

Cited Cases

Mabathoana & One v DPP CRI/APN/373/2004

Seola v DPP 1981 LLR 277

Theko v Compol and Another 1991 – 92 LLR & LB 239

Lekhetho Sefali v DPP CRI/APN/77/2006

Books

Criminal Law and Procedure through Cases by M.P. Mofokeng J.

- [1] This is an opposed Application for bail wherein the petitioner is facing two charges of murder and seven of attempted murder on people whose age group ranges between twelve and nineteen years.
- [2] In his papers the petitioner does not deny that he caused some deaths and injured some people with his use of firearm, but explained the whole incident as one big accident as he claimed to have been chased and in trying to save his life he started shooting randomly in the dark.
- [3] He again claims to have voluntarily surrendered himself to the police when he learned that he was wanted for questioning on suspicion of his involvement in the events of the evening of the 31st December 2011.

- [4] To strengthen his point of having voluntarily surrendered himself, the petitioner said he had not even been aware that there had been any injury occasioned by his action of trying to ward off his pursuers. According to him he is not aware of any partners in crime as he only fled to save his life alone.
- [5] It has been the respondent's case that the petitioner did not surrender himself as he wanted this Court to believe. The investigating officer had deposed to the opposing affidavit to say that in order to get the petitioner, they had to ask of his relatives to call him on his cell phone. The police then intercepted the call telling the petitioner to come else his wife who was in police custody was not going to be released.
- [6] In order to determine whether the petitioner could be released on bail, the respondent has tabled before this Court some considerations which this Court has been invited to look into.
- [7] They are the following: that
- (a) Three of the petitioner's co-accused are still at large and chances are that they are still heavily armed wherever they are since at least 24 shells were found at the scene from at

least six firearms. And that only one firearm out of the six was found with the petitioner on his arrest.

- (b) The shooting affected some young and innocent children who appeared to have gathered in the private premises where they must have assumed that they were safe.
- © The petitioner is charged with very serious offences which might attract a severe punishment, which fact might induce the petitioner to abscond.
- (d) There exists a very strong *prima facie* case against the petitioner.
- (e) The petitioner has not exhibited the presence of any exceptional circumstances which may justify his release.

[8] The interests of justice dictates that the Courts should always be desirous that accused persons be allowed bail. But even there there is always a catch, that such should be the position only where it is clear that the interests of justice will not be prejudiced.

[9] **Mofokeng J** in his book, **Criminal Law and Procedure** through cases¹ has been quoted where he had said these words:-

“In dealing with applications such as this, it is necessary to strike a balance, as far as that can be done, between protecting the liberty of the individual and safeguarding the proper administration of justice.”

¹ Page 188

Theko vs Compol and Another².

[10] In bail applications the law dictates the presumption of innocence to operate in favour of the accused even in situations where there is a strong prima facie case against the accused; **Soola v DPP³**.

[12] As my brother Moiloa AJ has been quoted in his decision in **Motebang ‘Mabathoana and one v DPP⁴**, that in considering whether to release a petitioner to bail there will always be a fine balance undertaken between safe-guarding the liberty of the petitioners and the prejudice in the administration of justice. That means, there has to be a balance between the two though one must tend to be more probable than the other.

[13] In *casu*, the petitioner has shown that he voluntarily surrendered himself, when the respondent on the other side said they had to use his relatives to catch him.

[14] What remains an issue would be whether the respondent could be taken to have satisfied the Court on available evidence that if

² 1991 -92 LLR &LB 239

³1981 LLR 277 at 281

⁴ CRI/APN/373/2004

released on bail the respondent will abscond and not stand trial thereby defeating the ends of justice.

[15] To get to the bottom of that, the Court had to look at the date when the events of the shootings took place. It was on the 31st December 2011 when the shootings took place. We learned from the petitioner's founding papers that he was only arrested on the 5th January, 2012.

[16] The respondent has alleged that the petitioner could not have been arrested had it not been because of the threats about his wife after his call had been incepted. The affidavit has shown that the petitioner had fled after the incident hence why he could not be arrested sooner than the 5th of January, 2012.

[17] The respondent had again agreed that since the petitioner is facing serious charges, that calls for the petitioner to show the presence of exceptional circumstances necessitating his release on bail.

[18] My brother Peete J has been quoted in **Lekhetho Sefali v DPP**⁵ where he stated as follows:

⁵ CRI/APN/177/2006

“In my view, the rationale behind the new Amendment requires the applicant to adduce evidence which satisfies the Court that exceptional circumstances exist which in the interest of justice permits his release.

A conscientious judicial discretion still has to be exercised after some justification for release has been shown.”

[19] Can it then be said that telling the Court about one being unemployed, parents surviving on subsistence farming and making livelihood for oneself and one’s young wife be considered as exceptional?

[20] The Court considers that what has been put forward as exceptional circumstances are but ordinary bare facts which have not informed the Court of what is exceptional about them.

[21] As was said in ‘**Mabathoana** *supra*, what the petitioner has stated as exceptional circumstances are matters common to most honest people.

[22] The Court has thus come to the conclusion that the petitioner has failed to exhibit any exceptional circumstances that would compel this Court to release him on bail.

[23] The respondent has also managed to discharge the burden of proof by showing that it is not only an unfounded fear that the petitioner would not stand trial if released on bail, but that he in fact fled after the incidents only to be arrested after his call by his relatives had been incepted.

[24] Bail is thus refused and Application is dismissed.

A. M. HLAJOANE
JUDGE

For Petitioner: Ms Molapo

For Respondent: Mr Mahao