IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI) 11/04
CRI/T/111/2002

In the matter between:

THABO MONYAU	APPELLANT
and	
REX	RESPONDENT

6, 20 April 2005

CORAM:
Steyn, P.
Smalberger, JA
Gauntlett, JA

JUDGMENT

Sedition – elements – whether gathering constituting actus reus itself must be unruly, restive or otherwise presage public violence –compliance of common law offence with Constitution of Lesotho may require consideration - further count of conspiracy to commit murder constituting in particular case a splitting of charges or duplication of convictions – interference on appeal with sentence of 15 years' imprisonment for sedition.

GAUNTLETT, JA

[1] The Appellant, a priest attached to the Roman Catholic Cathedral in Maseru, was convicted by the trial court (Monapathi J and assessors) of sedition and conspiracy to commit murder. He was sentenced in September 2004 to 15 years' imprisonment on the first count, and to five years' imprisonment on the second count, to run concurrently. The conviction and sentence in respect of both counts are in issue on appeal.

[2] The indictment comprises two counts, with two alternatives to the first count. The first count is one of high treason: the Appellant was acquitted in this respect, and the State has lodged no cross-appeal. The first alternative is sedition :

> "IN THAT during or about 1998 and at Maseru, the said Accused did unlawfully and with seditious intent participate in various gatherings of a number of people, which gatherings had intent unlawfully to defy and subvert the authority of the Government of the Kingdom of Lesotho by detaining and or arresting and or killing senior officers in the Lesotho Defence Force, and members of the Executive of the Government of Lesotho".

The second alternative to the first count entails an alleged contravention of s.7, read with sections 1, 2, 3 and 12 of the Internal Security (General) Act, 24 of 1984, in relation to the same events. For reasons set out later, this count does not require elaboration.

The second count relates to an alleged contravention of section 183 (2) of the Criminal Procedure and Evidence Act, 1981 (as amended):

> "In that upon or about 1998, and at or near Maseru, the Accused did wrongfully, unlawfully and intentionally conspire with Private Phaila, Second Lieutenant Phaila, Private Hosanna Sako and other members of the Lesotho Defence Force to the prosecution unknown, to aid or procure the commission of or to commit the

> crime of Murder, viz, to kill Prime Minister Mosisili, Deputy Prime Minister Maope, Foreign Minister Thomas Thabane, Lieutenant General Mosakeng, Colonel Lefosa and Colonel Matobakele".

[3] In a trial which, with unfortunate interruptions, stretched over a period of nearly two years, seven witnesses testified for the Crown. The Appellant gave evidence in his defence (which was conducted by senior and junior counsel). Before us his senior counsel stated at the outset of oral argument that their approach on appeal was narrowly focused: as regards the conviction, it was that the evidence accepted and factual findings made by the trial court, whilst not challenged, do not in law support the conviction on either count. In the alternative, it was submitted that this court was bound to interfere with the sentence imposed (at least in relation to the first count) in view of material misdirections by the trial court, and in any event, because it was strikingly inappropriate.

[4] The approach so adopted on behalf of the Appellant therefore requires the factual findings of the trial court to be identified before the legal arguments are examined.

[5] On 11 September 1998 serious civil disturbances commenced in Lesotho. Members of the Lesotho Defence Force (LDF) arrested certain army officers. They were tried in separate proceedings, and it was common cause before us that their actions constituted a mutiny. Army leaders, on the facts not in material dispute before us, were seized by certain junior officers and other ranks, stripped of their command, in some instances shot at, and held against their will. As a matter of notoriety, lives were lost in what amounted to an uprising, property was pillaged and burnt, and troops from other SADC countries entered Lesotho to restore order. Very shortly before the uprising the Appellant had approached separately two senior army officers, a brigadier and a colonel. He knew them as parishioners. He indicated that his concern was rumours of corruption on the part of the Commander of LDF, also a parishioner. He spoke of a need to arrest the Commander; that he (the Appellant) had support within the army; and that for the operation to succeed, cool heads were needed as bloodshed could result. The Appellant's overtures – made on one occasion in the cathedral sacristy after Mass - were separately spurned by both officers (who in fact reported them to their superiors). The overtures were not renewed.

[6] But the Appellant pursued the matter. Other members of the LDF – some now sentenced for their part in the mutiny and serving long prison sentences – testified that they encountered the Appellant and others in a series of meetings. The meetings sought to secure the support of the soldiers present for the arrest of senior army officers. On occasion, Chief Selala Sekhonyana (who with Chief Khoabane Theko was prominent in discussion) is said to have stated that as LDF officers were to be arrested, there should be a concerted endeavour to seize the power of government with the support of disaffected LDF members.

[7] Some seven such meetings took place. (I refer to them deliberately as meetings at this stage so as not to beg the question whether they or any of them in law comprised unlawful gatherings for purposes of the offence). In view of the approach adopted on behalf of the Appellant, accepting the factual findings of the trial court, it is unnecessary to itemise them. What matters is that, even if certain of those present did not support the general purpose – working out a plan to capture, quite unlawfully, senior army officers and remove them from effective command – the Appellant did. More, he played an important role in securing the presence of the army attendees, driving them to and from the meetings, often over long distances, while two of the meetings took place, clandestinely, on church property. Finally, it was agreed by those present that the Appellant would continue to assist, as he had already done, by providing transport. In addition he would provide cellular telephones (with funds for airtime), which in the event he did. Later, too, after the uprising had taken place and participants were being pursued, the Appellant assisted them in hiding and with funds.

[8] Do these essential facts found sedition? In oral argument before us, counsel for the Appellant contended that they did not, for two main reasons. The first is that the trial court had not clearly found, he said, which meeting, of the many to which I have referred, constituted an unlawful gathering, within the purview of the offence. The second – the main argument advanced – was that (counsel argued) such a gathering itself had to have attributes of unruliness or restiveness (regard being had to what was contended to be the rooting of sedition at common law in public violence) to give rise to the offence.

[9] This court has previously dealt with the nature and ambit of sedition in the law of

Lesotho (Molapo v Rex [1999 – 2000] LLR - LLB 316 at 320). The court there applied the definition of sedition advanced by a leading academic authority (Milton South African Criminal Law and Procedure: vol II Common Law Crimes (3rd ed 1996) 42) as reflecting the offence as it had evolved in South Africa, namely:

> "Sedition consists in unlawfully gathering, together with a number of people, with the intention of impairing the majestas of the State by defying or subverting the authority of its government, but without the intention of overthrowing or coercing that government".

(This definition, it is to be noted, draws on case-law antedating the 1993 and 1996 Constitutions in South Africa which introduced justiciable Bills of Rights).

[10] The challenge in oral argument on appeal to the conviction of the Appellant was directed, as I have indicated, to the actus reus of the offence. The finding on the facts by the trial court that the Appellant through his participation in the meetings, and his approaches to the brigadier and colonel, manifested an intention to subvert the State is indeed in my view unassailable. The Appellant without doubt intended to subvert the discipline and functioning of the LDF. Under the Constitution of Lesotho the LDF is one of the public service institutions established by Chapter XIII; to intend to subvert its legitimate authority is to intend to subvert the State. Indeed, the evidence is such as to raise a serious question whether the trial court was correct in giving the Appellant, as it put it, the benefit of the doubt as to whether he harboured a "hostile intent" (that is, an intent to overthrow or coerce) against the Government of Lesotho, founding high treason, but in the absence of a cross-appeal that issue is not justiciable by us.

[11] I turn accordingly to the two arguments concerning the actus reus for sedition. In relation to the first, counsel for the Appellant drew attention to the fact that the meetings with the brigadier and colonel had involved on each occasion only two persons. He invited us not to follow the approach in S v Twala 1979 (3) SA 864 (T) at 869, where Van Dyk J held that even two persons can constitute a gathering for the purpose of the offence of sedition, referring to criticism of that approach by leading academic writers in the field (CR Snyman (1980) 97 SALJ

14 at 20 and Snyman Criminal Law (4th ed. 2002) 317; Milton op cit 51-52; to which may also now be added Burchell Principles of Criminal Law (3rd ed. 2005) 936).

[12] Prof. Milton argues that the principal Roman-Dutch common law authorities do not in this respect support the conclusion in S v Twala supra that two persons can constitute the requisite concourse or gathering of persons (Milton *op cit* 51, read with 45-47). Nor do the earlier leading decisions in R v Endemann 1915 TPD 142 and R v Viljoen 1923 AD 90 appear to do so. But this point does not require determination in the present case because of the plethora of meetings at which a significant number of persons were present, and at which the planned arrest of the commander and certain other senior army officers was a central theme. (Nor does the further question raised in passing as to whether a gathering must be inter praesentes or, in the current age, may be achieved by telephone or audiovisual conferencing or perhaps an internet chat-room).

[13] This leaves the inquiry whether those meetings had the requisite features of an unlawful gathering for the purposes of sedition and more particularly, the second argument advanced for the Appellant (summarized in paragraph [8] above).

[14] That argument is supported by the views of three academic authorities. Each (thus see Snyman op cit 318; Burchell op cit 936; Milton op cit 51) contend that the decision in S v Zwane (1) 1987 (4) SA 369 (W) was wrongly decided in holding this (at 374G):

> "Although sedition may take the form of an armed uprising or violent resistance of a tumultuous mob in defiance of established authority, I am of the view that a seditious gathering need not necessarily involve an uprising or riot, or be coupled with clamour, uproar, violence or threats of violence. It seems to me that the weight of authority only requires a gathering in defiance of the authorities and for an unlawful purpose to constitute the crime of sedition".

(A similar finding was made in S v Twala supra at 869G).

[15] This approach was presaged by that in R v Endemann supra, where De Villiers JP observed (at 147) that "to constitute the crime of sedition it is not necessary that acts of violence should have been actually committed". Snyman op cit 22 (n 13) contends that this observation is not fully supported by the common law authorities cited. But reliance on this criticism does not assist the Appellant in the present case. This is so for three reasons. The first is that the old writers in fact dealt with what they knew as oproer, meaning tumult or public disturbance. A requirement of violence in some manifestation is to be seen in that context. Sedition in the modern law of Lesotho is an offence distinct from either high treason or public violence. Burchell op cit 934 puts it well when he describes the modern offence of sedition as "begotten upon the crime of public violence by the crime of treason". It has its own requirements to which I shortly return, which may in part be derived from and overlap with the two parent offences but are not for that reason to be equated with the requirements of either.

[16] Significantly Professor Milton (*op cit* 53) does not contend that to constitute sedition, the gathering in question must itself necessarily be violent. (His approach is thus more muted than that advanced for the Appellant, and summarized in paragraph [8] above.) He argues for a requirement of "some element of violence (albeit in the form of a threat or intent to cause or to incite violence) before persons should be punished for exercising their constitutional right of coming together to protest the actions or policies of government".

[17] The reliance by counsel for the Appellant on an attribute of violence as a requirement for sedition – even in such an attenuated form – seems to me to be unsound for a second reason. It overlooks the nature of present-day society in general and the functioning today of the State. A modern State may be subverted, indeed, brought to its knees, by stratagems which involve no violence. Hacking into computer systems or interference with telecommunications are just two examples. They may entail no violence or threat of violence or intention to use violence. But they may drive a stake through the heart of the modern State.

[18] The third reason why the argument for the Appellant cannot be sustained relates to the factual findings made by the trial court which, as already noted, were not challenged before us in

oral argument. At the series of gatherings held in the weeks leading up to the mutiny the recruitment of dissident LDF members was under recurrent discussion. The meetings were concerned with subversion of the most direct kind. Even if the approach urged by Professor Milton were to have been adopted in this case, the appeal in this regard must still fail. The gatherings may themselves have been orderly, but they both threatened and intended violence at every turn.

[19] It may in future be necessary for this court to reconsider the definition of sedition in the terms quoted in paragraph [9] above. This is because the common law must comply with the Constitution of Lesotho as its supreme law, and any other law (thus including the common law) inconsistent with it is invalid to the extent of the inconsistency (s.2). Among the fundamental rights entrenched in Lesotho's Bill of Rights (Chapter II of the Constitution) are the rights to freedom of peaceful assembly, association, equal protection of the law, conscience and expression. Provisions that entrench upon these rights have to be justified in the various respects and according to the various tests specified, and which do not require recitation here. So assessed, the common law actus reus for sedition as it applies in Lesotho since the adoption of the Constitution must be approached with care. Certain dicta and academic writings in South Africa may have to be reconsidered in this country, to the extent that they suggest that acts falling short of subversion and defiance and which amount only to a challenge to authority or protest against its exercise, constitute sedition. One example given in S v Twala (supra at 870) is workers' strikes in opposition to the enactment of restrictive legislation.

[20] It seems to me that a concern is rightly raised regarding the almost feudal sweep of the common law offence, in constitutional democracies in which the relations between subject and government are not appropriately still to be described in terms of majestas. As Curlewis JA already noted some 60 years ago in R v Roux 1936 AD 271 at 281, in considering the continued existence of the common law crime laesae majestatis (scandalizing or dishonouring the monarch):

> 'Even as the Roman-Dutch jurist expressed amazement at some of the acts that were regarded in the time of the Romans as constituting the *crimen laesae*

> *majestatis*, so too we under the conditions of our modern civilization and development, and of our political liberty and freedom of thought and speech, cannot be expected to accept the narrow and restricted views of the sixteenth to the eighteenth centuries as regards criticism of the Monarch, as applicable in the present state of our political advancement. We have travelled a long way on the road of freedom of speech and of political criticism since the days when it was a crime *laesae majestatis* to enter a house of ill-fame or a latrine with money in one's possession or a ring on one's finger, bearing the image of the *Princeps* . . . We must interpret the language complained of by the light of modern thought and freedom of speech and not by the light of the restricted ideas of the Middle Ages.'

The concern may have to be addressed in a way which holds in balance the existence of sedition as a separate modern-day offence with its compliance with the Constitution and the fundamental rights the latter entrenches. This may be (no final view can now be suggested) to require that the actus reus of sedition relate to a gathering of persons the unlawful purpose of which is to subvert or defy the functioning of the State; and to require its mens rea to relate to an intention on the part of a participant (to found his or her individual culpability) so to subvert or defy the State.

[21] A definition of the offence in these or similar terms would permit gatherings taking place which may indeed challenge government but which will be legitimate forms of expression so long as they do not seek to subvert or defy the State (or, of course, are otherwise in conflict with the law).

[22] This issue was, however, not raised before us by either the Appellant or the State. Its determination must accordingly be left open in the present matter.

[23] To sum up. Counsel for the Appellant's two contentions relating to the actus reus for sedition in the present case cannot be accepted. The Appellant attended a number of gatherings, the purpose of which was to subvert the State of the Kingdom of Lesotho. The mechanism agreed at the meetings between a number of participants, including the Appellant, was the recruitment of disaffected elements in the LDF. On the facts found by the trial court, and not

challenged before us, the threat of violence and intention to commit violence were not only inherent, but were articulated. Even on the approach for the actus reus of sedition advanced for the Appellant, he was guilty of the offence.

[24] Counsel for the Appellant however argued that even if this were to be our conclusion, we should nonetheless hold that the Appellant was wrongly convicted of sedition because 'the same facts ….. would qualify for conviction in respect of section 7 …. of Act 24 of 1984". The trial court, it was said, had "not offered a juridical justification for convicting on the first alternative as opposed to the second alternative".

[25] No authority was cited in support of this argument. It is unsound in principle. The Crown is entitled, having framed its case and advanced its evidence as seems appropriate to it, to ask for a conviction on the counts it chooses. The court's role is to adjudicate the lis so arising. It cannot direct the Crown in the choice as to which, if any, charges should be pressed in a criminal matter, as little as it can properly direct a civil litigant in his or her decision as to relief ultimately to be sought from a court. If the count on which the Crown seeks a conviction is proved, the court must convict.

[26] For these reasons the conviction of sedition must stand.

[27] The conviction on the second count however is another matter. This in my view is based on substantially the same set of facts as those alleged in the indictment in relation to sedition, as the extracts quoted in paragraph [2] above clearly indicate. Both refer to the intended object of (inter alia) killing members of the Executive of the Government (a description which encompasses the Cabinet Ministers specified by name in the second count). Charges cannot be split or convictions duplicated where conduct could properly have been encompassed by one offence, to the prejudice of an accused (S v Grobler 1966 (1) SA 507 (A) at 523B). The conviction on count two accordingly cannot stand.

[28] This leaves the question of sentence. The trial court in my view materially misdirected itself. It held that the Appellant was "the prime mover of …. what eventually resulted", a

significant overstatement of what the evidence establishes. At none of the gatherings did the Appellant exert any authority; his involvement was essentially supportive, in the respects already described. Similarly there is no proper basis for the description of the events culminating in the uprising on 11 September 1998 as "his original scheme".

[29] These misdirections are related to a further aspect. This is that the trial court asserted that its approach in sentencing was "not [to] depart from those other sentences meted [out] to soldiers involved in the similar background events". This is a reference to the court-martial, conducted under military law, the legality of which was unsuccessfully challenged before this court in Sekoati v President of the Court-Martial [1995-1999] LAC 812. The court could properly in my view have had some regard to the sentences imposed on those found to have played important roles in the mutiny, but it would have to do so with care. It did not do that in this case. Those persons were charged with different and yet more serious offences under what this court has previously described as "a particular and explicitly different legal regime for the military" (Sekoati v President of the Court-Martial supra at 823A). Their offences under the Military Code for instance carried the death penalty as a possible sanction; sedition does not. Certainly it was wrong for the trial court to take as its departure point the avowed intention "not [to] depart from those sentences". Worse, in the event the court did depart from the earlier sentences – by imposing a yet heavier sentence on the Appellant. That is only explicable in the light of the conclusion that the "original scheme" for the uprising was that of the Appellant, which is, as I have said, unsustainable.

[30] In these circumstances, it is unnecessary to consider the argument that this court should in any event interfere with the sentence imposed by the trial court for sedition because it is strikingly inappropriate, or induces a sense of shock. The misdirections in sentencing have the effect of vitiating the trial court's conclusion, and we are at large to impose the sentence we think appropriate.

[31] The offence committed by the Appellant was a very serious one. "This is the more so in a country where political stability has proved to be an elusive goal and coups d' état are not infrequent occurrences" (Molapo supra at 320 ad fin.). The efforts of the Appellant were directed

at subverting the disciplined force set up by the Constitution for the defence of Lesotho, and whose operational use is determined by the Prime Minister (s.145 (1) and (2)). Nor was this, even by his own lights, a matter of last resort for the Appellant. He had access to the commander himself, as was put to him in cross-examination, to challenge him on the rumours of personal corruption, and within his own church to take his concerns further. Lesotho functions as a constitutional democracy, where freedom of expression and related personal liberties exist and are protected by the courts. His was not the predicament of those in other times and places who have been constricted by the law in expressing opposition to those in power.

[32] What makes matters worse is that the endeavours planned at the gatherings were directed at, and on the evidence clearly contributed to, the uprising which took place on 9 September 1998. In seeking to subvert the State through disaffected elements of the LDF, the Appellant knew – as his own words to the colonel already referred to, evince – that bloodshed could well result. The LDF, as a force of soldiers trained in armed combat and with access to lethal firepower, vehicles and other support equipment, was both the most formidable and violent means available to subvert the Executive. Disaffected elements within it were likely to use those means, as they did, with results which (as a matter of notoriety) were devastating, and indeed for a while imperilled Lesotho's continued existence as a constitutional democracy.

[33] On the other hand there are certain other features of the crime which cannot be ignored. The Appellant was, on the evidence, not moved by any consideration of personal gain, political or otherwise. He did not, as I have said, play a leading role at the seditious gatherings. He played no role at all in the events of the uprising, other than afterwards to help certain participants into hiding. These considerations, together with the fact that at 40, he is a first offender, must also be weighed in the scales. They would however have weighed more had he exhibited some remorse, or even candour in the witness box. Regrettably the figure in the witness box was an unattractive one, adopting no stance of principle and frequently untruthful. And as I have noted, he came within a hairbreadth of conviction for high treason. The sedition of which he is guilty is, all in all, extremely serious.

[34] The sentence to be imposed needs also to make it clear that sedition in Lesotho with

actual and potential consequences such as those here present will be treated with severity. For the reasons I have given, the fact that Lesotho is a constitutional democracy may mean that the common law offence of sedition cannot be used as a blunt instrument against socio-political challenges to government. But that same fact has as a consequence that those who do commit sedition strike at the very basis of that legal order, and are likely to receive significant punishment for doing so.

[35] In all the circumstances, in my view a sentence of ten years' imprisonment is appropriate.

[36] The order I propose is accordingly as follows:

(a) The Appellant's appeal against his conviction on the first alternative to count one (sedition) is dismissed.

(b) The sentence imposed in respect of that count (15 years' imprisonment) is set aside, and is substituted with a sentence of 10 years' imprisonment.

(c) The conviction and sentence in respect of count two (conspiracy to commit murder) are set aside.

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J.J. GAUNTLETT
JUDGE OF APPEAL

I agree. It is so ordered.

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J.H. STEYN
PRESIDENT

I agree: _____

J.W. SMALBERGER

JUDGE OF APPEAL

Counsel for the Appellant: Adv. I. Semenya SC

(with him, Mr. K. Mosito)

Counsel for the Crown: Adv. P. Hemraj SC

(with her, Adv. K. Singh SC)

Maseru

20 April 2005