

IN THE HIGH COURT OF LESOTHO

In the Application of :

MARY KHALANE

Applicant

v

COMMISSIONER IN CHARGE OF POLICE
MINISTER IN CHARGE OF POLICE
SOLICITOR GENERAL

1st Respondent
2nd Respondent
3rd Respondent

J U D G M E N T

Delivered by the Hon. Chief Justice Mr. Justice
T.S. Cotran on the 31st day of July 1984

On the 31st December 1981 the applicant Mary Khalane moved the Court citing the Commissioner of Police and the Minister in charge of the Police, as respondents, seeking orders:-

1. to procure the body of Jobo Khabo Khalane before the Court,
2. to disclose to the applicant the whereabouts of the said Jobo,
3. to justify that the detention of Jobo was in accordance with the law, otherwise to release him,
4. that a magistrate be directed to visit the said Jobo wherever he is detained, and
5. to direct that a doctor should visit the said Jobo.

A rule nisi was granted as prayed and after many extended return dates Mofokeng J confirmed the rule on the 7th April 1982. What emerged is found in the Judge's judgment. The long and the short of the matter is that a Lesotho citizen, Jobo Khabo Khalane, arrested allegedly in terms of the Internal Security General (Amended) Act 1974,

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was last seen in the hands of a member of the Lesotho Paramilitary Force in November 1981 has not, according to his relatives, been heard of since. The learned Judge was obviously concerned and implied in his judgment that Warrant Officer Carthwright Selomo, who admittedly arrested the said Jobo Khabo Khalane, was not telling the truth when he averred in his affidavit that after interrogating Jobo for about an hour and a half, he released him at a certain spot, and could not therefore produce him. This incident, if I may add, took place in a village on the borders between RSA and Lesotho where a number of insurgents were active at the time.

The confirmation of the rule by the Judge did not result in the production of the body of Jobo Khabo Khalane but the Court's displeasure was manifested in the respondents being ordered to pay the costs.

On the 26th July 1983, that is to say, about 14 months after the judgment was pronounced the applicant sought, on the same papers, to "join" as 4th respondent, the officer commanding the Lesotho Paramilitary Force, directing him to interrogate members of his Force to find out the truth and establish the whereabouts of Jobo Khalane "and to bring him before the Court dead or alive".

The 4th respondent, through the Solicitor General, resists such an application on the ground that he does not hold the body of Khabo and has "no reason to doubt the veracity" of the statements of Warrant Officer Selomo with whom he discussed the matter. These statements as I said were earlier made by way of affidavit to the Judge who dealt with the case.

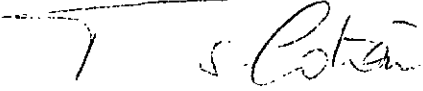
Mr. Maqutu says that that affidavit by the commanding officer does not show that a proper and honest investigation has been conducted into the disappearance of this man, but Mr. Tampi for the Solicitor

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General says that we do not have in our jurisprudence a provision for a judicial inquisition. The concept of habeas corpus presupposes that there is a person detained by another person or body of persons or an authority, who are called upon to justify the arrest otherwise to release the prisoner. The concept is not applicable once it is established that no one knows the whereabouts of the person whose body is supposed to be produced.

If a person has not been heard of for seven years there is a presumption that that person is dead. This period has not elapsed but if the Court is permitted to speculate the worst that could have befallen Jobo is that he may no longer be alive. The next question that must arise is whether there is anything in our legal system, common law or statutory, that permits the High Court or a Judge thereof, to unilaterally assume, without legislation, or the necessary machinery, or precedent, the task of embarking upon an inquiry to try and find out if this man had been murdered, or eaten by beasts, or had fled across the borders and decided to lie low, or had met with some other vicissitude that might have happened to him. The answer surely is that no such judicial powers exist. The learned Judge who was seised of the application could not find any nor can I.

The application is dismissed with costs.



CHIEF JUSTICE
31st July 1984

For Applicant : Mr. Maqutu

For Respondents: Mr. Tampi