IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CRI/APN/0602/17

In the matter between:

KHUTLANG MOCHESANE **PETITIONER**

And

THE DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

JUDGMENT

1. This is an application by the petitioner, Khutlang Mochesane for bail pending trial. The petitioner is an adult Mosotho male of Ha Makhoathi in Maseru. He is awaiting trial at Maseru Central Correctional Institution. The case is at the Magistrate court.

2. The petitioner is conjointly charged with four (4) other accused with attempted murder. In terms of the charge sheet, Annexure 'A', the other accused are Rapele Mphaki aged 47 years of Ha Leqele, Mahanyane Phasumane aged 37 years of Ha Mopeli Matsoso u/c Khoaboane Theko of Masowe, Nyatso Tsoeunyane a aged 41 years of H/M Khupiso Khupiso u/c Ntaote Ntaote of Lesobeng Ha Khupiso and Maribe Nathane aged 35 years of H/M Jonathan Jonathan u/c Joel Motsoene of Moholobela.

3. According to Annexure 'B' of the charge sheet, the particulars of the offence, the accused are charged with contravening section 22(1) R/W

109 of the Penal Code, Act No.6 of 2010 (Attempted Murder). It is alleged that on or about the 9th day of July 2016, and at or near Ha Thamae in the district of Maseru, the said accused did each, both or all of them, acting in concert or common purpose, unlawfully and intentionally, did an act which is more than merely preparatory to the commission of the offence to wit: By firing gun shots at one LIOYD MUTUNGAMIRI and inflicted upon the said LIOYD serious injuries as such committed an offence of Attempted Murder contravening the provisions of the aforesaid Act.

4. The petition is supported by the verifying affidavit of the petitioner. The DPP has opposed the petition by filing the notice of intention to oppose on 07th December 2017 together with the opposing affidavit of Lance Sergeant Thamae, a member of Lesotho Mounted Police Service (LMPS) stationed at the Police Headquarters in Maseru. The notice of opposition is supported by the supporting affidavit of Hlalefang Motinyane, the Director of Public Prosecutors of the Kingdom of Lesotho. The petitioner has also filed his replying affidavit.

5. The parties filed Heads of Argument and made oral arguments.

6. The petitioner has clearly articulated the reasons for his release on bail in his petition. He stated at Paragraph 5 thereof that he is desirous of being admitted to bail so as to enable him to prepare for his defence. He further indicted at Paragraph 6 that preparation for his defence is seriously impaired by his continued incarceration and that he cannot engage in frequent and extensive consultations with his lawyer, something that is unachievable when he is in custody at Maseru Central Correctional Service. According to the petitioner, legal consultation of

the Maseru Central Correctional Service is between 0900 to 1100 hours and 1200 to 1500 hours only on weekdays. The petitioner further averred that the said Correctional Service has 3 or 4 consultation rooms which are shared by the legal counsel of the inmates. The petitioner undertook to abide by such reasonable conditions which the court may impose once he is admitted on bail.

7. The petitioner indicated at Paragraph 7 of the petition that his realise on bail shall not jeopardise the interests of Justice and his reasons for so believing are outlined in the said Paragraph 7 of the petition, to wit; on 23rd November 2017 he was ordered by the police to report at the Police Headquarters on 27th November 2017 and he did report on the said date. On 27th November 2017 he was released by the police and asked to report at the Police Headquarters on 30th November 2017 and he so reported and was taken to the Magistrate Court where he was charged with attempted murder. According to the petitioner, his conduct clearly indicated that he is a responsible person who would not want to be a fugitive from justice. The petitioner, therefore, prayed that he should be released on bail on conditions outlined in his prayer.

8. The Respondent on the other hand has filed affidavits wherein are advanced reasons for its opposition to bail. In his opposing affidavit, Lance Sergeant Thamae of Lesotho Mounted Police Service, LPMS, deposed at Paragraph 5 thereof that despite his bare denial of the charge of attempted murder, the fact of the matter is that the petitioner shot the victim. Further, Lance Sergeant Thamae avers that the petitioner has made an informal admission to the effect that he shot the complainant. It should immediately be indicated that any reference to an admission should clearly show that it met the requirements of a

confession if it is being suggested that the petitioner confessed to the crime and this is not indicated in the affidavit.

9. Further, at Paragraph 6 of the opposing affidavit the respondent states that the petitioner faces a serious charge of attempted murder and if granted bail this fact alone renders him a flight risk. The deponent further said in this paragraph that the offence was allegedly committed around July 2016 and the petitioner was arrested sometime in November 2017, nearly eighteen months after the alleged commission of the offence. The petitioner did not hand himself to the police and was only arrested after a long painstaking investigation. According to Lance Sergeant Thamae, this is at variance with the assertion by the petitioner that he will stand his trial and is a conduct of a person who wants to evade justice at all costs. The Director of Public Prosecutions opposed bail on other grounds that are contained at paragraphs 7 and 8 of the opposing affidavit, which will be dealt with during the course of this judgement.

10. The right of any person charged with a crime to be granted bail is guaranteed and recognised under the constitutional and legal order of the Kingdom of Lesotho. The Constitution of Lesotho, section 6 (5) provides as follows:

> "If any person arrested or detained upon suspicion of his 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."

This constitutional provision entitles an accused person who is not tried within a reasonable time to be released on bail unconditionally or with reasonable conditions in order to ensure that he/she appears for trial. Therefore, while the constitution accords an accused the right to be released on bail based on the fact that he is entitled to his personal liberty, *vide* section 6(1) of the Constitution of Kingdom of Lesotho and is presumed innocent, the constitution also recognises that he should stand trial. This is the limitation on the right to be granted bail. It is predicated on the notion that eventhough an accused is entitled to liberty but the demand of justice requires that he should stand trial. This has been given judicial endorsement by the Kingdom courts such as *Retela Mosothoane & Another v Rex 1985-90 LLR 496* and *Raselebedi Maboee v DPP 1997-98 467*. In the latter case, the court, per J Peete, observed as follows at P469 paras E-F:

> "Presumption of innocence is a cornerstone to fair trial and such presumed innocence also operates in bail applications… It is for the court to look at the facts or evidence as a whole and consider whether it will be in the interest of justice to grant bail to an applicant or not. In deciding that question a court will obviously look at the question whether the accused will stand trial, or whether he will interfere with witnesses and it is not a question of an onus of proof being upon the applicant".

See further *Shadrack Ndumo v The Crown 1982-84 LLR 169* at p.171.

11. In casu, one of the grounds upon which the petitioner relies on for his application for bail is to enable him to prepare his defence. There is no doubt that the petitioner needs to prepare for his defence. He indicated that the times between 0900 am – 1100 am and 1200 – 1500 pm on weekdays are too restrictive for him to prepare his defence. In

my view these times are not too restrictive as averred by the petitioner. In fact, they give apple time for any consultation that he may need with his legal representatives. He can still consult with his lawyers during these hours in preparation for his trial. The petitioner also said that there are 3 or 4 consultation rooms that are shared at intervals by legal representatives of all inmates at the Correctional Centre. On this point, the petitioner seems not to be sure as to the number of consultation rooms at the centre. If he knew the exact number of consultation rooms at the Correctional Centre he should have indicated that number and not say that there are 3 or 4 consultation rooms. This leaves me in doubt whether even the number of consultation rooms is as suggested by the petitioner. But whatever the number of rooms there were at the Correctional centre, it appears to me that the consultation rooms or space and time slots at the correctional centre are sufficient to enable the petitioner to adequately consult with his legal representatives, therefore this ground falls away.

12. The other ground advanced by the petitioner to urge the court to release him on bail is the fact that he denies that he did fire shots at the victim, LLoyd Mutungamiri and inflicted upon him serious injuries as alleged in the charge sheet. This is found at Paragraph 4 of the petition where the petitioner said he “verily avers that he did not fire shots at one LLoyd Mutungamiri and inflicted upon the said Lioyd serious injuries.” The DPP calls this a bare denial which does not even attempt to vary the *prima facie* allegation that he fired the shots at the victim or offer any defence. Further, at paragraph 5 of his opposing affidavit, Lance Sergeant Thamae deposed that the petitioner does not even attempt to vary or contradict the allegations in the charge that he inflicted serious gunshot wounds on LLoyd Mutungamiri but “merely

resorts to a bare denial which is devoid of any truth. The truth is that he made an informal admission to the effect that he shot the complainant."

13. I have to say that although the petitioner flatly denies ever firing a shot at the victim and inflicting the injuries he sustained, the denial is not at all motivated. No more is said about the said denial. Mere denial is insufficient in the face of a serious accusation in the charge sheet. The petitioner should have substantiated his denial in the petition or verifying affidavit. In fact, his verifying affidavit merely confirms the contents in his petition and does not go further to state the reasons for his denial that he did not fire shots at the victim, which would probably constitute his defences, for instance alibi or self-defence. This omission particularly in the verifying affidavit fails to advance his case any further and his petition stands or falls on his affidavit. On the other hand, the opposing affidavit of Lance Sergeant Thamae provides more information as to why the DPP opposes the application for bail. Apart from the allegations in the particulars of the charge in relation to the offence of attempted murder Sgt Lance Thamae goes further to aver that there is a prima facie case against the petitioner. Moreover, he says it the petitioner who fired shots at the victim. In *Seja-banna and Another v DPP CRI/APN/153/2000* at paragraph 3, the Court noted:

> "Still, furthermore, on the question of the circumstances of the deceased's death one would have expected to hear more from the arising affidavit through the investigating official who was No. 7456 D/Tpr Kotsana of the Lesotho Mounted Police Service. This would necessary advert to whether or not there was a prima facie case against the appellant."

14. Be that as it may, the fundamental principle in bail applications pending trial is whether or not the interest of justice will be served. Thus, will the accused, the petitioner in the instant case, appear on the date set for trial. The petitioner has indicated that he will not abscond if he is granted bail. Both in his petition and oral submissions, he, through his learned counsel submitted that there is no reason that he will abscond and he has no intention of being a fugitive of justice under any circumstances and is anxious to face trial. He premised this submission on the fact that on the 23rd November 2017 the police told him to report at the Police Headquarters for questioning and he did so on 27th November 2017. On 27th November 2017 when he was taken for a confession at the Maseru Magistrate the police released him and told him to report on 30th November 2017 and he did so. He stated that he waited at the Police Headquarters until 13:30pm and he was then taken to the Magistrate Court where he was charged with the offence he is currently facing.

15. Evidently, all this happened during police investigations and before the petitioner was charged. At this stage the petitioner did not even know whether or not any charge would he preferred against him. So, the issue of apprehension of absconding on the part of the petitioner at the investigation stage did not arise. However, once he was charged as he presently is, the position obviously cannot be the same.

16. The position of the DPP is that because the petitioner faces a serious charge of attempted murder and if convicted he stands to receive a heavy sentence he is not a candidate for release on bail since to do so would undermine the due administration of justice. There is no doubt whatsoever that the petitioner is facing a serious charge of

attempted murder. While it cannot be asserted with definite certainty that because he is charged with a serious offence he will want to avoid trial, the very fact that he faces this kind of charge may be the reason for him to decide not to be available at his trial and thereby defeat the ends of justice. The ends or interests of justice principle has been reinforced by a plethora of judicial pronouncements. See for instance the *R v Ramakatane1979 LLR 535* and *Malefetsane Soola v Director of Public Prosecutions CRI/APN/39/81*. In the latter case, the Court, per Justice Mafokeng at p.4 observed as follows:

> "The guiding principles governing the grant of bail are that the courts must hold the interest of justice. The court will always grant bail where possible and lean in favour and not against the liberty of the subject provided the interest of justice are not thereby prejudiced. The court's duty is to balance these interests."

Perhaps one of the recently cited authority in bail applications in the Southern African Region, which was also relied upon by the petitioner himself, is the Namibian High Court decision of *S v Acheson 1991 (2) SA 805 (NmB)* where the court held that one of the considerations for granting bail to an accused person is how inherently serious is the charge in respect of which the accused has been charged.

17. Apart from the gravity of the offence, considerations of bail application also entail having regard to the severity of the penalty that the petitioner is likely to receive if convicted. As I have indicated that the petitioner faces a serious offence of attempted murder, it follows that on conviction there is likelihood that he will receive a severe penalty if convicted and the temptation not stand trial may even become higher. As it was noted in *Retela Mosothoane and Another v Rex* (supra) by

Lehohla A.J, at page 499 referring to a paragraph in *Koning v Attorney General* (supra) where Wessels J. said:

> "…In order to determine this the court must ascertain, as far as it can from the circumstances, what the penalty is likely to be which will be imposed on the applicant. If the penalty is likely to be a severe term of imprisonment, then the courts ought not to grant bail."

Therefore, the decision whether to grant bail or not is balancing exercise between the liberty of the person charged with an offence and the interest of justice. The accused, and the petitioner in the instant case, is entitled to his liberty. At this stage of the proceedings where his trial has not even commenced he is only a suspect and is presumed innocent as the defence counsel has vigorously argued. On the other hand he has been charged with a serious offence with a possibility if convicted of being given a severe penalty. The likelihood of absconding and evading trial cannot be discounted. It should be mentioned here that although the circumstances surrounding the commission of the alleged offence have not be provided to the court not least in the opposing affidavit of Sgt Lance Thamae, the offence appears to have been committed around 2016 when the country was experiencing political problems a fact that cannot be ignored in dealing with the petition.

18. The Crown has also filed the supporting affidavit of Hlalefang Motinyane, the Director of Public Prosecutors to buttress the point that the petitioner should not be granted bail. At paragraph 3 thereof the deponent avers that he fully associated and aligned himself with the contents of the opposing affidavit of Lance Sergeant Thamae. Although his views cannot be taken as gospel truth even when presented by way

of an affidavit but as the person in charge of the prosecution in the country his views cannot be ignored in determining the bail application.

19. The DPP has raised the issue of trust of the petitioner in its Heads of Argument and in oral submission. It argued that whereas at paragraph 4 of his petition the petitioner denied firing shots at Lloyd Mutungamiri, at paragraph 6 of the petition he admits that he shot at the said Lloyd Mutungamiri but that in shooting Lloyd Mutungamiri he was obeying superior orders. In fact, the relevant part of the said paragraph 6 of the petition reads as follows;

> "Your petition's preparation for his defence is seriously impaired by his continued incarceration. The fact that the charge levelled against him is of such a nature that draws a very thin line between obeying superior orders and executing such orders within the confined of the law warrants frequent and extensive consultations with his lawyer..." (Emphasis supplied)

The petitioner confirmed the veracity of the aforecited paragraph at paragraph 3 of his verifying affidavit when he said:

> "I have read and understood the above Petition and I wish to confirm the contents thereof as true and correct."

The specific orders that were given to the petitioner by his superiors do not come out not clearly from the petition. But whatever the case may be, from the above cited paragraphs the petitioner was not only obeying the orders of his superiors but he also executed such orders. This is the only reasonable interpretation I can ascribe to the contents of the above paragraphs. Further, in the circumstances the only way he could have executed the orders from his superiors whatever they were would be to

fire at the victim, in this case, Lloyd Mutungamiri. Thus by making all these allegations in his petition and confirming same in an affidavit, and later turning volte-face and merely denying firing shots at the victim casts doubt on his honesty. This court cannot take him in confidence when he said two conflicting things particularly in a petition the contents of which are confirmed in a sworn statement.

20. The petitioner has also raised the point that the petitioner has been in custody since November 2017 which is a considerable period of time and his continued incarceration amounts to anticipatory punishment. Indeed, incarceration of the accused since then is a long period of time. However, the interest of justice as I have already alluded to above given the nature of the offence and the possible severity of the penalty likely to be meted should he be convicted also need to be taken into consideration. In my view, the detention of the petitioner awaiting trial for this type of offence cannot be said to amount to anticipatory punishment. It is to ensure that he stands trial and justice be duly administered.

21. On the whole and balancing the liberty of the petitioner and the interest of justice, the court has exercised its discretion that it would not be in the interest of justice to grant the petitioner bail. In the circumstances, the application for bail pending trial is refused.

Delivered in open Court at ……..on ……October 2019.

……

Dr O B Tshosa

ACTING JUDGE