

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

'MAMAHLOLI MALISE

Appellant

VS

R E X

J U D G M E N T

Delivered by the honourable Acting Chief Justice Mr.
Justice J.L. Kheola on the 27th day of October, 1986.

The appellant was charged with assault with intent to do grievous bodily harm it being alleged that on or about the 23rd June, 1985 and at or near Ma Telukhunoana in the district of Berea the accused unlawfully and intentionally assaulted 'Malineo Tongoane by stabbing her on the left upper chest with a knife with intent to cause her some grievous bodily harm. She pleaded nbt guilty but was found guilty as charged and sentenced to six (6) months' imprisonment without the option of a fine. The appeal is against the conviction and sentence.

The complainant testified that on the 23rd June, 1985 at dusk she was walking towards her home when she heard the foot steps of a person running towards her from behind. As soon as she turned and looked back the accused came to her and stabbed ^{her} above the left breast with a knife. She fell down. When she rose and ran away the accused stabbed her on the back with a knife. She then chased her until she entered into

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'Matumelo's house. She was later taken to TY Hospital and admitted for four days.

In cross-examination she denied that the accused found her in compromising circumstances with her (accused's) husband. She denied that she was in love with the husband of the accused.

Dr. Gotink is the medical practitioner stationed at TY Hospital and he examined and treated the complainant when she was admitted into the hospital. He found one stab wound on the upper left side of the chest and another stab wound at the back. There was bleeding into the chest. He formed the opinion that the wounds were dangerous to life and that the degree of force used to inflict the wounds was severe.

The version of the accused is that for a long time the complainant had a love affair with her husband. She complained to her husband, to her husband's family and to the chief but in vain. On the 23rd June, 1985 she found the complainant and her husband amorously holding each other. They were standing between the arable lands of 'Mahelile and 'Makhabo. The complainant saw her and warned her (accused's) husband that she was coming. The husband ran away. She then attacked the complainant and stabbed her on the chest and back with a knife. She then chased her until they came to 'Matumelo's house where people stopped her from assaulting the complainant.

Mr. Pheko, for the appellant, submitted that under the traditional view provocation was a defence on a charge of murder but the courts have extended the defence of provocation to crimes involving specific intent such as the charge in the present appeal. He further submitted that under the new approach to provocation as enunciated by Burchell and

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Hunt in the book "South African Criminal Law and Procedure, Vol. I 1st edition at page 242, the provocation received may not only mean that the accused did not intend to do grievous bodily harm upon a charge of assault with intent to do grievous bodily harm, but also that he lacked the intention required for common assault. He contended that the trial court failed to make a proper inquiry.

I entirely agree with the above submissions as far as the law is concerned, but I do not agree with the submission that the trial court failed to make a proper inquiry as to whether the appellant had the necessary specific intention for assault with intent to cause grievous bodily harm. On page 9 of the record starting from the middle of the second paragraph the learned magistrate states:

"But she (accused) has said she has been watching them, and prepared to catch them red-handed; from these facts it is clear that she had the intention to commit grievous bodily harm because while she was watching them she was armed with a knife and a knife is a dangerous weapon."

What the learned magistrate is saying is that the appellant did not come upon the complainant and her husband by chance; she had been going about armed with a knife and looking for a chance to find them in compromising circumstances and then punish the complainant for her affair with her (accused's) husband.

The appellant knew very well that her husband was having an affair with the complainant. She took her complaint to the right people and finally to the chief but her husband was not prepared to bring the affair to an end. Thus she decided to watch them with the view of catching them red-handed and punishing her or both of them accordingly.

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The fact that she went about armed with a knife clearly proves that she had the intention to cause grievous bodily harm.

The story of the complainant that the appellant attacked her without any cause is untrue and must be rejected. The husband of the accused gave evidence that he and complainant were caught red-handed amorously holding each other.

The evidence before the trial court was that the appellant saw the couple from some distance away. It is not clear how far she was but what is clear is that when she came to the complainant the husband had run away. After stabbing the complainant twice the appellant chased her until they came to the home of one 'Matumelo. The most important aspect of the case is whether or not the appellant ^{was} lost self-control and whether the provocation sudden in terms of the Criminal Law (Homicide Amendment) Proclamation No. 42 of 1959. Although the Proclamation refers to murder cases, the requirements of provocation are the same. I do not think that the provocation was sudden. The appellant had known the affair between her husband and the complainant for a long time and had been seeking an opportunity to find them under those circumstances. (Rex v. Setai, L.L.R. 359 at p.378).

The defence of provocation is not available to the appellant in the circumstances of the present case. The appeal against conviction is dismissed.

Although provocation has been rejected as a defence, I shall take it as mitigating or extenuating circumstance in this case. The behaviour of the complainant and the appellants husband was so preposterous that leniency must be shown in passing sentence. The learned

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magistrate did say that he took into account provocation as a mitigating factor. By sending the appellant to prison without the option of a fine the learned magistrate seems to have given very little weight to this important factor. The sentence appears to be too severe under the circumstances of this case.

The sentence imposed by the court below is set aside and substituted with one of M150.00 or six (6) months' imprisonment.

J.L. KHEOLA
ACTING CHIEF JUSTICE.

31st December, 1986.

For Appellant - Mr. Pheko
For Crown - Mr. Lenono.