CRI/APN/772/2010

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the Matter Between:

'MAKHOTSO MOLISE 1st Applicant

KHOTSO MOLISE 2nd Applicant

'MANTOA MOKOALELI 3rd Applicant

And

THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent

JUDGMENT

Coram : Hon. Monapathi J

Date of Hearing : 11th June, 2012

Date of Judgment : 2nd August, 2012

SUMMARY

It is properly in the court's discretion to consider the fact that where evidence has already been led, granting of bail touches on the interest of justice. Exceptional circumstances are even more important in the circumstances for an accused to be released on bail. Where none exist the accused will not be released.

CITED CASES

S v Hudson 1980 (4) SA 145 at ***146***
S v Lulane 1976 (2) SA 204
R v Emmanuel Ntoi
R v Kok 1927 CPD 267
R v Nell 1911 N.P.D 210

STATUTES

Criminal Procedure and Evidence Act 1981
Criminal Procedure & Evidence Amendment Act 2002

[1] A decision in this matter has already been made on the 28th June, 2012. This is a bail application wherein Applicants (Accused) stand charged with crimes of murder and robbery. This application is opposed by the Crown on the fear that Applicants will abscond if released on bail. Applicants were arrested and charged in 2009. The trial proceeded in December 2010 and it was last postponed to May 2012 for further hearing. It is worth noting that Applicants have never exercised their right to apply for bail since their incarceration until the commencement of their trial. It was only after second Crown witness's testimony that they moved the application. In any event release on bail of an accused is in the discretion of the court.

[2] The law and principles involved in the applications for granting of bail have been spelled out in the much quoted the case of ***R v Emmanuel Ntoi*** CRI/APN/20/1977 (unreported) at page 3 when Cotran CJ had this to say:

> "In application for bail pending trial it has often been said that the courts must start with the premise that every accused is presumed to be innocent until the contrary is proved and should lean towards the granting of bail rather than refusing it. This rule is of course subject to certain qualifications based on the principle that it will not be granted if the interest of justice will be prejudiced. Bail may be refused."

[3] There are other considerations but the central question in this matter is whether the interests of justice will not be defeated if Applicants are released on bail. In the exercise of its discretion to grant or refuse bail, the court in answering this question inter alia considers whether Applicants will stand trial. In answering this question attention should be given but not limited to the following considerations that will help the court to make proper assessment of the risk that Accused might abscond. The seriousness of the offence charged and likelihood of a severe sentence. If the charges against Accused are serious as the present and there is possibility of a severe sentence so are accused likely to abscond.

[4] In ***S v Hudson 1980 (4) SA 145*** at ***146*** the court had this to say:

> "… The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the appellant to abscond and leave the country".

In the present case it was submitted that both charges that Applicants face are very serious offences as they fall under Schedule III of ***Criminal***

Procedure and Evidence Act 1981. The indication is that for these offences, on conviction, the offender cannot be dealt with under Section 314 of CP&E i.e the sentences cannot be postponed or be suspended. Count one in particular still carries with it a capital punishment. It was therefore submitted that this will provide an incentive for these Applicants to abscond. As pointed out in the answering affidavit, Third Applicant had actually made an attempt to disappear immediately after the commission of the offences.

[5] Another factor is the strength of the state's case and probability of conviction. If the Crown's case is so strong that there is high likelihood of conviction, accused person is likely to abscond and not stand trial as was said in ***S v Lulane 1976 (2) SA 204***. The court must careful not to "usurp" the functions of the trial court in evaluating the probability of conviction. See ***S v Kok 1927 CPD 267*** and ***S v Nell 1911 N.P.*****D 210.**

[6] In the instant case, as I know, the Crown had already lead evidence of two witnesses inclusive of PW2 who is undoubtedly Crown's key witness. The evidence that has already been lead in my view seriously implicates these Applicants. The property that is subject of count two had been positively identified by PW2 and other witnesses and it is not denied that it was mostly recovered from Applicants or some of them. It was accordingly submitted that the Crown's case in the light of the evidence that had already been led, and the one that is pending was so strong that there is high likelihood of conviction. It was further submitted therefore that to release Applicants on bail under these circumstances would result in a miscarriage of justice which concept includes the

Accused's rights vis-à-vis those of the victims and the community at large. I was in agreement.

[7] It was to be noted that Applicants were applying for bail after commencement of the trial. This move leaves a lot to be desired because Applicants have been implicated by the evidence adduced before this court. The most probable inference that can be drawn is that they will abscond if released on bail. While it was conceded that the High Court in terms of section 109 of CP&E can grant accused person bail at any stage of the trial, it was however, not desirable for the court to release Applicants on bail after it had already heard part of the evidence. This was more so because Applicants have already pleaded to the charge and even if they were on bail, that would have the effect of terminating their bail and they would be detained in custody unless the court directs otherwise. See ***Criminal Procedure and Evidence Act 1981*** *section* ***151***.

[8] Furthermore section 109 as amended by ***Criminal Procedure & Evidence Amendment Act 2002*** in particular section 109 (1) (ii) demands that any person charged with the crimes that Applicants face and under the circumstances as some as those of the Applicants, be kept in custody unless they advance exceptional circumstances to the satisfaction of the court. Applicants have advanced no such exceptional circumstances as required by law and thereby failed to discharge the burden on them that the interest of justice demands their release.

[9] The application ought to be dismissed.

T. E. MONAPATHI
JUDGE

For Applicants : Adv. Nteso
For Crown : Adv. T. Fuma
Judgment noted by Adv. Tšenoli