IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

PITSO PHAKISO MAKHOZA
MPHEU MASHEANE
ALBERT TANKISO LECHE
MOKHASI MLONGENI

J U D G M E N T

Delivered by the Hon. Acting Mr. Justice J.L. Kheola on the 7th December, 1984.

The accused are summarily tried before this Court in terms of section 144 of the Criminal Procedure and Evidence Act, 1981. They are charged with assault with intent to murder; in that upon or about the 6th day of August, 1984 at or near the Maseru Bus Stop in the Maseru district the accused did jointly or one or the other or all of them unlawfully assault Michael Moeketsi Mokhehlane by shooting him in the stomach with a firearm, stabbing him in the thighs with a knife and cutting off his right testicle with a knife with the intention of killing him.

The accused pleaded not guilty to the charge. Mr. Kabatsi counsel for the Crown, withdrew the charge against accused No. 4 Bereng Makoanyane Seeiso. As the accused had already pleaded Mr. Edeling, counsel for accused 1 and 2, moved that accused 4 was entitled to verdict of not guilty. Accused 4 was found not guilty and discharged. The numbering of the accused was changed and accused 5 became accused 4.

/Mr. Buys

Mr. Buys appeared for accused 3 and 4.

Mr. Kabatsi made his opening address and handed in a copy of his address in which a detailed account of what each of the accused did in the commission of the offence charged.

Mr. Edeling objected to the charge on the ground that it is embarrassing because it does not state what each of the accused did in the commission of the offence. I ruled that the opening address was part of the Crown case and that as it gave a detailed account of what each of the accused did that was sufficient.

The first Crown witness is Dr. A. Masemene, stationed at Queen Elizabeth II Hospital in Maseru. He holds an M.B. and CH.B. degrees. During the evening of the 6th August, 1984 he was in the theatre where he was carrying out a caesarean operation. He received a report from the sister that there was a man who was seriously injured. He instructed the sister to give him blood. He later saw the patient in Ward 4 and was able to talk to him. On examination he found that the patient had

(a) a 4 cm. long cut on the inner side of the left thigh,
(b) two small wounds on the abdomen just below the umbilicus,
(c) a cut on the scrotum and
(d) the right testicle was missing.

The injuries were fresh and the injury on the thigh was caused with a sharp instrument such as a knife. The two wounds on the abdomen were bullet wounds and they were circular in shape The entry wound was on the left and the exit wound was on right. A sharp instrument caused the cut on the scrotum and

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it was a clean cut. The doctor did not ask the patient his name but his names were already on medical report form prepared by the police. He handed the report as an exhibit in this case and it was marked Exhibit A. The medical form is L.M.P. 47. The first page of the form is a request to the doctor to "examine the undermentioned and to submit his report on the reverse side of this form." Then follow the name, sex, age, address, date of the injuries and a short history of the case as reported. All this information is written on the form by the police officer who issues the form. He then signs the form and date stamps it.

The reverse side is filled by the doctor who examines the patient.

Under cross-examination Dr. Masemene explained that on the 6th August, 1984 when he examined the patient he made notes and that on the day he (patient) was discharged he compiled his report from the notes he made on the 6th August, 1984. The notes were not handed in because they are hospital property and confidential. Although the missile injury was superficial it was still serious because it caused bleeding and there was loss of blood. At the time he examined the patient the wound on the thigh had already been sutured. He examined him at about 9.00 or 10.00 p.m. and the wounds were less than five hours old. The injury on the scrotum could cause terrific shock. He denied that the examination was not proper and exact.

The complainant, Michael, Moeketsi Mokhehlane, testified that he had known accused 1 since 1974 as a very prosperous businessman. He first knew accused 2 on the day he and accused 1 had gone to fetch him from Malunga Hotel. He said

/he was

he was talking of the events of the 6th August, 1984. He also knew both accused 3 and accused 4. As far as accused 4 is concerned he remembers buying beer for him and that was before the 6th August, 1984. Immediately after the complainant had given his knowledge of the accused persons the Crown Counsel said: "Mr. Mokhehlane, you have just mentioned the 8th of August, I would like to take you back to that date" and tell the events of that day. Obviously the Crown counsel was mistaken; the witness had never mentioned the 8th of August. He had mentioned the 6th of August, 1984.

After that introductory question by the Crown Counsel the witness said that he saw accused 1 at Lower Thamae at about 4.20 p.m. The complainant was driving his taxi when he was stopped by accused 1 driving a brown Mercedes Benz car. Accused 1 told him that he had been looking for him for a long time as he (complainant) has information which would be of great assistance in a matter accused 1 had at the charge office. Accused 1 said they should go to the charge office at once.

It was agreed that the complainant should leave his car at his home which was not far from where they had stopped. The complainant left his car at his home and they travelled in accused 1's car. They called at Malunga Hotel where they were joined by two men, one of them was accused 2. The other man was a stranger to the complainant. Accused 1 drove towards town but when they came to the traffic circle instead of driving towards the charge office accused 1 accelerated and drove towards the Maseru bus stop and stopped near the door of his bottle store. He suddenly

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took out his pistol and pointed it at the complainant ordering him to come out. He also instructed the two men (accused 2 and the stranger) to "cock" so that "this dog" does not run away.

The complainant came out of the car and was ordered to go into the bottle store. He saw one Jeffs near the door and told him that his bag (Jeffs's) was in his car and that he would bring it. Accused 1 pushed him into the bottle store and was led into an inner office. When they entered into the office he noticed that he was accompanied by accused 1, accused 2, accused 3 and the strange man who had joined them at Malunga Hotel. Accused 1 took a sjambok from accused 3 and hit the complainant all over the body but he managed to ward off the blows. Accused 1 accused him of having a love affair with one of his wives and asked how such a rag and dog could be in love with his wife. As the complainant denied the accusation against him accused 1 became more angry and hit him with the sjambok. All of a sudden there was a firearm report and then the complainant was pointing a firearm at him, he got frightened and rushed at him and pushed the arm holding the firearm. There was a second firearm report and accused 1 retreated for a distance of 3 metres and then shet the complainant on the stomach. He fell down and accused 1 ordered accused 3 to handcuff complainant's left hand to the left foot. Accused 3 complied.

During the shooting accused 1 shot his left hand and told accused 2 and 3 that he was going to consult a doctor. When he left the office the complainant was still bleeding from the wound on the stomach. Accused 2 and 3 guarded him while accused 1 was away and they did not assault him. He returned after about 40 minutes and looked for another pair

/of handcuffs.

of handcuffs. Accused 2 brought them and the right hand was handcuffed to the right foot. Three of accused 1's wives were brought into the office and the woman alleged to be in love with the complainant denied this and said that when she was pregnant she liked him but never told him. It was at about 7.15 p.m. and again accused 1 left with his wives. He returned at about 9.00 p.m. He again instructed one of his drivers to fetch his junior wife. When she arrived he expressed his gratitude to her for having informed him of what was going on between his wife and "this dog". He again left with his wife and returned after a few minutes. He then asked accused 2 and 3 to give him a knife but they did not have it. An attempt was made to buy it from the shops but it was discovered that the shops were already closed as the time was 9.20 p.m.

At this juncture accused 4 entered into the office and accused 1 asked him to give him a knife. Accused 4 complied and yet he saw that the complainant was handcuffed in a very peculiar manner and was still bleeding. Accused 1 instructed accused 2 and 3 to pull him (complainant) to the middle of the office. They complied. Accused 1 ordered him to open his thighs. When he refused to do so he stabbed him on the thigh and ordered accused 2 and 3 to open his thighs. Accused 1 cut trousers and exposed the private parts. There was a fierce struggle till another man was called into the office. The complainant was overpowered and he lost consciousness. When he regained his senses he noticed that they were standing besides him and watching him. They got hold of him again and accused 1 cut his scrotum and took out the right testicle and showed it to him. The complainant was screaming and pleading with accused 1 not to

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castrate him.

Letele Emmanuel Makhele testified that on the 6th August, 1984 he was going to work when he saw the complainant driving his vehicle going in the direction of T.Y. About fifteen minutes later he saw accused 1 driving in the same direction. When he came to the bus stop the time was about 4.30 p.m. Accused 1 arrived at his bottle store and parked his vehicle on the pavement near the door. Accused 1, the complainant and two men came out of the car and the complainant was pushed into the bottle store by accused 1. He denied that before the complainant was pushed into the building he had a conversation lasting about two minutes with another person. If the complainant talked to anybody at all he must have done while he was still walking. At the time he saw these things he was on the other side of the road but crossed to the bottle store side because he was curious to find out what was happening to the complainant. When he entered into the bottle store they were expelled by the employees of accused 1 who insisted that only people who had come to buy should remain.

The fourth witness is 'Mamohlakola Letsatsi. On the 6th August, 1984 whe was going to her home when the complainant drove past her going towards his home. Accused 1 was following him. A few minutes later before she reached her home she saw that accused 1 was driving back to town and the complainant was in his (accused 1's) car having left his car at home.

Mojalefa Baartjies was near the door of the bottle store when the car driven by accused 1 arrived. When the occupants of the car came out the complainant told him his bag was

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in his (complainant's) car. He explained in Court that the bag contained his electrical tools and that the bag remained in complainant's car because he had given him a lift in his taxi. He denied that the complainant was his friend.

The evidence of D/Sgt. Monyane was to the effect that on the 7th August, 1984 accused 1 came to the C.I.D. office at about 4.30 p.m. He (accused 1) told him that on the previous day he shot himself on the hand when he tried to shoot the complainant. He attended the scene of the crime in an office at the bottle store of accused 1. He saw something red on the floor and accused 1 explained that it was the blood of the complainant. He also saw two holes on the mat on the wall and accused 1 explained that they were caused by the bullet and that he threw the spent bullets and shells into the sewerage. But a search in the sewerage drain revealed no bullets nor shells. When he was asked about the testicle accused said he threw it into the dust bin. Sgt. Monyane looked for it in the bin but he did not find it. On the following day accused 1 brought a .22 pistol to Sgt. Monyane at the C.I.D. office.

Under cross-examination Sgt. Monyane told the Court that accused 1 admitted that he had acted against the law because he found the complainant with his wife and had shot him and also castrated him. The case for the defence was closed without calling any of the accused to give evidence.

The report of Dr. Masemene is being challenged on the following grounds:-

/(a)

(a) he did not enter the name of the patient on the report,
(b) at no stage did the doctor identify the complainant as the patient he saw,
(c) he handed the report without confirming the contents thereof, and therefore it is not evidence of the contents.

In this regard I was referred to a case of S. v. Joubert 1971(3) S.A. 924 and to Hoffmann: South African Law of Evidence, second Ed. page 317.

In regard to (a) above I have already explained that page one of the medical form (L.M.P. 47) is filled by the police and they give the particulars of the patient they request the doctor to examine. On the reverse side there is no space for particulars of the patient except the space for description of the injuries. It is therefore understandable why the handwriting on the one side is different from that on the other side.

In regard to (b) above it would be expecting doctors to do miracles if in a big hospital like Queen Elizabeth II Hospital where a doctor examines hundreds of patients in a month, we would expect him to recognize faces of such patients. In any case, if the defence had any doubt as to the identity of the patient examined by the doctor that he was not the complainant in this case they would have directed their cross-examination to that issue. Castration of a human being is such a rare occurrence in this country that almost all the witnesses including the doctor said it was their first time to see it. There can be no mistaken identity that the patient referred to in the doctor's report is the complainant in the present case.

In regard to (c) above I agree that there is authority to that effect. In Letuma v Rex, 1976 LLR. 1 at p. 4 where

/Cotran,

Cotran, A.C.J., (as he then was) said:

> "This may give a false impression to a trial judge or a judge sitting in an appeal. I can understand a magistrate's reluctance to write down in long hand what a doctor says, especially if it is merely a repetition of what he has written in his report but it is important to remember that his report as such is not evidence. It is what he says orally, viva voce, that is the evidence that can be relied upon, and this despite some criticism from Hoffmann's Treatise on Evidence 2nd Ed. at 317. A judge or an Appellate Court will have much more confidence if the magistrate writes down clearly, in such a manner as will leave no doubt, that the doctor is simply refreshing his memory from the report, not reading it (Rex v Van Schalkwyk, 1948(2) S.A. 1000 (O), and where the report is handed in as an exhibit it is imperative for the magistrate to note not only that the doctor adhered to it, but also confirmed that it is correct (Rex v Manda) 1951 (3) S.A. 158(A), R. v. Birch-Monchrieff 1960(4) S.A. 425(T) and S. v. Joubert, 1971(3) S.A. 924(E)."

I entirely agree with the learned Acting Chief Justice and the South African Case cited in the judgment, but since that case was decided our Criminal Procedure and Evidence Proclamation of 1938 has been repealed and replaced by the Criminal Procedure and Evidence Act 1981, section 223(7) reads:

> "In any criminal proceedings in which any facts ascertained by a duly qualified medical practitioner in regard to any injury or state of mind or condition of body of a person or his opinion as to the cause of death of a person, or any facts ascertained by a veterinary practitioner as to any injury or his opinion as to the cause of death to any animal may be proved by a written report signed and dated by such medical or veterinary practitioner and that report shall be prima facie evidence of the facts recorded in it." (My underlining).

In my view the decision in Letuma's case, supra, that a medical report is not evidence has been overridden by the above statutory provision that a medical report is prima facie

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evidence of the facts recorded in it. All that the statute requires is that it should be signed and dated by the doctor. The next question is whether the requirement that the doctor should adhere to the contents of his report and confirm it as correct has fallen away. Now that the medical report has been made prima facie evidence of the facts recorded in it I am of the opinion that the doctor need not adhere to and confirm his report because it is evidence. Before section 223(7) was enacted the doctor had to confirm the report because it was not evidence.

I may add that the doctor gave his evidence in a manner that clearly showed that he was merely refreshing his memory from the report. Be that as it may, I am of the view that section 223 (7) of our Criminal Procedure and Evidence Act 1981 has abolished all these technical points. I have checked Swift's Law of Criminal Procedure, 2nd Ed. and found that the South African Criminal Procedure Act of 1955 did not have a provision similar to our section 223 (7) of the 1981 Act. It will not be wise for our Courts to fllow the South African cases dealing with the admissibility of medical reports because our statutory law differs from theirs.

I have been asked by the defence counsels to disregard the evidence of the complainant because it related to the 8th August, 1984, which is irrelevant to the present charges. The complainant said he first knew accused No.2 when he and accused 1 fetched him from Malunga Hotel on the 6th August, 1984. He again referred to the 6th August, 1984 when he said prior to that date he bought beer for accused 4. Immediately after he had said this Mr. Kabatsi put a leading

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question and said: "Mr. Mokhehlane, you have just mentioned the 8th of August, I would like to take you back to that date ....." The complainant had never mentioned the 8th of August, he had twice referred to the 6th August, 1984. It was patently clear that it was a merel slip of the tongue on the part of Mr. Kabatsi but because this was a leading question by the counsel to his own witness he probably did not suspect that his own counsel would mislead him. In his book the "South African Law of Evidence," 2nd Ed. at page 312 Hoffmann has this to say regarding leading questions:

> "Questions of this type may not be put because a witness may be too lazy to do more than assent to counsel's suggestions, or too polite to correct him on what may seem to the witness to be unimportant inaccuracies."

I agree with the learned author and I wish to add that in the present case P.W.1 referred to the 6th August, 1984 and the complainant referred to the 6th August, 1984 twice before the misleading question was put to him. He probably did not even hear that a different date was mentioned. I did not hear that a different date was being mentioned because my notes still show the 6th August, 1984. It was only when the tape was played that I heard for the first time that the wrong date had been mentioned. Now the question is whether the defence was entitled to take advantage of an obvious slip of the tongue by Mr. Kabatsi. Mr. Edeling argued that there was no duty on the accused or their counsel to assist the Crown in the presentation of its case. He referred me to S. v. Joubert, supra, at page 928. That case is not authority for the proposition that the defence or the Crown should take one another by surprise where an obvious mistake has been made by another party. If the complainant

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in the present case contradicted himself with regard to date (the 6th and the 8th) the defence had to cross-examine him on this point because it was clear that he never intended to say the 8th August. As the wrong date was introduced by a leading question it has no effect at all on the proceedings.

The next question is whether time was of essence in the present case. In Motloli v Rex 1976 LLR. 177 it was held that when an accused raises an alibi defence the element of time is of the essence and the Court must be careful lest the accused be prejudiced by admission of evidence which does not coincide with the date on the charge. (See Section 155 of the Criminal Procedure and Evidence Act 1981, R. v. Jooste, 1928 A.D. 369). In the present case the accused have not raised the defence of alibi and they cannot be heard to say they were prejudiced by the contradictions made by the complainant. As far as the authorities show time or date becomes of the essence only if the defence is an alibi. It seems to me that it was unwise of the defence counsels to leave the evidence of the complainant unchallenged because time was not of the essence in pre present case; moreover, it was clear that the 8th August was mentioned by mistake by the Crown counsel and also that it was introduced through a leading question and would thus have no force and effect. A criminal trial must be fair not only to the accused but to the Crown as well. It would not be a fair trial if one of the parties is allowed by the Court to take advantage of obvious mistakes due to a slip of the tongue.

Section 154 (2) of the Criminal Procedure and Evidence Act 1981 reads:

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"If any particular day or period is alleged in any charge as the day or period during which any act or offence was committed -

(a) proof that the act or offence was committed on any other day or time not more than 3 months before or after the day or period laid down therein shall be taken to support such allegation if time be not of the essence of the offence; and

(b) proof may be given that the act or offence was committed on a day or time more than 3 months before of after the day or period stated in the charge, unless it is made to appear to the court before which the trial is being held that the accused is likely to be prejudiced thereby in his defence upon the merits."

This section again emphasises that where time is not of the essence proof that the offence was committed on a day three months before or after the day alleged in the charge such evidence shall support the charge. The 8th day of August, 1984 was within the time prescribed by the Act because time was not of the essence in the present case.

The evidence of the complainant was corroborated by Emmanuel Makhele and Mojalefa Baartjies who saw when he (complaiant) was pushed into the bottle store by accused 1. The two witnesses appeared to me to be truthful witnesses and I do not agree with the defence counsels that they gave unsatisfactory evidence. The evidence of M. Letsatsi also corroborates that of the complainant.

I agree with the defence counsels that the first part of the evidence of Sgt. Monyane with regard to what accused 1 told him at the charge office was a confession to police officer and inadmissible. But the second part concerning what he observed at the scene of the crime was perfectly admissible. It is true that when this witness told the Court that when this witness told the Court that he could not make

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sketch plan of the office in which the offence was committed was lying. Despite the fact that he lied on this point I accepted his evidence concerning his observations in the office of accused 1.

Mr.Kabatsi has submitted that when accused 1 fired at the complainant point blank aiming at the front part of his body, hitting him in the stomach, at that juncture, he certainly did appreciate that there was a risk to his life and was reckless as to whether or not the complainant in fact died. I agree. And as luck would have it the wound caused by the bullet was superficial but this fact did not affect intention accused 1 had when he fired at the complainant and hit him on the stomach. I think it can rightly be said that at that stage he had the necessary intention to kill the complainant by shooting a vulnerable part of his body. By castrating the complainant in an office where there were no medical facilities accused 1 foresaw that the likelihood of him bleeding to death. The fact that he subsequently changed his mind and took him to the hospital does not change his initial intention to kill him.

With regard to accused Nos. 2, 3 and 4 it is trite law that when two persons act in consort with the intention of doing an illegal act, each may be liable for the criminal of the other, although the co-operation commenced on an impulse and without any prior agreement or consultation R. v. Mkize, 1946 A.D. 197, S. v. Maree and Another, 1964(4) S.A. 551 O)). Accused 2 and 3 assisted accused 1 throughout the shooting, beating and castrating and raised no objection at any stage. They then guarded the complainant for a very long time while he was bleeding from the stomach wound and

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made no attempt to stop the bleeding or to take him to the hospital. They knew that accused 1 had a gun and they were present when he aimed at the complainant and shot him on the stomach but they raised no objection. If they merely feared their boss they still had the chance to raise alarm because there were many people in the bottle store who were not the employees of accused 1. In my view the Crown has convincingly proved common purpose (R. v. Levy and others 1929 A.D. 310, R. v. Cilliers, 1937 A.D. 285)).

The case against accused 4 does not differ from the case against accused 2 and 3. When he entered into the office he saw how the complainant was handcuffed and bleeding from the wounds he had already sustained on the stomach. It was clear that the complainant was in serious pain and his life was in danger. This notwithstanding he willingly gave his knife to accused 1 to continue the assault on the complainant. It must have been clear to accused 4 that accused 1 was going to use the knife to cause some injury to the complainant and by so doing he associated with accused 1 in a joint unlawful enterprise to harm the complainant. (See Rex v Longone, 1938 A.D. 532). After giving the knife to accused 1 accused 4 left the office. Accused 1 immediately started stabbing the complainant on the thigh and then castrated him. Although accused 4 did not expressly assent to or authorize the stabbing and castration of the complainant, he is responsible as in the circumstances he should reasonably have contemplated or forseen the stabbing as likely to be taken by accused 1. I have earlier in this judgment indicated that castration in the circumstances of this case constituted attempted murder because it was likely that the complainant would bleed to death.

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For the reasons stated above I formed the opinion that the Crown has proved its case beyond a reasonable doubt. I therefore find all the accused guilty as charged.

REASONS FOR SENTENCE.

I have taken into my consideration all the matters mentioned to me by the defence counsels and I have taken into account:

(a) the nature of the assault,
(b) the manner of its infliction,
(c) the measure of the hurt received by the complainant, and
(d) the insult the complainant has suffered.

Sentence:- Accused 1, 2 and 3: Three (3) years' imprisonment.

Accused 4: Two (2) years' imprisonment.

J. K. Kleoff

ACTING JUDGE.

7th December, 1984.

For the Crown : Mr. Kabatsi assisted by Mrs. Bosiu

For the Defence : Mr. Edeling & Mr. Buys.