

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

MPHO KORO

Appellant

V

R E X

Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 20th day of October, 1989.

The appellant who was the second accused in a trial for assault with intent to do grievous bodily harm held before the magistrate's court Quthing was convicted as charged and sentenced to a term of five years' imprisonment.

The facts of the case are not strictly necessary to narrate as I am of the view that the learned magistrate who presided over the proceedings gave a fair evaluation of those.

The only matter upon which my decision is anchored relates to the fact that, as reflected in the record and later argued before me at the hearing of the appeal though never raised in the grounds of appeal, the appellant seems not to have been given the opportunity to cross examine P.W.2 even though P.W.2's evidence directly implicates the appellant in the commission of the crime which he was charged with and ultimately convicted of.

In considering this the court invited the crown to

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say what the effect of such an irregularity is on the entire proceedings.

The invitation was in view of the fact that the C.P. & E. under section 329(2) of the 1981 Act says :

"Notwithstanding that the High Court is of the opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings unless it appears to the court of appeal that a failure of justice has resulted therefrom."

Read with the High Court Act 1978 section 8(2).

The crown conceded that the form of irregularity committed in these proceedings is not such as can be cured by mere alteration of the defect but by setting aside the entire proceedings.

Section 171 of the C.P. & E. is of relevance in this matter. It reads :

"(1) Subject to sub-section (c) every person charged with an offence is entitled to make his defence at his trial and to have the witnesses examined or cross examined"

I agree with the learned counsel for the crown that the court is justified in setting aside the lower court's verdict without hesitation since no conviction should ever be allowed to stand which is the product of a discredited trial.

Among the procedural safeguards that this court drew attention to some appear on p. 13 of CRI/A/37/88 R vs. Lehlohonolo Pulumo. This court relying on S vs Khanyile and Another 1988(3) S.A. 795 at 796 et seq emphasised the importance of the exercised of a party's right to cross examine witnesses for the other side.

This has not been observed in the court below,

/perhaps

perhaps by mistake but the end result is that the accused's rights were violated.

In the result his appeal is upheld.

J U D G E.

20th October, 1989.

For Appellant : Mr. Nthethe

For Crown : Miss Nku.