

IN THE HIGH COURT OF LESOTHO

In the Appeal of

TEFO MAKHATSEANE	1st Appellant
ADOLPH MAKHATSEANE	2nd Appellant
MALISE MAKHATSEANE	3rd Appellant

v

R E X

J U D G M E N T

Delivered by the Hon. Mr. Justice J.L. Kheola
on the 23rd day of April, 1986

The appellants were charged with one count of arson and another charge of malicious injury to property. They were all found guilty as charged on both counts. The first appellant was sentenced to receive ten (10) cuts with a light cane, the second appellant and the third appellant were each sentenced to three years' imprisonment on count 1 and six months' imprisonment on count 2, sentences were to run concurrently. The first appellant is appealing against sentence only while the other appellants are appealing against both the convictions and sentences.

The case for the Crown is based on the evidence of four eye-witnesses, namely, Simon Makhatseane (P.W 1), 'Mamotselisi Makhatseane (P W 2), Kebone Makhatseane (P.W 3) and Matseliso Makhatseane (P W 4). P.W.1 is the complainant and the husband of P W.2

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It is common cause that the complainant's four houses were destroyed by fire together with their entire contents which included bedroom suites, dining room suites, kitchen suites, clothing for the entire family and some money amounting to R1 000. The first appellant decided to shoulder the entire blame and purported to exonerate the second and third appellants. I shall deal with his confession later in this judgment.

P.W 1 told the court below that at about 5 00 p.m on the 4th August, 1984 he was in his house in the company of his wife (P W.2) and two of his daughters, 'Mathabo and 'Matankiso who did not give evidence in this case. The first appellant arrived and stood outside the house. He invited him (P W.1) to come out so that they could fight. The first appellant was carrying two swords and a timber stick. P W.1 told him that he was afraid of him and refused to come out. The first appellant started to throw stones into the house through the door. P.W.1 says that he came out of the house and noticed that the first appellant was accompanied by the third appellant. The two appellants threw stones at him in an attempt to stop him from going into another house. The second appellant chased him and caught him near the door of the second house. They grappled with each other until they were both inside the house and P W .1 overpowered him and threw him to the ground. 'Mathabo arrived at this juncture and stopped the struggle. P.W 1 says that the second appellant^{got} out of the house and said, "We are burning this house." He (P.W.1) remained in the house until he saw smoke get into the house.

When he realised that the house was burning he came out. The three appellants ran away because they did not know with what weapons he had armed himself, but when they noticed that he was running away they turned back and chased him. He ran to the house of 'Matseliso Makhatseane (P.W.4) and locked himself into it. The appellants followed him and when they

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came to P W.4's house they threw stone at the door and broke it. P W 3 arrived while the appellants were still breaking the door and tried to stop them. The second appellant slapped him and asked him if he wanted to die. P.W 3 left. The appellants besieged P.W.4's house until midnight when they left. After the departure of the appellants he came out and went to Mokolanyane's place and spent the night there. On the following day he noticed that all his four houses had been completely destroyed by fire

P.W 2's version of what took place is more detailed than that of P W.1 because she saw how the four houses were set on fire. When P.W.1 came out of the house after the first appellant had thrown stones into the house, he chased the first appellant for some distance before he turned and ran into another house being chased by the second appellant. She also refers to the struggle between P.W.1 and the second appellant before they got into the house. When the second appellant came out of the house he said, "We are burning these houses" and ordered the other appellants to set them on fire. The first appellant went to his home and brought bundles of maize stalk-fodder and set them on fire. The second appellant took some of the burning bundles of fodder and set one of the houses on fire. The third appellant took some of the burning bundles and lit the house in which P W 1 had sought refuge by putting the burning bundles at the door. The other two houses burnt after she had fled. She went to P W 4's house and hid herself there. P W.1 found her there

P.W 3's testimony was to the effect that when he heard the alarm he came to P.W.1's place. On his arrival the first appellant was setting on fire P.W.1's house facing east. The second and third appellants set on fire the stone-built house. When he tried to put out the fire on the stone-built house the first appellant threw stones at him forcing him to

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run away. While the houses were burning P.W.1's daughters managed to retrieve two or three trunks containing some goods and put them outside the burning houses. The appellants put some material on the trunks and burnt them.

P.W.4 told the court below that when he heard cries at the home of P.W.1, she immediately went there and found the appellants. They were making noise and threatening to kill P.W.1 who was alleged to be in the house. She pleaded with the appellants and asked them to desist from doing such a thing but in vain. She finally left them and went to her house. When she was about 70 yards from P.W.1's houses she heard an alarm that the houses were burning. She returned and found that the appellants were still present. She claims that the trunks were actually taken out by her. She suddenly heard that there was noise at her house and rushed there. She found that the door of her house had been broken but P.W.1 was no longer there.

The Crown closed its case.

The first appellant elected to give a sworn statement while the second and third appellants elected to remain silent. The first appellant told the court that on the 3rd August, 1984 P.W.1 had fought with his (1st appellant's) father and had chopped his legs with an axe. He alleged that on the following day (4th) P.W.1 came to his home at about 6.00 p.m. and threw stones at him when he found him in the garden. He jumped over the fence and fled to the home of the second appellant. P.W.1 followed him and told the second appellant that he wanted to kill him (1st appellant) like he had killed his father. He also said he wanted to attack the second appellant and suddenly struck him with an iron rod but the second appellant caught the iron rod. P.W.1 delivered another blow and hit the second appellant on the fingers. The latter managed to

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dispossess P.W.1 of the axe. After P.W.1 had left, the first appellant says that he felt so badly hurt by the acts of P.W.1 that he decided to chase him. P.W.1 ran away and entered into one of his houses. He (1st appellant) set it on fire because he wanted him to come out. The fire from this house spread to the two houses next to it. As the fourth house was some distance from the others he went to it and set it on fire. He denied that the other appellants were there when he was burning the two houses. He also denies that he broke the door of P.W.4's house.

Mr. Kolisang, counsel for all the appellants, has submitted that as the first appellant has made a confession that he alone burnt the houses, the court below erred in convicting the second and third appellants. The court below properly considered the confession and came to the conclusion that it was false. The learned magistrate was of the opinion that because the first appellant was a boy of only sixteen (16) years of age at the time of the trial and who could be sentenced to only a few cuts with a light cane, the defence decided to put all the blame on him so that the other adult appellants could not go to gaol for this serious offence. I tend to agree with the learned magistrate because the evidence against all the appellants was simply overwhelming. They were seen by several people when they were actually kindling the four houses and even going further to destroy the little goods that were retrieved from one of the burning houses. It is alleged that the hand of the second appellant was chopped with an axe but no evidence, medical or otherwise, was led to show that he ever sustained any injuries. It was alleged that when the first appellant chased P.W.1 towards his home, the second appellant remained at his home and that one Malise attended to the injuries he (2nd appellant) had sustained as a result of P.W.1's attack. Malise was not called to give evidence.

Failure to rebut or to explain prima facie evidence is a very dangerous choice made by the defence in the instant case. As I stated

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earlier the case established by the Crown against all the appellants was a very strong one. In the South African Law of Evidence, 2nd edition by Hoffmaun at pp 429-430 the learned author puts it thus

"If a witness has given evidence directly implicating the accused, he can seldom afford to leave such testimony unanswered. Although evidence does not have to be accepted merely because it is uncontradicted, the court is unlikely to reject evidence which the accused himself has chosen not to deny. In such cases the accused's failure to testify is almost bound to strengthen the case for the prosecution" (S. v. Gokool, 1965 (3) S.A. 461, S v. Nkombani, 1963 (4) S.A. 877).

The two appellants in the instant case decided not to deny the charges against them and yet there was overwhelming evidence which directly involved them in the commission of this odious crime. The two appellants were not mere spectators when the appellant set the houses on fire, they were actual perpetrators who took some burning fodder and lit up some of the houses. I am of the opinion that all the appellants were properly convicted and I accordingly do not wish to disturb the convictions on both counts.

The appeal against sentence by the second and the third appellants has to be considered very carefully. The second appellant is said to be an old man of sixty-seven years of age. It is submitted that sending an old man of that age will serve no good purpose. I do not agree with that submission because at that age he is supposed to be a mature man who ought to know that taking the law into his own hands would lead him into serious trouble. The second appellant was the main instigator in the commission of this heinous offence during which the complainant was left homeless and with only the cloths he and his wife and children were wearing. There is evidence from the first appellant that P.W.1 had been charged with the assault of his (1st appellant's) father and that the case had already been set down for hearing. All the appellants knew this but instead of allowing the law to take its course they elected to

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resort to self-help. Be that as it may and taking into account the age of the second appellant the sentence of three years' imprisonment does give me a sense of shock. In passing sentence in a case of destruction of property the court must bear in mind that the injured person can, in most cases, be compensated to the full extent of his loss.

It was submitted on behalf of the first appellant that a sentence of ten strokes with a light cane is too harsh. It was further argued that a sentence of detention at the Juvenile Training Centre should have been imposed. I do not agree with that submission. A sentence of detention at a Juvenile Training Centre is usually the last resort where other non-custodial sentences have failed to reform the juvenile. It may also be imposed in cases homicide and rape irrespective of whether or not the juvenile is a first offender. The instant case is one of malicious injury to property and there is evidence that the juvenile committed this offence at the instigation of adults. The sentence of ten strokes with a light cane appears to me to be on the harsh side.

For the reasons stated above the appeal against convictions is dismissed. The appeal against sentences is upheld. The sentences imposed by the court a quo are set aside and substituted with the following -

First Appellant Eight (8) strokes with a light cane to be administered in terms of Section 308 of the Criminal Procedure & Evidence Act 1981.

Second and Third Appellants Count 1 Twelve (12) months' imprisonment.
Count 2 Six (6) months' imprisonment. Sentences to run concurrently.

J L. KHEOLA
J U D G E

23rd April, 1986.

For Appellants - Mr. Kolisang
For Crown - Mr. Seholoholo.