

IN THE COURT OF APPEAL OF LESOTHO

Case NO. C of A (CRI) 5/2006

In the matter between

THABANG SETENANE MAKATENG

APPELLANT

and

REX

RESPONDENT

26TH March and 4 April 2007

CORAM:

RAMODIBEDI JA
MELUNSKY JA
PEETE JA

Summary

Criminal Law - the appellant convicted in High Court on two Counts of murder, three of attempted murder and one of kidnapping on the basis of the doctrine of common purpose. In a planned and unlawful operation by a number of members of the Police Force, two police officers were shot and killed, three others were wounded and

one was unlawfully incarcerated in a police cell. All of the aforementioned acts were unauthorised and illegal. The appellant was not the actual perpetrator of the crimes but he was convicted on the grounds that he acted in concert with those who committed the offences.

The Crown relied on the appellant's participation, more especially in that he was the driver of a motor vehicle which conveyed members of the police to various places.

Held:

- 1) *That a common purpose to accomplish unlawful acts of detaining two police officer was established;*
- 2) *That the common purpose arose by prior agreement and not spontaneously;*
- 3) *That the prior agreement was proved by inference from the facts;*

- 4) *That the participants in the plot must have foreseen the possibility that the intended victims might offer resistance and that the firearms might be used resulting in death and/or bodily injury;*
- 5) *That the appellant's evidence that he did not take part in the operation was rightly rejected by the trial Court;*
- 6) *That his participation was clearly proved on the facts of the case.*

Appeal accordingly dismissed.

JUDGMENT

MELUNSKY JA:

[1] This appeal arises out of an unlawful operation carried out by certain members of the Royal Lesotho Mounted Police ("the RLMP" or "the Police Force") on or about 31 October 1995. During the course of this operation, and at Maseru Central Charge Office ("the MCCO"), two senior members of the RLMP were killed and three others injured, the deceased being

Lieutenant Colonel Penane (“Penane”) and Major Chabeli (“Chabeli”), and the injured being Captains Mokolatsie (“Mokolatsie”) and Mokeki (“Mokeki”) and Major Raleaka (“Raleaka”). On the same day warrant officer Ramoeletsi (“Ramoeletsi”) was forcefully put into a police cell at Ha Mabote Police Station (“HMPS”) where he was detained.

[2] As a result of the foregoing the appellant was indicted in the High Court on six counts – counts 1 and 2 for the murders of Penane and Chabeli respectively, counts 3, 4 and 5 for the attempted murders of Mokolatsie, Mokeki and Raleaka respectively, and count 6 for the kidnapping of Ramoeletsi. He pleaded not guilty but was convicted on all counts by Nomngongo J sitting with assessors and was sentenced to an effective period of imprisonment for eight years. He appeals to this Court against his conviction.

[3] It is important to note that, in terms of the indictment, the appellant was alleged to have

committed the aforesaid offences acting in concert with others, including certain named persons, all of whom will be referred to in this judgment as co-conspirators for the sake of convenience only. It is also to be noted that there is no dispute that the said offences were committed and that the actual perpetrators were one or more of the co-conspirators and not the appellant. The essential question that has to be answered in this appeal is whether the Crown has proved beyond reasonable doubt that the appellant in fact acted in concert with the co-conspirators and the actual perpetrators - whether, indeed, he had a common purpose with them to commit the offences of which he was convicted.

- [4] There was evidence before the trial court by various members of the Police Force, including some of the complainants, that the appellant was observed at certain relevant times in the company of some of the co-conspirators both at the MCCO and the HMPS. It will be necessary to

recount his actions in some detail in due course. All that need to be noted at this stage is that in the Court a quo the appellant testified that he was not at the scenes in question and that all the witnesses who implicated him had fabricated their versions. The appellant's evidence was rejected by the trial court and rightly so and very little attempt has been made on appeal to persuade us that this finding was wrong. In fact the only ground raised in the notice of appeal is that the Crown did not establish that the appellant was part of the common purpose to commit the offences of which he was convicted. It is to this aspect that this judgment is largely devoted.

- [5] In order to determine the extent of the appellant's involvement, if any, in the offences, it is necessary to set out, firstly the background and outline of the Crown evidence; secondly, to detail the appellant's conduct, as observed by the Prosecution witnesses; thirdly, to refer to the material aspects of the law relating to common

purpose; and finally, to apply the legal principles to the facts of the case.

- [6] The appellant joined the Police Force in 1993. At the time relevant to the charges he was a sergeant attached to the Police Community Relations section (“the PCR”).

The appellant was a member of an organization known as CODESA which consisted of certain junior members of the RLMP and which appeared to function as a sort of liaison committee between the junior officers and the more senior members, including the Commissioner of Police. It may be noted that the appellant’s counsel put to various Crown witnesses that he (the appellant) was not a member of CODESA and that he had nothing to do with that committee. In his evidence, however, the appellant conceded that he was indeed a member of CODESA and his attempt to explain away the version put by his counsel was unconvincing and, in fact, patently untruthful. It

may be mentioned here that the most prominent member of CODESA, in fact the leader of the organization, was one of the persons named in the indictment as a co-conspirator, second Lieutenant Molise.

- [7] Penane and Ramoeletsi (PW1 in the trial court). both members of the RLMP, had been deputed then to deal with unlawful disturbances and processions arising out of a strike by teachers in Maseru during the earlier part of October 1995. Certain members of the RLMP, notably Molise, objected to the methods employed by Ramoeletsi to quell the disturbances and on 19 October shots were fired at Ramoeletsi's house. In an effort to defuse the situation, a meeting was held under the chairmanship of Lieutenant Colonel Nalete (PW 2) on 30 October. Present were Penane, PW1, Molise and a certain Major Telukhunoana, but the meeting failed to achieve a resolution of the problem. The events that followed are outlined in the heads of argument

of Mr *Suhr*, counsel for the Crown both in the court a quo and before us, and as these facts are not seriously in dispute I will rely fairly extensively on his summary of the events. The relevant facts are the following:

- a) The Response Unit and the Band Unit of the RLMP were stationed at Police Training College (“the PTC”) in Maseru. Both units had paramilitary functions with the Band Unit supporting the Response Unit;
- b) In the early hours of 31 October 1995 a coordinated and clearly unlawful operation, involving a number of heavily armed members of the Police Force, dressed in operational uniform, was launched from, inter alia, the PTC;
- c) Molise and other members of CODESA, all being the alleged co-conspirators, played a leading role in the operation;
- d) PW1 went to Penane’s house after being

summoned by Penane to do so. Although Penane's house was surrounded by armed police, Penane and Ramoeletsi managed to leave the house separately;

- e) Thereafter Ramoeletsi was unlawfully apprehended and detained in a cell at the HMPS by members of the RLMP. After being detained for about six hours he broke out of the cell and escaped;
- f) In the meantime Penane arrived at the MCCO where he attended a meeting with serving police officers in the office of Colonel Ngatane, the Commander: Central Region (PW5). Apart from Penane and Ngatane, other officers present included the deceased on count 2 and the complainants on counts 3, 4 and 5.
- g) The MCCO and the nearby Police Headquarters ("the (PHQ)") were invested by armed policemen who seized arms including

a general purpose machine gun (“GPMG”).

- h) Lance Sergeant Lekhooe and two other armed policemen, all alleged co-conspirators, made their way into PW5’s office. Lekhooe, who was armed with an M16 automatic rifle, saluted in what was described as a “mocking manner”. He faced Penane, holding his firearm with both hands in a “ready” position and said that Penane was wanted. Penane resisted, drew and fired a 9mm pistol and Lekhooe fired a number of shots with his rifle;
- i) As a result of the shots fired by Lekhooe, Penane and Chabeli were killed and the complainants on counts 3, 4 and 5 all sustained gunshot wounds;
- j) Lekhooe was killed by shots fired by Penane;
- k) The uprising collapsed and came to an end on the same day.

[8] It is not disputed that the operation carried out by certain disaffected members of the Police Force was obviously unlawful, nor is it in doubt that at least one of its purposes was to act against Penane and Ramoeletsi for the part they had played in dealing with the teachers' strike. The Crown alleges that the appellant was part of the unlawful operation and that his role was that of driver of a Combi motor vehicle which transported the conspirators, including Molise, to the HMPS, the MCCO and the PHQ. It is this aspect that I now turn to consider.

[9] It was in the early hours of the morning of 31 October, and while PW1 was on his way to Penane's house, that he saw a number of armed policemen in a PCR Combi vehicle parked next to the road. The policemen were attired in brown operational uniform and so were a group of others who were leaning against a wall. PW1 identified the appellant as the driver of the stationary Combi. According to the witness the

appellant was not in police uniform; he wore a woollen hat and an overcoat which was unbuttoned. As PW1 drove past the Combi, the appellant (who was close enough to PW1 to recognise him) gave a “thumbs up” gesture to the other police officers. The occupants of the same Combi were soon thereafter deployed in an attempt to surround Penane’s home.

[10] On his way from Penane’s house, Ramoeletsi was apprehended by three policemen and forced at gunpoint to drive to the HMPS where, as stated above, he was compelled to enter a cell, one of the main perpetrators in this respect being Molise. Two further factors are of significance: the first is that before PW1 entered the HMPS building and while in the parking area of that police station, he observed the Combi driven by the appellant enter a parking place at the HMPS. It was, in PW1’s words, “full of men”. One of them, an alleged co-conspirator called Sergeant Leuta, alighted and told PW1 that he was under arrest. The second factor is that PW1

testified that while he was being forced into the cell, the appellant was one of the persons in the group who escorted him although he, the appellant, was “at the back”.

[11] On his arrival at PHQ at about 6 am, PW2 found that a number of armed policemen from the PTC were present, one of whom directed PW2 into a hall with other senior officers. From the hall, PW2 observed the PCR Combi come through the gates of the PHQ. Molise and the appellant, both in operational gear and armed with rifles, alighted from the vehicle and spoke to other policemen near the gate. They then re-entered the Combi which drove off in the direction of MCCO after which PW2 heard multiple gunshots coming from that direction.

[12] PW3, then a sergeant in the Band Unit also identified the appellant as the driver of a Combi in which there were five or six other members of the RLMP including Molise, all armed and dressed in operational uniform. It was the

appellant, according to PW3, who stopped the bus in which PW3 was travelling to work and who persuaded PW3 to board the Combi on the pretext that Lekhooe wanted to meet him at the HMPS. On his arrival at the HMPS, however, Lekhooe refused to speak to PW3 who went on his way to his work at PHQ and, after the shooting, to the MCCO where he again saw Molise and the appellant.

[13] The appellant's presence at MCCO, before the shooting commenced, was confirmed by Colonel Ngatane, PW5, who testified that the appellant and a handful of other members of the Police Force, all in operational dress, were close to the outside gate of the MCCO on PW5's arrival at the building. PW5 gave a detailed account of the events in his office which led to the deaths of the two deceased and Lekhooe and the wounding of three other officers, which I have recounted in brief in para [7] (f) to (j) above. After the shooting, and from the window of his office, PW5 saw Molise and a sergeant Mosae, also a co-

conspirator. The latter was armed with a GPMG and, according to PW5, was lying on the ground and “taking cover”.

[14] PW6, Colonel Monyeke, also noticed the appellant in operational uniform at the MCCO when he, the witness, entered the gate after the shooting. It should be noted that earlier that day, and while PW5 was at Police Headquarters (“PHQ”), he was one of the officers who was ordered to go into a hall by a sergeant Senekane but he refused to do so.

[15] In October 1995 PW7, then Brigadier Makoaba, was the Deputy Commissioner of Police. He, too, saw the appellant at the MCCO in the company of others, as did PW8, Senior Inspector (then warrant Officer) Khuele who testified that the appellant and others, who were all dressed in operational uniforms and carried rifles, were outside the MCCO building when Lekhooe and others went into the building and up the stairs. Shortly thereafter she heard the sound of

gunfire.

[16] Mr. *Hoeane*, who appeared for the appellant at the trial and in this Court, submitted before us that the Crown evidence fell short of establishing beyond reasonable doubt that the appellant was a participant in the common purpose to commit any of the offences. Save to some extent in respect of PW3, counsel did not submit that the evidence of the Crown witnesses should not have been accepted by the trial Court. He was correct in adopting this approach as the court a quo made positive and justifiable findings of credibility in favour of the Crown witnesses, including PW3, and rejected the evidence of the appellant for good and sound reasons. I will refer to *Mr Hoeane's* submissions in more detail later in this judgment but it is appropriate to refer briefly to some aspects of the appellant's evidence at this stage.

[17] The appellant admitted driving the PCR Combi on the morning in question. He said that, on

the instructions of Molise, he had conveyed members of CODESA from their respective homes to attend a meeting with PW7 at PHQ. For reasons which do not have to be elaborated upon, however, the appellant claimed that he did not attend the meeting but said that he spent the day at work in his office at the HMPS. He admitted that the members of CODESA whom he had conveyed wore operational uniforms and carried rifles and eventually conceded that Molise and the other members of Codesa were engaged in a criminal enterprise on that day. For the rest he persisted in his contention that he played no other part in the unlawful operations and that the Crown witnesses who had implicated him had done so falsely and for no apparent reason save, he said, in the case of PW7 who allegedly bore him ill-will. The alleged reasons for the bias or malice of PW7 are too improbable to warrant serious consideration. However, in 1997 the appellant fled Lesotho and was eventually arrested in the Republic of South Africa and handed over to the

investigating officer, Senior Superintendent Mofolo (PW9) at the Caledonspoort Border Post.

[18] The appellant's evidence was so improbable and contradictory that it is not surprising that Mr. *Hoeane* did not challenge the trial Court's credibility findings on appeal. For this reason it is not necessary to detail the respects in which his evidence was obviously untruthful but it is not without some significance that he corroborated the Crown version to the extent that he conceded that he did indeed drive armed members of CODESA in the PCR Combi on 31 October and that he knew that Molise and others were involved in unlawful activities.

[19] On appeal there was no dispute about the legal principles of common purpose that are applicable in this matter. We are not here concerned with a common purpose that arose upon an impulse without prior consultations or agreement but with a common purpose arising out of an agreement. As Corbett CJ pointed out

in **Magmoed v Janse Rensburg and Other** 1993 (1) SA 777 (A) at 810 H – I, it is seldom that there is direct evidence of such an agreement and that usually the Court is asked to infer it from the proven facts. The facts in this case show that there were concentrations of armed members of the RLMP at key and critical points – Penane’s home, the MCCO, PHQ and the HMPS; that the persons concerned were dressed in operational uniform and that their presence at the aforesaid places as well as their attire and weapons were not only unauthorized but unlawful.

From these facts it is not difficult to conclude that this was a coordinated and pre-planned operation. It is also obvious from the evidence that the operation was under the leadership of Molise, who was the most senior ranked police officer involved in the unlawful enterprise and there is no suggestion that the other policemen were unwilling participants in the plot.

[20] What were the aims and objectives of the participants in the operation? On these matters, too, there is no direct evidence but it is not difficult to infer, from the proven facts, what the participants had in mind. The obvious targets were Penane and PW1. They were to be apprehended and other senior members of the Police Force were to be kept together in the hall at PHQ. It is not known what would have happened to PW1 had he not escaped, nor is it known what Penane's fate would have been had he succumbed to the conspirators' demand. The intended victims, however, were to be captured by means of force and by persons using loaded fire-arms. That the use of force and possible shooting was contemplated is obvious from the fact that all the participants were armed with rifles and that threats were made to PW1. Moreover Penane was confronted by Lekhooe who pointed an automatic firearm in his direction and PW1 was forced at gunpoint to drive to the HMPS. The conspirators must have foreseen and by inference did foresee that fire

arms would be used in the event of resistance, with fatal or serious consequences. As Holmes JA stated in **S v Malinga and Others 1963 (1) SA 692 (A) at 695** “violence, firearms, and death are ever an easy and sombre trinity”.

[21] What of the appellant’s participation in the offences? Mr. *Hoeane* argued that the Crown relied on the appellant’s involvement only to the extent that he, the appellant, had driven armed policemen to the places where the offences were committed; that there was insufficient evidence that the appellant was the driver as alleged by the Crown and that therefore his participation in the conspiracy had not been proved.

[22] Assuming from the moment that we are entitled to have regard only to the accused as a driver, Mr. *Hoeane’s* submissions are not sustainable. On PW1’s evidence it is plain that he saw the appellant as the driver of the stationary PCR Combi and that almost immediately thereafter men from the same Combi were deployed at

Penane's house and that at the HMPS PW1 again saw the PCR Combi driven by the appellant and noticed that it was occupied by armed men. In the absence of an acceptable explanation by the appellant, the inference is irresistible that the appellant took his complement of policemen to Penane's house and thereafter to the HMPS where PW1 was held captive.

[23] Furthermore PW3's evidence, as reflected in par [12] above is quite explicit. He identified the appellant not only as the driver of the Combi but also as the person who stopped the bus in which PW3 was a passenger and conveyed him and others to the HMPS. Mr. *Hoeane* asked us to disregard PW3's evidence on the grounds that he was a single witness and that his evidence was uncorroborated. This argument is without merit. No corroboration was required for PW3's evidence, despite the fact that he was a single witness. His evidence was accepted by the Court a quo and that of the appellant rejected on this very aspect. It was not submitted that the

finding was wrong or that it was based on a misdirection or misconception of the evidence. To the contrary we are quite satisfied that PW3's evidence was acceptable and truthful in all material respects. Counsel for the appellant was also incorrect in submitting that PW3's evidence was uncorroborated. To the extent that the appellant was the driver of the Combi on the morning in question was confirmed by PW1 and PW2 and even, albeit to a lesser extent, by the appellant himself.

[24] Finally Mr. *Hoeane* submitted that PW2's evidence to the effect that the appellant drove Molise in the direction of the MCCO before the shooting at that place did not establish that the vehicle travelled from PHQ directly to the MCCO. This argument is also unacceptable. It is clear from PW2's evidence that the shooting occurred at the MCCO shortly after the Combi left PHQ; that immediately after the shooting Molise (the appellant's passenger) was seen at the MCCO by PW5, in the company of Mosae who was armed

with the GPMG; that earlier that morning PW5 & PW6 observed the appellant at the main gate of the MCCO; that PW8 saw the appellant at the gate of the MCCO shortly before the shooting; and that PW7 saw him there after the violence had erupted in PW5's office. The combination of these facts, coupled with the appellant's failure to furnish a credible explanation, lead us to the inevitable conclusion that the appellant did indeed drive Molise to the MCCO before the shooting took place and that he must have been in the vicinity of the gate when the violent encounter occurred inside the building.

[25] From the foregoing there is no doubt that the appellant performed an important role in the operation, even if the evidence against him is confined to the fact that he drove the other conspirators to the places referred to. But there is no need why we should close our eyes to other facts - that he was at the back of the group who directed PW1 into the cell at the HMPS; that he was clothed in operational gear

(save that when PW1 saw him, he was attired in civilian clothes); that at least two witnesses - PW2 and PW8 - testified that he was armed with a rifle; and that he was part of the group of conspirators at the material times and the relevant places.

[26] When all is said and done, it is abundantly clear that the appellant took part in an unlawful operation which involved the illegal and unauthorized arrest and detention of two members of the RLMP. It is equally obvious, given the arms carried by the conspirators, that he, as other participants in the plot, foresaw the possibility that the intended victims might resist and that violence, in the form of shooting, would then result. The appellant therefore foresaw the possibility of death and injuries during the course of the actions to achieve the unlawful objectives of the operation. I have already alluded to the fact that the appellant played an active and significant role in furthering the aforesaid aims and objectives of the operation

and, in the words of the judgment in **Mabaso and Another v Rex (1980 - 1984) LAC 256 at 258-9** following **S v Madlala 1969 (2) SA 637 (A) at 640** he persisted in his participation in the plan, reckless of the consequences. In short, the appellant, with full knowledge of the possible consequences, played an important role in aiding the actual perpetrators to achieve their unlawful objectives. He was clearly part of the common purpose to achieve the said objectives by concerted action. The fact that he may not have been one of the active perpetrators is of no consequence.

[26] In the result, the appeal is dismissed and the conviction and sentence confirmed.

L.S. MELUNSKY
JUSTICE OF APPEAL

I agree : M.M. RAMODIBEDI
JUSTICE OF APPEAL

I agree : S.N. PEETE

JUSTICE OF APPEAL

Delivered on the 4th day of April 2007

For the Appellant : Mr. T. Hoeane

For the Respondent: Mr R.A. Suhr