

IN THE HIGH COURT OF LESOTHO

CRI/APN/381/2013

In the matter between:

SEHLOHO CHEFA

APPLICANT

And

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT

Coram : Honourable Acting Justice E.F.M. Makara
Dates of Hearing : 2 September, 2013
Date of Judgment : 3 September, 2013

Summary

*The applicant who is facing charges of double murder, attempted murder against the children of one of the deceased and arson applying for bail - The crown resisting the application - Sec. 109 A of the Criminal Procedure and Evidence Act (Amendment Act) 2002 providing that an applicant who **inter alia** faces three of the charges involved, should advance special circumstances to qualify for bail – The grounds for bail presented found to fail the statutory test considering the seriousness of the offences and balancing them against the interest of Justice – bail consequently refused.*

CITED CASES

Emmanuel Ntoi v Rex CRI/ APN/20/77

Libman v AG 1950 (1) SA 607

Heller and Ano. v AG 1932 CPD 102
Maserow v AG 1941 WLD 43
Nthaisane v The State (2000) 1 B L R 247

STATUTES

Criminal Procedure and Evidence Act (Amendment Act) 2002

MAKARA A.J

[1] The applicant is in this proceedings seeking for bail order following his remand in custody. This has been in consequence of the criminal charges of murder, attempted murder and arson which the Crown has preferred against him. The Crown has vigorously opposed the application and resultantly, the parties have exchanged the papers in which they respectively state their contrasting views.

[2] The substance of the Crown's allegation against the applicant is in paraphrased terms that he had at the respective material times and places committed two crimes of murder. This constituted of a plan to kill Manthatisi Lebeko and Mahlomohang Nchoba and subsequently translated that into action by firstly killing the former by shooting her and four days later fatally shot the latter. According to the Crown, the applicant had murdered the two women because he was under a misdirected view that they had conspired to bewitch his wife. As for the charge of attempted murder and arson the explanatory content is that he had committed the offences at the time he attacked Manthatisi in that he had put her house under fire despite the presence of her children who were sleeping inside and

that they had miraculously escaped death from that arson incidence.

[3] In a nutshell, the application originates from what appears to be a common cause factual landscape that the above mentioned deceased women had died from a shooting phenomenon and simultaneously that the house of Manthatisi was at the moment she was terminally shot, set on fire while the her children were sleeping therein and that they had narrowly escaped death. It is clear from the papers that the applicant doesn't by any stretch of imagination contest the fact that the women died from the separate shooting occurrences and that the described arson and attempted murder had taken place.

[4] It emerges from the applicant's replying affidavit that whilst he has no problem with the narration of the undisputed facts, he however, shares a divergent point of view with the Crown when it comes to its allegation that he is the one who committed the offences. He has in support of that position denied that he knew the deceased women or their close relatives and specifically denied his knowledge of their brothers as well.

[5] There is a substantial controversy between the Crown and the applicant regarding what had caused him to report himself to the police. The Crown's version is that he had proceeded to the charge office in connection with the commission of another offence

unbeknown to him, that the police were looking for him about the present offences and that the police then took the opportunity to arrest and charge him in connection with those. He has on the contrary explained that he had voluntarily surrendered himself to the police after learning that they were looking for him. The controversy on the subject has been occasioned by the fact that the applicant has advanced it as one of the indications that he has established special circumstances for him to qualify for bail.

[6] Adv. Makhera has in his motivation of the application for bail referred the court to the provisions of **sec 109A of Criminal Procedure and Evidence Act (Amendment Act) 2002**. This is the legislative enactment which governs the considerations of bail where the accused is facing *inter alia* a charge of *murder* and *attempted murder*. He cautioned that the requirements prescribed therein should be considered side by side with the normal Common Law requirements in determining the eligibility of a subject to be admitted on bail. In this respect, there appeared to be a harmony of understanding between the parties. Their point of departure manifested itself on the question of whether or not the applicant has satisfactorily on the balance of probabilities, established the statutory requirement and the Common Law ones to qualify for his admission on bail.

[7] The counsel has in his endeavour to demonstrate that the applicant has made a case warranting for the bail sought for to be

granted, by stating that the pre condition provided for in the applicable enactment, has been fulfilled. He described that to establish the exceptional circumstances which would justify the freeing of the applicant facing the prescribed offences on bail.

[8] In a summarized version it was explained that the exceptional circumstances favourable to the application were supported by the applicant's voluntary surrendering to the police immediately he learned that they were looking for him. It was here highlighted that the applicant had proceeded to the police on the understanding that they required his attendance at the charge office in relation to some other offence and not at all in connection with the offences which form the *sub stratum* of the offences against which he is seeking for bail before this court. The impression presented is that his voluntary reporting to the police is for the purpose of the present charges against him, demonstrative of his innocence in the matter since otherwise he would have fled the jurisdiction at that time. This seems to be consistent with the averment in his replying affidavit that he was not at the scene at the material times and places.

[9] On the Common Law requirements for bail, both counsel have in essence reiterated by reference the principles pronounced by Cotran CJ (as then was) in **Emmanuel Ntoi v Rex CRI/ APN/20/77 @p3**.¹

¹ This is written and commended upon in Mofokeng M P Criminal Law and Procedure 1st ed Morija : 1981 at p245

in which he formulated the approach to be followed and in the process citing with approval the supportive cases thus:

In applications for bail pending trial... 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 subject to the consideration that the interests of justice should not be prejudiced. Bail may be refused –

- (a) On serious charges (though the seriousness of the charge is not *per se* an impediment) - **Libman v AG 1950 (1) SA 607**;
- (b) If there is fear that the accused will interfere with the investigations or intimidate witnesses, (**Heller and Anno. v AG 1932 CPD 102, Maserow v AG 1941 WLD 43**) or
- (c) if he is likely to abscond (**Omar 1930 CPD 79**) or
- (d) There is probability of conviction **Kok 1927 NPD 267**, (though the court must be careful not to encroach upon the functions of the judges and assessors when the trial eventually takes place- **Nell 1911 NPD 210**).

[10] The criterion postulated above and the case law relied upon, have hitherto stood the test of time in balancing the fair trial rights of the accused with the interests of justice. It has, however, in **Emmanuel Ntoi v Rex (supra)** been further cautioned that the Court should seriously consider the opposition of bail by the Director of Public Prosecutions since he has knowledge of the facts on the ground and that he would normally not resist the application except where he in good faith found that indispensable.

[11] It transpires to the court that its determination of the bail application will have to be based upon the sworn testimonies of the parties before it. This is being dictated by the fact that given the

manner in which the Court has been approached, the evidential revelations for its reliance exists in those papers. It has accordingly in **Nthaisane v The State (2000) 1 B L R 247** been directed that the Court should in this assignment be guided by the evidence advanced before it.

[12] The respondent has in opposing the bail application relied on the affidavit of the Investigating Officer No. 51716 D/P/C Nthuloane. The deponent has therein proceeded from the position that that the applicant is facing a serious charge in that he is alleged to have murdered two women and has in addition been indicted for attempted murder and arson in which the children of one of deceased victims narrowly escaped death. According to him, the applicant had premeditated the commission of those offences before executing them.

[13] The Investigating Officer has maintained in his testimony that there are strong grounds for the applicant to be convicted in the trial. He has in support of his optimism that there are adverse prospects for the applicant to succeed in the murder trials, took the Court into confidence that the man had ultimately tendered a confession before a Magistrate of the district of Mhale' hoek. The implication hereof is that he has a deeper command of the details of the offence which have damaging revelations against the admission of the applicant on bail and that he had been identified at the scene at the material time.

[14] This Court doesn't think that it would be safe for it to attach any significance to the investigating testimony regarding any statement which he claims that the applicant had made to the police at the charge office. According to him, the applicant had *inter alia* expressed to them that he was under a fear that the son of one of the victims who happens to be a soldier will kill him. The Court's attitude is based simply upon the fact that the utterances made by a criminal suspect within the police environment, are suspect concerning the purpose for which they were made. In this consideration, the alleged statement made by the applicant doesn't advance the Crown's resistance against the application.

[15] The Court endorses the already obvious fact that the applicant is being confronted with serious offences by the Crown and that by operation of the law, it is obligatory for him to advance before the Court the exceptional circumstances which would qualify him for a dispensation to be freed on bail. Thus, the defining factor in this case is whether the applicant has successfully done so. In the understanding of the Court the exceptional grounds would be those which are characteristically outside the parameters of the usual ones which are relied upon when seeking for bail before the courts.

[16] It should in the final analysis suffice to register a conclusion that the Court doesn't find the grounds upon which the application for bail is being based, to be extra ordinary. This receives

fortification from the *prima facie* damaging counter revelations advanced by the Investigating officer.

[17] The end result is that the application for bail is in the premises refused. This notwithstanding, the applicant has the liberty to pursue his application again if the Crown takes an unreasonably long time to prosecute the case.

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

For Applicant : Adv. N.E. Makhera
For Respondent : Adv. M.E. Tsoeunyane