CRI/A/62/84

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

JOHN MONNE MAJALLE

v

R E X

J U D G M E N T

Delivered by the Hon. Chief Justice Mr. Justice T.S. Cotran on the 18th day of September 1984

The appellant, who is a Lieutenant in the Lesotho Mounted Police, was convicted of assaulting, with intent to do grievous bodily harm, Policewoman Makakole, who was then working with the appellant at Mohale's Hoek Police Station. He was sentenced to nine months imprisonment and he is appealing against his conviction.

There are two main grounds of appeal.

The first ground of appeal, which is one of law, is that the proceedings against the appellant were null and void from inception by reason of the fact that the local Public Prosecutor did not have before him a sworn declaration in writing to enable him to commence a prosecution against the appellant in contravention of s.11(4) of the Criminal Procedure and Evidence Act 1981. This provides:-

> "Whenever there is lodged with or made before a public prosecutor a sworn declaration in writing by any person disclosing that any other person has committed an offence chargeable in a subordinate court to which the public prosecutor is attached, he shall determine whether there are good grounds for prosecution or not except that -
>
> (a) he may refer to the Director of Public Prosecutions the question whether to prosecute or not; and
>
> (b) any other person may be specially

/authorised

> authorised by the Director of Public Prosecutions to prosecute in the matter".

Mr. Monaphathi submits that this subsection is peremptory and not directory.

This subsection was in existence in the Criminal Procedure and Evidence Proclamation 1938 (s.13(1) Vol.II Laws of Lesotho p.865) which was repealed by the Act of 1981.

Research has revealed that the subsection was taken from s.13(3) of the South African Criminal Procedure and Evidence Act No.31 of 1917 which Act and the subsection were repealed by the South African Criminal Procedure and Evidence Act No.56 of 1955. When the subsection was in existence in South Africa between 1917 and 1955, Gardiner and Landsdown, the learned authors of South African Criminal Law and Procedure - (3rd Edition, 1929 Vol.I p.119) wrote thus:-

> "This provision does not require that sworn information shall necessarily precede the institution of prosecutions; it merely prescribes what shall be done when sworn information is submitted. In many cases it is impracticable to secure sworn statements before trial, and in others, from the nature of the circumstances information is sufficiently conveyed to the prosecutor by other means".

No authority was cited. The same passage, with no authority cited, appears in Vol.I of the 6th Edition of Gardiner and Landsdown, written after the South African Act of 1955 (which omitted this provision) came into force (p.195).

There is nothing in the wording of the subsection which leads me to the conclusion that a sworn declaration is mandatory. This ground of appeal must accordingly fail.

The second ground of appeal is that there were a number of factors which were adverse to the truth of the complainant's story, and that the magistrate (the appellant has sworn that the incident was a figment of the complainant's imagination) should have entertained some doubt about the appellant's guilt

/and

and acquitted him.

The credibility of the witnesses is a matter for the trial Court and an appellate tribunal will not interfere in findings on credibility unless it is manifest that a grave error has been made or that the evidence as a whole is such that it would not be reasonable to sustain the conviction.

It is common cause that the appellant and the complainant were lovers. The complainant's story that the appellant assaulted her in the circumstances she described are not inherently improbable and there was some evidence to support her story. There is no doubt that Dr. Leister (P.W.5) saw some injuries on some woman on 19th October 1982. The doctor did not himself write the name of the woman in the space provided for this section of the form. It is possible that the complainant, who herself signed the police form, could have sent some other woman, who happened to have received the same kind of injuries she says she sustained, but this possibility is really too far fetched. The fact that the "occurrence book" has disappeared from the station is not evidence in favour of the appellant. He himself could have organised its disappearance. There is no reason to disbelieve two officers that a complaint was lodged against the appellant. The delay in informing the appellant that a prosecution has been decided upon is, to my mind, understandable, because it may well be that the appellant's colleagues, if not the complainant herself wanted to deal with the matter internally, i.e. within the Police Force Disciplinary Regulations. This is not, with respect to Mr. Monaphathi, evidence that the whole incident was being fabricated.

If we take into account that the appellant may lose his job in the police force, possibly also his pension, the length

/of time

of time it took for a decision to prosecute, and the fact that the matter has been hanging over his head for nearly two years, nine months imprisonment is too severe a sentence. It also seems to me that the lady complainant was also somewhat to blame for her undue familiarity with a senior officer in the same town. If she was ready to flirt with the appellant, she no doubt, was prone to flirt with others.

I would confirm the sentence but I order that the sentence be suspended for three years on condition that appellant be not convicted of an offence involving violence to the person during the period of suspension. This is, as I said, without prejudice to any proceedings the police authorities take against the appellant.

CHIEF JUSTICE
18th September 1984

For Appellant : Mr. Monaphathi
For Respondent : Mrs. Bosiu