

**IN THE HIGH COURT OF LESOTHO
(HELD AT MASERU)**

CRI/T/0150/2018

In the matter between;

SELE MOHOLOBELA

1ST APPLICANT

SENGAPHA KOLOTSANE

2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

REASONS FOR JUDGMENT

Coram : Honourable Justice E.F.M. Makara
Dates of Hearing : 12 April, 2018
Date of Judgment : 16 April, 2018

[1] The petitioner is a member of the LDF. He and his colleagues are facing charge of murder and two (2) of attempted murder and several ones relating to malicious damage to property. He has petitioned this court to release him on bail.

[2] A background of this case is that one Thabo Tongoane who is charged to have committed the same offences with the petitioner has already been released on bail by Justice Nomncongo. The Court takes judicial notice that this was done in CRI/APN/0166/18

Thabo Tongoane v Director of Public Prosecution. The conditions thereof were:

1. No bail deposit;
2. Petitioner to provide security in the amount of M10,000.00;
3. He should report himself at the Roma LMPS on the last Friday of every month;
4. He should attend remand and stand trial;
5. He should not interfere with the Crown Witnesses and police investigations.

[3] It is of significance for the purpose of this case to be realized that the Crown had not opposed the petition. Understandably, the Learned Judge who heard the petition mainly premised his decision on that basis. He even on his own motion imposed the security condition in an endeavor to ascertain that the petitioner would at the end stand trial.

[4] In the present petition, Counsel for the petitioner prosecuted the case of the petitioner from the premise that he deserves to be released on bail in equal terms with his co-accused who has been so released. The emphasis was that he is similarly situated with the petitioner in CRI/APN/0166/18.

[5] The Court then took judicial notice of S19 of the Constitution which details that everyone shall be entitled to equality before the law and to the equal protection of law. This was also done in relation to S.18(1) and (2) of the Constitution. The first provides:

Subject to the provision of Sub Sections 4 and 5, no law shall make any provision that is discriminatory either of itself or in its effect. The second details that subject to the provisions of Sub Section 6, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any office or any public authority.

[6] Then the Court adjoined the proceedings on a note that the Counsel should contemplatively resolve the impasse. This was done to give them an opportunity to explore prospects for assisting the Court to be seen to be consistent in its judgments and give a practical significance to the stated constitutional imperatives. Otherwise, the Court could land into a disrepute for being discriminatory and inconsistent in its decisions. It was in particular emphasized that a divergence from the earlier decision could create a negative perception concerning the manner in which this Court dispenses justice. Such skepticisms should as far as it is practically possible be avoided.

[7] S.109 of the CP& E Act, obliges a petitioner who faces the instant charges to establish exceptional circumstances which would qualify one for consideration of bail. This notwithstanding, there is no recorded indications of what constituted such circumstances in CRI/T/0116/2018. The Court conjunctives that the fact that the petitioner concerned attended schooling and was absent to sit for an examination, may have been recognized as such.

[8] It should suffice to be recorded that the Crown was unable to reconcile its earlier none opposition in the initial petition and its present resistance to bail. The irony is that both petitioners are similarly situated, and alleged to have committed similar offences at the same place and time. Though the counsel for the Crown appreciated the Constitutional fears entertained by the Court, she fairly advised that she was simply executing her institutions.

[9] The Counsel for the Petitioner throughout maintained that the Court should be seen to be dispensing justice equally. He then submitted that in the context of this case, this would be so if, the petitioner is equally freed on bail, on similar terms as his colleague.

[10] In the circumstances, the Court was singularly left with a challenge to consider the merits of the present case. It transpires from the papers filed by the petitioner that straightforwardly identified the facts through which he establishes exceptional circumstances. However, it is inferable therein that his reference to a car accident which compromised the physical ability of his brother whom he has to support together with his family was intended for that. Even if this could be acknowledged as such, it should as Moiloa J pointed out in *Kamoli v Rex*¹ be supported with medical evidence. Thus, it is found that ex-facie the petition, there are no exceptional circumstances established.

[11] The Court notwithstanding its finding that ex-facie the petition there are no exceptional circumstances made, it

recognizes the fact that the earlier admission of a similarly situated petitions in *Tongoane vs DPP*, constitutes such circumstance. This is rendered in dispensable by operation of S.18 (1) and (2) of the Constitution when read in particular with its S.19. In essence, the message here is that everyone has a right to be treated equally and for the law to be administered equally among all. Of significance is a dimension that state institutions including the courts, must give effect to the provided aspects of equality.

[12] In an endeavour to give effect to the constitutional right to the equality of all pensions and to their equal treatment, it emerges that the decision in the earlier case cannot be ignored. This does not necessarily mean that the decision should holistically be similar in both cases. Be that as it may, it would rhyme with or sense of justice if both decisions are similar on the core issue of bail itself. Otherwise, there would be counter perceptions on the question of the equality of persons before this Court and so the consistency of its decisions. Courts must as far as it is practicable avoid landing the administration of justice into disrepute. That would be risked by the **erconceivability** of the core decision in both similar cases involving similarity charged persons under similar circumstances.

[13] Despite the basically constitutional jurisprudence which the Court has discussed, it regards the offences charged to be of a serious magnitude. Thus, the interest of justice must equally be taken into account and some inquisitorial investigation should be resorted to for the assistance of the Court. The Counsel in

particular the Crown were asked to assist in that regard by calling the relevant officers of the LDF. PP – Monday the 16/04/18.

16/04/18 Appearances before

[14] Captain Qhubu and Motikoe advised the Court that the petitioners are still at work in the LDF and that hitherto they do not put any threat within the establishment. They suggest that they could be considered for a release on the same terms as their colleagues who has been freed on bail.

[15] COURT: The petitioners are released on bail on the same terms as Thabo Tongoane in CRI/APN/0166/18.

E.F.M. MAKARA
JUDGE

For Applicant : Adv. Ranthithi instructed by Law Office
For Respondent : Adv. Shale instructed by K.M.T. Thabane's Attorney