C of A (CRI) No. 12/2004

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

LENKOANE MOLELLE	**Appellant** (formerly Accused 2)
vs	
REX	**Respondent**
and	
REX	**Appellant**
vs	
LIJANE M KALOKO	**First Respondent** (formerly Accused 3)
TANKISO MAJORO	**Second Respondent** (formerly Accused 6)
SETSUMI M LETSIE	**Third Respondent** (formerly Accused 10)
TANKISO P MOLETOA	**Fourth Respondent** (formerly Accused 13)

Held in Maseru
27 March, 18 April 2006

CORAM:
Steyn, P
Ramodibedi, JA
Melunsky, JA

JUDGMENT

STEYN, P

[1] The events that underpin the indictment, convictions and sentences of the appellants (referred to below as accused Nos. 2, 3, 6, 10, and 13 or cumulatively as the accused), concern an insurrection by certain members of the Lesotho Defence Force (LDF) as long ago as the 13th and 14th of April 1994.

[2] This violent uprising against authority resulted in the murder of the Deputy Prime Minister – one Selometsi Baholo – when he resisted an attempt by the dissident soldiers to kidnap him. It also brought about the kidnapping of four members of the Cabinet of the democratically elected government at that time.

[3] For reasons I will refer to below, it was not until the 7th of August 2002 that 25 accused appeared in the High Court on an indictment which charged them with four counts of kidnapping and a charge of murder. All these offences were physically committed on the 14th of April 1994. It is evident, however, that the actions of these soldiers had been preceded by

careful planning and implemented by what Crown Counsel correctly described as "a well co-ordinated action plan carried out with all the panoply of a military operation".

[4] As stated above, the murder count related to the assassination of the Minister of Finance who also was the Deputy Prime Minister.

The four kidnapping counts related to the abduction of:

"(a) Monyane Moleleki (PW13), at the time Minister of Natural Resources;

(b) Kelebone Maope (PW4), at the time Minister of Justice;

(c) Pakalitha Mosisili (PW19), at the time Minister of Education and subsequently Prime Minister;

(d) Robong Shakhane Mokhehle (PW6), at the time Minister of Trade and Industry".

[5] The history of the proceedings from the 7th of August 2002 has been well summarized by Crown Counsel as follows:

"4.

On 7 August 2002 all the accused pleaded not guilty to each of the five

counts in the indictment. A protracted trial ensued in which 59 Crown witnesses and 11 defence witnesses testified.

5.

During the course of the trial four of the accused died. A9 and A17 died before the close of the Crown case. A7 and A12 died after the close of the Crown case, neither of them having testified.

6.

On 23 August 2002 an inspection-in-loco was held at the former dwelling of the deceased in Ha Abia.

7.

After the close of the Crown case on 25 June 2003 ten of the remaining accused, viz A8, A11, A15, A16, A18, A20, A21 A23, A24 and A25 were discharged as it was found that they had no case to meet and they were duly found not guilty.

8.

Of the 13 accused that were put on their defence, ten viz, A1 (DW2), A2 (DW9), A3 (DW8), A4 (DW3), A5 (DW5), A10 (DW11), A13 (DW6), A14 (DW7), A19 (DW1) and A22 (DW4) testified in their own defence.

9.

A6 did not testify in his own defence and DW10 was called as a defence witness.

10.

Of the 11 accused placed on their defence, only the five who feature in this appeal (A2, A3, A6, A10 and A13) were convicted on 11 June 2004. A2 and A3 were convicted on all counts, A6 on counts 1, 2 and 5 and A10 and A13 on count 5 only. For the sake of convenience they are collectively referred to as "the present accused".

11.

On 18 August 2004 the present accused were sentenced as follows:

(a) A2: kidnapping (counts 1 – 4), ten years' imprisonment, of which one-half was conditionally suspended, murder (count 5) 12 years' imprisonment, the sentences to run concurrently;

(b) A3: kidnapping (counts 1 – 4) eight years' imprisonment, of which one-half was conditionally suspended, murder (count 5) ten years' imprisonment, the sentences to run concurrently;

(c) A6: kidnapping (counts 1 and 2) fined M4000,00 or four years' imprisonment, one-half conditionally suspended, murder (count 5) detained until the rising of the court;

(d) A10 and A13: murder (count 5) four years' imprisonment.

[6] It was also common cause that, subject to what I have to say regarding the procedure adopted by the Crown in respect of its "cross-appeal" against A13, this Court was seized with the following:

(a) an appeal by A2 against his conviction and sentence on four counts of kidnapping and one count of murder;

(b) an appeal by A6 against his conviction on two counts of kidnapping and one count of murder;

(c) an appeal by A10 against his conviction on one count of murder;

(d) an appeal by the Crown against the leniency of the sentences imposed on A2, A3, A6, A10 and A13 on the murder count, the Crown contending that the sentences of imprisonment imposed on A2, A3, A10 and A13 should be substantially increased and that the sentence that he be detained until the rising of the court imposed on A6 be replaced with imprisonment;

(e) an appeal by the Crown against the leniency of the sentence imposed on accused A6 on two counts of kidnapping, the Crown contending that the sentence of a fine should be replaced with imprisonment.

[7] At the close of argument by both the Crown and counsel for the accused, the Court ordered that the appeal by the Crown against the sentence imposed on A13 be struck from the roll for the following reasons. A2 was the only appellant who initially noted an appeal. He did so out of time. The Crown then sought to note a cross-appeal also out of time, as set out in paragraphs (d) and (e) above and sought condonation for the

late noting of the appeal. In each case the notice of appeal was served only on the attorneys who had acted for the accused at the trial. In the case of A6 and A10 this prompted a "cross-appeal" noted on their behalf by the attorney who acted for them at the trial. A2 and A3 were also duly represented by their legal adviser who acted for them both before us and before the court a quo. These accused were therefore in no way prejudiced by the late noting of the appeal by the Crown and also sought condonation of the late noting of their cross appeal.

[8] It is common cause that A13:

(i) was never served personally with the notice of the Crown's cross-appeal;

(ii) the mandate of his attorney had terminated after his conviction and sentence and had never been renewed, and that –

(iii) no other legal representative had been appointed to act for him; and

(iv) there was no evidence that A13 had any knowledge of

the “cross-appeal” initiated by the Crown.

[9] A fair hearing of the cross-appeal was in his case therefore not possible. It was clearly not in the interest of either the Crown or the accused to postpone this long-delayed matter for the purpose of regularizing the procedure in the case of A13. Indeed no such application was made. We accordingly declined to grant the Crown condonation of its late – and in our view irregular – noting of the appeal in case of A13 and ordered that it be removed from the roll.

[10] I should add that Crown Counsel had some justification for his contention that counsel who had acted for A13 in the High Court should have advised him that he (counsel) had no mandate to continue to act for him in the appeal. However, it would seem to us that it would be a salutary practice in all cases where the Crown appeals or cross-appeals that it takes all reasonable steps to ensure that a respondent is duly served with the relevant notice either personally or via an attorney authorized by him to act in such an appeal on his behalf. I should add

that it would appear that as a matter of practice the Crown has adopted a procedure of service of all appeal process on the respondent in one other appeal in which it has prosecuted in this Court. See in this regard D.P.P. v Ntsoele C of A (Cri) 16/2005 which served before this Court at the current session. This should however be the rule and consistent practice in the future.

[11] An Historical Overview

(i) In its judgment the court a quo gave a brief outline of political developments in the Kingdom of Lesotho over the past decade. In this regard it said the following:

> "When she attained her national independence on the 4th October 1966, the new and democratic Kingdom of Lesotho had a rather small population which had experienced stoically a century of acute economic depression and other social ills as a British Protectorate. Since 1966, the history of Lesotho was chequered with unfortunate political crises which deprived the country of the necessary peace and stability. In 1970 the nation's constitution was suspended indefinitely; it was only in 1993 that democratic constitutionality was restored. The recently elected Government of Lesotho however continued to face sporadic manifestations of discontent mostly from the ranks of the military, the police and the prison services.

The Crown also contended without contradiction that "notwithstanding the new democratic dispensation, the crimes with which the accused are charged took place

against a background of dissent, ill-discipline and near-mutiny in the LDF".

(ii) This Court can testify to the fact that both the police services and the army were subjected to sporadic incidents of insurrection and criminal violence. Convictions of both police and army officers, were the subject of appeals before us in respect of mutinous as well as murderous acts of insurrection. It is clear that the restoration of a constitutional democracy in 1993 did not immediately translate into stable governance based on democratic values. The events that took place in casu as well as subsequent acts of insurrection during the decade of the nineties seriously jeopardized the vesting of a stable constitutional democracy. Indeed it was only with the advent of the new millennium that stability, law and order, and a disciplined loyal army and police force came to be established.

(iii) The court a quo then proceeds to summarize the relevant provisions of Constitution and comments thereon as follows:

> "Under the 1993 Constitution of Lesotho, section 146 establishes the Lesotho Defence Force. It reads:-
>
> *"146(1) There shall be a Defence Force for the Maintenance of internal security and Defence of Lesotho."*

Section 5 of the 1996 Lesotho Defence Force Act reads:-

> *"The Defence Force shall be employed-*
>
> (a) *in the defence of Lesotho;*
>
> (b) *in the prevention or suppression of*

(i) *terrorism;*
(ii) *internal disorder;*

(c) *in the maintenance of essential services including maintenance of law and order and prevention or crime,*

and such other duties as may, from time to time, be determined by the Minister.

> It should be noted that the primary duty and role of an army under a democratic dispensation therefore is to protect the national sovereignty of Lesotho, and to protect lives and property of the citizenry. *Ipso facto* anything done which is antithetical to this primary duty is both unconstitutional and illegal. Under the rule of law, the Lesotho Defence Force can only operate rightfully in accordance of the Constitution of Lesotho and the 1966 Lesotho Defence Force Act, Regulations, Rules and Orders lawfully given. It must therefore be understood by all and sundry that the members of the Lesotho Defence Force can only act and operate as soldiers of the Force only if they act within the parameters of the Constitution of Lesotho and other laws. Arbitrary covert operations are illegal *per se."*

[12] The conduct of the accused must therefore be assessed and the gravity of their conduct determined in the light of this historical background. I proceed to set out the facts as they are related by the 59 crown witnesses.

[13] Once again I am indebted to the Crown for an accurate and succinct summary of the evidence adduced on its behalf.

"16.

During the evening of 13 April 1994 certain of the accused gathered at the Makoanyane Barracks and the arrest of ministers was discussed. Also discussed was the abduction of two senior officers of the Support Company then stationed at the Ha Ratjomose Barracks.

17.

Agreement was reached at such discussions and a well-co-ordinated action plan commenced in the early hours of the following morning, 14 April 1994, with the five ministers as the initial targets.

18.

The action plan was carried out with all the panoply of a military operation. The participants donned camouflage uniforms, wore battle order and were armed with automatic weapons such as Galil rifles and general purpose machine guns (GPMGs). LDF motor vehicles were used to transport the participants.

19.

In order to prevent counter-measures to the action plan being taken by members of the Support Company, who were stationed at Ha Ratjomose Barracks, certain soldiers were stationed in the mountains around Maseru.

20.

It must, however, be noted that none of the accused whom the Crown averred participated in this manner, were convicted.

21.

At the residence of PW13 in Maseru West, a hole was cut in the fence using the wire cutter forming part of a Galil rifle's bipod and access was gained to the premises.

22.

PW13, who was about to take his morning bath, was apprehended at gunpoint and, bare-foot and wearing only his pyjamas, taken to a military vehicle parked outside the premises.

23.

PW13 thereafter pointed out the residence of PW4, also in Maseru West, to his captors.

24.

There, PW4, who was returning from a morning walk and dressed in a track suit, was also apprehended at gun point. He made an unsuccessful attempt to escape from his captors, during which he was struck about the eye with a hard object, causing laceration and swelling.

25.

PW13 and PW4 were then transported, in the back of an open vehicle, to Makoanyane Barracks, where they were kept under armed guard in the standby room until their eventual release later on that day."

[14] The present Prime Minister, who gave evidence as PW19, and PW6 (Minister Mokhehle) were also captured at gunpoint. These "arrests" were effected at their Ministries the same morning and they were also transported to be detained at the Makoanyane Barracks. On the way they met other military vehicles. A soldier in one of these reported that the Deputy-Prime Minister had been killed. The words used were "that devil Baholo we killed … these ones will know us". When they arrived at the barracks one of the soldiers threatened them by saying – "this is not your mothers' place." They joined their colleagues where they were seated on the floor. The one (Moleleki) was bare-footed and in his pyjamas and the other (Maope) in a track suit. The learned Judge a quo records the evidence of the present Prime Minister as to what occurred as follows:

> "He continues to say that as soon (sic) they had been ordered to sit on the bare floor, some soldiers came into the hall and were sneering, jeering and shaking their heads in disgust – one even grabbed his neck–tie and tugged at it roughly. He says he soon removed it himself – fearing that it could be used to strangle him. One soldier

> approached him gleefully and said "*Nx.. this one is my homeboy*".. pointing to him."

I cite this passage from the judgment because it reflects the gravity of the situation and the threat which the conduct of those involved posed to the safety of the political leadership of the Kingdom, leave alone the serious impairment of their dignity inflicted on them.

[15] Due to the intervention of the military at high level and the actions of prominent members of civil society, the Ministers of the Crown were released from captivity on the late afternoon April 14. As indicated in para [2] above the uprising resulted in the murder of the Deputy Prime Minister. I summarize these events as follows: (Once again I have placed considerable reliance on the heads of argument of the Crown Counsel and what follows is an edited version of his heads, the correctness of which was not challenged by counsel for the accused.)

[16] (i) In the early hours of April 1994, PW5, a gardener/watchman employed by the deceased was asleep in his room, which formed part of the deceased's house, when he was awakened by armed

soldiers who enquired after the whereabouts of the deceased and were told by PW5 that they were at the deceased's house.

(ii) The deceased was called by PW5 but, after looking out the kitchen window, refused to come out.

(iii) The deceased had in his possession a 6,35 Star automatic pistol (exhibit 1), sometimes referred to in the evidence as a "Baby Brown [ing]", which was however faulty in that it could only be operated in an awkward and impractical fashion by loading each round individually and pulling back and releasing the slide – as was revealed by subsequent examination by a firearm expert, PW58. It seems beyond doubt that he fired three shots with this pistol, see para (xi) below.

(iv) Thereafter the deceased's house was subjected to a barrage of automatic gunfire, including that of a GPMG, the results of

which were still visible at the inspection-in-loco and are reflected in some of the photographs in exhibit B.`

(v) The deceased made telephone calls and called out for help, but none was forthcoming. Thereafter the telephone line was cut.

(vi) At some stage the use of a “bazooka” (a rocket propelled grenade launcher) and the use of teargas was contemplated to force the deceased out of his house. Attempts were even made to fetch teargas from the Makoanyane Barracks.

(vii) Access was eventually gained to the deceased’s house through the bedroom door after the lock on it had been shot at.

(viii) The body of the deceased was found in the kitchen of the house with severe gunshot injuries, as are reflected in the two

post-mortem reports, exhibits A and B.

(ix) PW3 was subjected to insulting and threatening behaviour by some of the soldiers who entered the deceased's house.

(x) The soldiers retained control of the deceased's house for some time and denied access to the family of the deceased, viz PW10 (who even attempted to gain access by way of a Red Cross vehicle) and PW12.

(xi) PW48, then a member of the National Security Service (NSS), gained access to the scene and recovered certain spent cartridges, some of which he handed to PW9 and the others to his superior, now deceased, at the NSS. The spent shells handed to PW9 were one of calibre 7,62mm (such as is fired from a GPMG) and three of 6,35mm calibre, such as are fired from exhibit 1.

(xii) After the event, PW50, the company commander of E

Company, questioned certain of the accused regarding the motive for the events of the morning and was given certain explanations, regarding the kidnapping of the ministers and the death of the deceased.

(xiii) It should be noted that, although no objection as to the admissibility of such statements was made, the court did not rely on them in convicting the present accused. I will deal with this aspect of the matter below.

[17] The Commander of the L.D.F. and its Director of Operations both testified that the actions of those involved were in no way authorized and that their conduct was both unlawful and in conflict with their duties to maintain law and order.

[18] In para [3] above I said that I would deal with the delay in investigation and subsequent prosecution of the accused. The former Commissioner of Police (PW46) testified that their capacity to act in any meaningful manner against those involved in regard to these events was inhibited by the prevailing existence of “dissent, ill-discipline and near mutiny”. (See para. [11] (ii) above.) It was only after the intervention of

armed forces from the R.S.A. and the involvement of SADC and the International Community, from October 1998 onwards that stability and orderly military governance was restored. Only then could any meaningful investigation and law enforcement take place.

[19] Before dealing with the evidence against each accused and their evidence in their defence, it is necessary to record the facts and consequent legal basis upon which the Crown relied for its contention that the appellants were correctly convicted.

[20] The Court has to ask itself the following questions –

(i) What was the common intent or objective of those who participated in the insurrection?

(ii) Was that common intent the pursuit of a lawful goal?

(iii) Did the participants comprehend the use of violence in pursuit of the attainment of their objective?

(iv) Did they foresee the possibility of resistance and were they prepared to use such force as necessary to quell such resistance?

(v) For the purposes of determining their guilt on the charge of the murder of the deputy Prime Minister, did they foresee the possibility of death resulting from their concerted actions?

(vi) Did they nevertheless, heedless of such consequences, persist in the pursuit of their objectives

> with the knowledge that death might result from their actions?

[21] It was not in serious dispute that the common goal of those who participated actively in the insurrection was the kidnapping of five ministers of the Crown. It was not contended in the court below nor was it before us, that their enterprise was a lawful one, or that they believed that they were carrying out orders which were lawful. None of them contended that they committed their unlawful acts under compulsion or under "superior orders". (I will deal with the position of Accused No.6 specifically in this regard, because, whilst he did not testify, the learned Judge a quo, in reliance upon a statement made by No.6 to one of the witnesses, hinted that he may have been a reluctant participant).

[22] The first two questions must therefore be answered in the affirmative. Indeed these matters could hardly have been said to have been in dispute. It will be seen later that each of the appellants who testified sought to avoid liability only by denying participation in the uprising.

[23] Did they comprehend the use of violence? About this also there can be no doubt. Their dress, the arms they carried, their conduct, speech and actions left no doubt in anyone's mind that these were soldiers on a mission which they would accomplish by means of violence should they encounter any resistance. And when they did meet with resistance they countered it with a resort to massive, concerted violence. In this regard one need only have regard to the photographs depicting the state of the deceased's house, the largely unchallenged evidence of the four ministers – particularly Minister Maope – and of those who witnessed the murder of the Deputy Prime Minister. Questions (iii) and (iv) are therefore also to be answered in the affirmative.

[24] Did they foresee the possibility that death may result from their actions? About this too there can be no doubt. If one sets out to kidnap five people armed to the teeth with firearms and machine guns one must inevitably appreciate that their use may result in someone being killed. The response to the resistance offered by the deceased is the best

evidence that demonstrates the lengths to which the participants involved in the insurrection were prepared to go to achieve their objective of apprehending and detaining the five ministers of the Crown. I am of the view that the Crown established beyond doubt that those who participated actively and meaningfully in the uprising and the kidnapping of the ministers, foresaw that death may result from their actions and pursued their goal, heedless of this consequence.

[25] Both in the court below and before us counsel for the accused submitted that for the doctrine of common purpose to apply there must be a perpetrator who can be identified as such. The argument is premised on a misleading citation of comments by Burchell in Principles of Criminal Law (Thids Ed. p. 574 where the author says:

> "B COMMON PURPOSE
>
> 1 Definition
>
> Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime.
>
> If the participants are charged with having committed a

> 'consequence crime', it is not necessary for the prosecution to prove beyond reasonable doubt that each participant committed conduct which contributed causally to the ultimate unlawful consequence. It is sufficient to establish that they all agreed to commit a particular crime or actively associated themselves with the composition commission of the crime by one of their number with the requisite fault element (*mens rea*). If this is established, then the conduct of the participant who actually causes the consequence is imputed or attributed to the other participants."

The submission was: where there is no perpetrator identified there could by no imputation of stability. A reading of the next passage in the above cited work demonstrates the unsustainability of the argument . It reads as follows:

> "Furthermore, it is not necessary to establish precisely which member of the common purpose caused the consequence, provided that it is established that one of the group brought about this result".

See also Matsoso and Ano v Rex LAC 1980 – 1984 256 where the dictum in S v. Madlala 1969 (2) SA 637 (A) at 640 was cited with approval. This citation at par. F-H reads as follows:

> "It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted or murder if the killing was unlawful and there is proof –
>
> (a) that he individually killed the deceased, with the required *dolus,* e.g. by shooting him; or

(b) that he was a party to a common purpose of murder, and one or both of them did the deed; or
(c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred;

See *S v Malinga and Others,* 1963 (1) SA 692 (A.D.) at p.694F-H and p. 695; or

(d) that the accused must fall within (a) or (b) or (c) – it does not matter which, for in each event he would be guilty of murder."

That the submission advanced by counsel is flawed can perhaps best be demonstrated by an example. Two persons enter a shop armed with a pistol with an intention to rob. The shopkeeper resists, shots are fired by one of the robbers and the shopkeeper is killed. The Crown cannot prove which one of the two fired the shot. Must they then both be found not guilty? The failure to cite the passage from Burchell in full is both misleading and improper. This also is the case in regard to the contention that the deceased committed suicide. One look at the post-mortem report would have demonstrated the absurdity of this suggestion.

[26] Having laid a factual base of this matter by overview, having

determined the mindset of those involved and having dealt with the issue whether a common purpose had been established, I now proceed to analyse the evidence to determine whether the court was correct in finding that each of the appellants who appealed against his conviction was indeed guilty of the offences of which he was convicted.

[27] Accused No.2 (No.2) was convicted on 4 counts of kidnapping and on the charge of murder. He was identified by numerous witnesses not only as a participant, but in a leadership role. This applied not only to his actions on the 14th of April, but in the pre-planning and mastering of men on the 13th and 14th of April. His defence was a denial of any participation and an allegation that he was simply on stand-by on the day in question. His counsel argued in the court below and before us that his evidence that there was a conspiracy to implicate him to which the witnesses who testified against him were parties, appears to be most unlikely. For a variety of good reasons the High Court rejected this evidence and it made sustainable credibility findings in support of such

rejection. It would have required a massive and intricate manipulation of the evidence to have produced 10 witnesses each one of whom ascribes a pro-active role in the endeavour to this accused. In this regard it should be noted that only some of the witnesses who implicated this accused were accomplices who may have had a motive to fabricate, but there were several witnesses who identified the accused as a leading figure in the fracas and no suggestion could be made why and how they would have been prepared to lend themselves to accord a leading role to the accused.

[28] In summary. There is overwhelming evidence that A2 was, put at its lowest, a prominent participant in the kidnapping of the ministers and in the murder of the deceased. Moreover, Brigadier Lekanyane (PW50), after learning of the death of the deceased and after visiting the scene of the murder, sought to investigate why soldiers had become involved in the apprehension of ministers and the shoot-out at the deceased house. He subsequently succeeding in meeting with a small group of the dissidents from whom he sought an explanation of their conduct and the reasons for

the insurrection. Amongst these group who purported to speak on behalf of the soldiers was No.2. He, No.3 and two others (A7 and A19) reported on the events in question and gave an explanation for their conduct. The principal spokesman was No.2. He gave as a reason for their kidnapping of the ministers and the murder of the deceased that the latter (and presumably other political office bearers) were colluding with the South African government to disarm a certain group of soldiers at Makoanyane and then to dismiss them. He also told the witness that the Lesotho government was also seeking support from the Zimbabwean government with the same objective of disarming the battalion of soldiers at Makoanyane. On his enquiry why the Deputy Prime Minister had been killed, he received the following reply from No.2:

> "The response we got was that at their arrival there they wanted the minister to come out of the house and he could not. The idea behind shooting was mainly to break the lock to the door with bullets so that the group may gain entrance into the house to arrest the minister to take him to Makoanyane where the ministers had been locked. This is what I received from them".

It is clear that through this interchange No.2 and No.3 spoke on behalf of those present and that it was also clear from their response that they had

participated in the attack on the Deputy Prime Minister's house and in the kidnapping of the Ministers.

[29] This evidence was not challenged by the defence as being inadmissible. Indeed both No.2 and No.3 denied that any such conversation took place. However, about the voluntary nature of these statements and the effect of the fact that they as corporals questioned by a superior officer, the trial Judge ruled that these statements were inadmissible. With respect to the court a quo, this ruling cannot be supported. No enquiry was made from the witness to lay a foundation for such a challenge, no objection to the admissibility of the statements was raised and the assertion that the statements may not have been made voluntarily was never raised with the Crown. Moreover it was, in the absence of evidence, mere speculation on the part of the trial court that either undue influence or other coercive pressure was brought to bear on the accused involved to admit participation in the events concerned. Whilst the evidence against No.2 is overwhelming in its own right, the statements he made to PW50 tie in with all the other evidence implicating

him. The court a quo quite rightly rejected the evidence of No.2 as "false beyond all doubt" but erred in finding that it was not established beyond reasonable doubt that the statements he and No.3 made to PW50 were made voluntarily.

[30] The court a quo said the following when convicting No.2:

> "I am convinced by the credible evidence adduced by the Crown that the Accused participated actively at Ha Abia on the morning of the 14th April 1994 and that in an operation which was manifestly illegal, himself or his colleagues opened a heavy calibre fusillade at Baholo's hose, knowing fully well that death would likely result. That Baholo apparently shot first does not legalise what was a manifestly an illegal operation. I do not believe that Baholo committed suicide either; the same applies to the grand theory that the then Prime Minister Ntsu Mokhehle had machinated or engineered his elimination. I do not believe that the accomplice witnesses had any ulterior motive to implicate him falsely. They spoke about what they saw and heard and each gave his own account which did not demonstrate any conspiracy to implicate him falsely in the charges before this court. It is the cumulative evidence against Accused No.2 that proves beyond all doubt he participated in the attack at Baholo's residence on the 14th April 1994. I reject the version that he only went to Matala on standby after the death of the Deputy Prime Minister."

The court then concludes as follows:

> "I find him guilty of murder under count 5 and under the other four counts upon the basis that he knew when he went to Matalas that these other four Ministers were also going to be kidnapped. It was indeed fortunate that Ministers Mosisili, Shakhane Mokhehle, Maope and Moleleki offered no resistance to attract much violence from their

captors".

[31] These findings are fully supported by the evidence. Not only was No.2 a participant in the events in question. He played a leading role both in its planning and in its execution. His appeal against his conviction must therefore be dismissed.

[32] Accused No.3 (A3). The evidence against him has correctly been summarized as follows:

PW25 described A3 as being in a group with A2, A4, and A22 who were discussing the kidnapping of ministers at the E Company dormitory on 13 April 1994.

PW23 identified A3 in the lights of his motor vehicle as part of armed group of soldiers at the Makoanyane Barracks in the early hours of 14 April 1994.

PW26 described A3 being in the cab and in charge of the motor vehicle driven by A6 that carried soldiers to effect the abductions of PW4 and PW13 in Maseru.

> PW35, who had been in charge of the gate guard at Makoanyane Barracks described how A3 had instructed him, PW35, not to let any other soldiers and especially Lt Col Tsoele, through the gate on 14 April 1994.

PW25 also described A3 arriving at the standby room in the company of

A2 and A7 together with the complainants.

PW24 stated that A3 was at the deceased's house in the company of A2, A6, A9 (deceased during the trial), A10 and A13. A3 ordered PW24 to fire two shots at the door of the deceased's house in order to open it.

PW11 and PW27 placed A3 at the deceased's house in the company of A2. PW11 actually spoke to A3 and received the same disrespectful and dismissive reply to his enquiry as were given by A2.

> PW50 described A3 as being part of a group, including A2, A7 and A19 whose spokesman, A2, described the events at the deceased's house to A50 later on 14 April 1994.

The High Court found that

> "I find that the Accused No.3 was in the military van carrying soldiers who later kidnapped Ministers Moleleki and Maope on the morning of the 14th April 1994 and that also along with Accused No.7 they also participated at the bombardment of Baholo's residence which caused his death which result was foreseeable.

After depositing the Ministers in the standby hall and ordering the Ministers to be guarded by PW.25 Tjamela saying "Remain guarding these Ministers .. we are coming," soon the Accused No.3 and No.7 are seen at Ha Abia besieging Baholo's house. From Makoanyane to Malata's is not a great distance … a speeding van can take less than twenty minutes.

> I find the version of Accused No.3 not worthy of credit as it denies even something admitted by his counsel when cross examining the crown witness. His evidence is rejected as false.
>
> He is found guilty on all five counts."

[33] I am of the view that the findings are fully supported by the evidence and no argument was advanced to us which in any way impugns their

reliability or the fact that No.3 played a prominent role in the fracas – both in so far as the kidnapping charges and the murder charge is concerned. That his role was marginally less significant than that of the No.2 as reflected in the sentences imposed also appears to us to be justified on the evidence.

[34] Accused No. 6 (A6). The court a quo says the following concerning A6 in its judgment:

> "Without being repetitive, I should point out that there was credible and sufficient evidence that:-
>
> (a) Accused No.6 was the driver of the military van which transported soldiers first to Maseru West to kidnap Ministers Moleleki and Maope.
>
> (b) Accused No.6 drove the said military van to Makoanyane Barracks where the two Ministers were later joined by the then Minister Mosisili and then Minister Shakhane Mokhehle.

(c) Accused No.6 was seen still dutifully driving the van at Matalas where the bombardment took place.

(d) Accused No.6 did nothing else to perpetrate the commission of offences of kidnapping or shooting.

> (e) Accused voiced his genuine dismay or disapproval of kidnappings of Ministers and his statements are admissible in this trial, (see **Snyman** (*supra)* 164 in deciding the issue of his state of mind at the particular time (**Estate De Wet v De Wet** 1924 CPD 341 per **Watermeyer JA**)

(f) His deliberate election not to controvert what was direct and credible evidence, renders conclusive the strong *prima facie* case against him (**R v Theron** – 1968 (4) SA 61 A.D)."

[35] What should be noted in regard to his failure to testify, is the fact that when two Crown witnesses PW4 (Maope) and PW13 (Moleleki) gave evidence it was put to them that No.6 emphatically denied that he was the driver of the vehicle in which they were abducted and that his version would be that he wasn't even in the vehicle. When PW23 testified that A6 was the driver of a vehicle in Maseru West on the 14th of April, this also was challenged and it was put by his counsel that he was not there on that day. As the evidence of his participation mounted, his vigorous denials declined and his participation became undisputed. He then sought to hitch his wagon to the star of PW26's evidence concerning the statement he allegedly made at the time (see (e) above).

[36] The question that has to be answered at this stage of the enquiry is whether or not A6 participated in the insurrection in such a manner and to such an extent that the court was entitled to find that he was a socius

criminis . See Rex v Mlooi and Others 1925 AD 131 at 134 where Innes CJ says the following:

> "Whoever instigates, procures or assists the commission of the deed is a *socius criminis,* and may be indicted, convicted and punished as if he were the principal offender. (*Rex v Peerkhan and Lalloo* 1906 T.S. p. 802; *Rex v. Jackelson* 1920 A.D. p. 490). Nor does his liability depend upon the liability of the latter; as pointed out in *Rex v. Parry* (1924, A.D. 401) it flows from his own part in the transaction, coupled with the existence of *mens rea* in relation to the crime itself."

The court a quo correctly found that his failure to testify was a significant factor that had to be placed in the scale in finding that the Crown had proved that he intentionally (in his case – also willingly) acted in pursuit of achieving the objective of kidnapping the five Ministers and whether he foresaw that death may result from the implementation of the plot.

It is my view that having regard to the totality of the evidence as set out in par [33] above the court a quo was correct in finding him guilty on the two charges of kidnapping and charge of murder. Whether the court was entitled to attach the weight it did to his *extra curial* comments will be

debated below when I deal with the cross-appeal by the Crown against the sentence imposed on him. His appeal against conviction falls to be dismissed.

[37] Accused No. 10. He was identified as having been at the home of the deceased in battledress and armed in the company of No.6. Two Crown witnesses also related how this accused arrived at the barracks and requested that he be provided with teargas. They confirmed that he was in battledress and armed with a Galil. It is clear from their evidence that:

(i) It was intended to use the teargas for the "arrest" of the deceased; and

(ii) the Minister had barricaded himself in the house and was resisting his 'arrest'

(iii) he was informed that teargas could kill and he confirmed that he was aware of that fact

(iv) He was in an army 4x4 driven by No.6 and there were other soldiers also in battledress and armed in the vehicle

(v) His request for teargas was refused and he left empty-

handed.

[38] The evidence of these witnesses was confirmed by D24 who testified that he too saw A10 at the house of the deceased. He had hastened there because he had heard the sound of a heavy gun fire coming from that direction. The accused's version that his request for teargas was in respect of an unrelated incident in the mountains was with every justification rejected as untrue by the trial judge. He clearly associated himself with the attempt to force the deceased out of the house; he knew that violence was used to achieve this object; he knew, that the deceased was resisting and appreciated, or at least must have appreciated, that the use of force could lead to the deceased's death. He was correctly convicted of murder but why he was also not convicted on the kidnapping charges is difficult to understand.

[39] It follows from what has been set out above that all the accused were correctly convicted and that their appeals against their convictions must fail.

SENTENCE

[40] It hardly needs to be emphasized that the offences were of the

utmost gravity. They were carefully planned and were executed with brutality, particularly where the victims put up any resistance. Moreover the crimes must be seen as part of an insurrection against the democratic order in the Kingdom. That the insurrection came to a relatively speedy end with the death of only one person was not due to the accuseds' change of heart. In fact no genuine remorse was shown in the trial court, although in favour of A2 and A3 were the reasonably candid admissions of their involvement made to PW50 but which, as I have pointed out, they denied having made.

[41] Before considering the sentences imposed by the trial court it is necessary to emphasise that this Court may interfere with the punishment imposed by the trial judge only where he has failed to exercise a proper discretion, either because of the substantial disparity between the sentence imposed and what the proper sentence should be or because the trial court has misdirected itself or has committed an irregularity. (See DPP v Ntsoele C of A (CRI) 16 of 2005).

[42] Viewed against the background of an attempt to strike at the integrity of the government with the use of violence, the sentences in general, and, in particular, the punishments imposed on the murder count, can only be described as lenient. I now deal with the sentences given to the individual accused.

Accused No. 2

[43] Counsel for the Crown challenged the sentence of 12 years' imprisonment imposed on A2 for the murder of Selometsi Baholo (Count 5). He submitted that there was a striking disparity between the sentence that this Court would have imposed on him and the sentence that the trial court imposed.

[44] A2, as I have pointed out earlier, played a leading role, both in the planning and in the execution of the crimes. It may well be, as the judge a quo found, that there was a degree of turmoil within the LDF and that some members of the military were discontented and dissatisfied with what they perceived as unfair or discriminatory treatment. This

perception, even if well-founded, can never justify the resort to blatant illegality of the kind that occurred on 14 April 1994. No matter what circumstances prevailed, all of the accused, especially those who played a leading part in the offences, cannot expect leniency from a court merely because they believed that conditions were ripe for an insurrection. They should have realized that grievances, even if genuine, cannot be addressed by unlawful means.

[45] It may be, as the trial judge indicated, that there were other persons or elements, involved in the events of 14 April 1994. However, the fact remains that it was A2, assisted by A3, who controlled and apparently commanded the operation, and who encouraged other members of the LDF to join in.

[46] Under the circumstances outlined, I have come to the conclusion that a sentence of 12 years' imprisonment, imposed on A2 for the murder of the deceased (which sentence was to run concurrently with the sentence imposed on him on counts 1 to 4) was far too lenient. I therefore agree with counsel for the Crown that there is a substantial disparity between the sentence actually imposed and the sentence which the learned judge a quo ought to have imposed.

[47] The sentence which it is my duty to impose must reflect the gravity of the crime and it must also take into account the degree of participation of the accused and the interest of society. Against this must be weighed the factors personal to the accused and any other mitigating features.

[48] I take into account that A2 was a first offender, that he had many years of unblemished service in the military and that he supported many defendants. Important as these considerations are, they are overshadowed by the gravity of the offences and the interests of society. It is unnecessary to say anything further in this regard.

[49] While I have no doubt that the sentence on A2 in respect of count 5 does not reflect the gravity of the crime, the sentence that ought to be imposed has caused me a great deal of concern. In the circumstances of the case, and having regard to all the facts, I am of the view that an appropriate sentence on count 5 would be one of 17 years' imprisonment to run concurrently with the sentence imposed on counts 1 – 4.

Accused No. 3

[50] A3, too, played a leading role in the execution of the kidnapping of the Ministers and the murder of the deceased. He was not quite as prominent as A2 but Crown counsel correctly submitted that after A2, A3

played the most important leadership role.

[51] Having regard to the nature of the offence and its consequences, there is no doubt in my mind that the sentence of 10 years' imprisonment on count 5, to run concurrently with the sentence on counts 1 – 4 was far too lenient and substantially less than the trial court should have imposed.

[52] In his case, too, the sentence should be increased on count 5 so that it more properly reflects the seriousness of the crime and the role played by the accused. In my opinion an appropriate sentence is one of 14 years' imprisonment, to run concurrently with the sentence imposed on counts 1 to 4.

Accused No. 6

[53] A6, as the trial court held, drove the vehicle that transported the Ministers to the Makoanyane Barracks. In addition, however, he also conveyed soldiers in a military van to the deceased's house and from there to Makoanyane to fetch tearsmoke. The sentence imposed on this

accused on count 5 – to be detained until the rising of the court – was patently inadequate.

[54] Moreover the trial judge misdirected himself in two important respects. First, he was under the impression that A6 raised the defence of obedience to superior orders and second that he expressed his misgivings about his involvement to PW26. In considering the question of the sentence to be imposed on A6, I cannot overlook the pivotal role that he played in driving the soldiers with the kidnapped Ministers to the Makoanyane Barracks, then taking troops to the deceased's house and later driving A10 to the Barracks in an attempt to obtain tearsmoke. A6 did not give evidence and there is no room for assuming that he was an unwilling participant acting under superior orders. His statement to A26, which was also relied on by the court a quo, is of little significance. There is considerable doubt as to whether an extra curial statement which is self-serving or is consistent with innocence is admissible (see Hoffmann and Zeffert: The South African Law of Evidence, 4th Ed at 167-168).

The authorities relied upon by the trial court do not indicate the contrary. But admissibility apart, there is little weight that should be attached to A6's statement to PW26 as it is inconsistent with his actual participation in the offences and was not confirmed by his own evidence.

[55] Counsel for the Crown contended that the sentences on counts 1, 2 and 4 were all substantially less than the sentences which should have been imposed. I agree with this submission. There are, however, factors that weigh in favour of A6 and I take them into consideration in imposing an appropriate sentence. He was a first offender, he was apparently unarmed and he did not wear battle-dress. Clearly it was not his intention to personally commit acts of violence. Furthermore, it seems to me to be desirable that the punishment on those of the accused who played a lesser role than A2 and A3 should be reflected in their sentences.

[56] Although the sentence of four years' imprisonment imposed on A10 and A13 are more lenient than the sentence which I would have imposed, I am not convinced that their punishments are such that would justify

alteration. Moreover, and as the sentence imposed on A13 stands, it would be improper, in the circumstances of this case, if there is a differentiation between A13's sentence and that imposed on A6 for the murder count and, incidentally, the sentence on A10 on the same count. I am not convinced that A6's moral blameworthiness however serious, was more reprehensible than that of A13 or A10. However, counts 1 and 2 were, in my opinion far too serious to have warranted the imposition of a fine on A6. For this reason, therefore, a sentence of imprisonment on counts 1 and 2 is justified.

[57] Having regard to all of the facts stated above, accused No.6's sentence should be increased to two years' imprisonment on counts 1 and 2 and four years' imprisonment on count 5. The sentences should run concurrently and any portion of the fine which he has paid should be refunded to him.

[58] For reasons which I have given, the appeal by the Crown against the sentence imposed on A10 should be dismissed.

ORDER

[59] The order which I make is the following:

1. The appeals by all of the accused against their convictions are dismissed and the convictions are confirmed.

2. The sentences imposed by the court a quo are confirmed only insofar as they relate to the following:

   (a) Accused No.2 in the court a quo on counts 1–4;

(b) Accused No.3 in the court a quo on counts 1-4;

   (c) Accused No.10 in the court a quo on count 5.

3. The appeal by the Crown against the sentence imposed on accused No.13 in the court a quo is dismissed.

4. The sentence imposed by the court a quo on accused No.2 in respect of count 5 is set aside and is replaced with the following:

   "**Count 5 : 17 years' imprisonment to run concurrently with the sentence imposed on counts 1 to 4".**

5. The sentence imposed by the court a quo on accused No.3 in respect of count 5 is set aside and is replaced with the following:

"Count 5 : 14 years' imprisonment to run concurrently with the sentence imposed on counts 1 – 4".

6. The sentences imposed on accused No.6 by the court a quo is set aside and is replaced with the following:

"Counts 1 and 2: Two years' imprisonment;

Count 5: four years' imprisonment". The sentences are to run concurrently.

7. The fine or any portion thereof paid by accused No.6 is to be refunded to him.

_____

J.H. Steyn
PRESIDENT OF THE COURT OF APPEAL OF LESOTHO

I agree: _____

M.M. Ramodibedi
JUDGE OF APPEAL

I agree: _____

L. Melunsky
JUDGE OF APPEAL

Appearances:

For the Crown : Mr. R. Suhr

For Appellant & 1st Respondent : Mr. T. Maieane

For 2nd and 3rd Respondents : Mr. T.Nteso