

IN THE HIGH COURT OF LESOTHO

CRI/T/165/2007

In the matter between:

BILLY MACAEFA

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS
THE MINISTER OF LAW AND
CONSTITUTIONAL AFFAIRS
ATTORNEY GENERAL

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

JUDGMENT

Delivered by the Honourable Mr. Justice T. Nomngongo
on the 16th March 2009

The accused first appear before me sitting with assessors on the 24th April 2008 charged with contravening section 4 (1) (a) (b) read with section 3(1) (i) (ii) (iv) and in the alternative with contravening section 7 (d) of the International Security (General) Act 24 of 1984. He pleaded guilty not to both the main and alternative counts. Evidence was then led on behalf of the crown. At the end of the crown case an application for the discharge of the

accused was made for the discharge of the accused in terms of section 175 (3) of the Criminal Procedure and Evidence Act 1981. I granted that application. The crown appealed. The Court of Appeal allowed the appeal and set aside my order granting the application for discharge. It ordered that the matter be remitted to the court *a quo* for the trial to proceed in the ordinary course. (DPP v BILLY MACAEFA C of A (CRI) N0.9/2008 *unreported*).

Pursuant to that order the proceedings re-commenced on the 3rd March 2009 before me and one assessor Mr. Dingiswayo, the other Motsamai having since passed on (May his Soul Rest in Peace). On that day the accused gave evidence which was essentially to explain what he meant by the speech he delivered on the 8th April 2007 at a political rally at Makhaleng, which gave rise to the charges he now faces. More of that later.

At this stage of the proceedings the court has to decide whether the crown has proved its case beyond reasonable doubt.

In this regard the crown adduced the evidence of three witnesses P.W.1 was that he was a member of LMPS and on the 8th April 2007 he was on duty as a journalist. He attended a rally held by the All Basotho Convention party attended by three hundred to five hundred people. The accused addressed the rally and he made a video recording of the proceedings on a DV cam recorder. He later dubbed what he had recorded on to a VHS video tape. This video tape was viewed by the court and was handed in and marked Ext "A". The defence did not suggest that it did not represent what transpired on that. In fact the accused admits that he addressed the meeting at Makhaleng.

P.w.2 transcribed and translated into English what was said at the rally and Pw3 corroborates the evidence of Pw1. He was also present at the rally. After that the crown closed its case. Thus what the crown did was to lay the speech before the court to decide whether or not it was seditious.

The speech in translation is as follows:

**A TRANSCRIPTION FROM A
VIDEO TAPE**

Speaker: Shine!

Response: The Sun!

Speaker: I appreciate this opportunity of addressing you after the elections.

I am sure some of you were wondering as to why I did not speak to you immediately when we came from the elections. The main reason, inter alia, is that in our collation with Kobo-tata and Workers' Party, when we have visitors, I always consider it that it suffices that the leader, ntate Tom for the merger to speak alone. May I remind you that when I fight, it is not so much that I fight for seats. In fact I would like to put the record straight, because I have had some people quote me from the Parliament that it is as though we have been cheated as regards the seats by Kobo-tata. I would like to make this clear here and now that we Workers' Party, our aim and intention with Kobo-tata is not the seats. Our aim and intention is to remove that person who has become a stumbling block when it comes to starvation. If we can manage to remove that person from Qacha, that is all I want.

My masters, I want to give you an assurance, if I had an opportunity of making an address after the election, on the very day that the Leader addressed you at Ha Mopapa; If I spoke on that day, things could have gone bad from that day. Let me remind you that his responsibility as a Leader and further tell you that we, who usually talk about these matters, they say we are delaying; this will make them cool down. I would like to tell you friends, that to day I share the same sentiments with you. But, don't put the leader in a fix; don't put him in a fix. If I may teach you, the main responsibility of the Leader is to restrain you. After you having done what? After you have acted. I assume you, friends, that there is never going to be a day when ntate Tom will stand

here to say you should do this. His is to be heeded when he restrains you. Once he says 'stop', you stop.

Should I tell you the affairs of this country? The affairs of this country can't be solved round a table. As for these discussions, let me tell you, I Billy stand here with certainty, I don't see any head-way. That notwithstanding, let us respect our Leader and let him go to those discussions. If after this thing called SADC, Troika' which thing I don't know, there is no solution, Comrades, I tell you that we shall call one meeting that will give us the way forward.

We are not going to waste time. I want to tell these my fellow NSS members who are present here that it is no secret that I together with some others, I know they are many here, this man from Qacha'nek looks down on us as though he is the only man. I hate a man who, when talking to other men, says he spans a bull while it is bellowing. I think it is because we don't want to talk about the affairs of this country. If we were to recap a little, things are much better, he should have long been toppled.

You can go round the whole of Lesotho right now. Yesterday I was at my home, Matelile. Matelile people ask how they did not succeed! The whole nation is upset: you can go round the whole country of Lesotho, right now people are wondering what is happening because the elections went well. I mean you know that the elections were conducted fairly. Mr Thabane, that thing I spoke about these computers! As for this faxing! Goodness me! Things change. These children who are Returning Officers are bribed. They change our election results. My fellow people, I say it is well that we still listen to our leader, but I would say, as for the stay-away, I thank you who participated, we did well. For that matter it was successful. My plea is that there be no other stay-away. There is going to be one thing only, that is after these SADC discussions which I trust nstate Tom to ably handle; I don't want to get to that. I can turn those discussions tables up-side-down. He, as the Leader can go to those discussions. If they out-vote him, because they know how to negotiate those things, we, Billy and others, should be told that they have hit a rock. But we are not going to stage a stay-away this time, we will 'announce' in our last meeting what the way-forward is. We are not going to have a man that we have expelled from Maseru turning back along the way.

My fellow-people, I don't want to derail the purpose of this today's occasion, I want to believe that it is to introduce to Makhaleng community what Kobo-tata is.

They should know that it is all-encompassing, the tame the belligerent, the normal, the spirits, the recently traditionally circumcised young men, we are here; the workers as well. We would like you our fellow-people at Makhaleng to agree with us on one thing and that is here in Maseru, as you reside in Maseru district, the aim is that where you see a bird, you chase it away. When you see two or three birds, consider them dangerous, put them out of sight.

As Maseru people we say we chase this person away to return to Qacha, he has failed in administration, we don't want to see him being elected by means of those computers. I am sure you are witnesses that after the elections, these commissioners of IEC ran all over spending millions of monies for a short vacation. They toured. My fellow people, I assure you, please remember what the responsibility of the leader is. If you were to watch television, not necessarily going to those places, you would notice that in Africa as well as in Europe, you will see people running in towns, young and old, sweating, getting rid of a person who has become a stumbling block. I am saying this time we do not go for a stay-away. He who has ears should hear properly. We are going to go on our own, we will properly go to Maseru. We are not going to beat about the bush; we will lawfully go there with our matter, seeking one thing, that is Mosisili should go, we are not going to waste time.

Mr Thabane, go and talk to those your Troika people, talk in any manner you choose and then tell us the result. They should know that I purposely speak before they come that if they are not going to take you seriously but look at Mosisili, we stand ready for command.

**Power!
Shine!**

This transcription and the translation hereof I consider true and fair.

Ex-Senior Interpreter

As I said the accused in his defence went about explaining what he meant by his utterances. He starts by explaining that he is the leader of the Lesotho Workers Party (LWP) but also the Secretary General of the ABC. He is a member of the National Assembly. The ABC and LWP have apparently entered into an alliance for fighting elections. The occasion for addressing the rally was the eve of an election for the constituency of Makhalleng which did not take part in the general elections held two months previously. The reason for holding such an election was that one of the nominated candidates had died just before the general elections. He explains that they were canvassing votes for the ABC and the LWP and that other parties including the LCD (Lesotho Congress for Democracy) were doing the same. The leader of the LCD during these campaigns addressed rallies as well, not as Prime Minister but as leader of the LCD.

The witness then points out that the motto of the ABC is that the greatest enemy of a man is starvation. It was in that context that he said that the person from Qacha's Nek must be removed. But he emphasized in his explanation that, that must be done democratically. By that he means lawful demonstrations, processions and petitions. He explains what he means when he say that the aim of the LWP was not to obtain seats but remove the man from Qacha's Nek. He says it arose from what he had heard from fellow parliamentarians that the ABC had cheated the LWP in allocating it only three proportional representation seats. What he meant was that it did not matter to them how many seats they obtained as LWP as long as the man from Qacha's Nek is removed. He explained that by the man from Qacha's Nek he meant Mr Mosisili, the leader of the LCD.

The accused also says that his words were uttered in the context of the delays in the negotiations between opposition parties and the government. According to him some of the more restive among

their members, him included thought they were a waste of time and they demanded immediate action. In the speech he urges them to be more restrained and not act first and expect the leader to restrain them after they had acted. He urges them therefore not to put the leader in a “fix” for as he says these would never be “a day when nate Tom will stand here to say you should do this. His is to be heeded when he restrains you. Once he says “stop” you stop”.

The accused explains the context in which he expressed loathing for the man from Qacha’s Nek who had said that he would span a bull even as it was bellowing. He apparently says it was in response to Mr. Mosisili’s own offensive language in reference to the leadership of the ABC and LWP, for instance that he had compared them to fresh yellow faeces that attracts lots of flies. He said using that kind of language he could not have been acting as the Prime Minister of the nation. His reference to things being better now as opposed to times when the man from Qacha’s Nek

would have been toppled was a reference to the times when the military was prone to topple those it did not like.

I do not find it necessary to go through the whole of the accused's explanation of his speech. Suffice it to say that he emphasizes whatever actions were contemplated in his speech they were to be done democratically and lawfully.

The crown submits that the speech made by the accused must be considered as a whole. I was referred in this regard to R v SEKHONYANA LLR (1991-96) (2) 1354 at 1364 and MACAEFA's case (supra).

The crown makes the following observations regarding the speech.

- (a) the accused states that his aim is not to fight for seats but to remove the man from Qacha's Nek (The Prime

Minister) who had become a stumbling block on the issue of starvation;

- (b) the removal of the Prime Minister is a recurrent subject throughout the speech, there being six references made to that theme;
- (c) the Prime Minister is referred to as the person or man from Qacha's Nek or Mosisili and is at no stage referred to as the Prime Minister or leader of the LCD party indeed the name of that party does not feature in the speech.
- (d) The accused points out to his audience that their leader (Mr Tom Thabane) will not tell them what to do, but will only restrain them after they acted.
- (e) It is said that the affairs of Lesotho cannot be solved by discussions around a table.
- (f) The Independent Election Commission (IEC) is openly vilified as being corrupt in that its returning officers are bribed to alter election results and millions are misspent on holidays.

- (g) It is emphasized that there was not to be another stay-away;
- (h) The Prime Minister was not to be elected by means of those computers;
- (i) Reference is made to crowds of people in Africa and Europe “running around in towns, young and old sweating” getting rid a stumbling block, as had the Prime Minister;
- (j) It is reiterated that there was to be no stay-away and this time they would go to Maseru for the purpose of removing the Prime Minister.

The crown concludes that viewed holistically the speech is manifestly a clamant call for those present to depose the Prime Minister by inciting unrest and disorder. It says at the very least even if it is not such a call, by the very nature of its attack on the Prime Minister and democratic institutions such as the IEC, it

manifests an intention to raise discontent or disaffection amongst the audience.

I will turn to the accused's explanation on these submissions.

Regarding (a) as indicated above he says what he meant by not fighting for seats was a matter that had been talked about in parliament and this appears in his speech, that the party that he led the LWP had been cheated by its partner the ABC of seats in the proportional representation allocations. It was a matter between LWP and the ABC. I understood him to say that between themselves they should not quarrel over seats but share in the common objective of removing the person from Qacha's Nek. This is different from the colour that the crown gives to what the accused said.

(b) the accused throughout the speech makes references to the removal of the man he refers to either as the man from Qacha's

nek or Mosisili. He does not once in the speech itself refer to him as Prime Minister or leader of the LCD nor the leader of the government of Lesotho. He confined himself to the former only.

The interpretation given at (d) by the Crown of accused speech is not the explanation given to it by the accused. The accused gives the opposite meaning to his words, namely, that he exhorts his audience not act first and then expect the leader to restrain them afterwards. That is how I understood the request that they should not put the leader in a “fix”.

He explains that by saying that the affairs of Lesotho cannot be solved around a table he was speaking in a context of the then on-going negotiations with members of SADC regarding the elections with which the opposition was apparently unhappy. He meant in that context that he viewed the negotiations as

futile and therefore that they could not solve the problems of Lesotho.

The allegations against IEC and its returning officers, he explained was based in part on the example he gave of the Qhalasi constituency where the results of the 2002 elections were published instead of those of 2007. He says the IEC even had to apologize for that. In the speech itself the accused does not say as it is submitted by the crown that the Prime Minister is not to be elected by means of those computers. He simply in general casts serious doubts about computers and faxes. No mention in that context is made about the Prime Minister having been elected by those computers nor of his name at all.

The reference to crowds of people running around in towns sweating with the aim of getting rid of a stumbling block is explained as a reference, to petitions, protests and demonstrations which the accused says are provided for in the

constitutions and laws of Lesotho. He says stay-aways had not produced the desired results and those would be the alternatives. He concludes by saying that they would go to Maseru lawfully, carrying their own matter seeking only one thing that Mosisili must go.

Before proceeding to consider whether the words constitute an offence as charged it is opportune to refer to the remarks of the Court of Appeal in the MACAEFA case (*supra*) that it was abundantly clear that the offence charged here was a contravention of section 4 (1) (b) of the Proclamation. It went on to say:

“The offence created by section 4 (1) (b) relates to the uttering of any seditious words, which in terms of section (2) of the Proclamation means **“words having a seditious intention”**. In terms of section 3(1) (i) a seditious intention is an intention *inter alia*, “to bring into

hatred or contempt or to excite disaffection against the Government of [Lesotho]” (The references in the indictment to section 3(ii) and (iv) would seem unnecessary). What was alleged in the main charge was the intention to “defy and subvert the authority of the Government of Lesotho”, which is what sedition would amount to under the common law. In terms of the Concise Oxford English Dictionary, “defy means openly resist and refuse to obey”, and “subvert” to “undermine” the power and authority of lawfully established system or institution. The somewhat archaic word “disaffection” means “dissatisfaction with those in authority and no longer willing to support them”. There is therefore a strong correlation as to meaning between defying and subverting the authority of the Government (as charged) and exciting disaffection against the Government within the meaning of section 3(1) (i). In substance, the body of the charge accords with the statutory provisions the accused is charged with”.

The Court of Appeal in Macaefa's case also endorsing the view expressed by Kheola C.J. in SEKHONYANA's case (supra) that in a sedition case a speech must be viewed holistically said that regard may be had to section 3(2) of the proclamation which provides:

“in determining whether the intention with which any words were spoken, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct.”

In the case of R v NKATLO 1950 (1) SA 26 which Mr Phoofolo referred me to Herbstein J. had this to say regarding a similar provision in South Africa. (at p.30)

“It should however be emphasized that care must be exercised in the application of the rule. A person cannot be convicted under the section for uttering words which are calculated or liable to promote feelings of hostility without proof that he had the intention to do so. And there may be cases where though the language used is liable to promote those feelings of hostility, the speaker clearly has not that intention”.

And further on at p.31 he concludes:

“Therefore in applying the test that a person is to be presumed to intend the natural and probable consequences of his acts, the court must be astute to see that the inference of intention to promote feelings of hostility is the only inference which can reasonably be drawn. If the language used is reasonably capable of another explanation, the inference of intent cannot be drawn”.

I respectfully, agree with the views expressed by Herbstein J.

Viewed holistically the speech centre around the man from Qacha's nek or Mosisili. The accused wants him removed because he says he is a stumbling block in the fight against starvation. This is the central theme of his speech. He never once in his speech referred to him by his title as the Prime Minister, although of course he admitted that the man he referred to as the man from Qacha's nek or Mosisili is the Prime Minister. Again he made no reference

to the government of Lesotho. In his evidence the accused explained that he was directing his speech to him as a fellow politician and leader of a political party. This was done at an election rally.

The remarks of **Young J. in R v NGONO 1961(3) 222 at 230 B-C** come to mind in this regard. He said

“Before turning to the decision of this case it is necessary to remind ourselves that, to paraphrase the words used in an English case, the path of criticism is a public way in which even the wrong-headed are entitled to wonder provided they act bona fide. Further, the remarks of Wessels J. in R v Bunting 1916 TPD 578, to the effect that this statute must be strictly construed so as not to interfere with the liberty of the subject beyond that which the law clearly requires, must also be born in mind”.

The statute referred to is similar to the one now under consideration. The learned Judge then went on to say:

“It is desirable, however, to deal with the matter on the alternative basis, namely that to excite disaffection implies an incitement to violence or breach of the peace. Having regard to sundry exhortation on the part of the accused to non-violence, we think there is some doubt whether or not he was resorting to the notorious tactics of Mark Antony on another occasion. We give him the benefit of the doubt on this point”.

The accused in this case specifically urged restraint when he said that the audience should not act first, before being restrained as they would put the leader in a “fix”. This of course was misconstrued by the crown to mean that they should act first and then be restrained afterwards. He also said that they would march to Maseru lawfully to present their matters. The crown seems to import a sinister motive in the removal of the man from Qacha’s nek. It seems to me that the purpose of contesting an election is to unseat – that is to remove the opposition. In any case the accused has said he

sought to remove the man from Qacha's nek by lawful democratic means as was demonstrated by a lawful protest march on the 5th July 2007.

I have found nothing to suggest that the accused had the intention to bring into hatred or contempt or to excite disaffection against the Government of Lesotho. At best his *diatribe was ad hominem*.

I do not find him guilty and I discharge him

My Assessor agrees.

T. NOMNGCONGO
JUDGE

For Crown : Mr Surh
For Accused : Mr Phoofolo

