

IN THE HIGH COURT OF LESOTHO

In the Appeal of

1. MAKOAE MOLAPO
2. NTALA LELEKA
3. MONESAPULA SELAHLA
4. RAMPHO PHALATSI

Appellants

v

R E X

Respondent

J U D G M E N T

Delivered by the Hon. the Chief Justice Mr. Justice
T.S. Cotran on the 17th day of April 1984

Four accused persons whose names appear above were convicted by a magistrate at Mokhotlong (Mr. Nomngongo) of assault with intent to do grievous bodily harm. They were modestly fined and the fine has been paid. The learned magistrate took into account that the complainant was the initial aggressor. This was a family fight in which brother was pitted against brother, the mother of both, who gave evidence, watching helplessly in horror.

All four accused appealed but only three paid the appeal fees, viz, Molapo, Selahla and Phalatsi. I shall refer to these three as the appellants.

Mr. G.N. Mofolo argued that the Crown evidence was not only unsatisfactory but that when he submitted that there was no case to answer at the end of the case for the Crown, the Public Prosecutor agreed and said words to the effect that the "stand" (presumably taken by the mother of the complainant) was "incredible".

The magistrate, however, disagreed and held that there was
/indeed a case.

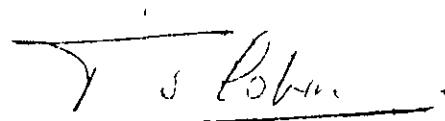
indeed a case. Mr. Mofolo did not call upon the appellants (and the fourth accused) to testify. The magistrate, as I said, convicted, and Mr. Mofolo now submits that the magistrate was bound to acquit.

Mr. Peete for the Crown who was unaware of the new legislation, initially agreed and submitted, on the strength of Tsematsi Mosolo v Rex (Court of Appeal CR/A/1/1979 dated 7th September 1979 - unreported) that what the prosecutor had said tantamounts to the withdrawal of the charge by the Director of Public Prosecutions. That appeal however was decided on the strength of s.7(2)(c) of Criminal Procedure and Evidence Proclamation (as amended by Act No.4 of 1975) and on some, though by now means all, precedents in the Republic of South Africa, but the law has since changed. I had occasion in R. v Setai (1980(2) LLR p.359 at 361-375) to voice some apprehension about the matter in the circumstances prevailing in Lesotho. The legislature was then debating the consolidation of, and amendments to, the above Proclamation which culminated in the Criminal Procedure and Evidence Act 1981 (No.7 of 1981) by s.5(c) whereof the words "in writing", which did not appear before, were inserted. Some meaning must be attached to the use of these words as one must assume the legislators were cognizant of the issue and the only meaning I can think of is that the Director of Public Prosecutions must give his written consent to the withdrawal or discontinuance of a prosecution or there must be factual proof either a quo or here that his subordinate was acting in accordance with his general or special instructions (s.6(1)). There is no such proof and mere words uttered by a public prosecutor are no longer sufficient to inevitably result in an acquittal, if the judicial officer has before him evidence upon

/which he

which he might convict In this case there was such evidence

The appeal must be dismissed but if Mr Mofolo wishes to take the matter further leave to appeal is granted and if Mr Peete requests me to state a case in terms of s 15 of the Court of Appeal Act 1978, I shall be happy to do so


CHIEF JUSTICE
17th April 1984

For Appellants Mr. Mofolo

For Crown Mr. Peete