

IN THE HIGH COURT OF LESOTHO

In the matter of:

R E X

VS

SEOEHLA JONATHAN MOLAPO

J U D G M E N T

Delivered by the Honourable Acting Chief Justice Mr.
Justice J.L. Kheola on the 17th day of December, 1986.

The accused is charged that on the 7th day of December, 1985 and at or near Litlhatsaneng in the district of Leribe the said accused acting in concert with Colonel Sehlabo, Private Lebese Jonathan, Sergeant Tjane and Private Thaabe Letsie, murdered one David Macooa-alias Joseph Makhubo.

The accused pleaded not guilty to the charge. The following formal admissions were made by the defence:

- "1. At the relevant time, the accused aged 28 was a private in the then Lesotho Paramilitary Force.
2. He was under the direct command of the late ex-colonel Sehlabo Sehlabo.
3. The deceased met his death at Litlhatsaneng - Leribe on the night of the 7th December, 1985.
4. The cause of death was due to multiple stab wounds leading to haematopneurothorax and heart injury.

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5. The body of the deceased was discovered on the 8th December, 1985 by one Mphuthi Maqala, a herd-boy, on the mountainside of Litlhatsaneng and a report subsequently was made to the Leribe Police.
6. The body was inspected by police on the 10th December 1985 and photographs thereof taken - the album of which will be handed in as exhibit.
7. That Dr. Speich of Leribe Government Hospital conducted the post-mortem Examination of the body - which was then unidentified. A report of which to be handed.
8. That about 16 stab wounds were found on the body.
9. That the body was subsequently identified as being that of David Makhubo (Alias Maccoa) by one Japhet Ndlovu - who has now left the country."

It is common cause that in 1985 terrorism was rife in Lesotho. The members of the so called Lesotho Liberation Army crossed into Lesotho from the Republic of South Africa and attacked the military forces and murdered civilians who were suspected of supporting the then Government of Lesotho. During some encounters between the Lesotho armed forces and the Lesotho Liberation Army some terrorists were captured or killed. The deceased, David Maccoa, was described as an insurgent who had been captured by the armed forces. It is however, not clear when and by whom he was captured.

Private Lebesse Jonathan (P.W.1) was declared as an accomplice. He testified that in December, 1985 he was a member of the then Lesotho Paramilitary Force and was under the command of the late Colonel Sehlabo. He knew the deceased to be a captured insurgent who was kept at the private home of the late Colonel Sehlabo. On some occasions he was instructed to keep guard on the deceased and to interrogate him.

On one occasion he (witness), the accused and other members of the Lesotho Paramilitary Force went to Khubetsoana on a military

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operation following the information given to them by the deceased that there were insurgents in certain houses in that village. In that operation the deceased accompanied them because he was the one who was going to point out the relevant houses. When they arrived there certain houses were fired at with guns and a hand-grenade was thrown into one of the houses. No terrorists/insurgents were found.

From there they went to Upper Thamae and finally to Tsosane's but still found no insurgents. Colonel Sehlabo was present throughout the operation and when they failed to get insurgents at all the places pointed out by the deceased he (Colonel Sehlabo) said that he had not realized in time that the deceased was a liar. They returned to their barracks at Makoanyane and the deceased was taken to Colonel Sehlabo's house.

The accomplice testified that on the 7th December, 1985 he met the deceased at about 2.30 p.m. He was in the company of Sergeant Liphoto, Sergeant Tjane, the accused and Private Thaabe Letsie. They were travelling in landrover station wagon. He joined them and from Makoanyane barracks they went to a restaurant at Maseru East where they met Colonel Sehlabo. Sergeant Liphoto was driving. When they arrived at the restaurant Sergeant Tjane alighted and met Colonel Sehlabo outside the vehicle. He (the witness) also alighted and stood on the side of the vehicle. He overheard Colonel Sehlabo instructing Sergeant Tjane that the deceased must be killed or that when he (Sergeant) left the place where the deceased was being taken to, he must make sure that he is dead.

From there they proceeded to Leribe. Colonel Sehlabo remained behind. On their way to Leribe Sergeant Tjane explained to them the purpose of their journey. It was that the deceased was being taken to

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Leribe to be killed. Sergeant Tjane neither shouted nor whispered but spoke in a normal voice when he explained to them the purpose of their journey.

When they arrived at Levi's Nek they alighted and Sergeant Tjane led them to the spot where the deceased was to be killed. Sergeant Liphoto remained with the vehicle. They marched for a distance of about four kilometres led by Sergeant Tjane, followed by the deceased, then the accused, the witness (Jonathan) and then Private Thaabe Letsie at the end of the line. When they came to the cave Sergeant Tjane instructed the accused to stab the deceased. The accused stabbed him and the deceased stumbled and got into the cave. Under cross-examination P.W.1 admitted that it was dark and that he did not see whether the accused stabbed or merely poked the deceased.

After the deceased had stumbled into the cave Sergeant Tjane instructed the accused and P.W.1 to get to the top of the rock and stop the deceased from escaping. He (Sergeant Tjane) then stabbed the deceased with his bayonet. Because of darkness the witness could not see how many times he stabbed him. The late Private Letsie also took part in the stabbing of the deceased. When it became clear that the deceased was dead Sergeant Tjane instructed him P.W.1 and the accused to cover the body of the deceased with stones and soil. After covering the body the party returned to Maseru and on the following day Sergeant Tjane made a report to Colonel Sehlabo that the deceased was killed.

The accused gave evidence and denied that when Sergeant Tjane explained the purpose of their journey to Leribe he heard. His version is that he sat on the front seat next to the driver while the others sat on the back seat. He could not hear what was being said by Sergeant Tjane while the vehicle was still moving. He admits that Sergeant Tjane

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instructed him to poke the deceased. He complied and poked him on the feet with his gun; the deceased entered into the cave after he poked him. The rest of the stabbing of the deceased was carried out by Sergeant Tjane.

The evidence of the single accomplice who gave evidence in this case is not disputed on any material aspects. The only issue that has to be resolved by the Court is whether or not the accused heard when Sergeant Tjane explained that they were going to Leribe in order to kill the deceased. In his evidence the accomplice said:

"Sergeant Tjane told us the purpose of
our mission to Leribe." (My underlining)

I understood the accomplice's evidence to be that the Sergeant told them who were in the vehicle that the deceased was going to be killed. Since the vehicle they were travelling in was a station wagon and the sergeant spoke in a normal tone of voice, the accused must have heard what was being said by the sergeant and by all the occupants of the vehicle. In a recent case I had before me CRI/T/22/85 I conducted an inspection in loco and travelled to the scene of the crime in a station wagon landrover. I sat on the front seat next to the driver but I was able to hear the conversation being made by all the people in the vehicle including my interpreter who sat on the back seat. I am aware that ability to hear may be affected by a number of the prevailing circumstances, such as whether or not the windows were open and the speed at which the vehicle was travelling as well as the hearing capabilities of the person concerned.

I am convinced that the accused heard the explanation made by the late Sergeant Tjane and knew the purpose of their mission. Furthermore, it was never put to the accomplice in cross-examination that the accused would say that he did not hear the explanation. In Small v. Smith, 1954 (3) S.A. 434 (S.W.A) at p. 438 Claassen, J. said:

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"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity to explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved."

Although this is not an absolute rule the defence of the accused is greatly weakened and the Court may not believe his story. In the present case the accused was represented by an experienced practitioner who was well aware that he must put his story to the Crown witnesses. He submitted that the evidence of the accomplice in no way contradicts that of the accused that he did not hear Sergeant Tjane make the explanation. I think it does contradict it. The accomplice said that the explanation was given to them and that included the accused.

It is also most improbable that Sergeant Tjane could exclude the accused when he was telling his men the most important part of the operation in Leribe. He expected them to assist him in case of resistance by the deceased or escape. If they did not know what was going to happen to the deceased they would probably not be on full alert.

I came to the conclusion that the accused knew that the deceased was going to be eliminated because he was an insurgent who had lied on several occasions and put the soldiers on a wild goose-chase.

It seems to me that the evidence of the accomplice has been corroborated by the accused himself on all material aspects. The only point on which the evidence of the accomplice seems to stand alone is whether or not the accused heard when the late Sergeant Tjane explained the purpose of the Leribe mission.

The accomplice gave his evidence in the most satisfactory way and as I stated earlier in this case it is improbable that the accused could not

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hear when the explanation was made.

If I am correct that the accused heard when the explanation was made, then the doctrine of common purpose must apply i.e. where X, Y and Z associate in a joint unlawful enterprise. X and Y are responsible for any crime committed by Z which falls within their common design. In Rex v. Shezi and others, 1948 (2) S.A. 119 at p. 128 Greenberg, J.A. said:

"In my view, the true doctrine is that suggested during the argument, viz., that the liability of the parties to a common purpose depends on whether the result produced by the perpetrator of the act falls within the mandate and is not concerned with the means by which the result is produced."

Even if the accused merely poked the deceased with his gun on the foot causing him to stumble before Sergeant Tjane stabbed him with his bayonet, the accused is still liable for the death of the deceased under the doctrine of common purpose. The murder of the deceased fell within the common design. It may be argued that as a soldier the accused had no choice but to obey orders emanating from his superior officer. It is quite correct that within certain limits, the fact that a member of the armed forces acted on the orders of a superior is accepted as a defence in our law. The accused has raised this defence in the alternative. His main defence is that he did not know that the deceased was going to be killed and took no part in the inflicting of the injuries which caused his death. It was submitted that at the worst the accused could be found guilty of common assault only. For the reasons stated above I disagree with this submission because the accused had every chance to dissociate himself with the plan by escaping during the march from the road where they left the vehicle to the cave where the deceased was killed. It was so dark that the escape was very easy. He not only poked or stabbed the deceased but he stood on the rock in order to stop the deceased

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from escaping while the late sergeant Tjane stabbed him to death.

The requirements of the defence of obedience to order of a superior are clearly set out by Burchel and Hunt in their book: The South African Criminal Law and Procedure, Vol. I at page 297. They are (a) the Order must emanate from a person lawfully placed in authority over the accused; (b) The accused must have been under a duty to obey the order, and (c) He must have done no more harm than was necessary to carry out the order. There is no doubt in my mind that Sergeant Tjane was a lawful authority from whom the order emanated.

In the leading case of R.v. Smith, (1900) 17 S.C. 561 Solomon, J.P. laid down the rule that "if a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer".

In R. v. Van Vuuren, 1944 O.P.D. 35 De Beer, A.J.P. declined to follow Smith's case and preferred the rule that a person is only under a duty to obey a lawful command, namely, "one not contrary to the ordinary civil law and justified by military law."

In R. v. Werner, 1947 (2) S.A. 828 Watermeyer, C.J. expressed the view that the judgment in Smith's case would have to be qualified in so far as it suggested that ignorance of law is an excuse.

The decision in Van Vuuren's case totally throws overboard the defence of obedience of orders because it does not seem to excuse any unlawful order. I prefer the decision in Smith's case which qualifies the unlawful order by saying that it should not be manifestly illegal.

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I also agree with the suggestion that in deciding this matter the standard to be applied is that of a reasonable man in the position of a soldier. In other words the accused may be judged by the standard of a reasonable soldier.

In Smith's case the accused had, in obedience to an order from his superior officer, shot and killed a black man who refused to produce a bridle. It was during war time. The accused was acquitted on the ground that the order was not manifestly illegal. In the present case the accused knew the deceased to be a captured insurgent and that he was already in the custody of the army. The deceased was not killed in combat or in an attempt to escape from lawful custody. He was taken to a remote cave about 100 kilometres from Maseru and executed there and secretly buried. The accused as a reasonable soldier knew that the order was unlawful. He unlawfully and intentionally participated in the unlawful killing of the deceased. He and his associates had actual intention to kill the deceased.

I find the accused guilty of murder.

My assessors agree.

GILL. KHEOLA
ACTING CHIEF JUSTICE.

17th December, 1986.

For Crown - Mr. Peete
For Defence - Mr. Sooknanan.

EXTENUATING CIRCUMSTANCES

In determining whether there are extenuating circumstances or not, I took into account the following factors and their cumulative effect:

1. The accused did what he did because he was obeying orders of a superior officer which were manifestly illegal. He did not plan the murder himself but obeyed orders of a superior officer.
2. Minimal participation by the accused in the killing of the deceased - He did no more harm than he was ordered to do. He poked the deceased with his gun and guarded the deceased when Sergeant Tjane stabbed him.
3. He was in danger of being killed if he tried to escape.
4. The accused was a very junior officer in the army who was expected to obey orders emanating from his superiors.

Taking all these factors into account I came to the conclusion that the accused is guilty of murder with extenuating circumstances.

SENTENCE:- Three (3) years' imprisonment.

J.L. KHEOLA
ACTING CHIEF JUSTICE.

17th December, 1986.

For Crown - Mr. Peete
For Defence - Mr. Socknanan