

IN THE COURT-MARTIAL OF LESOTHO

HELD AT MASERU

CM/T/07/10

In the matter between

REX

AND

NO. 50676 PVT MPHUNYANE

ACCUSED

RULING ON APPLICATION FOR DISCHARGE

-1-

BACKGROUND

1.1 Accused is charged with theft of service property contrary to Section 63 (a) of the Lesotho Defence Force Act NO. 4 of 1996 (the Act), or alternatively with abandoning service property which was in his care, contrary to Section 65 (2) (c) (ii) of the Act. The particulars of the offence are that on the 23rd July 2010 the accused stole a Galil rifle, a property of the LDF or in the alternative he negligently abandoned the same rifle in the woods or forest at Makoanyane Barracks on the date in question.

1.2 Accused pleaded not guilty, and the prosecution led evidence of four witnesses namely Cpl Thaele, the armourer, W/O Lesesa, the Brigade Sergeant Major (BSM), Cpl Maanela of Military Police (MP) and Pvt Ramats'ella who was on parade with the accused on the day in question.

-2-

SUMMARY OF CROWN WITNESSES TESTIMONY

2.1 PW1, Cpl Thaele who works at LDF Armory only testified that he was told by BSM Lesesa (PW2) that one rifle that had issued for parade purposes that morning went missing and that two soldiers suspected of the incident had been arrested. Thereafter, PW1 went on, he saw two soldiers who were

handcuffed and under the care of PW3 Cpl Maanela MP. After locking up the rifles this witness met PW3 who told him that there was a case against accused in respect of the rifle that went missing.

- 2.2 PW2 BSM Lesesa testimony in brief was to the effect that on the day in question there was a parade at Moshoeshoe 1 International Airport. The parade consisted of 96 soldiers, among who was accused while there were four reserves whose names are not important just now. After the parade formed up at airport the witness realised that there was a blank file in the parade and he inquired about the issue. When he went to where the reserve were he found them to be five in number and PW4 Pvt Ramat'sella was among them. PW4; explanation was that accused had told him that he was that accused had told him that he was a reserve and PW4 had ordered him to be on parade in his place and that he had given his own rifle to the accused. BSM went back to the parade and BSM went back to the parade and asked accused where his own rifle was and accused answered that he had forgotten Makoanyane at the clerks' office.
- 2.3 After the parade back at Makoanyane accused, Pvt Ramat'sella (PW4) Cpl Maanela and the witness headed for the clerks office. When they were about to enter the office accused told Cpl Maanela (PW3) that actually the rifle was not at the clerks office but in the forest. The team then went to the forest. At the forest accused said he did not remember the exact spot where he had left the rifle and a long search ensued. The BSM testified that we observed accused looking beneath the leaves while searching for the rifle and he asked him why he was uncovering the foliage if he had merely left the rifle in the woods which relieving but accused did not answer him. The witness then left the trio i.e. Cpl Maanela accused and Pvt Ramat'sella and went to the clerks' office. He then went back to the forest and as he was about to enter the woods he met Cpl Maanela told him that the rifle was found covered with leaves.
- 2.3 PW3 Cpl Maanela testified that after they have arrived at Makoanyane from the parade at the airport they proceeded to the clerks' office but accused told him that actually the rifle was in the forest next to the dam. Then the witness accused Pvt Ramat'sella and the BSM went to the forest and started

searching until finally accused told them that actually he had left the rifle further deep into the forest. They went further in and at some excavated spot accused uncovered some leaves came up with the rifle.

- 2.4 PW4 Pvt Ramat'sella testified that at the airport accused told him and some other soldier that he i.e. accused was a reserve and that he wanted to join the parade. That is when the witness gave accused his own rifle to be on parade. This witness materially testified along similar lines as transpired back at Makoanyane barracks until the prolonged search of the rifle at the forest until it was found covered with foliage.
- 2.5 It should be noted though that accused denied that the rifle was covered with leaves when he found it and he maintains that it was leaning against a tree stump.

-3-

THE LAW VIZ A VIZ THE EVIDENCE

- 3.1 Rule 39 of the Court Martial procedure Rules of 1998 read with necessary correction as established the court martial of **Rex v Sgt Mahase and others CM/T/1/99** read with **section 175 of the Criminal Procedure and Evidence Act of 1981** provides that if at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged, the may return a verdict if not guilty.
- 3.3 It is largely settled that even if discharge is refused accused may close his case once and still be acquitted. In this sense therefore a ruling that the prosecution has made out a prima facie case means only that accused runs the of being convicted if he offers no evidence. **S v Mthetwa 1972 (3) SA 766.**
- 3.4 It is also a trite principle of law that the prosecution must prove its case beyond reasonable doubt. However, the question of proof beyond reasonable doubt at this stage need to understood in a somewhat different context since it has to be tied to the general rule hereinbefore alluded to which is to the effect that absence of a prima facie case should be understood to mean where there is no evidence upon which a reasonable court might, and not

should convict. So unless the prosecution case is so devoid of substance in the form of wholly insufficient evidence that it would be premature stage to determine in detail whether the crown has proved its case beyond reasonable doubt.

- 3.5 There are many factors which may be indicative if whether the prosecution has proved its case beyond reasonable doubt. Detailed assessment of credibility of witness is one of them and that should not meticulously be embarked on at his stage. **Justice MP Mofokeng in Criminal Law and Procedure Through Cases page 267** observed, "... it has been held that the court should not at this stage embark upon a final assessment of credibility and should leave the matter in abeyance until the defence has closed their case....."
- 3.6 It is also generally accepted that the accused is entitled to a discharge where prosecution witness were so discredited that there is no way that a verdict of guilty can be returned unless accused somehow incriminates himself in his defence.

-4-

PRESENT CASE

- 4.1 In the present case it cannot be said that prosecution witness testimony was so unreliable nor was their credibility so shattered that putting accused to his defence would be a miscarriage of justice. The testimony of PW3, PW3 and PW4 in particular seem to point to a high probability that accused conduct on the day in question as regards the rifle that when missing smacks of the theft of the said rifle.
- 4.2 Having said that let me reiterate that detailed and final assessment of the crown witness testimony in its entirety will be done to establish whether all requirements are met. It is still possible therefore that accused may be acquitted at that stage if the prosecution would be adjudged to have failed to prove its case beyond reasonable doubt and that is possible even if accused elects to close his case without leading any evidence.

4.3 The court is therefore advised that the prosecution has made out a prima facie against the accused and that the application for discharge should be refused.

GIVEN THIS 9TH DAY OF AUGUST 2011

MAJOR T MATHATJANE

JUDGE ADVOCATE

On the 7th February 2011 the court assembled.

**SUMMING UP OF EVIDENCE- RULING OF COURT MARTIAL
PROCEDURE RULES 1998**

-1-

BACKGROUND

The accused is charged with stealing service property contrary to Section 63 (a) of the Lesotho Defence Force Act N0. 4 of 1996, or in the alternative abandoning service property which was in his care contrary to Section 65 (2) (c) (ii) of the same Act. The particulars of the offence are that on the 23rd July 2010, the accused stole a Galil assault rifle, a property of the Lesotho Defence Force; or alternatively he negligently abandoned the said rifle in the forest at Makoanyane Barracks.

-2-

SUMMARY OF EVIDENCE LED

The accused pleaded not guilty to the charge, and the Prosecution let evidence of four witnesses. PW 1, Cpl Thaele told the Court that he works as an armourer at LDF Armoury. He was informed by BSM (PW 2) that one rifle that had been issued earlier went missing and that suspects were arrested. Later on the same day the rifle was found and handed over to him and he kept it with other rifles at the armoury.

2.1 PW 2, WO Lesesa (BSM) testified that on the day in question there was a parade at Moshoeshoe I Airport. There were 96 soldiers on parade including the accused. There were also four reserves. All soldiers on parade were issued with rifles. After the parade had formed up at Moshoeshoe I International Airport, the witness realised that there was a blank file in the parade and when he went to where the reserves were and found five soldiers. The senior soldier among reserves (PW 4) told PW 2 that the accused had told them that he was a reserve; whereupon PW 4 gave the accused his own rifle to join the parade as he had forgotten his (accused) at Makoanyane at the Clerks office.

2.2 Back at Makoanyane barracks after the parade PW 2, accused, Cpl Maanela of MP and Pvt Ramatsella (PW 4) headed to the Clerks office. However, according to PW 2, when they were about to enter the Clerks office, the accused told Cpl Maanela that the rifle was actually in the forest near the dam. The team went to the forest and started searching around for a long time since the accused told them he could not remember the exact spot where he left the rifle. The witness testified that during the search accused kept looking beneath the dead leaves and foliage and when he asked the accused why he was uncovering leaves when he had said he left the rifle in the forest while relieving himself, the accused did not answer.

2.4 The witness then left the search party in the forest and went to the clerk's office. He then went back to the forest and as he was nearing it he met Cpl Maanela, the accused and PW 4 and they had the rifle. Cpl Maanela informed him that the rifle was found covered with leaves.

2.5 PW 3 Cpl Maanela of MP testified that after they arrived at Makoanyane Barracks from Moshoeshoe I, they proceeded to the clerks' office where the accused had said he had left the rifle. On the way to the Clerks office, the accused, told the witness that he had left the rifle in the forest near the dam. The witness, PW 2 and PW 4 then went to the forest and started searching for the rifle. The search continued for a long time until the accused told them that he had left the rifle deeper into the forest and they went deeper in. at some excavated spot accused uncovered some leaves and came up with the rifle.

2.6 PW 4 Pvt Ramatsella, testified that at the airport the accused told him and his fellow reserves that he was also a reserve and that he wanted to join the parade. PW 4 then gave the accused his own rifle. This witness's testimony is also to the effect that back at Makoanyane barracks on the way to the Clerk's office, the accused changed his story and told them that the rifle was not at the Clerk's office but in the forest. In the forest a long search ensued until PW 2 left the trio in the forest. They continued searching until the rifle was found covered with leaves. It was the accused who found and uncovered the rifle.

2.7 During cross-examination much was made by the defence as to whether the rifle was said to have been "covered" with leaves or "buried". It was also contended that the search was not as long as the prosecution witnesses testified.

These issues will be dealt with later on when the defence case is analyzed in its entirety.

-3-

DEFENCE CASE- ACCUSED TESTIMONY

The defence called the accused to testify in his defence, and he testified as follows:-

On the 23rd July 2010 after they had been issued with rifles for the parade he went into the forest to relieve himself. Then they boarded the vehicles and left for the airport. At Moshoeshoe I Airport that is when he realised that his rifle was missing. Pvt Ramatsella gave him his rifle and ordered him to join the parade. After the parade had formed, BSM Lesesa (PW 2) came to him and asked him where his rifle was and the accused told him that he had forgotten it at the Clerk's office in Makoanyane. According to the accused he was apprehensive that he might be beaten up if he said that he had left the rifle in the forest.

At Makoanyane the accused, told PW 2, Cpl Maanela that the rifle was in the forest. When they entered the forest the rifle was found leaning against a tree stump.

-4-

ISSUES RAISED DURING CROSS-EXAMINATION

4.1 The defence questioned PW 2 and PW 3 whether the rifle was buried or merely covered with leaves; and went on to stress that there was a discrepancy between PW 3's written statement and testimony in Court on the issue. Another issue that the defence denied was that the search of the rifle lasted for a long time as testified by PW 2, PW 3 and PW 4. The defence also questioned the propriety of the rifle i.e. EXHIBIT 1 being so devoid of any signs that it was buried due to its cleanness when it was handed-in in Court.

4.2 As far as the accused testimony is concerned, during cross-examination, during cross examination he told the court that he became aware that his rifle was missing at Lithabaneng on the way to the airport. It was put to him that in his

defence in chief he said he realised that his rifle was missing when he arrived at Moshoeshoe 1 airport and he answered that he didn't recall saying that.

-5-

THE LAW, FACTS AND ELEMENTS OF THE OFFENCE

5.1 In simple terms theft consists in the unlawful and intentional appropriation of another's movable corporeal property. From this definition it is clear that there has to be intention to deprive the owner of his property, and on top of that the appropriation must be unlawful. It should be mentioned that there are various manifestations of the crime of theft in our law.

5.2 In the present case accused was issued with a rifle belonging to LDF for service purposes. He left it in the forest. PW2 PW3 and PW4 testified that the rifle was found in the forest after an extensive search and that accused found it covered with leaves. Accused when questioned earlier on regarding the whereabouts of the rifle he initially said he had left it at the clerks office; only to change his story later on to say he left it in the forest. According to him he was afraid to say he had left in the forest "because of what might happen to him".

5.3 Accused story might have been plausible if not for certain aspects that were brought forth by the prosecution witness. Accused presented himself as a reserve to PW4 and took the latter's rifle to join the parade in his place. His initial answer when questioned about the whereabouts of his rifle was that he had forgotten it at the clerks' office in Makoanyane only to change his story at Makoanyane to tell the truth about where the rifle actually was. Even in the forest the rifle was found covered with leaves according to PW3 Cpl Maanela and PW4, Pvt Ramatsella. During cross examination, accused said he became aware of the missing rifle at Lithabaneng whereas in his evidence in chief he told the court that he became aware at Moshoeshoe 1 airport.

5.4 The significance of accused misrepresenting himself as a reserve at Moshoeshoe 1 cannot be overstated. On the basis of his misrepresentation he ended up convincing PW4 to give him his rifle so that he could join the parade in his place. After it was discovered by PW2 and PW3 that accused rifle was missing it was, or ought to have been, clear to accused that he had to tell the truth there and

then if it was to be believed that indeed he had forgotten the rifle in the forest while or after relieving himself. It is not clear where the difference would be if the rifle was left at the clerks' office or in the forest. The fact is it was missing.

5.5 There is no reason which this court could immediately fathom, as to why PW3 and PW4 would not say the rifle was found not after a long search nor that it was found leaning against a tree stump as accused claims. The court is strongly inclined, therefore, to believe that indeed the rifle was not in plain sight left innocently by accused while relieving himself but rather that it was hidden and covered with leaves. That factor coupled with the relatively long time it took for accused to uncover where he had left the rifle can only be construed as an indication that accused had the intention to steal the rifle. Accused of lying about where the rifle was initially only serves to support this conclusion.

5.6 The court is therefore advised to return a verdict of guilty since in my review the prosecution has proved beyond reasonable doubt that accused stole service rifle bearing the serial N0. 38370 which was issued to him for parade purposes.

5.7 In the event that the court feels that on the basis of evidence led, accused cannot be held to have stolen the rifle, and then the court is advised to convict him of negligently abandoning the rifle in the forest. It is a cardinal rule of weapon handling in the military that a soldier should always have his weapon i.e. rifle with him when issued with one. This court comprising of officers with considerable service is in a position to take judicial notice of this well-known rule in the military.

5.8 Let me conclude by addressing the issue of the state of the rifle when it was handed in as an exhibit. It was sufficiently identified and communicated to the armourer (PW1) by its distinctive serial number. The same rifle was handed in and shown to the court. So the issue of whether it should have been brought to the court covered with leaves or dirt as the case may be would perhaps have been contentions if the court was to hold that the rifle was supposed to have been dug up from the ground and not uncovered from beneath some leaves. As indicated earlier, on the basis of the evidence of prosecution witnesses 3 and 4 the court is advised that the rifle was uncovered from some leaves and I had already indicated what should be concluded from that.

Pres: The court will adjourn to deliberate on the finding.

When the court resumed.

Pres: The court has considered all evidence tendered as well as summing up of evidence. After careful deliberations, the court finds accused guilty as charged.

DC: After the accused has been found guilty may we advance several points in mitigation of sentence. He is still a relatively young and may be reformed. It is the first time that he appears before a court martial. As regards his conviction in a court of summary jurisdiction on the offence of absence without leave, he had gone to my office after his superiors refused to release him to seek legal assistance. So it was not owing to indiscipline on his part that he ended being so convicted.

Accused is the sole breadwinner in his family since he is the only one working in the family of five. All his other siblings are not working, and he has to take care of his mother as well as other members of the family. A severe punishment would not only hurt him but his dependents as well.

The accused also attended this trial impeccably and was never problematic before this honourable court. As the court pleases.

Pres: The court will sit in close court to deliberate on the sentence.

When the court reconvened.

Pres: Accused is a well trained soldier who should appreciate the havoc caused by proliferation of illegal arms and allowing arms to fall into wrong hands. A person of your training should not be allowed to continue as a soldier since you don't appreciate the responsibility bestowed upon soldiers. It is any one's guess what you intended to do with the rifle if it was not recovered.

Having said that the court has considered mitigating factors advanced on your behalf. Had it not been for that, the punishment would have been heavier. It is a unanimous feeling of the court that a soldier who steals service rifles cannot be trusted under any circumstances. He is simply a criminal masquerading as a soldier.

The court sentences you to six (6) months imprisonment and discharge with ignominy from the Defence Force. The finding and sentence are subject to confirmation. You are apprised of your right to petition the reviewing authority as provided for in the Act or to appeal to the Court Martial Appeal Court if you are not satisfied with the finding or sentence, or both. The trial is ended.

E. Lehloka 05/05/2012

Lehloka
Major
President

T. Mathatjane
.....

T Mathatjane
Major
Judge Advocate