IN THE HIGH COURT OF LESOTHO

In the Appeal of :-

PHELANG HATAHATA Appellant

v.

R E X

J U D G M E N T

Delivered by the Hon. Acting Chief Justice J L. Kheola on the 16th day of June, 1986.

The appellant appeared before the Senior Resident Magistrate for the district of Maseru charged with the offence of malicious injury to property, it being alleged that upon or about the 23rd November, 1985 and at or near Thaba-Bosiu in the district of Maseru the said accused did wrongfully, unlawfully and maliciously stab four cattle with a sharp instrument the property of Motsemoholo Machobane with intent to injure the said Motsemoholo Machobane in his property. To this charge the appellant pleaded not guilty but was found guilty as charged and sentenced to two (2) years' imprisonment.

It is common cause that on the night of the 23rd November, 1985 the four cattle referred to above were brutally killed by stabbing them in the anus with a sharp instrument which pierced the intestines.

The crucial issue in this case is whether the evidence of the only eye-witness to the events of that night is reliable enough to

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sustain a conviction. P.W.2 is the son of the complainant. He deposed that on the night of the 23rd November, 1985 he went to his father's cattle kraal and waited there for some time and then decided to go back to bed. Before he reached the house his attention was drawn back to the kraal by a bellowing cow. He quickly returned to the kraal to investigate and saw one cow jump over the kraal and fall below the wall. He then saw the appellant jump over the wall and go towards the cow which had fallen below the wall. He chased the appellant and at the same time raised alarm that "the appellant (phelang) had killed his cattle". During the chase he came very close to the appellant and saw that he was holding a long shinny object. It was a clear night. He feared to apprehend the appellant because he was armed and feared for his life. The witness gave a full description of attire the appellant wore that night.

When asked by the court to clarify how he could identify the fleeing man who had his back towards him, the witness explained that at one stage he cornered the appellant on the edge of a donga when he could not find the escape route. It was at that stage that they faced each other at a very close range because the appellant turned and came towards the witness in an effort to get his way down the donga and had passed at a distance of about six (6) paces from him.

The learned Senior Resident Magistrate came to the conclusion that although the events of this case occurred at night P.W.2 had a good opportunity to identify the appellant because he passed very close to him. He also reviewed the authorities on the identification of an accused person by a single witness. He quoted section 238 (1) of the Criminal Procedure and Evidence Act 1981 which gives discretion to the court to convict on the single evidence of any competent and credible witness. He further referred to a South African case in R. v. J 1966 (1) S.A. 88

at page 90 where Macdonald, A.J.P. had this to say:

> "The third point is that while there is always the need for special caution in secrutinising and weighing the evidence of young children, complainants in sexual cases, accomplices and, generally, the evidence of a single witness, the exercise of caution should not be allowed to displace common sense. If a judicial officer, having anxiously scrutinised such evidence with a view to discovering whether there is any reasonable possibility of conscious or unconscious fabrication, is satisfied that there is no such possibility and that the evidence of the single crown witness may, due and proper weight being given to the whole of evidence, be safely accepted as proving the guilt of the accused beyond reasonable doubt, he should not allow his judgment to be swayed by fanciful and unrealistic fears."

With respect, it seems to me that the authorities referred to by the learned Senior Resident Magistrate relate to a single competent and credible witness who observed the events he is testifying to under normal circumstances with regard to the state of light, state of his mind (he was not frightened), where the person he saw was not running. In the instant case the court must take into consideration that the person seen by P.W.2 was running and had his back towards the witness. The evidence of P.W.2 is that as soon as the appellant jumped over the kraal he chased him and shouted that "Phelang" had killed his cattle. At that stage he had not yet seen the face of that person but he had already formed the opinion that person was the appellant. That person ran away before the witness saw his face and the important question is whether the witness could identify the appellant at night by merely looking at his back while the latter was not even stationary. The answer must be in the negative.

It was argued that on that night there was twilight and that the witness clearly saw the appellant. It seems to me that even if there was faint light from the stars it was a dark night and whatever light came from the stars was not sufficient to enable the witness to identify that

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person as soon as he started chasing him. Taking into account the prevailing circumstances i.e. the poor state of light and the fact that the witness and that person were running, it cannot be said that the identity of the appellant was proved beyond a reasonable doubt.

It is my belief that P.W.2 contradicts himself in his evidence. He said that when the appellant jumped over the kraal and went to the cow which had fallen near the wall, he chased him and shouted that "Phelang" had killed his cattle. But later in his evidence he says he only identified the appellant positively when they met face to face near the edge of the donga. This piece of evidence proves that the witness shouted that the person he was chasing was the appellant before he had positively identified him.

The witness admitted that when he confronted the appellant on the edge of the donga he was frightened and feared for his life because the appellant was armed. This fact goes to show that even during the so called confrontation the prevailing circumstances were not such that the witness can be said to have had a good opportunity to identify the appellant. He did not only fear for his life but in addition to that the light was poor and the appellant was running.

In dealing with cases of this nature the court must always bear in mind the words of Williamson, J.A. in S.v. Mehlape, 1963 (2) S.A. 29 when he said:

> "The often patent honesty, sincerity and conviction of an identifying witness remain, however, ever snares to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence."

I respectfully agree with this warning. It appears that in the instant case the trial court was highly impressed by the witness

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and found him to be a truthful and honest witness. The important thing was whether he had a good opportunity to identify the appellant.

Mr. Lenono, counsel for the Crown, supported the conviction and referred me to the case of Rex v. Lengoeha, CRI/S/10/85 (unreported) in which I convicted the accused on the evidence of a single witness who also observed the events at night. That case may be distinguished from the instant case in a number of respects. In that case the witness observed the accused from an advantageous position in that he was standing at a distance of about 15-20 paces from the the accused who on two occasions came out of the house carrying some articles. There was a big fire in the house which enabled the witness to see the accused very clearly as he came out of the house. In the present case both the witness and the appellant were running and it was dark. The witness was frightened (See R. v. Mputing, 1960 (1) S.A. 785).

It was submitted that the evidence of P.W.2 is corroborated by the fact that the appellant refused the chief and his party entry into his house to conduct a search for a weapon used in the commission of this offence; and that the only reasonable inference to be drawn from this conduct is that he had something to hide. I do not agree that the only reasonable inference to be drawn from his conduct is that of guilt . It may be that the appellant did not want the chief and his party to violate his rights of privacy at night. The powers of search are spelt out in sections 46, 47 and 48 of the Criminal Procedure and Evidence Act 1981 and the chief is not one of the officers authorised to search without a warrant. I have not been able to find any law that authorises the chief to search his subjects' houses at night on suspicion that a weapon recently used in the

commission of a crime is hidden therein. If I am right that there is no law which authorises the chief to make a search in people's houses, then the purported search of the appellant's house was an unlawful act which had to be resisted.

For the reasons stated above the appeal was allowed.

J.L. KHEOLA
ACTING CHIEF JUSTICE

9th July, 1986.

For Appellant - Mr. Maqutu

For Crown - Mr. Lenono.