IN THE LESOTHO COURT OF APPEAL

In the matter of the appeal of

EDWIN RALIOTLO PHAKISI — Appellant

and

SOLICITOR-GENERAL — First Respondent
SECOND LIEUTENANT TSITA — Second Respondent

HELD AT MASERU

Coram

Mahomed, J. A.
Aaron, J. A.
Miller, J.A.

JUDGMENT

Aaron, J A

Since judgment was reserved in this matter, one of the members of the Court, the Hon Mr. Justice Miller, has most regrettably passed away Although he did not have the opportunity of reading this judgment in print, he did participate in discussions with the other members of the Court after the conclusion of argument, and was in full agreement with the conclusions then reached and which are set out hereunder.

The question arises as to whether the matter must be re-argued before a newly-constituted court because of his death. There is no provision in the Court

of Appeal ...

of Appeal Act, 1978, dealing with this situation. The only section of any relevance is s.6 which provides

> " The Court shall, when determining any matter other than an interlocutory matter, be composed of an uneven number of judges, not being less than three".

Where the Court hearing a matter consists of three members, and one dies before the matter is determined by them, then there is no longer a quorum, and a fresh Court will need to be constituted But the important question is as to the meaning of the word "determining" There are cases in which it has been held unnecessary to reconstitute the Court where a deceased judge had died after judgment had been reserved, but he had concurred in the decision (Marais v. Smuts 3 Off Rep (1898) 174, Lynch v. Knight 9 H of L Cas. at 588, Rabot v. De Silva (P C.) 100 LT at 242) In the present case, a conclusion was unanimously reached by all 3 judges, and it remained only to express that conclusion in written form In the view of the remaining two judges, the Court "determined" the matter before the death of Miller, J.A., and this judgment in fact reflects the determination of the issue by the 3-judge Court. It is therefore not necessary to reconstitute the Court.

I proceed now to the merits of the appeal.

Applicant is a businessman from the Mokhotlong district who at the time of events described below, was 47 years of age. It is common cause that on 13 August 1983, he was arrested by members of the police force, one

/of whom ..

of whom was Second Lieutenant Tsita (Second Respondent), and subsequently detained on suspicion that he had been involved in subversive activities in contravention of the Internal Security (General) Act, 1982. At the same time as he was arrested, a Mercedes Benz truck belonging to him and a Toyota Landcruiser used in the conduct of his business were also seized by members of the police force. Plaintiff was kept in custody until 7 September 1983, when he was formally charged, and remanded into custody A few days later, he was released on bail

Three months after these events, Plaintiff instituted an action for damages against the Solicitor-General, as representative of the Lesotho Government, jointly and severally with Second Respondent. He alleged, firstly, that during the period he was in custody, he had been wrongfully and unlawfully assaulted by Second Respondent, and other members of the police force, acting within the scope and course of their employment with the Lesotho Government For this assault, he claimed M15,032 50, made up as follows

Pain and suffering	M10,000 00
Medical expenses	32 50
Contumelia	5,000.00

He also alleged that he had suffered damages in respect of earnings lost as a result of the wrongful seizure of his vehicles, and under this head he claimed M18,360

In their plea, defendants denied that plaintiff had been assaulted and denied that the seizure of plaintiff's vehicles had been unlawful. They claimed that the vehicles

/were taken .

were taken because there were reasonable grounds for suspecting them to have been used by plaintiff in the subversive activities in which he was reasonably suspected to have been involved

The matter came to trial in May, 1985, that is, about 21 months after appellant had been taken into detention In the course of his evidence, appellant testified to various kinds of assaults which he alleged had been perpetrated on him in the course of his interrogation, in order to try to elicit from him information which the police were hoping to get. It will be convenient to list them at this stage

(i) he claimed that he had been taken from his cell at nights to be questioned, that he had been handcuffed on the way to the office used for interrogation, that when he got there the handcuffs were removed, but he was made to undress completely and was made to remain naked while he was being interrogated After being questioned for some time, but still not having given his interrogators the answers they wanted, he was told he would be dealt with "in a police way so that (he) should tell the truth".

(ii) he claimed the police had subjected him to electric shocks by connecting a jump starter to a wall plug, and applying the two ends to his thighs, this caused wounds to his thighs, the scars of which he said were still visible, and were exhibited to the trial Court,

(iii) he claimed he had been hit on the head and kicked with booted feet, this caused bruises,

/but ...

but not bleeding, he still had residual low back ache at the date of the trial,

(iv) he claimed that a large canvas bag had been pulled over his head and upper body down to his thighs, the bag was fastened around his waist, suffocating him. When he collapsed, the bag was removed, but when he failed to give his interrogators the answers they wanted, the exercise was repeated,

(v) he claimed that one officer had taken hold of his penis, and pulled it in all directions,

(vi) at times, he would be made to stand on a hot, flat object with his bare feet,

(vii) on the day that he was taken into custody - which had been in the early morning - he was given nothing to eat and nothing to drink. Later, he was given food at times, but sometimes he would be made to go as long as four days without meals. When he did get food, it was no more than a thick slice of bread and a glass of water with orange flavouring (Oros), twice a day,

(viii) he was not given any washing facilities, and although he was provided with a bucket for sanitary purposes, he was provided with no toilet paper,

(ix) his underpants and socks, which he had been made to remove during the interrogation on his first night in custody, were not returned to him until the day he was released, nor his shoes, which were removed when he was placed in his solitary cell,

/(x) all the ..

(x) all the time that he was in detention, he was kept handcuffed. This produced scars on his wrists, which he exhibited to the trial Court.

Plaintiff claimed that there was not a night during his period of custody (25 nights in all) that something of this kind was not done to him. The electric shocks were applied, and the canvas bag was put over his head every night.

All these allegations were denied by the defendants witnesses, save for the handcuffing. This they sought to justify on the basis that defendant was being violent in his cell, that he presented a threat of an escape, and that handcuffing was necessary to restrain himself from injuring himself, and from preventing an escape.

The trial judge found, for reasons which will be dealt with later in this judgment, that plaintiff had failed to prove on a balance of probabilities that he had been assaulted in the various ways alleged by him, other than that he had been handcuffed. He held that there was no justification for the police having kept the plaintiff in handcuffs, and for this he awarded plaintiff an amount of M3,000 as damages against both defendants, jointly and severally With regard to the claim in respect of the seizure of the vehicles, he found that s 52 of the Criminal Procedure and Evidence Act provided the police with the necessary authority, on the facts of this case, to have acted as they did, and he dismissed this claim for damages. As plaintiff had succeeded on one claim, and failed on the other, he

/ordered

ordered the defendants, jointly and severally, to pay one-half of plaintiff's costs of the whole action

Against this judgment the plaintiff appeals to this Court He contends that the trial Court should have found that the other assaults alleged by him had been proved, and that the vehicles had been wrongfully and unlawfully detained He contends also that the quantum of damages awarded was not commensurate with the nature of the assault.

However in argument before this Court, counsel for the appellant conceded after some debate that he could not persist in the contention that the seizure of the vehicle had been unlawful. We are left therefore only with the issue whether the other elements of the assaults had been proved by plaintiff on a balance of probabilities, and with the quantum of damages.

At this stage it becomes necessary to set out more details of the events that occurred after plaintiff was taken into custody.

The place where he was held in custody was in the police station at Mokhotlong Although this adjoined the magistrate's office, he was allowed no visits by the magistrate, and was not visited by him

On 7 September, he was taken before a magistrate, charged with a contravention of the internal security laws, and remanded in custody. He was then in a very weak condition. He testified that he had complained to the

/magistrate ..

magistrate that he had been assaulted, but the magistrate said it was a matter for the police, and did no more than ask whether he had been taken to a doctor.

Appellant went on to say that when he was admitted to prison, he told the prison officers that he had been assaulted, they examined his injuries and wrote down what they observed. This was later substantiated when the record was produced the entry made against appellant's name read

> " New several scars on both hands
> 1 fresh wound on left thigh.
> 2 wounds on r/thigh.
> Handcuffs small wounds".

Defendants called as a witness the prison officer who had made these entries. He explained that he had actually examined appellant, and had seen the scars and injuries he recorded. The wound on the left thigh was healing up, it was small and oblong in shape, like an egg The two wounds on the right thigh were almost healed up When he saw appellant he "appeared physically deteriorated". He also testified that appellant had complained to him that he had sustained the wounds while he was in police custody. He confirmed that appellant was "a well-known man in Mokhotlong" and a wealthy businessman.

On 9 September, two days after having been admitted to prison, he was taken to see a doctor He testified that he was unable to walk, and that an ambulance was called to convey him. He explained that his feet "were

/in trouble .

in trouble" when he walked, that he felt numb, his legs were painful, and that he could not walk normally. The fact that he sat on the ground and complained that his knees and legs were painful and that he was unable to walk was confirmed by the prison officer in charge of the group of awaiting-trial prisoners who were being escorted to the hospital, and called as a witness by defendants. Assistance was provided by the hospital's vehicle.

At the hospital, appellant was seen by a government medical officer, a German doctor, who prescribed pills and a medication for rubbing his feet and his biceps. The doctor gave evidence and said that he had certified him as "fit for No 1 labour". This meant he had no disease or injuries which would have prevented him from being able to work.

He was then taken back to gaol, and remained there until 13 September, when he was released on bail That same day he went to consult his own doctor This doctor was not called as a witness as he was not available A certificate signed by him was produced at the pretrial conference, and was seen by the trial judge. Although he ruled that it was not evidence, he treated it as part of the pleadings, and relied upon it as showing an improbability in appellant's version because the doctor did not record having been told all the different kinds of assault which appellant testified to in Court.

At the trial, appellant himself gave evidence and told the Court of the various assaults allegedly committed on him. He also called as witnesses two

/other persons ..

other persons who were in detention at the same time as he was, and who became his two co-accused when they were later charged with committing offences under the Public Safety Act. They claimed that they too had been assaulted by the police while in detention, but the kinds of assault allegedly practised on them were in some respects different from those alleged by appellant. Both testified that they had seen appellant while they were all in detention, that he had been weak, and that they had seen wounds on his thighs when they had helped him wash his body. As his final witness, appellant called another doctor who had examined him shortly before the trial (but long after the events complained of). He testified to having seen superficial scars on each thigh just below the lateral buttock, and some healed linear scratch marks above and below the left wrist. The scars were permanent, and it was not possible to determine their age, but they were consistent with burn marks

Defendants called twelve witnesses, and second respondent also gave evidence. The twelve witnesses consisted of 3 prison officers, 5 members of the police and security forces who had been involved in the arrest and interrogation of appellant, the German doctor who had examined him when he was remanded into custody, an electrical engineer, an official police photographer, and a witness on the claim relating to the trucks.

The electrical engineer had been instructed, after appellant had given evidence that the current used to give him electric shocks was taken from a wall-plug low down on the wall in the interrogation room, to visit the

/room ...

room and to see if there still was, or if there were signs of there ever having been, such a plug there It is common cause that no such plug and no such signs were found

I come now to consider the reasons given by the learned trial judge. As already indicated, he could find no justification for the conduct of the police in keeping the appellant in handcuffs, and awarded appellant damages for this particular assault.

As to the evidence of the other assaults, he was not able to accept the evidence of any witness in preference to any other, judging by demeanour alone. He indicated that no witness was sufficiently tested in cross-examination as to honesty or recollection, and that accordingly he could decide the matter only by considering the probabilities of the respective versions. That means that the trial judge was in no better position than we are, and we are free to consider the probabilities anew. The learned judge obviously gave the matter careful consideration, and we regret having to differ from him, but in our view he appears to have overlooked a number of probabilities that favoured the appellant's version and gave too much weight to what he considered were improbabilities in that version. In our opinion, the most significant factor to which insufficient weight was given was the presence of the wounds on appellant's thighs

The wounds were present on his thighs when he was released after 25 days' detention, and the fresh nature of these wounds must surely indicate that he

/received ...

received these wounds while in custody. Second respondent tried to explain them away by saying that when he searched appellant on taking him into detention, he noticed old wound scars, which appellant attributed to an earlier car accident in Natal But he denied having seen fresh wounds on the thighs, even, though he conceded having pulled his trousers down to his knees.

The trial judge made light of this aspect by saying "One would expect therefore his thighs to be pitted with scars. Instead there were only two circular scars which he exhibited". This was a reference to his exhibiting the scars at his trial, 21 months after the events. We do not consider this sufficient reason for dismissing plaintiff's evidence that he had several wounds, some of which had healed, and some of which had left scars. There was clear evidence, from witnesses called by defendant, that when appellant was released from detention and remanded into dustody, he had fresh wounds on both thighs, that he was complaining of sore feet, and that he was too weak to walk. The implications of this evidence were not examined by the learned judge. The learned judge took into account against the appellant the absence of any wall-plug in the interrogation room, and rejected his evidence of having been subjected to electric shocks. He was undoubtedly correct in finding that it had not been proved on a balance of probabilities that the electric current had been derived from a wall-plug as alleged by appellant, but this does not provide an answer as to where the wounds on the thighs came from. Appellant may have been mistaken as to the source of the current, or he may even have fabricated the entire aspect of electric shocks,

/but on ...

but on the balance of probabilities, he did receive wounds on his thighs whilst in detention.

Cases where there are allegations of assaults committed on detainees in the course of being interrogated must in their very nature always give courts difficulty. There are many methods of assaulting or torturing persons who are being interrogated which will leave no visible indications to serve later as evidence. Devices such as standing a man naked in front of his interrogators for 2 hours at a stretch, putting a bag over his head, or making him crouch while holding a stick behind his knees - all which were mentioned in this case - are examples of such methods. The practical effect of this is that plaintiffs who have been treated in this fashion will often have great difficulty in proving it, while the other side of the coin is that there may be exaggerated or even false allegations made which may be difficult to disprove It may well be that appellant has embellished what was in fact done to him, but in our view, the balance of probabilities is that he was subjected to at least some of the assaults that he complains of, even if not to all. Appellant was kept in custody for 28 days, and was questioned every night for periods between 1 and 2 hours It is conceded by the police witnesses that he did not readily give them the information that they wanted. Considering the fact that the police considered the public security to be threatened, it is demanding too high a degree of naiveté from the court to expect it to believe that all that the police then did - as Second Record Respondent testified - was "to insist and warn him, and advise him to respond to the questions"

Continued questioning of this duration and the continued failure of the appellant to give the answers which his interrogators wanted renders it probable that some coercive measures (though not necessarily all those alleged by the appellant) would have been used.

It is relevant here to refer to the handcuffing of the appellant. The trial judge found that putting the appellant in handcuffs was "a useless exercise in restraint". We agree fully with this conclusion his hands were handcuffed in front of him, not behind him, and the police evidence was that the handcuffs were not tight, but loose. This means they could not restrain him from banging on the door of his cell, and in fact, the evidence is that they did not stop him from doing so The learned judge held also that to keep the appellant in handcuffs for 28 days while being locked in solitary confinement is such unusual and cruel treatment as to merit the description of torture With this we also agree. It is also, as the learned judge pointed out, a breach of the Prison Rules to use such form of mechanical restraint for longer than 24 hours. Although technically the rules may not have been broken here because the handcuffs were removed every night during interrogation, the continual use for 28 days indicates that his captors resorted to cruel and unusual treatment, and their purpose can only have been to try to induce him to reveal the information they wanted and which they thought he could provide.

Also relevant is that the purported justification for keeping the appellant in custody did not stand scrutiny

/In other ...

In other words, not only did the police handcuff appellant as a coercive measure, but they also gave a false justification for their action.

The learned judge considered that the readiness of the police witnesses to admit to having handcuffed the appellant for so long a period indicates that they were ready to admit to what they had done wrong. We find this an unacceptable inference. There was evidence that appellant had injuries on his wrists which could have been caused by handcuffs These wounds had to be explained by the defendants, and the more probable explanation of their admission of the continued use of handcuffs is that they thought they had a better chance of justifying such use than of being believed in a complete denial. Far more important than their admission of the use of handcuffs, in our view, is the unconvincing manner in which they attempted to justify the use.

I have already pointed out that interrogators have available to them a number of techniques of persuasion which leave no signs of their use, and are almost impossible to prove. It is a probability that interrogators will prefer such difficult-to-prove methods of coercion to more unsophisticated methods which leave wounds or scars Where, therefore, there are some signs of the latter and the circumstances point to the use of some coercion, it is probable that other less provable forms of coercion were also employed.

The trial judge gave some weight to the appellant's failure to give to the magistrate at his remand, and to the prison authorities, a full catalogue of all the things

/that he ...

that he told the Court had been done to him I do not find this so improbable as to negative the complaints which he did make, and the hard evidence of injuries found on physical examination. Where a general complaint of having been assaulted is made, I would not expect a full and detailed account to be given in the circumstances as they were described by appellant This would, of course, be relevant on the question of whether particular kinds of ill-treatment were administered, but it appears to have been used by the trial judge as a factor rendering improbable all the kinds of ill-treatment complained of except handcuffing.

The judge was influenced by the "apparent fitness for hard labour" found by the prison doctor, despite appellant claiming to have been on a diet so far below what must be required for life support. But in our view the prison doctor's comment should not have been so readily accepted His evidence that appellant was "fit for No.1 labour" is inconsistent with other evidence that he was even too weak to walk to the hospital, and in our view, very little reliance can be placed on the doctor's finding In cross-examination the doctor explained that appellant had stripped only to the waist, and that he had examined him for heart and lung disease. He did not examine his thighs, and was unaware of injuries there this despite the fact that he had been given the Medical Reception Register filled in by the prison officials on which details of appellant's injuries had been recorded, so that he could append his signature thereon. When asked whether he had recieved any complaints about pains

/in the knees, ...