proper administration of justice then the court would be fully justified in refusing to allow the applicant bail.

See **S v Essack 1965 (2) S.A. 161 (D) at 162 per Miller J.**

As I had occasion to state in David Lelingoana Jonathan v Director of Public Prosecutions (supra) the onus is on the Applicant to show on a balance of probabilities that the grant of bail will not prejudice the interests of justice. In this

respect our law differs drastically from the current position in the Republic of South Africa. There as I understand the current position the onus is now on the State to show why bail should not be granted in the interests of justice.
See **Magano & Another v District Magistrate, Johannesburg & ors. (1) 1994 (4) S.A. 169 at 171.**

The fact that the Director of Public Prosecutions opposes bail, as in this case, is a factor which the court should per se attach weight in balancing the probabilities in the matter but the ipse dixit of the Director of Public Prosecutions is however not conclusive and the court must still look at all the circumstances of the case to determine whether the applicant will stand trial and not abscond.

Again as this court stated in David Lelingoana Jonathan v Director of Public Prosecutions (supra) the seriousness of the offence charged is one of the factors for consideration by the court in a bail application in as much as the possibility of a severe sentence is in itself a potential inducement to an accused person to flee rather than stand his trial.

Now it is against the above mentioned principles that I proceed to determine the factors in this application and whether the applicant has discharged the onus to show that his release on bail will not prejudice the interests of justice as well as whether he will stand trial.

It is common cause that the Applicant is a non citizen in this country. He comes from Makhalaneng Witsi's hoek, Qwa Qwa in the Republic of South Africa where he resides. I consider therefore that he comes from outside the jurisdiction of this court. I have taken this factor into account in refusing bail in this matter as

I felt the applicant has failed to make out a case that despite the fact that he is a non citizen residing outside the jurisdiction of this court he will stand trial. He does not even make a token undertaking in that regard in his founding affidavit and this court subscribes to the principle that a litigant must stand or fall by his founding affidavit.

In his founding affidavit the Applicant has failed to state his personal circumstances and background from which the court can determine whether he is likely to stand trial rather than flee. Again this is a factor against the Applicant in this matter. In this regard I accept Mr. Ramafole's submission on behalf of the Respondent that the Applicant has not placed factors that would influence the court to confidently exercise its discretion in favour of the applicant.

There is again the aspect of the nature of the charge the Applicant is facing. As earlier stated the Applicant is facing a charge of armed robbery involving an amount of M24,000-00. I consider that this is a very serious charge indeed and that the applicant faces a very substantial term of imprisonment in prospect. That is the reality of the matter which this court cannot lose sight of and I consider that the inducement for the Applicant to flee rather than stand trial is therefore very great indeed.

Mr Fantši for the Applicant submits that only M150-00 was found on the person of the Applicant after his arrest. I understand him to imply thereby that it cannot be correct that the applicant stole the amount of M24 000-00 as alleged. I don't agree. In my view this argument is clearly a non sequitur and must be rejected as such. It does not merit any further attention by this court.

One Clement Koaqo who is admittedly a relative of the applicant's alleged

accomplice namely one Pule Radebe who was shot at the scene of the crime has deposed an affidavit in support of the Respondent's opposition to bail. This is what he states in paragraphs 2-6 thereof:-

"2.

I know the Applicant herein as he was a friend of my relative, who is now deceased, Pule Ratebe. I am used to the applicant herein.

3.

On the 8th February, 1997, I found applicant at my aforesaid home, he was already in a vehicle with one Mathabang Petlane and my mother, Makoaqo Koaqo.

4.

Applicant then informed me that the previous day, being the 7th February, 1997, he was from Pitseng in the company of the deceased and others and that whilst en route to Hlotse, they met the Police who attempted to stop their van, but they ignored them hence the police shot at them and injured Pule Ratebe, so they were now going to see the condition of Pule Ratebe at the hospital.

5.

The reason applicant advanced for not stopping when requested to do so was that they were transporting dagga.

I asked applicant where the dagga was, but no answer was forthcoming."

In his replying affidavit the Applicant admits paragraph 2 above but "vehemently" denies the rest of the paragraphs quoted above. He seeks to persuade the court that the deponent Clement Koaqo is "referring to an incident which took place in Botha Bothe where I was fined M50-00 for possession of dagga." Well I do not agree. The deponent Clement Koaqo is specific as to dates. It may be that the Applicant told him half truths about the incident and preferred to label it dagga but I don't think that anything turns on this for the purpose of this application.

What matters is that I consider that there is a prima facie case against the Applicant and in this regard I have also taken into account what the investigating officer Tpr. Lehata says in paragraph 7 of his opposing affidavit namely "there is evidence that applicant was involved in the said robbery and he knew that the deceased was shot at the scene."

In sum therefore I remain unpersuaded that the Applicant will stand trial if released on bail. On the contrary I consider that, as matters stand, the administration of justice will be prejudiced and/or defeated if bail is granted.

Accordingly the application is dismissed.

M.M. Ramodibedi

JUDGE

9th day of June 1997.

For Applicant : Mr. Fantši

For Respondent : Mr. Ramafole