

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOTEBANG MAKOE	1ST APPELLANT
TEBOHO MAKOE	2ND APPELLANT
KALI MALEKE	3RD APPELLANT
PHALLANG MAKOE	4TH APPELLANT

and

R E X

RESPONDENT

J U D G M E N T

Delivered by the Hon. Mr. Justice M.P. Mofokeng on  
the 17th day of December, 1982

The appellants were charged before the Subordinate Court of Maseru with the crime of Assault with Intent to do grievous bodily harm. They are alleged to have assaulted Morris Mokete by hitting him with blunt objects, setting dogs on him until he fell over a cliff. They all pleaded not guilty but were found guilty and sentenced to various terms of imprisonment. They now appeal to this Court against such convictions and sentences.

Morris Mokete briefly stated that he knew the accused, that on the day in question he was with his brother driving animals to their cattle-post. Along the way his brother left him whilst he was looking for cattle. He found him already with Appellant 4. On his arrival they were eating. At about 10 P.M. or there about Appellant 4 left his cattle-post where they were all sleeping and said he was going to get mealie-mealie for his dogs.

While the witness and his brother (Moeti Mokete P.W.2) were sleeping, he heard dogs bark. Moeti got out.

/the witness

The witness also got out. As he did so appellants 1,2 and 3 chased Moeti. They asked him what he wanted at the cattle post. He said firstly he was sheltering from rain and secondly he was on his way to his own cattle-post. Appellant 1 said that he must be "beaten up". He ran away.

They then grabbed him, the witness, and said, "Here is another one". They pushed him into the hut. Appellant 1 said: "Shall I slaughter him or not?" He insulted him by his mother's private parts. When the witness heard he was to be slaughtered he managed to escape and ran out and dashed for it. They chased after him towards a cliff. They set dogs on him. They lit a torch and would switch off alternately. He thus could not see his way properly and he fell over a cliff.

He was injured. He lay there. Appellants appeared from above and he heard them ask among themselves if there was anyone of them who had fallen over a cliff so that they could come and kill him. When he heard them say that he did not raise an alarm. He lay there until 3.00 a.m. when Moeti Mokete, chief's messengers and others came to him.

He was taken to the hospital at Morija.

Under cross-examination he said that permission of appellant 4 had been obtained. He said that it was not true that all the appellants found them in the hut and appellant 4 knew nothing about their presence. He permitted them. This witness is to a large extent corroborated by his brother, who only adds details of where the witness was not present for example what transpired between him and appellant 4. He is referring to their conversation with appellant 4 on his arrival :

"We (he) said he would accomodate me since the owner would not quarrel since we were fellow-villagers. We repaired to his cattle-post.

/We drove

We drove our flock of sheep into the fenced area. I gave him my provision after he had told me that he was hungry.... He told me that the dogs had no mealie-meal to feed them...My younger brother arrived at 7.00 p.m."

Morris Mokete answered his brother's call that evening even though he had received injuries as the former was looking for him, and, as he could not see, he shouted his name. He went to him and instructed him to remain talking to himself. Presumably if he did not do that he would die if he fell asleep.

It was put to this witness that he could not ask for permission from a young man such as appellant 4 but had to get it from the owner of the cattle-post and the answer was:

"It is because at the cattle-post we do not adopt the same procedure as we do at home normally."

It was again put to this witness what report appellant 4 made:

"Q: I put it to you that accused-4 reported that there are strangers at accused's (1) cattle-post?

A: I do not deny."

Nothing of the kind was ever reported.

Appellant 4 said:

"I reported to accused numbers 1, 2, 3 and my mother. I said that there were gentlemen who arrived at the cattle-post. I reported that (they said?) I should fasten the dogs and go home and report."

Finally Moeti Mokete was asked:

Q. What made you believe that the dogs were chasing you?

A. It is because they were setting them on us."

There was moonlight that night.

Dr. Moore gave evidence to the effect that Kefuoe Mokete was admitted at his hospital on 16th November 1981 and he had the following injuries: an abrasion on the left elbow swollen;

/he had

he had a paralysis of both his arm and leg. These injuries were caused by a blunt instrument and the degree of force was savage. The probabilities were that the injuries could also have been caused by a fall.

That was the Crown's case.

Appellant 4 gave evidence and described how the first two Crown witnesses arrived at his cattle-post.

He says that they came and told him that they would put up at the cattle-post. He did not agree. They said he should fasten the dogs and go home to report that there were visitors. He fastened the dogs. He went home to report as mentioned earlier.

When he returned with his co-appellants the dogs barked but were still fastened. He noticed Morris Mokete get out and ran away. He was asked why he was running away. The second crown witness came out running and appellant 3 asked him why he was doing so and what he wanted at the cattle-post. There was no reply.

He saw the possessions of the Crown witnesses after they had fled.

The Mokete brothers were not assaulted nor any dogs set upon them. He did not know why they ran away. The dogs, moreover, were never loosened.

Under cross-examination it was put to him

"Q: Did you tell PW.1 and PW.2 that you were going home to fetch some mealie-meal for the dogs?

A: Yes I said so to PW.1 and PW.2.

Q: At what stage did you tell them?

A: When they said I should sleep with them.

Q: When then did they instruct you to report to your father?

/A: When

A: When I said I was going home.

Q: Meaning that when you said you were going home they told you to report at home that they were putting up at the post?

A: Yes.

Q: Meaning that they did not apply any threats at all?

A: Yes."

Appellant 1 gave evidence and described how appellant 4 arrived at home at night and made a report. He and the other appellants went to the cattle-post in question. As they approached he saw a person jump over a fence and ran away. He called him back but did not come. He had not even touched the man. Then dogs were still fastened. Morris Mokete had fled. Moeti Mokete came out of the hut and as they approached the gate, he called him back to tell him who he was and what he wanted. He says it was not raining at all that night. He had not been informed that the two brothers were coming to sleep in that hut. They were not assaulted nor dogs set on him. He says nobody goes to his cattle-post without his permission.

That was the defence's case

The learned magistrate has seen the witnesses who have given evidence on both sides. He saw the demeanor of these witnesses and observed them closely. He accepted the evidence of the Crown, on adequate grounds. The two appellants, as witnesses on the record before me are shocking liars. I am astounded that a young boy of the age of appellant 4 can lie with such deliberateness. I am in no doubt in my mind, whatsoever that the learned magistrate in accepting the crown's evidence acted quite correctly.

There is a fallacy which persists up to the present day

/that for

that for common purpose to be present there must exist first an element of conspiracy. The two concepts are entirely different as cheese is from chalk. For common purpose to be present ceremony is necessary nor must consultation always be essential. It can happen on the spur of the moment. Whether or not two or more persons perform an act jointly will be determined by their actions. The appellants acted jointly.

Appellants 2 and 3 have chosen not to answer a prima facie case against them which the Crown had established against them at the close of the Crown's case. That evidence, in my view, called for an answer from them and they failed to do so. The prima facie evidence then became conclusive proof. (R. v. Basothou Makhethé & Others, CRI/T/32/78 (unreported) dated 17th October, 1978 at pp 13 - 15.)

In our law the application of force in assault cases may be indirect as where, in this case X set a dog on the complainant causing him to run into a pit. (See Matjekoa v. Rex, 1976 L.L.R. 258 at 262; Hunt - S.A. Criminal Law, p. 437).

As regards sentence everything was said on behalf of the appellants. It is true that they are first offenders, that the offence was occasioned by provocation (to a very minimum degree indeed). In the case of Appellants 1, 2 and 3 the sentence imposed by the learned magistrate is extremely lenient in the circumstances of this case and I do not propose to interfere with it. It is thus confirmed.

/In respect

In respect of appellant 4, the position is entirely different. He was dependant on appellant 1. He is a mere 12 year old baby. Section 306 gives the court a wide discretion. In my vew, a baby like that ought to be at home under watchful eye of his parents and not be thrown to the wolves, so to speak. He ought to be at school, in my view and not far away at the cattle post. Moreover, this court has, on numerous occasions, said that corporal punishment should not be used as a form of punishment unless the law compels the court in the particular or special circumstances of that case to do so. The sentence of whipping is hereby set aside and it is substituted by the following:

"Accused is found guilty is cautioned and discharged."

In the result, therefore, the appeals of all the appellants are dismissed.

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J U D G E

For the Appellants : Mr. Matsau

For the Respondent : Adv. S. Peete