

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MATATIELE DONGWANE

v

R E X

REASONS FOR JUDGMENT

Filed by the Hon. Chief Justice Mr. Justice T.S.  
Cotran on the 10th day of September 1984

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On the 5th September 1984 I dismissed the appeal against conviction and sentence and said reasons will be filed later. These now follow.

The appellant was charged with the attempted murder of Teboho Letsela. The particulars stated that the appellant, "acting unlawfully and with intent to kill did shoot a loaded pistol at on Teboho Letsela". He was convicted and sentenced to nine months imprisonment.

He appealed against conviction and sentence. The appellant himself drafted his own grounds of appeal as follows:-

- "(a) The learned magistrate misdirected himself when he concluded that the accused intended to murder the complainant.
- (b) The sentence is too harsh and induces a sense of shock".

On appeal he was represented by Mr. Kolisang who submitted that the magistrate should have entertained some doubt whether the appellant had used the pistol at all because

- (a) he denied that he used it, and
- (b) as a corollary, in face of this denial, it was incumbent on the police, to whom the pistol was handed in, to have sent the

/pistol

pistol to a ballistic expert to find out whether it was used or not.

On this last point no shell or cartridge was found and without this a test was not necessary.

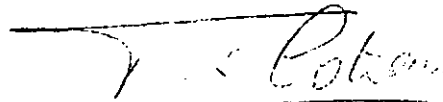
With respect to Mr. Kolisang there was ample evidence from the complainant supported by an independent witness that appellant shot at the complainant with a pistol after an argument about the fare of a ride on a government's vehicle driven by the appellant. The appellant's story from the witness box was that the pistol "was never used" but he added that "If" he shot to frighten the complainant, he would have "pointed the pistol upwards and fired it".

The crucial point is that the allegation that the pistol was not fired at the complainant was rejected by the magistrate. There is no justification in disturbing findings of fact. The next question then is whether or not there was intent to kill. The onus was of course on the Crown to prove intent. But intent can seldom be proved by direct evidence, and its absence or otherwise, has to be decided from the surrounding circumstances of the incident. Here we have a person shooting at another person over five maloti at relatively close range. If the appellant had gone to the witness box to swear that whilst he did discharge the gun, he did so only to frighten, then it is conceivable that the appellant might not have been found guilty of attempted murder if the magistrate believed him or if he was in doubt. But no acquittal would have been possible because the appellant would nevertheless be guilty of assault in terms of s.188(2)(a) of the Criminal Procedure and Evidence Act 1981 or guilty in terms of s.188(3) of the Act as read with s.25(1)(a) of the Internal Security (Arms and Ammunitions) Act 1966 (Vol.XI Laws of Lesotho p.84 at 98/99), both of which are competent verdicts on a charge of attempted /murder.

murder.

However, I find the conviction of attempted murder in order, because I agree with Crown Counsel's submission that there need not be a purpose to kill proved as an actual fact and that it is sufficient if there is an appreciation that there is some risk in life involved in the action contemplated coupled with recklessness as to whether or not the risk is fulfilled in death. R. v Huebsch 1953(2) SA 561 (AD).

As I had intimated earlier in this Judgment the appeal was dismissed in toto.



CHIEF JUSTICE

10th September 1984

For Appellant : Mr. Kolisang (with copy of Judgment)  
For Crown : Mr. Seholoholo