IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

V

NDABEHLEKE QHOSHEKA

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 28th day of April, 1989.

Accused in this matter has been committed for sentence to this Court by the Quthing Class 1 magistrate who found him guilty of assault with intent to do grievous bodily harm. Accused had been originally charged with culpable homicide and had pleaded not guilty to the charge.

It is a matter of great concern that although accused was convicted as long ago as 21st July 1988 and had his matter accordingly committed to this Court for sentence afterwards, it was only set down for hearing on 14th April 1989. I cannot over-emphasise the need for speed with which the processing of an accused persons's case should be brought to completion especially when he has been improperly convicted and therefore is entitled to acquittal by the Court to which his case has been committed. Even if he was properly convicted an accused is entitled to a speedy knowledge of his fate. Thus delay is reprobated in all circumstances. Moreso because once convicted prospects of an accused being granted bail are nil while theoretically the court is deemed to be pondering on what sentence to impose.

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To return to the charge: It is trite law that when a matter has been committed for sentence to this Court accused is entitled to address the Court on the merits.

I accordingly heard the address given on his behalf by his counsel Mr. Z. Mda. I have noted that the alleged crime is said to have been committed on 1st November, 1987; and that trial commenced on 11th March 1988 whereas deceased succumbed to his injuries on 6th November, 1987.

In his opening remarks Mr. Mda questioned the basis of the learned magistrate's committing the accused for sentence as reflected in her order appearing on page 33 of the record.

The learned magistrate's order reads in respect of sentence:

> "Committed to the High Court for sentence in terms of Order No. 10 of 1988. Revision of Penalties (Amendment) Order 1988."

My reading of this Order does not show that it can be relied on for purposes of committing matters to this Court for sentence. Section 293(1) of our C.P. & E. seems quite adequate for such purposes if the Subordinate Court is of the opinion that

> "greater punishment ought to be inflicted for the offence than it has power to inflict ..."

Order No. 10 of 1988 merely provides under 2 A(1) that :

> "Notwithstanding sections 1 and 2, upon conviction the sentence to be imposed on each of the criminal offences set out in Column 1 of the second schedule shall be set out in column 2 of the second schedule to this Order."

In respect of conviction of assault with intent to do grievous bodily harm the minimum punishment prescribed is five years' imprisonment without the option of a fine.

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Hence, if the learned magistrate felt that the minimum penalty prescribed is lower than the desirable punishment for the offence, but that she had no jurisdiction to impose the suitable sentence, then she was at large to commit the accused to this Court for sentence in terms of section 293(1) of the C.P. & E. referred to above.

It is significant that order No. 10 of 1988 does not in its express provisions draw any distinction between offences committed before its coming into operation on 14th July 1988 and those committed on that day or after.

However it poses no problem with regard to offences committed on that day or after because clearly they fall to be treated under the provisions of this Order.

An Act of equal strength to this Order is the Human Rights Act No. 24 of 1983. Section 13(1) thereof provides that

> "No one shall be held guilty of any criminal offence on account of an act ..... which did not constitute a criminal offence ..... at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed."

I have had recourse to the words of Schutz P. in C. of A. (CIV) 5 of 1985 The Law Society of Lesotho vs The Hon. Prime Minister & Another (unreported) at pg. 27 that

> "The Courts are plainly enjoined to protect human rights conferred by the Act, and not otherwise taken away."

I have noted that the Court of Appeal in that case adopted the attitude

> "that if the legislature had intended to confine itself to a pious expression of intent it could merely have made a non-binding declaration to that effect. ....." and that
>
> "It is our duty to give effect to that law

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of which the legislature chose to make Human Rights Act part.

But rules of interpretation of statutes state that later statutes prevail over older ones where there is a conflict.

Furthermore Schutz P. in the case referred to above gave recognition to the fact that

> "..... As Human Rights Act is something new and an important instrument that will require much interpretation in the future I wish my words to be understood to be confined to that which is now under consideration. I do not address myself to whether, in general, human rights taken away either before or after the H.R.A. can only be taken away expressly."

This in my view apart from qualifying the initial stance by Schutz P. referred to above; and far from presenting a stereotyped outlook, provides a variety of possibilities.

It is therefore my considered opinion that provisions of the Human Rights Act cannot avail in circumstances of the case before me. Where there is a conflict in the application of two statutes of equal strength then the later statute takes priority because it cannot be reasonable to suggest that in passing a subsequent law the law-maker was not aware of the prior countervailing law. Furthermore because there is no constitution there is no question of these two laws i.e. H.R.A. and Order No. 10/88 ousting each other or vying for position of favour by means of being tested for validity against the well-worn procedure (adopted in areas where that Supreme law exists) of the constitutional touchstone in order to qualify. Therefore in our jurisdiction these laws have to exist side by side as independent entities emanating from and sanctioned by the will of the law-maker unless one or other is abrogated by express legislation.

What then? Then the only solution can be found

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in the rules of interpretation. It is a well known rule that in the absence of express provision to the contrary statutes are to be considered as affecting future matters only.

In Sigcau vs. Q. (1895) 12 SC 256 at 266 De Villiers C.J. said

> "There is a strong presumption ..... against any construction of the Acts whereby an individual would be liable to punishment by means of a retrospective statute."

Cockram in his Interpretation of Statutes (1975) at page 66 says

> "There is also a presumption against implying that a statute which increases the penalty for an offence should apply retrospectively, unless the statute expressly provides that the increased penalty should be retrospective."

Order 10 of 1988 does not expressly say the increased penalty should be retrospective.

The temptation to apply this order regardless of the above considerations may have had its roots in other lands because in the words of Cockram at 66:-

> "At one time the South African Courts, under the influence of British decisions (e.g. D.P.P. vs. Lamb (1941) 2 KB 89) preferred the view that an accused becomes liable to punishment only upon conviction of an offence, and thus if between Commission of the offence and the conviction therefor the penalty was increased, the accused should be liable for the increased penalty e.g. R vs. Banksbaird 1952(4) SA. 512 AD."

So clearly whatever doubt dogs this position has its root in ever-recurring errors of the past.

However it inspires one with delight and confidence to learn that the above case was later overlooked by the Appellate Division which decided in R vs. Mazibuko 1958(4) SA. 353 A.D. that

> "where an amending statute provided the death penalty for robbery with assault and intent to murder, this penalty could not be imposed

/where

where the robbery had taken place before the amending statute was passed."

The foregoing and the following paragraph should suffice to spotlight the principle I have been trying to extract from what has been laid down by various authorities.

No express provision is to be found in Order No. 10 of 1988 to show that offences committed before July 14th 1988 fall to be treated under the prescribed minimum penalties section. In any event, and as an alternative approach to the foregoing, it would be doubtful whether the law giver intended the effect of that Order to affect pre-existing offences as at the date of its passage. Such doubt should redound to accused's benefit.

I therefore find that accused's case falls to be treated under the law as it existed prior to 14th July 1988.

As to the merits I find that the learned magistrate properly found the accused guilty of assault with intent to do grievous bodily harm. That the evidence showed that considerable force was used to inflict the injury that resulted in bleeding on both sides of the brain; and when admitted, deceased was in a coma, stoutly bespeaks the fact. The argument that the identity of the assault victim who later died is in doubt has no basis in the evidence that deserves credence.

The record shows nothing to support the view that circumstances of this case negative specific intent. The assault was unlawful and unjustified. I agree with the learned magistrate's finding that the offence proved is that of assault with intent in view of the fact that although deceased was struck only once with a lethal weapon which the doctor testified could have caused the injury attested to by eye witnesses, deceased had nonetheless two inj[illegible],

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The learned magistrate's summary of the facts and reasons for judgment cannot be faulted. I therefore confirm the conviction.

All that remains is what suitable sentence to impose.

I have taken into account that you have been in custody since January 1988; and have addressed my mind to the point raised by your counsel that whereas sentence should have been imposed within reasonable time after your conviction on 21-7-88 it is only today that you are to know your fate. This has resulted in considerable anxiety in your mind. I need not elaborate on all the points raised in mitigation save that the sentence of M250 or 3 years' imprisonment starting from January 1988 would suffice in giving expression to my acceptance of those points collectively.

J U D G E.
28th April, 1989.

For Crown : Miss Moruthoane
For Defence : Mr. Z. Mda.