CRI/APN/412/97

IN THE HIGH COURT OF LESOTHO

In the matter between

MOKOBI MOLAPO **APPLICANT**

and

DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

JUDGMENT

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

On the 2nd day of September 1997.

This is an application for bail on a charge of armed robbery. It is alleged that upon or about the 17th day of April 1997 and at or near Lithabaneng in the district of Maseru the Applicant and his co-accused unlawfully and intentionally pointed a gun at one Rannakalali Moshoeshoe and by inducing submission by the latter did take and steal from his person or out of his immediate care and protection a certain Super 10 Combi registration number X2224 the property of Lesotho Government.

The application is opposed by the Director of Public Prosecutions.

It is trite law that the Court is vested with a discretion whether or not to grant bail. This is so in terms of Section 109 of the Criminal Procedure and Evidence Act 1981 which 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 discretion whether or not to grant bail must however be exercised judicially and not arbitrarily or capriciously.

In David Lelingoana Jonathan v Director of Public Prosecutions CRI/APN/636/96 this Court, citing S v Essack 1965 (2) S.A. 161 (D), had occasion to state that in exercising the discretion whether or not to grant bail 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 adding that 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 bail to the Applicant. Indeed this Court subscribes to the principle that where bail can be granted subject to safeguarding conditions the Court should, if possible, lean in favour of doing so. See S v Bennett 1976 (3) S.A. 652.

Again in Moeti Mofokeng v Director of Public Prosecutions

CRI/APN/142/97 this Court stated the following:

> "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.
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> 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."

I shall bear the above mentioned principles in mind in the present application.

I now turn to the essential facts of the application.

In his founding affidavit the Applicant does not even make a token attempt to say that the contents of his affidavit are true and correct and that they are within his personal knowledge. I have considered this factor against the Applicant as I feel that the omission does not inspire any confidence in the Court as to the veracity of the allegations made by the Applicant. It is true the respondent's opposing affidavits suffer from the same defect or omission but unfortunately for the Applicant he has to face the firing line first.

I should mention straight away that I have been struck by the paucity of facts in the Applicant's founding affidavit relevant to enabling the Court to exercise its discretion in favour of bail such as personal circumstances relating to the Applicant's stability or otherwise, whether the Applicant is possessed of properties which would make it unlikely for him to abscond and whether the Applicant has a passport (the list is not exhaustive).

In an attempt to disclose his defence and in the only paragraph of relevance to the application the Applicant states as follows in paragraph 5 of his founding affidavit:-

"5.

> I know nothing about the alleged Robbery the subject matter of the charge except that on the said date I accompanied my friends **Tefo Mokorosi, Koriana and Rubel to** Thuathe in a combi and when they could find the person they were visiting we returned and parted. I did not know that we were travelling in a stolen vehicle."

It seems to me that by conceding that he actually travelled in the stolen vehicle on the day of the alleged armed robbery the Applicant is indeed skating on thin ice. This leads me to the response by the Crown in paragraph 4 of the opposing affidavit of No.7925 Detective Trooper Serobanyane wherein he states:-

> "Ad Para 5
> It is true that applicant was with the 3 people he mentioned because they are the very people with whom he robbed the vehicle subject

matter of the present charge sheet. The (sic) so it cannot be true that he knows nothing about the alleged robbery. The applicants (sic) Co.accused Koriana and Rubel are still on the run from this very robbery involving vehicle X 2224."

I have attached due weight to the fact that in his replying affidavit the Applicant has not denied or challenged this allegation. In like manner I have further attached due weight to the following unchallenged allegation contained in paragraph 4.5 of the opposing affidavit of Detective Trooper Serobanyane:-`

"Ad Para 4.5

Applicant was questioned about numerous offences committed by him for example murder, armed robberies. ....."

In the circumstances I am being left with a very uncomfortable feeling that the applicant might commit further offences while on bail and thus jeorpadize public safety or law and order. It must be understood here that the Court is not concerned with the criminal propensity of the applicant but with public safety. That this is a relevant factor in a bail application admits of no doubt.

See S v Mhlawli and others 1963 (3) S.A. 794 G-H.

Indeed I found it amazing that in his founding affidavit the Applicant himself actually alluded to some of his other alleged criminal offences. For an example he states as follows in paragraphs 4.0, 4.1 and 4.2 thereof:-

"4.0 On Sunday the 15th June, 1997 I was helping driving one

TAOLE TAOLE and his brother in a cressida car which I did not know whether it was stolen or not. We were from Mohale's Hoek to Maseru.

4.1 At Mafeteng we were attacked by a group of people one of whom alleged that we once attacked them. We were severely assaulted resulting in my sustaining serious deep open wounds all over the head. One of us got killed.

4.2 I managed to escape to the Police where I was taken to hospital for treatment. Before I could be allowed to go away I was told by Police Mafeteng that when they informed my Superiors about my assault they were told to arrest me for suspicion of a stolen Galil Rifle."

I should mention that the Applicant's "superiors" are obviously the "R.L.D.F." as he claims to be a member thereof (the Respondent alleges he has since been dismissed from the force).

In response to the aforesaid paragraphs 4.0, 4.1 and 4.2 of the Applicant's founding affidavit Detective Trooper Serobanyane states as follows in paragraph 4 of his opposing affidavit:-

"Ad Para 4.0

It is denied that applicant did not know that the cressida was stolen as he has been positively identified as the person who robbed the same cressida at Sefikeng in the Berea district.

Ad Para 4.1

It is true that applicant was seriously assaulted together with others one of them even died. There had been monies taken during robberies committed to many taxis leaving late from Maseru to Mafeteng which resulted in monies being taken from such taxis.

Ad Para 4.2

The police found applicant being assaulted by the public and came to his rescue not that he managed to escape to police and it is true he was taken to hospital for treatment. The rest of what he says about the stolen galilee (sic) rifle and other things are true."

I have taken into account the fact that the Applicant faces a very serious charge indeed for which he faces a long term of imprisonment in prospect if convicted. I consider therefore that the inducement for the Applicant to abscond rather than stand trial is very great.

See Moeti Mofokeng v Director of Public Prosecutions (supra).

For the reasons which I have endeavoured to explain I have reached the conclusion that the Applicant has failed to make out a case for the relief sought and that it would be unsafe to grant bail at this stage on the papers as they stand.

Accordingly the application is dismissed.

M.M. Ramodibedi

JUDGE

2nd Day of September 1997

For Applicant : **Mr. Fosa**
For Respondent : **Miss Nku (Assisted by Miss Maqutu)**