IN THE HIGH COURT OF LESOTHO

CRI/APN/0038/2013
CRI/APN/0052/2013

In the matter between:

TSELISO TAU **1ST APPLICANT**
FOMATSOHLE MOTHOBI **2ND APPLICANT**
MAMATHIBELA MOTHOBI **3RD APPLICANT**
TSIETSI RALEKULA **4THAPPLICANT**

And

DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

RULING

Coram : Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 12 December, 2013
Date of Judgment : 12 December, 2013

Summary

Bail application – Applicants facing a charge of murder which has a ritual dimension – Their failure to make a *prima facie* case in favour of their admission on bail – onus lying upon them to do so – A likelihood of a considerable sentence being imposed against them if convicted, militating against a success of the application – Finally, the application refused.

CITED CASES

S v Schietekat 1999 (2) SACR 51
S v Hudson 1980 (4) SA 145
S v Dlamini, S v Dladla and other, S v Jourbert; S v Schietekat (ccT21/98, CCt 22/98, CCT2/99, CCT4/99 [1999] ZACC8; 1999(4) SA623

STATUTES

Criminal Procedure & Evidence Act 1981
Criminal Procedure & Evidence Act (Amendment) No. 10 of 2002

Introduction

[1] On the 12th December 2013, the Court heard an application in which Adv. H Nathane KC for the Applicants motivated an application for the 4th Respondents to be admitted on bail on the grounds which would be referred to in the course of the judgement. The 1st Applicant has in support of the move, filed a founding affidavit and the rest of the Applicants have respectively tendered their supportive affidavits.

[2] It should from the onset be stated that the Applicants are individually and collectively facing a charge of murder. The allegation made by the Crown in support of it, is that *they had at the material time and place intentionally and unlawfully killed the deceased Tefo Habaka by stabbing him with a knife all over his body and peeling off his penis and thus, committing the offence.*

[3] The Crown had vigorously resisted the application and reinforced its opposition by advancing the answering affidavit of the Investigating Officer 7417 Inspector Nyooko and its supportive testimony by Chief Tefo Phalatsane.

[4] The Court having read through the papers and heard the arguments from both sides delivered an *ex tempore judgment* on the same day and pronounced that it was reserving a right to write a full judgment soonest. The Judge's Clerk however, inadvertently omitted to place the file on the place which is reserved for those awaiting judgments and returned it back to the criminal registry. This occasioned some delay in the execution of the assignment within the planned time. Now, therefore, the Court is hereby presenting its full reasons for its earlier refusal for the Applicant to be admitted on bail.

The Common Cause Facts

[5] This not being the trial proceedings, the Court will in a summarised version, identify the facts which are pertinently relevant to the bail application. These are basically that the on the 2nd October 2013, the deceased, the 1st, and 4th Applicant who were acquaintances had embarked on a drinking spree around Ha Chaba which is their home village. On their return home, it happened that when they got to a place where there is a cluster of trees, there emerged a fighting in which the 4th and the deceased were definitely involved against each other. This caused the two to sustain injuries. The 1st Applicant was also certainly present at the scene at the material time irrespective of whether or not he had sought to intervene or had joined the 1st Applicant in the encounter against the deceased.

[6] The end result of the described phenomenal encounter is that the deceased died apparently from the injuries inflicted on him and from the fact that his penis had been severed from his body. The peeling off of the penis had definitely been done by the 4th Applicant regardless of whether or not the 1st Applicant was a *socio criminis* in that gruesome act. This culminated in the burning of the blanket of the deceased and that of the 4th Applicant.

[7] According to the police investigations the four (4) Applicants had conspired to ritually murder the deceased, hence the removal of his penis at the time of the act and its discovery at the home of the 2nd and the 3rd Applicant. The Applicants are denying the charge. This is specifically projected primarily in the explanation by the 4th Applicant that he and the deceased were engaged in a mere fighting and that in the heat of passion he had pulled down his trouser and peeled off his organ. The 1st Applicant states that he had intervened in the fighting while the other two Applicants who were both not at the scene disassociate themselves from the crime.

[8] The 4th Respondent had immediately after the death of the deceased left the Country for the Republic of South Africa. He was subsequently, arrested by the police with the assistance of the villagers when he had returned to his home to fetch his clothing. However, his counter explanation is that he was in the process of going to report himself to the police.

The Identified Issue

[9] The common cause landscape presented has precipitated a disputation between the parties as to whether the Applicants have made a *prima facie* case that the explanation which they have proffered is of a requisite nature that it qualifies them for bail without a detriment to the administration of justice.

The Grounds Advanced on the Admission of the Applicant on Bail

[10] The Applicants are in the main anchoring their application primarily on the reasoning that they entitled to the dispensation against the backdrop of their constitutional right to be presumed innocent until it could at the trial stage, be proven otherwise. In an endeavour to demonstrate that they qualify for it, they have canvassed their innocence by accounting that they had never at any moment whatsoever, conspired to kill the deceased for any reason including for ritual purposes. They 4th Applicant has specifically attested to the innocence of the rest of the Applicants by initially projecting a picture that the fatal injuries sustained by the deceased including the dismembering of his penis are solely attributable to the fighting he had with him. In the same vein, he has stated that the 1st Applicant had simply intervened in that encounter and that the 2nd and the 3rd Applicants were never at the scene at the material time.

[11] It should suffice to indicate that the 1st, 2nd and the 3rd Applicant have all subscribed to the representations tendered in their favour by the 4th Applicant. He has as it has been stated, indicated their innocence. Back to the 4th Applicant who seemingly occupies a

central position in the matter, the essence of his explanation is that he had fatally injured the deceased and severed his penis while acting in self defence against the assault mounted against him by the deceased.

[12] The Counsel for the Applicants submitted that in the foregoing account presented for the Applicants, a condition precedent for their admission on bail had been satisfactorily discharged. He emphasised that the Crown has not proven that they would in any way obstruct the course of justice.

[13] On the contrary, the Crown maintained principally that the Applicants are facing a serious offence which necessitates them to advance special circumstances for them to qualify for a consideration to be admitted on bail. He charged that they have not raised any such defence and therefore, their application should fail. From there he interlinked the seriousness of the offence alleged with the likelihood that they would abscond if allowed to proceed on bail. This was based on the possibility that the Court could in the circumstances, impose a heavy sentence upon them.

[14] There was emphasis made on the qualification that the Applicants had **conspired** to murder the deceased and that in furtherance of that they **ritually** killed him. To demonstrate that they were all involved in the crime, the Crown has introduced testimonial evidence by the Investigating Officer which specifically connects the

2nd and the 3rd Applicant with the offence despite their absence from the scene. The testimony indicates that the severed organ was ultimately found at their home. This warranted the Court to attach some weight to the consideration that the two similarly should as well satisfy the standard for their release on bail.

The Findings and the Decision

[15] The Court preliminarily finds without any hesitation that the Applicants are facing one of the extra ordinarily serious offences which radiate shocking waves. Thus, it has to attach to the application a commensurate consideration. It is in this regard guided by **S 109 A (1) (C) of the Criminal Procedure and Evidence Act**.[1] It directs:

> Notwithstanding any provision of this Act, where an accused person is charged with –
>
> (a) Murder under the following circumstances –
>
> (i) The killing was planned or premeditated
>
> (ii) The crime was committed by a person, group of persons or syndicated execution or furtherance of a common purpose or conspiracy;
>
> Court shall order that the accused person, be detained in custody until he is dealt with in accordance with law, unless the accused, having been given reasonable opportunity to do so, **adduces evidence which satisfies the Court that exceptional circumstances exist which in the interest of justice justifies his release.***(emphasis supplied)*

[16] Besides establishing the special circumstances, the Applicants would have to satisfy the ordinary Common Law essentials. These in a nutshell being to assure the Court that they would not undermine

[1] Criminal Procedure and Evidence (Amendment) Act No. 10 of 2002.

the administration of justice by for instance, not standing trial, fleeing the jurisdiction, intimidating the witnesses etc.

[17] The Crown has exploited the section by indicating that the offence alleged against the Applicants falls within the parameters of the Section and therefore, requires them to advance before the Court, special circumstances to qualify for the benevolence. This logically leads to the determination of whether the Applicants have satisfied the requisite statutory and the Common Law requirements.

[18] It has in **S v Schietekat 1999 (2) SACR 51 @ para 61**been advocated that the approach to be followed by the Court in giving effect to the provision which is couched in *pari materia terms with S* 109 A (1) (C) should be:

> ...Under sub section (ii) the law giver makes it quite plain that a formal onus rests on the detainee to satisfy the court. Furthermore, unlike other applicants for bail, such detainees cannot put relevant factors before the court informally, nor can they rely on information produced by the prosecution, they actually have to adduce evidence. In addition, the evaluation of such cases has the starting point that continued detention is the norm.

Also in **S v Dlamini, S v Dladla and Others; S v Jourbert; S v Schietekat (CCT21/98. CCT22/98, CCT2/99, CCT4/99) [1999] ZACC3; 19999 (4) SA 623.** Paragraph 65 Section 60 (110 (b) Stipulates that an accused must satisfy a magistrate that the "interests of justice" permit his or her release. It clearly places an onus upon the accused to adduce evidence.

It was not suggested that the imposition of an onus on an applicant for bail is in itself constitutionally objectionable, not could such a submission have been sustained.[2]

[19] The Court acting on the strength of S 109 A (1) (C) and the interpretation assigned to its counterpart section in **S v Schietekak** *(supra),* decides that the Applicants have not despite facing a very serious offence, presented any special circumstances to satisfy its material requirement. Their affidavits have been respectively considered to determine if they have individually demonstrated the existence of such circumstances. It is instead found that they have each relied upon the ordinary grounds for bail.

[20] On the Common Law terrain, it has transpired that the 4th Applicant, who is a central figure in the allegation, had immediately after the incidence left the jurisdiction for the Republic of South Africa. He had not first informed the police about the death of the deceased which according to him had accidentally occurred while he was fighting him in self defence. On his return into the Country, for apparently coming to fetch his clothes, he did not report the incidence to the Maputsoe Police or to their Mapoteng counterparts to demonstrate his innocence. A normal expectation is that he should have seized the first opportunity to have done so, since he had after the incidence 'rushed for work in South Africa'. This alone

[2] Ibid Para 78

justifies a conclusion that the Crown's fear that he is a flight risk, to have a reasonable foundation.

[21] It should suffice without traversing the merits of the trial case, that the story which the Applicants have told the Court in their endeavour to establish some *prima facie* account of their innocence sounds unbelievable. The dismembering of the penis of the deceased by the 4th Applicant while defending himself, the seemingly suspicious intervention by the 1st Applicant, the alleged subsequent discovery of the organ at the home of the 2nd and the 3rd Applicants and the circumstances which according to them surrounded the incidence appear to be all *phenomenal*. They give rise to many questions without answers. For a bail application to succeed, the Applicant must at least tell a possibly true and believable story in persuading the Court to find that his release would not in any manner whatsoever frustrate the course of justice.

[22] One other factor for consideration is the likelihood of the Applicants to abscond as a result of a corresponding possibility of a heavy sentence which the offence could, in the event of a conviction, attract. It was along the same thinking warned in **S v Hudson 1980 (4) SA 145 @ 146** that:

> The expectation of substantial sentence of imprisonment would undoubtedly provide an incentive to the Appellant to abscond and leave the country.

[23] This Court having already pronounced itself that the Applicants are for the stated reasons facing a very serious charge; it further determines that there is a likelihood of an imposition of a heavy custodial punishment and consequently a likelihood of their absconding if they are freed on bail.

[24] The Applicants have not satisfied the Court that their evidence is credible. It predominantly appears unrealistic and unbelievable.

[25] In the premises, the Court does not find it befitting to admit the Applicants on bail and their application for bail is accordingly refused.

E.F.M. MAKARA
JUDGE

For the Applicant	**:**	**Adv. H. Nathane KC Instructed by V.M. Mokaloba & Co.**
For the Respondent	**:**	**Adv. T. Fuma Instructed by Law Office**