

# **IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CRI/APN/0529/17**

In the matter between:

**TLALI KAMOLI**

**PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

## **JUDGMENT**

**CORAM:**

**HON. J.T.M. MOILOA J.**

**DATE OF HEARING:**

**14 NOVEMBER 2017**

**DATE OF JUDGMENT:**

**21 NOVEMBER 2017**

## **ANNOTATIONS:**

### **Statutes**

1. Lesotho Constitution, 1993
2. Criminal Procedure & Evidence Act 1981

### **Cases**

1. S vs Acheson 1991 (2) SA 805 (Nm)
2. Thabo Tšukulu vs DPP (CRI/APN/043/2017) (unreported)
3. DJVV vs The State case A721/2010 (unreported)
4. S vs Schiet 1992 (2) SACR 51 (CC)
5. S vs Rudolph 2010 SACR 262 (SCA)

- [1] Petitioner in this matter is a former Commander of Lesotho Defence Force (LDF). He resides at his home at Ha Leqele on the outskirts of Maseru City. It is common cause that the petitioner was arrested and detained in police custody on Wednesday 11<sup>th</sup> October, 2017 after he reported himself there at the instruction of Senior Superintendent Likhama on 9<sup>th</sup> October, 2017. Petitioner attended on police accompanied by his lawyer.
- [2] When a period of 48 hours expired in police detention presented the petitioner before a Magistrate. Police were accompanied by Public Prosecutor only without the presence of petitioner's Counsel. It is not explained by police why petitioner's Counsel was not informed so that he might make representation to the Magistrate on behalf of petitioner as well. These police applied to the magistrate for further detention of the petitioner. The magistrate granted police their request and authorised further detention of petitioner until 16<sup>th</sup> October, 2017.
- [3] On 16<sup>th</sup> October, 2017 the Petitioner was presented before the Maseru magistrate and was formally joined as a co-accused in Criminal Case Number 0751/2017 on a charge of murder alleging that he murdered one Mokheseng Ramahloko. I mention in passing that it is common cause that the late Ramahloko in his life time was a police officer stationed at Police Headquarters. He was also formally charged with 14 counts of Attempted Murder of a number individuals it being alleged that on 27<sup>th</sup> January, 2014 he detonated bombs at three locations namely, the houses of Liabile Ramoholi, Mamoletsane Moletsane, and Khothatso Tšooana. The first two alleged locations are at Moshoeshe II while Khothatso Tšooana is a resident of Ha Abia, all within the City of Maseru. Petitioner was remanded into custody at Maseru Central Prison. The Petitioner has not

yet been indicted in the High Court. He has not been given a trial date. All these facts are admitted by the Crown.

- [4] On the 20<sup>th</sup> October 2017 the Petitioner filed present bail petition. In his petition before me the petitioner asks to be admitted to bail on the following terms and conditions:

- (a) Payment of M1,000.00 cash bail deposit;*
- (b) That he reports at Police Headquarters on remand days between the hours of 06:00 hrs 18:00 hrs*
- (c) That he should not interfere with Crown witnesses*
- (d) That he attends remands and stands trial*
- (e) That he be released on bail on such other conditions that the Court may deem appropriate*

The Petitioner, at Paragraph 4 of his petition, avers that he neither killed Ramahloko nor detonated bombs at anybody's residence. He says immediately following the incidents of the bombs at Ramoholi's, Moletsane's and Tšooana's residences he suggested shortly thereafter that a joint LMPS, NSS and LDF task team be set up to do a joint investigation of the incidents. He says it was agreed, but it did not actually take off on account of Commissioner Tšooana refusing to co-operate. Instead, the Petitioner alleges Commissioner Tšooana later informed him that he had opted for outside help of forensic experts. Furthermore, Petitioner avers that ever since he retired from the LDF he has never conducted himself in a manner that threatened the security of the country. He has been a law abiding citizen in fact. He says he has no intention to abscond from Lesotho in order to avoid standing trial on any charges he faces. He says he will stand trial as he believes in his innocence. He claims that he has strong roots in Lesotho where he has his home in Maseru and at Bobete in

Thaba-Tseka. He has a wife and family in Lesotho who depend on him for their livelihood.

[5] On 23<sup>rd</sup> October, 2017 the Crown filed its notice of intention to oppose the petitioner's bail petition. On 30<sup>th</sup> October, 2017 parties appeared before my brother Makara J. who then recused himself. The reasons for recusal are not clear to me and don't really matter to me. The matter then was allocated to me. On 3<sup>rd</sup> November, 2017 the Crown filed their Answer to the petition explaining their reason for opposing Petitioner's bail.

[6] At paragraph 4 of Petitioner's petition the petitioner states as follows:

*“The presumption of innocence still operates in favour of your petitioner who cooperated with law enforcement agencies when he was telephonically warned to report to the police headquarters. Your petitioner was further in advance that it was likely that he was going to be detained. Your petitioner was further informed that arising out of the results of the interview, he stands likely to be charged with serious offence. The foregoing notwithstanding, your petitioner promised the police that he will report himself. He lived up to the promise. He duly reported himself.”*

[7] In response to Petitioner's paragraph 4.5 quoted above, the Crown's main Answer is provided by No.10555 Senior Inspector Makharilele at paragraph 6 of his Answering Affidavit. Specifically, S/Inspector Makharilele in response to Petitioner's paragraph 4.5 responds as follows:

**“Ad Para 4 thereof**

*4.5The presumption of innocence has to be balanced with the interests of justice. In the exercise of its discretion to grant or refuse bail, the court does in principle address one all-embracing issue: will the interests of justice be prejudiced if the Accused is granted bail? The other considerations are subsidiary to this overwhelming principle. It is denied that your petitioner was informed in advance of the possible arrest charges and the seriousness*

*of such charges to be laid against him, he was merely told to come and assist the police.*

*4.6 Contents therein are denied, when your Petitioner was told to report himself, he was not told about the charges to be levelled against him and the seriousness thereof and the severity of sentence they are likely to attract. Now that he does, these factors are likely to act as incentives for him to abscond.*

*4.8 It could be the case that your Petitioner did not conduct himself in a way that threatens the interests of justice since his retirement from Lesotho Defence Force. It is appropriate to mention that this was when the wheels of justice seemed stationary; now that it is visibly in motion with his arrest and remand it is not guaranteed that the position will be similar.”*

- [8] It will be seen from the Petitioner’s paragraph 3.1 and 4.5 of his Founding statement of petition that he specifically states that in the telephone conversation between himself and the police he was speaking to Senior Superintendent Likhama and Assistant Commissioner of Police Ramachaea. It was not S/Inspector Makharilele nor Mr. Tšooana. Neither Likhama nor Ramachaea have given affidavits on this point. That the denial of the content of the conversation is made by the S/Inspector Makharilele on behalf of the Crown is not helpful to the Crown’s case as to the content of the conversation and therefore what the Petitioner was told by police. In the circumstance I find that the content of the conversation of 9<sup>th</sup> October 2017 between the Petitioner and the police is as given by the Petitioner on the factual issue of whether or not police informed the petitioner that depending on the outcome of their interview with him he was likely to be detained and charged with serious offences. I accept therefore that he went to the meeting with police on 11<sup>th</sup> October 2017 as requested well knowing that he might be detained by police on alleged commission on serious offences.
- [9] In matters of bail petitions the primary concern of the Court is to ensure that the integrity of the judicial system is preserved by ensuring that those

charged with crimes will attend their trial on due date and await the verdict of courts on such charges. At the same time courts in determining bail petitions are mindful that persons accused of crimes are innocent of crimes alleged until proven guilty of such crimes in a court of law. Paramount in the Court's mind is the provisions of **Section 6(1) (e) of Lesotho Constitution 1993**. A third consideration to bear in mind is the court's desire to reduce the risk of threats to potential witnesses. In favour of the Petitioner in this respect, the Petitioner does not know names of potential witnesses nor their statements to the police against him as at this stage no list or police statements have yet been furnished to the Petitioner. Another consideration is how far away the date of trial is or whether it is not known at all. The court has to bear in mind also that the petitioner requires freedom to consult and prepare for his defence at the trial when it does take place. In the instant case I bear I mind that the trial date has not been set. It is not known when it will be set. But then it is very soon after his arrest. All of these considerations require a balancing of these competing interests in an effort to make sure that the interests of justice are safeguarded that the petitioner will indeed be available to stand trial. Of course it is also available to the court to attach such terms and conditions as the court deems likely to act as a disincentive for the petitioner to flee. There is no precise manner in which a court of law can quantify flight risks inherent in a petitioner's bail application. Each case has to be judged on its own merits. The classic authority on bails is the Namibian case of **S. vs Acheson 1991 (2) SA 806** judgment of **Mahommed AJ**. The Court there held that the following were considerations which should be taken into account in deciding whether or not to grant bail to an accused person:

*“(1) Was it more likely that the accused would stand his trial or was it more likely that he would abscond and forfeit his bail? The determination of that issue involved a consideration of sub-issues such as:*

- (a) *How deep his emotional, occupational, and family roots within the country where he was to stand trial were;*
  - (b) *What his assets in that country were;*
  - (c) *What means he had to flee from the country;*
  - (d) *How much he could afford the forfeiture of the bail money;*
  - (e) *What travel documents he had to enable him to leave the country;*
  - (f) *What arrangements existed or might later exist to extradite him if he fled to another country;*
  - (g) *How inherently serious was the offence in respect of which he had been charged;*
  - (h) *How strong the case against him was and how much inducement there would be for him to avoid standing bail;*
  - (i) *How severe the punishment was likely to be if he were found guilty; and*
  - (j) *How stringent were the conditions of his bail and how difficult would it be for him to evade effective policing of his movements*
- (2) *Was there a reasonable likelihood that, if the accused were released on bail, he would tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or disorder? The determination of this issue involved an examination of other factors, such as*
- (a) *Whether or not the accused was aware of the identity of such witnesses or of the nature of such evidence;*
  - (b) *Whether or not the witnesses concerned had already made their statements and had committed themselves to giving evidence or whether it was still the subject-matter of continuing investigations;*
  - (c) *What the accused's relationship with such witnesses was and whether or not it was likely that they might be influenced or intimidated by him; and*
  - (d) *Whether or not any condition preventing communication between such witnesses and the accused could effectively be policed.*
- (1) *How prejudicial it might be for the accused in all the circumstances to be kept in custody by being denied bail. This involved an examination of issue such as:*
- (a) *The duration for which the accused had already been incarcerated;*
  - (b) *The duration for which he would have to be in custody before his trial was completed;*
  - (c) *The cause of any delay in the completion of his trial and whether or not the accused was wholly or partially to be blamed for such delay;*
  - (d) *The extent to which the accused needed to keep working in order to meet his financial obligations;*
  - (e) *The extent to which he might be prejudiced in engaging legal assistance for his defence and in effectively preparing his defence if he were to remain in custody; and*
  - (f) *The health of the accused."*

[10] In the instant case I am satisfied that Petitioner did have telephone conversation with Senior Superintendent Likhama and also with Assistant Commissioner of Police Ramochaea on 9<sup>th</sup> October 2017 in which the Petitioner was told to report himself at Police Headquarters for an interview with police. I am also satisfied that on the papers before me the Petitioner was also informed by Likhama and Ramochaea that there is likelihood arising from that interview that he might be charged with serious offences necessitating his detention. I am satisfied that in the course of that conversation police and the petitioner agreed that the petitioner in fact report to them not on Monday 9<sup>th</sup> October but on Wednesday 11<sup>th</sup> October 2017. These facts count in favour of Petitioner in my evaluation of Petitioner as a flight risk. But they are not the only determining factor. I have to examine all the facts and circumstances of the Petitioner and the Crown holistically and make an honest assessment whether I should admit the Petitioner to bail now bearing in mind the provisions of **Section 6(1) and (5) of the Lesotho Constitution 1993** and **Section 109(A)(1) of the Criminal Procedure and Evidence Act 1981**.

[11] **Lesotho Constitution 1993**

**Section 6(1) (e) of Lesotho Constitution** provides that:

*“6(1) Every person shall be entitled to personal liberty that is to say, he shall not be arrested or detained save as may be authorised by law in any of the following cases, that is to say:*

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*(e) Upon reasonable suspicion of having committed, or being about to commit, a criminal offence under the law of Lesotho;”*

Thus the fundamental law of Lesotho (i.e the Constitution) requires that no person should be arrested and detained except upon a reasonable suspicion of having committed or about to commit an offence under the law of Lesotho. In the instant case the Petitioner is suspected of having killed one Mokheseng Ramahloko on 30<sup>th</sup> August 2014 and also having detonated bombs at the residences of Liabiloe Ramoholi at Moshoeshoe II, Khothatso Tšooana at Ha Abia and ‘Mamoletsane Moletsane also at Moshoeshoe II on 27<sup>th</sup> January 2014. I am satisfied that all of these matters are serious accusation against the Petitioner and the court must treat them as such even though admittedly at this stage they have not yet been tried and proven as such before a Court of law. I am not privy to the truth of what is alleged in the charges but I recognise that those charges are pretty serious.

Of equal importance is the provision of **Section 6(5) of the Constitution**.

**Section 6(5) of Lesotho Constitution** reads as follows:-

*“If any person arrested or detained upon suspicion of having committed, or being about to commit, a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”*

Thus, in my consideration of this bail petition I start from the premise that every person is guaranteed personal liberty by the Constitution but that this personal liberty he has may be curtailed to an extent that it may be necessary to assure that he stands trial on reasonable charges preferred against him. Where it is felt necessary to curtail his personal liberty because he stand charged with a breach of the criminal law of Lesotho, he

may be admitted to bail on such conditions as the court deems just and necessary. This is the position then both under our common law fortified by our Constitution and our statutes.

### **Section 109A, Criminal Procedure and Evidence Act 1981**

Parliament in its wisdom has introduced two elements when two classes of petitions are considered by courts, namely the requirement that where a petitioner is facing a murder charge where the victim was a law enforcement officer, or of a person who has given, or is likely to give material evidence with reference to an offence listed in Part II of Schedule 1 of the **Criminal and Evidence Act**, then the petitioner must satisfy the court that “exceptional circumstances exist which in the interests of justice permit his release.” The **Section** reads as follows:-

*“109A (1) 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 and the victim was:-*

*(A) A law enforcement officer performing his functions as such whether on duty or not at the time of the killing, or is killed by virtue of his or her holding such a position;*

*(B) A person who has given or was likely to give material evidence with reference to any offence referred to in Part III of Schedule I.*

*The Court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interest of justice permit his or her release.”*

Now, the offence of murder of a police officer is a schedule I Part II offence.

[12] **“Exceptional Circumstances” – what are they**

I respectfully agree with my brother Peete J in **Thabo Tšukulu vs DPP CRI/APN/043/2017** (unreported) that “exceptional circumstances” defies any precise definition such as would enable one to fit it into all bail petitions that come before courts. In **DJVV vs The State case A721/2010** (unreported) it was said by Legodi J. of North Gauteng High Court that “An applicant in a bail application is given a broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant (Accused) or anything else in particular that is cogent. (See **S vs Schiet 1992 (2) SACR 51(CC)** in particular paragraphs [75] and [76] thereof. Personal circumstances present to an exceptional degree, may lead to a finding that release on bail is justified. See **S vs Rudolph 2010 SACR 262 (SCA).**” All the authorities I have come across say in varying words that the court hearing a petition must look at the totality of the evidence before it in order to determine whether exceptional circumstances exist or not. Naturally each case must be determined on its own facts in order for the court to make that determination. In the instant case as we have seen above, the Petitioner says he has his roots in Lesotho both at his original home in Bobete in Thaba-Tseka, and at his home at Ha Leqele where he lives with his wife and family since his retirement from the Army. Furthermore he says that since retiring from the Army he has not conducted himself in any way that threatens the interest of justice and has always been in Lesotho save for occasional trips to South African border towns of Ladybrand and Bloemfontein. He says there are no facts that may persuade him to abscond. Finally the petitioner says that he is “prone to recurring influenza condition” which requires that he be assisted medically quickly. Evidence establishing it satisfactorily would have persuaded me to look at it as a

major factor in his favour in my evaluation of “exceptional circumstance” referred to in **Section 109A of the CP&E**. But the Petitioner has attached no medical expert evidence to establish that illness, if any. Neither has he attached his Health Book to enable the Court to gain clear understanding of the reality of what he is talking about. This **Section 109A(1)(a)(i) of the C P & E Act 1981** places the evidential burden on a balance of probabilities on the Petitioner and I am not satisfied that the petitioner has discharged this burden on a balance of probabilities. Such evidence as I have on this leg of the inquiry is too scanty to persuade me to tilt scales of weighing up these competing interests I mentioned earlier in favour of the Petitioner.

[13] **Conclusion**

The judicial discretion that is vested in this court must be exercised judiciously and with caution adopting a holistic approach in looking at the particular circumstances of each case. In the case before me I am not satisfied that the Petitioner has satisfied me, adopting a holistic approach to his case that, he has discharged the evidentiary burden on a balance of probabilities that exceptional circumstances exist in his favour to admit him to bail at this stage. I am mindful that he has not yet been served with an Indictment and trial date in the High Court on the alleged offences he is alleged to have committed. Of course he is free to renew his bail application should the Crown fail to indict him timesously and give him a trial date.

I decline to admit the Petitioner to bail for reasons set out above. Bail is declined.

**J. T. M. MOILOA**  
**JUDGE**

**For Petitioner:**            **Adv. Molati**

**For Respondent:**        **Adv. Phoofolo KC**