

IN THE HIGH COURT OF LESOTHO

CRI/APN/89/2013

In the matter between:

‘MALEHLOHONOLO SCOTT

APPLICANT

And

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT

Coram :Honourable Acting Justice E.F.M. Makara
Dates of Hearing :21 March, 2013
Date of Judgment :21 March, 2013

Summary

The applicant and her son facing two counts of murder – The son’s miraculous escape from the maximum security section of the prison – The law enforcement agencies continued failure to apprehend the fugitive son – The postponement of the hearing date as a result – The consideration of the applicant’s right to be freed on bail due to the uncertainty of the trial date – The Crown’s assurance that the fugitive shall have been arrested by the next hearing date – Balancing the interests of the applicant with the considerations for the proper administration of justice – Refusal of application – Grounds thereof.

CITED CASES

CRI/T/123/2012 Rex vs Lehlohonolo Scott and Ano.

Sec.6 of the Constitution

CRI/APN/123/81 Manamolela v Rex ex parte Reckling 1920 CPD 567
S v Makoanyane 1995 (6) BCLR 665

BOOKS

Mr. Justice M. Mofokeng **Criminal Law and Procedure Through Cases**
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MAKARA A.J.

[1] This is an application in which the applicant in the instant case is accused No.2 in **CRI/T/123/2012 Rex v Lehlohonolo Scott and Ano**. In that case the two accused persons who are mother and son respectively have been jointly charged with two counts of murder. The allegations against the two being that on or about January and July 2012 and at or near Koalabata in the district of Berea, the said accused did each or the other or both of them did unlawfully and intentionally kill **Moholobela Seetsa** and **Kamohelo Mohata**. The Crown has, thus, preferred a charge of murder against the two accused.

[2] It is common cause that on the night of the vigil of the late **Kamohelo Mohata**, who is one of the victims of the killings, an angry villagers surrounding the scene of the murders, besieged the residence of the accused persons. In the process, they broke its doors and windows, vandalized it and finally torched it. The incidence subsequently triggered spontaneous reactions from the members of the public at large. This represented a registration of the public indignation of the gruesome manner in which the deceased were killed.

[3] The demonstrations culminated in a public *pitso* which was attended by the Rt. Hon. Prime Minister, members of the Cabinet, Hon. Parliamentarians and other dignitaries. The occasion was graced by the attendance of the senior members of the clergy,

who led the *pitso* in prayer. All the classes of people present reiterated the public renunciation of the gruesome murders and denounced them as acts of abomination. The clergy dedicated their prayers to pleading with the Almighty God for His divine intervention, so that such acts will never be repeated again in the kingdom.

[4] It is *ex-facie* the papers before court, common cause that the case was scheduled for hearing on the 4th of February 2013 and that, this notwithstanding, the hearing did not proceed as a result of a sudden supervening evil. This constituted of a phenomenal, controversial and a suspicious escape of the 1st accused from the Central Prison in Maseru. The qualifications attributed to the escape are made with reference to the fact that the escapee was detained in the maximum security facility of the prison. The place is under a tight security throughout day and night. The breaking news about the escape radiated a shock throughout the country and this continues to obtain to date.

[5] In consequence of the escape from custody by the 1st accused, the case was postponed and rescheduled for a hearing on the 1st of August, 2013. The Crown had in seeking for the postponement of the hearing to the said date, advanced the reasons that the facts upon which the charge is based, militates against separation of the trials since the two were jointly charged on the basis of common purpose in the commission of the offences. The Crown further, however, expressed its optimism

that the 1st accused would have been apprehended and brought before court by the next hearing date.

[6] A foundation of the applicant's lamentation and plea for intervention by this court is that she has, hitherto, been languishing in jail for 8 months. She presents a picture that she is genuinely desirous that this case be expeditiously heard to a conclusion. In the same vein, she has complained in the papers before this court that her right to liberty in terms **sec 6 of the Constitution**, is being violated without any lawful justification. She, in this respect, adamantly and consistently maintained that she is not in any manner, whatsoever, associated with the escaping from lawful custody by her son, and therefore, that she cannot lawfully have her right to liberty continue being curtailed because of that.

[7] Adv. Hoaeane motivated the application by proceeding from the premise that the court must in considering the application, attach significance to the fact that the applicant has a right to a presumption of innocence and that by operation of law the court should be inclined to release her on bail. In support of this proposition, he referred the court to the direction given on the subject by one of the late eminent judge and legal scholar in the kingdom, Mr. Justice Mofokeng who has directed that:

In dealing with application for bail, it is necessary to strike a balance, as far as that can be done, between protecting the liberty of the individual, and ensuring the proper administration of justice.¹

¹ Mr. Justice M.Mofokeng **Criminal Law and Procedure Though Cases** Morija Printing Press P.188.

[8] The applicant's counsel submitted with reference to the quoted learned words by Mofokeng J, that the applicant has, on the balance of probabilities, proven her case to regain her liberty by way of being granted bail. He emphasized it that an accused person's right to liberty remains entrenched in law regardless of the charge which she is facing.

[9] The counsel reacting to a question posed to him by the court, advised that the court should be concerned with the jurisprudential based reasons and not with extra-legal considerations including being conscious about the court of public opinion. He warned in the same connection that the court should not at this stage be much concerned about the safety and security environment which may surround the applicant after being released on bail. His position in that regard was that she would take care of her safety and security.

[10] The centrality of the counter papers filed by Adv. Mokuku for the Crown is basically that the court in approaching this application, must seek to balance the protection of the liberty of an individual and the relevant imperatives in the administration of justice. He expressed a profound fear that against the backdrop of the history of this case, the prevailing hostile sentiments against the accused persons and a need to maintain the confidence of the public in the system of the administration of justice, it would be unwise to have the applicant released on bail. He in support of this stance cited the case of **Manamolela v Rex CRI/APN/123/81 ex parte Reckling 1920 CPD 567.**

[11] The Crown has in its answering affidavit maintained that the law enforcement agencies were already at an advanced stage towards the apprehension of the 1st accused. Advocate Mokuku cautioned that the police officer, who has made a deposition on the point, could not, for strategic reasons, elaborate on that. The assertion was made as a means of ensuring the court that the hearing of the main case would, definitely, proceed on the 1st of August, 2013. To demonstrate the Crown's commitment on that, he told the court that the Crown undertakes to proceed with the hearing on that date and that if the 1st accused shall not have been arrested by that date, they will consider a separation of trials or a withdrawal of the case against the applicant.

[12] The court recognizes the accused's right to a presumption of innocence under the **sec.12 due process rights in the constitution** and that bail would be a consequential translation of that into practice. In that thinking, the court is indebted to the counsel reference to the guiding authorities on the subject. The authorities advanced give rise to the understanding that in the circumstances of this case, the court is being presented with an assignment to balance the liberty of the individual i.e Applicant with the considerations for the proper administration of justice. This would include a challenge not to land the administration of justice into disrepute and thereby compromising the confidence which the court, particularly the High Court, should command in the eyes of the public. This does not, in any manner whatsoever, suggest that the independence of the judiciary should be

circumscribed by the public opinion. It instead, simply means that the court must in its dispensation of justice, recognize the reality on the ground so that its judgment itself would be a realistic one.

[13] In seeking to balance the said key considerations, the court takes a position that whilst it fully recognizes the applicant's constitutional right to liberty, it holds it wise to balance that with her **right to right to life and dignity**. The two are the core rights from which the rest of fundamental rights and liberties are traceable. This was acknowledged in **S v Makoanyane 1995 (6) BCLR 665**. This perception dictates that the court should adopt a practical and realistic approach.

[14] There is merit in the argument made by the applicant's counsel that the court should adhere to the jurisprudential based reasoning. Whilst that is so, it would be unwise for it to fail to take judicial notice of the developments of notoriety which happened after the incidences and a high possibility of their spontaneous re-occurrence. This could *inter alia* be triggered by an exclusively jurisprudential based decision which would divorce itself from the reality.

[15] The scenario presented before court, creates a reasonable apprehension that the safety and the security of the applicant may not currently be guaranteed outside the prison. There has already been a precedence that a rampaging aggrieved members of the public had destroyed the applicant's house immediately

after the incidence. This was in the midst of the existence of the Mabote Police Station which is hardly 2kms away and the nearby base of the Special Operations Unit (SOU). It didn't given the prevailing public anger, require a policeman of above average intelligence to have foreseen the likelihood of public reactions.

[16] In the premises, the court concludes that granting the applicant bail may in the circumstances, tantamount to condemning her to death by any unlawful means imposed upon her by a misguided court of public opinion and, thereby, permanently denying her, the right to liberty.

[17] The application for bail is, therefore, refused.

[18] The court registers its gratefulness to the learned, systematic and comprehensive presentations by the counsel and for their patience and accuracy while recording the judgment as it was being dictated to them.

**E.F.M. MAKARA
ACTING JUDGE**

For the Applicant : Adv. Hoeane
For the Respondent : Adv. Mokuku