

**IN THE COURT-MARTIAL OF LESOTHO DEFENCE FORCE  
CM/T/03/21**

**HELD AT MAKOANYANE BARRACKS**

**IN THE MATTER OF**

**REX**

**V**

**No. 75352 PVT LEBALLO**

**Accused No. 1**

**No. 75356 PVT KHUNONYANE**

**Accused No. 2**

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**RECORD OF COURT-MARTIAL PROCEEDINGS**

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PANELISTS	:	LT COL LINALE	PRESIDENT
	:	MAJ RAJANE	MEMBER
	:	CAPT MAFEREKA	MEMBER
	:	CAPT MOTLATSI	MEMBER
	:	LT MASHELI	MEMBER
JUDGE ADVOCATE	:	MAJ MANTSO Z SELLO	JA
FOR CROWN	:	LCPL MATELA Assisted by LT MABITSA	
FOR DEFENCE	:	LT KHOABANE Assisted by PVT MOTJEKETJE	
INTERPRETER	:	PVT MOKOTOANE (From Directorate of Legal Services)	
HEARD	:	26/05/21 and 31/05/21	

**Summary**

This is a Court Martial trial of two members of the Airwing military base charged jointly for contravening Section 63 (a) of the LDF Act, it being alleged that duo were on night duty on the night in question when they decided to steal litres of Jet A1 fuel used by the LDF aircraft. Both accused who were represented by

legally qualified LDF legal officers pleaded guilty to the charge and the verdict of guilt was returned, thereby being sentenced to detention.

**Trial Commencement: Day one- 26 May 2021**

**Lt Khoabane (DC)** introduced himself and stated that he had been duly appointed to represent the two soldiers as per a letter of appointment dated 18 May 2021, herein marked as Annexure "AA1". DC further stated that he would be assisted by Pvt Motjeketje who is also legally qualified and entitled to have right of audience in the courts of Lesotho, court Martial included.

**Lt Mabitsa** introduced himself as the duly appointed Prosecutor with Lcpl Matela who would be the lead Prosecutor in the present case.

With the necessary introductions done, the court read the Convening Order and thereafter asked the accused persons if they had any objections against the president or any member whose name appeared on the Order.

By the confirmation of the DC, both accused stated that they had no objection either to the Court President nor to any Member of the court. The court then took an oath including the learned Judge Advocate, who immediately requested to issue a preliminary legal advice before the court embarks into proceedings.

**Judge Advocate's preliminary Advice**

**Judge Advocate (JA):** President of the court and members of the court, it is appropriate that I give you some preliminary advice to ensure that the trial is conducted in a fair, orderly and impartial manner, and in accordance with the rules and procedures of the **Court Martial (Procedure) Rules 1998**.

Therefore, I advise you that you must keep an open mind throughout the trial. You must impartially listen and hear the evidence, advice of the law and only when you are in your closed session deliberations, may you properly make a determination as to whether the accused is guilty or not. You may not have a

preconceived idea or decision as to what type of punishment or amount of punishment should be imposed before making a determination of guilt. Most, importantly, remember these accused soldiers are presumed innocent of the offence they are facing until proven guilty after all the evidence presented before the court proved them guilty beyond reasonable doubt.

Therefore, I advise you that you must make determination of whether the accused are guilty or not guilty solely based upon the evidence presented before this court.

Thank you so much, you may now commence the proceedings.

### **Proceedings**

**Court:** The court convened on the 26<sup>th</sup> day of May 2021 wherein all necessary preliminary issues were dealt with. President (Pres) of the court welcomed everyone in court and declared the court opened for the trial of Pvt Leballo and Pvt Khunonyane. After both parties have introduced themselves President read the convening order marked as Annex "AA2" in open court and then asked each accused if they have any objection against him as the president or any member of the court.

### **ARRAIGNMENT OF THE ACCUSED**

President asked the accused whether or not they understand the charges. The accused acknowledged that they fully understand the contents of the charge sheet and that the charges had been explained to them by their Legal Representative. DC confirmed and informed the court that they were ready to proceed with a trial.

**Court:** Before the court arraigned the accused, President asked each accused if they had any objection to the charge or whether or not they had any plea to the jurisdiction of the court, or any plea in bar in line with **Regulations 21, 22 and 23 of the Court Martial**. He informed the accused that it is their right to raise such objections if there was any.

**DC:** No objection my Lord to the charge, nor jurisdiction of the court as well as plea in bar, as the court pleases.

### **Charge Sheet**

President asked each accused whether he understands the charges. Each accused acknowledged that they fully understand the contents of the charge sheet and that the charges had been explained to them by their Legal Representative. DC confirmed and informed the court that they were ready to proceed with a trial.

**Accused No. 1:** pleaded guilty.

**Accused No. 2:** pleaded guilty.

**DC:** confirmed the plea to be in accordance with their instructions.

**PP:** We accept the plea of guilty.

Before the court could accept the plea of guilty, JA explained to the accused the nature of the charge namely that both are facing a serious charge of stealing service property which attracts a sentence of imprisonment for a term not exceeding 5 years. He further explained to them that pleading guilty is an acknowledgement of unlawful and intentional commission of this offense as framed in the particulars of the offence. He went on to explain that should the court find them guilty as pleaded, they are likely to face harsh sentence which may ultimately lead to their discharge from their service.

Both accused soldiers confirmed that they fully appreciate the nature of their plea and are ready to face whatever consequence. Their DO also confirmed that him as well had already apprised them of the nature and the effect of the plea.

The court then recorded plea of guilty having satisfied that both accused understand the nature of the charge and the general effect of their pleas. The court then allowed the Prosecution to proceed with the summary of evidence.

### Summary of evidence

**PP:** We wish to hand in the reports as abstract part of evidence, to be marked as **Exhibit "1-8"** respectively.

**Court:** The court will adjourn until the 31<sup>st</sup> May 2021, at 09H00.

### Trial continue: Day Two-31/05/2021

The court resumed. The president welcomed the court members and everyone before the court; including the accused soldiers. He inquired if the accused were fit to proceed with the trial. Both accused confirmed that they were ready to proceed with the trial. He further informed the parties that JA would give legal advice to assist the court on what to consider in its findings.

### Advice on the law

Now I wish to advise the court on the law which is applicable when matters have unfolded the way they did. To start with, I remind the honourable members of the court once more that under our law, the accused are presumed innocent of the offences they are facing until the court finds otherwise on the basis of evidence presented before the court. It does not matter whether or not the accused in the present case pleaded guilty, the prosecution still has a burden to prove the accused's guilt by legal and credible evidence beyond reasonable doubt. I therefore advise the court to consider the evidence tendered in totality by way of summary of evidence and weigh it against the elements of the charge they are facing. Most importantly, at this stage of the trial, the standard of proof is that of proof beyond a reasonable doubt; that is, to prove each and every element of the charge preferred against these accused.

### Announcement of the finding

**President:** Having sat in close session to deliberate on the finding of the fate of the accused persons before this court, we have heavily considered JA's advice

and therefore hold that both accused are guilty as charged in respect of this count which they have already pleaded guilty.

**PP:** Prosecution intends to invoke provisions of **Rule 50 (3) of the Regulations** and with the leave of the court, may we call Lt Lenka as a personnel officer to come and read the service record of the accused.

Lt Lenka took an oath and stated that he is a Personnel Officer from LDF Personnel Unit. He testified to the court that his duties amongst others is to keep the records of soldiers as well as updating the service records of soldiers (other ranks), including the charged soldiers. He said he was in possession of their which he read and asked the court to receive it as part of the Court Record and was marked as **Exh 'A2'**:

**Prosecution's address on the aggravating factors:**

The Prosecution intended to make aggravating circumstances but the Defence objected on the reasoning that their application was not sanctioned by any Law. The court upheld the objection and ordered Defence to address the court on mitigation if any. The latter stated that he would like to invoke the provision of **Rule 50 (6) (b)** that allows the defence to address the Court in mitigation of punishment. He asked the court to receive the fully prepared submissions of the Mitigating Factors, which he asked to court to consider and to form part of the record. The court marked the document as **AA3** for ease of reference.

**President:** The court will now adjourn shortly to allow JA to advise the court on the theories of punishment before embarking on the deliberation of the sentence.

**SUMMARY OF THEORIES OF PUNISHMENT BY JUDGE  
ADVOCATE (JA) DELIVERED IN REX V PVT LEBALLO &  
KHUNONYANE CM/T/03/2021**

-1-

1.1 It is my duty as the JA at this stage to advise the court when it comes to the sentencing of the accused. It is not my duty as Judge Advocate to suggest the

sentence which this Court should impose. However, my legal obligation is to advise this Court to apply its mind judiciously, and to ensure that the court impose a punishment that qualifies the purpose of the punishment. The punishment must be proportionate to the offence committed. I totally agree with the counsel for the accused that in assessing the sentence, the court must not approach it with anger but try to balance the interest of the society which requires that those who committed the crime must be punished. The court is supposed to bear in mind theories of punishment for it to be able to act judiciously.

1.2 There are theories of punishment which this Honourable Court is invited to consider in imposing a sentence to the convict. These theories have stood the test of time and form the cornerstone of our criminal justice system, court martial is no exception to these theories. These are; retribution, deterrence, reformatory theory and preventive theory, to mention but the few.

1.3 It would be proper at this stage to briefly, discuss what these theories are, what their importance and intended consequences are. **Retribution** theory is best expressed by ensuring that offenders are punished for their deeds; this theory presupposes that the offender gets what he deserves<sup>1</sup>.

1.4. Another theory is that of **deterrence**. The theory propagates the notion that punishment meted out should deter even potential offenders and be a lesson. It must serve as a lesson to deter both individual and general deterrence, that is the whole community is deterred from committing similar offence. The community must be generally deterred by the threat of possible punishment, rather than by its actual imposition on an individual. The third theory is **reformatory theory** which is a very recent theory whereby according to it the purpose of punishment is to reform the offender as a person, so that he may become a normal law-abiding member of the community once again. Here the emphasis is placed not on the

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<sup>1</sup> CR Snyman. Criminal law 2<sup>nd</sup> ed. Page 18.

crime itself, but on the person and personality of the convict<sup>2</sup>. According to this theory, a person commits an offence because of some personality defect, or because of psychological factors in his background such as an unhappy or broken heart (*o robehile pelo*) as a result of undesirable influences, e.g ke eme nako e telele kele ranking.

1.5 As it may be deduced these theories are somehow interrelated as the end result anticipated by punishment is to root out or discourage anti-social tendencies disruptive of social order; thereby ensuring that society enjoys its tranquillity and fulfil its potential. Without boring this court with the theories, I want to advise the court to bear in mind the purpose of punishment in awarding the sentence. But most importantly, the court is reminded once again of the objective of military justice system and their powers vested in them as the court-martial.

-2-

2.1 I want to borrow my own words which I made as the Judge Advocate when I sitting on this very seat in the case of **Rex v Lt Tshehlo**, whose judgement was handed down two a year ago (2020), fortunately, the current President and Maj Rajane were members of that court and would remember very well where I said the following remarks, "*Court-Martial is the highest court in a military set up, especially Lesotho Defence Force justice system that has powers even to impose a death or life sentence. So it must be treated as such and be accorded such respect*". President Sir, and members of the court, I wish to submit that the value and respect given to the Court Martial as a military court, can only be determined by the sentences it imposes. The discretion lies with the court as to the kind of punishment it feels is appropriate. It would not make sense if a court martial can impose a sentence which otherwise could be given by a commanding officer or officer commanding sitting as the presiding officer in the summary trial. This

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<sup>2</sup> Supra, page 22 (para 8 thereof).



would really be to undermine the powers of this court and also the initiative of the commanding officer who went out all the way to apply for the court martial of the accused because he felt that the matter was is only this court that can give the accused what he deserves. Notwithstanding, I advise the court that each case is nevertheless treated on its own merit. This explains why there is a suspended punishment which this court can even give depending the circumstances of a given case.

-3-

3.1 Having put the Court into perspective in respect of the objectives of punishment of offenders it is, perhaps, proper at this stage to turn the Court's attention to the punishment which it may impose. In this regard, the following punishments are not permissible for this offence: **Section 83 (2)**

(a) death

3.2 The Court is, therefore, advised that it may impose any of the punishments prescribed by Section 83 of the Act: however, the court is advised that in the event that the punishment is imprisonment, the imprisonment must not be coupled with discharge from the Defence Force by reason that to discharge accused would be a punishment also suffered by their innocent children. The children should not suffer for deals of their parents. The children have ambitions and goals for their future and should not blame their parents for failing them to achieve their goals.

3.3 It is of great significant for the court to note that not more than one punishment shall be awarded for one offence unless expressly provided so, according to section 83 (4) of the Act.

3.4 Moreover, all the above considerations should be evaluated in light of the following aspects: the convicts are ordinary soldiers and clearly first time

offenders as reflected by their service records. they have never appeared before any military court.

3.5 The court is also advised to take into account the pleas of accused persons: they did not waist this court time. That is a clear sign of remorse.

-4-

4.1 In considering all these, the court is further advised not to disregard the mitigating factors presented by the Defence Counsel. DC has pointed out that looking at the length of service (7 years) and their age (less than 30 years), they can still reform.

-5-

### **Conclusion**

5.1 I wish to conclude my advice by asking the court to impose a sentence that fits the circumstances of the offence committed, in light of all circumstances surrounding this case. I have already mentioned that a sentence but suspended on certain conditions, is still a commensurate sentence and may still serve the objective of the theories of punishment

5.2 Finally, the court is advised to inform the accused that sentence/s are subject to confirmation of the confirming authority. And that, in the meantime accused persons are entitled to appeal or file a petition against the confirming authority within 30 days if they are not satisfied with the finding and sentence of this court.

**DELIVERED ON THIS MONDAY.....DAY OF MAY 2021**

**MAJ MZ SELLO**

**JUDGE ADVOCATE**

**Court:** The court shall adjourn until further notice to allow the court to sit in close session to deliberate on the appropriate sentence. The sentence will be announced in open court and you will be notified once the close session is completed.

**The court assembled at 14H30**

**Announcement of Sentence by the Court**

**President:** Accused stand on your feet before I hand down the sentence. Having sat in close session to deliberate on the most appropriate sentence, commensurate to the offence committed, it was not just a simple task. We have heavily considered the mitigating factors as outlined by the defence counsel. The court has taken account of your corporation with the court for a period of this two days of the entire trial. Most importantly, the court has paid particular attention to your plea of guilty; you did not waste the court's time and resources by pleading 'not guilty', knowing as a matter of fact that you have stolen the fuel.

Above notwithstanding, the court also has considered the nature of the offence and the manner in which it was committed, to be more specific the fact that you are the same people who were assigned to safeguard the property and who were entrusted with the keys for that matter on the night in question.

In view of this and also in light of the prevailing situation which LDF has gone through in the financial year 2020/21, your act has serious consequences on the effectiveness of the LDF and this could paralyse the LDF air operations.

Therefore, the court sentences you to 1 year detention with four months suspended on condition that you do not commit the same offence, bearing in kind of the JA's advice on the theories of punishment. This sentence is effective from now though it will be subject for confirmation. However, you are entitled to appeal or file a petition within 30 days if you are not satisfied with the sentence. Above all, the court has further noted that you seem to be persons who lack financial discipline, and you must make sure you attend the counselling sessions to curb this

otherwise, your lives will never change and will continue to steal. I now declare  
this trial closed

Handed down on this <sup>27<sup>th</sup></sup> 27... Day of May, 2021



**LT COL B LINALE**

**Court President**



**MAJ MZ SELLO**

**Judge Advocate**

AA 4  
31/05/21

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2.1 I want to borrow my own words which I made as the Judge Advocate when I sitting on this very seat in the case of **Rex v Lt Tshehlo**, whose judgement was handed down two a year ago (2020), fortunately, the current President and Maj Rajane were members of that court and would remember very well where I said the following remarks, "*Court-Martial is the highest court in a military set up, especially Lesotho Defence Force justice system that has powers even to impose a death or life sentence. So it must be treated as such and be given such respect*". President Sir, and members of the court, I wish to submit that the value and respect given to the Court Martial as a military court, can only be determined by the sentences it imposes. The discretion lies with the court as to the kind of punishment it feels is appropriate. It would not make sense if a court martial can impose a sentence which otherwise could be given by a commanding officer or officer commanding sitting as the presiding officer in the summary trial. This would really be to undermine the powers of this court and also the initiative of the commanding officer who went out all the way to apply for the court martial of the accused because he felt that the matter was is only this court that can give the accused what he deserves. Notwithstanding, I advise the court that each case is nevertheless treated on its own merit. This explains why there is a suspended punishment which this court can even give depending the circumstances of a given case.

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3.3 It is of great significance for the court to note that not more than one punishment shall be awarded for one offence unless expressly provided so, according to section 83 (4) of the Act. But the court may award one punishment in respect of each Count.

3.4 Moreover, all the above considerations should be evaluated in light of the following aspects: the convicts are ordinary soldiers and clearly first time offenders as reflected by their service records. They have never appeared before any military court as submitted by the Defence Counsel.

3.5 The court is also advised to take into account the pleas of accused persons: they did not waive this court time. That is a clear sign of remorse.

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4.1 In considering all these, the court is further advised not to disregard the mitigating factors presented by the Defence Counsel. DC has pointed out that looking at the length of service (7 years) and their age (less than 30 years), they can still reform.

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DELIVERED ON THIS MONDAY <sup>31<sup>st</sup></sup> DAY OF MAY 2021



MAJ MZ SELLO

JUDGE ADVOCATE