

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CRI/APN/369/07
QACHA'S NEK CR160/06

In the matter between:-

NTLATSENG SETENANE

APPLICANT

AND

REX

RESPONDENT

RULING

Delivered by the Honourable Judge M. Mahase
On the 26th October 2007

This is an appeal against conviction and sentence.

The applicant was charged with the offence of having contravened the *Provisions of the Sexual Offences Act No.3 of 2003*.

He was sentenced to a period of ten (10) years imprisonment. He noted an appeal against the conviction and sentence whilst he also simultaneously moved an application for release on bail pending appeal.

The application for bail pending appeal was dismissed by his Worship Mr. Loko; hence the noting of this appeal in terms of the *Provisions of Section 108 of the Criminal Procedure and Evidence Act No.9 of 1981.*

According to the papers filed herein, the only and overriding reason for the refusal of the application for bail pending appeal was that the application is against the *Provisions of Section 326(1) and (1)(b) of part XVIII of the Criminal Procedure and Evidence Act No.9 of 1981.*

The above section reads as follows: (I quote the relevant portions)

326(1) "The execution of the sentence of a subordinate court shall not be suspended by reason of any appeal against a conviction unless:

- a) The sentence is that the accused be whipped, in which case sentence shall not be executed until the appeal has been heard and decided or*
- b) The court from which the appeal is made thinks fit to order that the accused be admitted to bail or if he is sentenced to any punishment other*

than imprisonment, that the appeal has been heard and decided”.

It is noted that the court before which this application for bail pending appeal has been noted, remarked that “the application for bail pending appeal was made in *Terms of the Provisions of the Subordinate Court (Bail Conditions) Rules 2005* as contained in *Legal Notice No.9 of the 16th February 2005*.

Rule 2(1) of that Legal Notice reads as follows:

Bail conditions

“Where a convicted accused is granted bail pending appeal, the presiding officer shall impose as one of the bail conditions a date of hearing of the appeal in the High Court.

Rule 2(2) The date of hearing shall not be less than thirty days and not more than ninety days from the date of the noting of the appeal and shall be communicated to the appellant upon being granted bail”.

It must be noted from the above that nowhere is it provided in these Rules that the presiding officer is obliged to grant an

application for bail pending appeal where such had been filed by an already convicted and sentenced applicant.

The Terms or Provisions of Rule 2(1) and (2) are mandatory only as to what should be done after the presiding officer has granted such an application.

In other words, the Rules in question do not abrogate the *Provisions of Section 326(1) of the Criminal Procedure and Evidence Act No.9 of 1981*; which provisions are also mandatory.

In the instant application, the applicant's application for release on bail pending appeal was refused by the presiding officer who was a trier of the case in question. The reason for the refusal of the said application being that, and this was the only and overriding reason; the application was against the provisions of the above named *Section of the Criminal Procedure and Evidence Act No.9 of 1981*.

Obviously the presiding officer did not think that it was fit to order that the accused be admitted on bail pending appeal because the accused has been sentenced to a term of imprisonment. It is a matter of common cause that the accused/applicant has been sentenced to a period of ten (10)

years imprisonment. In other words the presumption of the accused's innocence no long operates in his favour.

Had the presiding officer granted the application for release on bail of the accused who he had just sentenced a few days ago to that term of imprisonment, he would have clearly violated the *Provisions of Section 326(1) of the Criminal Procedure and Evidence Act No.9 of 1981*. It should be recalled that the said application for release on bail was moved on the very same day that the appeal against conviction and sentence had been noted.

Had this application been granted clearly the execution of that sentence in such a serious case would definitely have been suspended contrary to the *Provisions of Section 326(1) of the Criminal Procedure and Evidence Act (Supra)*.

One must bear in mind that the granting of bail pending appeal is not automatic. Strong reasons calling for a departure from this general statement of the law would be required. Vide **MOTLOUNG AND OTHERS vs REX 1974-75 LLR 370 AT 372**.

The submissions that:

- The Rules in question i.e. Rules contained in *Legal Notice No.9 of 2006 dated the 16th February*

2005, alter and supplement the *Provisions of Section 326(1) of the Criminal Procedure and Evidence Act (Supra)*.

- “There is a presumption of innocence which operates in favour of the person seeking bail even where one has already been convicted and sentenced”

are unturnable; so also is the suggestion that the learned trial magistrate has, with impunity ignored the *Act of Parliament*. The said *Criminal Procedure and Evidence Act* is an Act of Parliament and an important piece of legislation whose provisions override the Provisions of the said Rules.

The said Rules (Bail Conditions) Rules 2005 only regulate the conduct of subordinates` court where the presiding officers are or have been persuaded to grant bail pending appeal. In such circumstances, the presiding magistrates are obliged to impose as one of the bail conditions a dated of hearing of the appeal in the High Court. *Vide Rule 2(1)* and so on.

The purpose for the above Rules is to obviate the need for issuing court process calling the accused to attend court for the hearing of his appeal in the High court.

This serves to ensure that the accused does not fail to attend court for the prosecution of his appeal and thereby avoid the consequences of the conviction where the appeal be not upheld.

In other words, the said Rules are meant to regulate the conduct of the subordinate courts and indeed of all the other parties including the crown where bail is granted pending appeal to the High Court.

They are not meant to change any of the relevant Provisions regarding applications of this nature. Indeed the execution of the sentence of a subordinate court shall not be suspended by reason of any appeal against a conviction - Vide *Section 326(1) of the Criminal Procedure and Evidence Act No.9 of 1981*.

This is so except under certain specified circumstances – Vide *Section 326(1), (a) and (b) supra*. Strong reasons would be required for the court to deviate from the above stated Provisions of the Law.

This court has accordingly come to the conclusion that in the instant application, there are no exceptional circumstances justifying the departure from the general rule.

Vide – **MOTLOUNG AND OTHERS v REX (Supra)**.

For the foregoing reasons, this application is dismissed.

It should be noted that this court is aware that the record of proceedings in the subordinate court for the district of Qacha's nek has to date (i.e. when this application was argued before the High Court) not been typed in preparation for onward transmission to the Registrar of this Court. This is so despite the fact that the appeal against conviction and the refusal of bail herein was lodged some three months after that refusal.

If indeed this situation is still obtaining, the Clerk of Court has ignored the *Provisions of Rule 62(3) and (8) of the Subordinate Court Rules 1996* as contained in *Legal Notice No.132 of 1996*.

This court would urge her/him to comply with the Provisions of the said Rule so as to ensure the proper administration of justice and to avoid causing any prejudice to the accused/appellant.

M. Mahase
M. MAHASE
JUDGE

For the Applicant - Adv. T. Fosa
For the Crown - Adv. T. Fuma