IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

SOKOLANG MOETI CRI/APN/0567/19

versus

DIRECTOR OF PUBLIC PROSECUTIONS

MOTEBANG MOTSELOA

versus

DIRECTOR OF PUBLIC PROSECUTIONS CRI/APN/568/19

NEO CHOACHOA

versus

DIRECTOR OF PUBLIC PROSECUTIONS CRI/APN/569/19

MOEKETSI KOLOTI

versus

DIRECTOR OF PUBLIC PROSECUTIONS CRI/APN/569/19

CORAM: **HUNGWE AJ**

DATE OF HEARING: **25 November 2019**

DATE OF JUDGMENT: **3 December 2019**

Bail Petition

Mr T Makhethe, for the 1st Petitioner

Adv M E Mokhathali, for 2nd Petitioner

Adv K Mashaile, for 3rd & 4th Petitioner

Adv T Hoeane, for the Respondent

HUNGWE AJ: The petitioners initially filed their petitions separately and were accordingly registered as such. These were separately allocated to different judges before it was decided administratively that it was appropriate that they be heard together as the facts applicable to each of the petitioners were the same in each case. The legal representatives of the petitioners agreed to the consolidation of the hearing and a date for hearing the petitions was set. By that date in respect of each petitioner all the papers constituting the relevant pleadings had been filed. On the date of hearing, Counsel for the Respondent took issue with the absence of a founding affidavit by the fourth petitioner who had chosen to simply verify the third petitioner's founding affidavit. By consent, the matter was postponed to the next day in order for the third petitioner to rectify his papers.

I will set out the facts upon which the petitioners founded their bail petition as recounted by the first petitioner in his founding affidavit since, as pointed out above, the facts are the same.

Background to the petition

The petitioners are all serving members of the Lesotho Defence Force ("LDF"). At the time of the alleged offence they were all stationed at a military base at Ha Molomo in Qacha's Neck. The first petitioner states that a group of community policing volunteers commonly called "Mahokela" approached the base with a letter authored by their Chief. The letter was addressed to the authorities at that

base. In essence sought their intervention in the matter of one Mamoleboheng Besele and her fellow community members who alleged that she defied the local authority.

The Chief's efforts to arbitrate in the dispute appear not to have yielded positive results hence their intervention was sought. The first petitioner states that the villagers who accompanied the now deceased pleaded with the army authorities to intervene by talking sense into her so that peace and order can be restored. After some discussions, it was decided that she be whipped before she is released. A whipping of the deceased indeed followed. According to the first petitioner, only moderate whipping administered by the villagers upon the person of the now deceased. He was a mere observer.

He also suggests that there are verifiable reports to the effect that the now deceased met her death on account of severe head injuries sustained at the hands of her abusive husband previously.

First petitioner denies taking any part in the whipping of the now deceased. He does not state in detail what the military authorities did pursuant to the villagers request nor does he explain whether he or his accomplices participated in the adjudication or disciplining of the chief's subject.

What is however acknowledged in this version is that later that day the subject was reported dead.

In this respect the second petitioner avers in his founding affidavit that the subject was whipped on the buttocks by the women members of the village and released thereafter. She met her death outside the military base later that same day.

The third petitioner states that he had been asleep during the morning when the chief's subject was brought to the base. He only learnt of her demise the following day when it was alleged that the lady who had been brought by local villagers had passed on. As such he knows nothing about the murder of the deceased.

The fourth petitioner, like the third petitioner, avers that he had been on night patrol the day preceding the arrival of the villagers who brought the now deceased. The events leading to the subsequent death of the deceased occurred in his absence. He knows nothing about the death of the deceased.

Circumstances of the Petitioners' Arrest

All four petitioners give the following facts as circumstances which this court ought to consider as weighing in their favour.

When directed by their superiors in the LDF to attend at the magistrate's court for remand on a charge of murder, they all duly complied with the directive without being formally arrested by the police. Although it had been anticipated that they would be formally, remanded on these charges, they were not attended to on no less than four occasions. The petitioners invite this court to consider this fact as reflecting favourably on their disposition regarding their willingness to attend their impending trial. They would wish to clear their names.

They have demonstrably co-operated with the police authorities throughout by appearing at court without a summons or under arrest. In my view, since they had not been advised formally that they were suspects in the murder of the deceased, this attendance at court should also be seen more as an act of obedience to superior orders rather than an act of sheer benevolence aimed at helping the police with their investigations. The petitioners were never arrested at any stage, but nothing can be read into that. If one were to do so, one may as well argue that they therefore have no case to answer. That cannot be true because they were identified by witnesses to the crime as possibly having taken part in the assault of the deceased.

First petitioner specifically avers in his founding affidavit that between 30 August and 18 September 2019 they reported at the magistrate's court on their

own but nothing happened. They were not charged or remanded in court. They were repeatedly, told to come back a few days later and duly did so without compulsion.

First petitioner states that on 18 September 2019 they were remanded in custody when they appeared voluntarily. Although they had been advised of the impending court appearance on a charge of murder a week before their initial attendance at court, second petitioner avers that this did not induce them to conduct themselves in a manner that indicated an unwillingness to submit themselves to due process.

As pointed out above, due process in the death of the deceased in 2016 was stultified by the machinations of the military under whose command the present petitioners worked. Any apparent voluntary attendance at court was more in obedience to superior orders than the civil duty to cooperate with police investigations.

Respondent's Opposition for the Grant of Bail

The respondent opposed the grant of bail. In her opposing affidavit the Director of Public Prosecutions ("DPP") avers the following. She disputes the averments wherein the first petitioner denies any involvement in the events leading to the death of the now deceased. She maintained that in respect of all four petitioners, there is a strong prima facie case against them.

The DPP disputes the petitioners' contention that they were law abiding citizens. She demonstrates the basis of her disputation on basis of the following averments.

As far back as November 2016 when the death was reported, police authorities communicated with the command element of the LDF in order that the petitioners are processed for the suspicion surrounding their involvement in a suspected

murder case. According to the DPP, the command element of the LDF took the view, on the basis of its own investigation, that no offence had been committed by its member, the petitioners, and therefore refused to release the petitioners.

The matter remained in abeyance from that time until 20 November 2018. On that day, the LDF, in a written response, communicated its unwillingness to cooperate with the police. In the letter, the Director of Legal Services dismissively concludes that no offences were committed by the members.

As a result, police investigations were concluded without the petitioners being interviewed in connection with the murder. The police docket forwarded to her office did not contain any arrest report by the investigators. This was in spite of the fact that the petitioners had been fingered by the villagers as far back as November 2016.

The DPP contends that the petitioners were implicated in the murder of the deceased by the villagers themselves as far back as 2016. The reason the investigations stalled was that the command element of the LDF, during that dark period in the history of the Kingdom, was determined to protect its offending members in a manner which was clearly obstructive of the course of justice.

The Petitioners` Case

Mr Makhethe, for the petitioners, urged this court to bear in mind that in a petition such as the present, the guiding principle is that the presumption of innocence still operated in favour of the petitioners. Secondly, and arising from the constitutionally entrenched right to liberty, an accused person is, as of right, entitled to his liberty unless the interests of justice required that bail be refused. He referred extensively, in his heads of argument, to several case authority, such as *Bofolo et al v DPP*[1] for the inquiry to be conducted when deliberating on the

[1] LAC (1995-1999) 321

interest of justice; legal principles associated with the importance of securing the protection of the right to liberty as adumbrated in *S v Acheson*[2] that are applicable in such petitions. I am indebted to his erudite argument.

In addition to what he sets out in his heads, *Mr Makhethe* basically raised three points. The first point was that the facts show that the petitioners had demonstrated that they were law-abiding citizens who had dutifully and obediently reported at court for initial remand. This factor alone dispels any suggestion that the petitioners are a flight risk. He went on to argue that had they been so inclined, they would have used the freedom they enjoyed as they repeatedly came to court before they were remanded in custody.

The second point he makes is that the facts upon which the Crown submits that a prima facie case against the petitioners had been made does not bear scrutiny. He posed the rhetorical question of the unlikelihood of the members of the army using a spade to strike a defenceless woman in broad daylight in the presence of the villagers. Highly unlikely, he retorts.

His third point revolves around what he called the anger with which the learned DPP deposes to the opposing affidavit. As an illustration, counsel points to the fact that the DPP blames the petitioners for the delay in the institution of criminal proceedings against them. The petitioners are clearly not to blame since it was their commanding officers who made the decisions leading to their not being subjected to due process. I am unable to read any anger or emotionally charged language as alleged by counsel. The fact of the matter is that there were unfortunate institutional hurdles placed in the way of law enforcement hence the frustration of the investigations. The DPP, in her affidavit, is at pains to paint the picture to those that may not have witnessed it.

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[2] 1991 (2) SA 805

Mr Mokhathali, for the second petitioner, associated himself with *Mr Makhethe's* submissions in the main. Like Counsel for the first petitioner, he urged the court to hold that in the absence of an affidavit from the investigating officer a prima facie case was not made on the papers filed in opposition. The denial of bail would, in his submission, set a wrong precedent which, according to him, was that members of the army are not granted bail once charged with an offence. I am unable to accept this submission. The petitioners are cited as ordinary citizens. They appear in court as such. Any such perception as referred to by counsel would be misinformed and regrettable. The petitioners enjoy the same constitutional protections as any other citizen, and bear a reciprocal obligation to obey the law in equal measure. This court operates on that basis.

Mr Mashaile, for the third and fourth petitioners, also associated himself with the submissions of the previous counsel. The thrust of his submission was that in bail petitions, the question is whether the petitioner will stand trial if granted bail. Where bail was opposed on the basis that a prima facie case of a serious offence had been made out on the papers but there was no substantiation of the facts averred as constituting a prima facie case, then opposition to bail ought to fail especially where, as here, there was no indication that the petitioners had attempted to flee the jurisdiction.

Mr Hoeane, for the respondent, submitted that this court must take judicial notice of the fact that around the time of the commission of the offence, the LDF was literally a law unto itself. As a result, although early investigations had pointed to the petitioners' role in the events leading to the death of the now deceased, the attitude of the military's command element prevented the civilian authorities from making an arrest against the suspects. The petitioners, who were, and remained the suspects, were literally given pseudo-immunity from prosecution by their employer.

This explains why it took three years for the petitioners to be ever questioned about this death. In any event the court ought not to lose sight of the fact that there is an admission by one of the petitioners, (second petitioner) to his employers that he had administered only two light cuts onto the now deceased. This admission, so the argument went, strengthens the prima facie case made in the witness statements contained in the police docket. That information at this stage remains privileged hence the DPP maintains her belief in the probative value of the statements in that docket.

In *Mahanyane Phusumane v Director of Public Prosecutions*[3] this court took judicial notice of the apparent challenges to the rule of law threatening to tear the social fabric of this Kingdom during the period 2014 up to 2016.

The relevant timelines in the Matter

In order to put this petition in its proper perspective, an appropriate timeline must be drawn and the events which occurred then analysed in terms of the timeline.

1. Annexure 'A' to the respondent's opposing affidavit, being a memo from the Officer Commanding Qacha's Nek Police District (Dispol) to the Commissioner of Police (Compol) records the date of the commission of the crime of murder on the 5th March 2016.

2. On or before 9th March 2016, the Lesotho Mounted Police Service ("LMPS") requested that a post mortem examination of the remains of one Mamoleboheng Basele be carried out.

3. On 9th March 2016 Dr C T Moorosi completed his examination and recorded his findings in a report of that date. In it he gives the date of the assault as being 4th March 2016. He also recorded the history of the assault as having

[3] CRI/APN/0616/17

been at the instance of the army personnel stationed at a camp. She died shortly after she was ordered to walk home after the assault. She walked past a nearby clinic, collapsed and died. This history was given by the police investigation officer.

4. Nothing is recorded as a response from the Commissioner of Police or the Military authorities, to who the subject of the inquiry was being directed. The file went cold.

5. On 20 November 2018 the Directorate of Legal Services of the LDF addressed correspondence to its Commander's Office which was acknowledged received on the same day by that office.

6. The essence of that correspondence is a rehash of the investigations purportedly carried out by the military. The date of occurrence is misstated, so are several other facts disclosed by the post-mortem report compiled by the appropriate authorities upon request by a duly designated civil authority on the subject.

7. On 18 September 2019, for the first time, the petitioners were brought to the Magistrate Court for an initial remand in terms of the law. The charge was explained and the petitioners were advised to apply to this court for bail, it having no jurisdiction to entertain such an application.

The principles to be considered in Bail Applications

In the case of *Perkins v R*[4] where the accused, charged with murder, was of "excellent character, financially sound and a man of substance", owning immovable property, and had himself surrendered to the police after the killing,

[4] (1934) CPD 276

was nonetheless refused bail. Matthews A.J.P. (Hathorn J. and Carlisle A.J. concurring) observed at p.277:

"... the first principle is whether or not the facts show that the accused is likely or unlikely, if admitted to bail, to appear to stand his trial. In judging of that likelihood the Court will ascribe to the accused the ordinary motives that sway human nature; see STRATFORD, J., in Ali Ahmed v. Attorney-General (1921) TPD 461 at p.590. That is why the Court will be guided by the nature of the charge and the penalty which in all probability would be imposed and the other surrounding circumstances of the particular case. The accused has to satisfy the Court that he will appear to stand his trial and that the probability of his not doing so is remote; see VESSELS, J., ibid, p.589. As was pointed out by INNES, C.J. in Kaspersen v. Rex (1909) T.S. 639 @ p641, a man is always more likely not to stand his trial where the indictment against him involves the risk of his life. It follows that bail is not often granted where an accused is charged with murder; the circumstances must be exceptional for bail to be granted."

It is correct to say with time the grant of bail to an accused who is charged with even the most heinous crime is more the rule rather than the exception. Case authority resurrected from the centuries-old archives bears no resemblance to the reality of the present-day rights-based approach to bail petitions. In most democratic dispensations, the right to bail has become so entrenched that it is correctly assumed that a court should grant bail as a matter of course unless the interest of justice requires that bail be refused. Section 35 (1) (f) of the Constitution of South Africa, 1996, is the one right that an arrested person or detained person looks forward to the most: to be released from detention, subject to meeting a few conditions and where the "interests of justice permit".

Similarly, the Constitution of Zimbabwe in similar terms specifically provides that any person who is detained pending trial for an alleged offence and is not tried within a reasonable time must be released from detention, either conditionally or on reasonable conditions to ensure that after being released they attend trial. Section 50(6) of the Constitution of Zimbabwe 2013. The entrenchment of the right to bail in Zimbabwe is strengthened by Part IX of the Criminal Procedure and Evidence Act, *[Chapter 9:07]* which deals specifically with bail in great detail.

The Constitution of Kenya in similar fashion enjoins as a constitutionally guaranteed right for a detained person to be released on bail "unless there are compelling reasons not to be released." Section 49 (1) (h) of the Constitution of Kenya, 2010.

I make reference to other jurisdictional frameworks approach so as to demonstrate the importance of the right to liberty. I will bear this in mind in my assessment of the merits of the present petition.

The Constitution of the Kingdom of Lesotho has similar provision regarding the right to liberty and a recognition of the right to be released on bail for a person detained on suspicion of having committed an offence. Section 6 of the Constitution. The constitution recognises that where a person is arrested and detained, he shall be tried within a reasonable time. However if that does not happen 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. Part VIII of the Criminal Procedure and Evidence Act, 1981 sets out the statutory framework in matters relating to bail in a permissive language. Clearly, the right to bail can be read into the Act. Read together with the Constitution, there is no doubt in my mind that the same strictures regarding bail which are expressly stated in the aforementioned regional frameworks can be gleaned from the Kingdom's legal framework although the language employed may not be rights specific. The courts have however traversed this subject on the basis of precedent found in the region which I am persuaded to follow.

The common thread in both the constitutional framework and statutory provision points to the fact that while the right to liberty is universally recognized, it is not absolute. The courts do not take a passive approach when determining whether an accused can be released on bail. A court ought to and in fact exercises a discretion by balancing the interests of society, the accused and justice enshrined

in the Constitution. At this stage the court is conscious of the presumption of innocence which operates in the petitioner's favour until a determination of guilt is appropriately made. Consequently what the interests of justice entail must of necessity entail a value judgment of what is fair and just in an open and democratic society.

In *S v Dlamini*[5] the South African Court stated:

> "There is a widespread misunderstanding regarding the purpose of bail. Manifestly, much must still be done to instil in the community a proper understanding of the presumption of innocence and the qualified right to freedom pending trial under section 35(1) (f). …The ugly fact remains, however, that public peace and security are sometime endangered by the release of persons charged with offences that incite public outrage."

Bail serves three main purposes; first the liberty interest of the accused, second the public interest by reducing the number of awaiting trial prisoners clogging our already overcrowded correctional system and lastly by reducing the number of families deprived of a breadwinner.

In the present case, the petitioners have fixed abodes and are gainfully employed by the LDF. They are responsible family men who have sworn their wish to clear their soiled names. They have not shown any inclination to flee the jurisdiction nor have they been accused, even remotely of witness tampering. They aver that detention awaiting trial is not necessary as they wish to stand trial. They believe there is no evidence which could lead to a conviction for murder.

On the other hand, these are not the only considerations at play in a matter as serious as the one the petitioners face. The interests of justice is a nebulous concept which entails a range of other factors which, in the view of the court, may militate against the grant of bail. To begin with, the investigations appear to be in their infancy. I use the phrase "appear to be in their infancy" advisedly. The court was not addressed on this specific issue nor did the petitioners claim that they

[5] 1999 (4) SA 623 @ para [55]

may be held for an indefinite period unless the court intervenes. What this then means is that this court must take into account the period of time from their first court appearance to the date of the filing of the petition and decide whether that period, taken together with other factors, indicate an approach by the police which signals some other motive for seeking their detention besides the need to complete investigations and bring the matter to trial. Since 18 September to 26 November 2019 some almost eleven weeks have passed.

A further factor which ought to be weighed in the balance is the society interest in seeing that justice is not only done but is seen to be done. The delay in the arrest of the petitioners cannot be attributed to the petitioners. This was only a symptom of a systemic decay which was eating at the core values of the rule of law and accountability of individuals for criminal conduct. The phrase that everyone was equal before the law had lost meaning to anyone familiar with the sad events leading to the death of one of the King's subjects. Her Chief had surrendered her to the law of the jungle personified by the individuals who manned the kangaroo court convened within the precincts of a revered military base. But it must be said that due process eventually won the day. The military command decided that it was time the law be given space to run its course. Vindication of the innocent is to be found in the courts of law where everyone is treated equally. To grant bail at this early stage, in the circumstances of this case will jeopardize not just the investigations, but the society's trust in the administration of justice. When the DPP states that the release of the petitioners may imperil investigations the courts must heed her fears since she is privy, at this early stage, to the delicate stages of investigations.

It is therefore my view that the interests of justice, for the moment, require that bail be denied. Upon the passage of a reasonable time within which investigations ought to have been concluded, the petitioners may still approach this court for reconsideration of the question of bail.

In the result the petitioners' petition is dismissed.

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T.Makhethe & Co. for the 1st Petitioner

Molati Chambers for the 2nd Petitioner

K.D Mashaile Chambers for the 3rd and 4th Petitioners.