CRI/A/23/89

IN THE HIGH COURT OF LESOTHO

In the matter between:-

THABO SEMAYI.....Appellant

and

R E X

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 21st day of July, 1989.

The appellant and one 'Manthako Mosia (hereinafter referred to as A1) were jointly charged with the offence of assault with intent to do grievous bodily harm, it being alleged that on or about the 30th day of July, 1988 the said accused each or one or both of them did wrongfully and unlawfully assault Molibeli Taetsane by hitting him on the eye with a bottle with intent to cause him grievous bodily harm. A1 pleaded guilty and the Appellant pleaded not guilty.

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No separation of trials was made. At the end od the trial the appellant was convicted and sentenced to five (5) years' imprisonment. A1 was acquitted despite the fact that she had pleaded guilty and had also given evidence that she assulted the complainant. Her evidence was corroborated by one Potlako Mosala (D,W.3) who was in the house at the time of the fight.

The appellant is now appealing to this Court on two grounds,namely,

1. That the learned magistrate misdirected himself in proceeding with the trial of both accused number one and accused number two (appellant) while the former pleaded guilty and the latter pleaded not guilty, the fact which prejudiced the appellant.

2. That the conviction was against the weight of the evidence and was bad in law.

The complainant testified that on the 30th July, 1988 at about 7.00 p.m. he went to the home of the appellant where beer was being sold. On arrival there he knocked at the door and the appellant allowed him to come in. After he had entered he sat down. In the house the appellant was in the company of A1 and another man he did not know. They were all drinking beer. All of a sudden the appellant and the stranger rushed at him and the former struck him on the left eye with a bottle of beer while

the latter was holding him on the shoulder. At the time of the attack he had not uttered a single word to the people he found in the house. He had not had any quarrel with the appellant and A1 on any previous occasion. He regularly visited the appellant's home because that is where he used to drink beer. The complainant deposed that after the attack he bled profusely from the eye. The appellant ordered him to get out and accused him of looking down upon other people.

He returned to his home and his mother (P.W.2) made arrangements for him to be taken to Mapoteng Hospital. His eye was found to be completely destroyed. He denied that when he left for his home the appellant accompanied him.

A1 gave evidence to the effect that on the day in question she was at the home of the appellant. She went outside to pass water and found the complainant standing at the corner of the garden. She finished passing water and after she had pulled up her panty, the complainant caught hold of her and tried to throw her to the ground but she overpowered him and managed to escape. She ran into the house with the complainant hot on her heels. Even before she reported to the people in the house what had happened, the complainant entered; he took off his overcoat and threw it away. He caught hold of her again and a struggle followed till they both fell down. During the struggle she found a bottle under the table and struck him with it on the left eye. She

got out and reported to Ausi Nurse who came and asked the complainant what the cause of the fight was. He did not reply.

She (A1) deposed that after the fight she went to the chief's place but found that he was not there. She did not go to the police because while she was preparing to go there complainant's brothers came and wanted to fight her.

The version of the appellant is the same with that of A1. He does not know what happened outside but saw the struggle till they both fell down. When they stood up A1 took a bottle and hit complainant with it. He stood up and separated them.

The evidence of Potlako Mosala (D.W.3) is the same with that of the appellant and A1.

The learned Resident Magistrate disbelieved the defence evidence and pointed out a number of discrepancies in the defence case. He also blamed the defence for having failed to put their case to the Crown witnesses.

Mr. Teele, counsel for the appellant, has submitted that although section 170 of the Criminal Procedure and Evidence Act 1981 gives the court a discretion to order a separation of trials when an application is made to that effect by the Crown or the accused, the judicial officer is entitled on the interest of justice to raise the matter. (Swift's Law of Criminal Procedure, 2nd Edition page 240). He submitted that it is an established and prudent practice to order separation of trials where a plea of guilty and

of not guilty are tendered in a joint trial and even though no statute provides for it. A higher court will find an irregularity if prejudice be shown to have been caused by want of separation.

In Swift's (supra) at page 242 the learned authors w write as follows:

> "A failure to follow this course is not per se irregular (R. v. Matabele and another, 1947 (1) S.A. 710 (O), but it is so if prejudice to the accused has ensued as where the evidence given by the accused pleading guilty is considered in reaching a decision in respect of the cases against the other accused (R. v. Fatshawa and Matluli, 1930 TPD 526."

He submitted that this position should be equally true to a position where a judicial officer places emphasis on the demeanour and/or conduct of co-accused and the same is used to convict the appellant. He submitted that in the present case A1 did not cross-examine the complainant at all and then the learned Resident Magistrate relies on authorities to the effect that it is unfair to leave the evidence of a party unchallenged and then ask that his evidence be disbelieved (page 20 of the record) and that failure of A1 seems to some degree to have been visited upon the appellant as well (see lines 25 - 29).

I do not agree with the suggestion that in arriving at its decision the trial court used A1's failure to cross-examine the Crown witnesses to convict the appellant. A proper reading of the record (page 20 lines 30 - 34) shows that the appellant is accused of his own failure to put his case to the Crown witnesses. There

is no doubt that the court a quo placed a very great emphasis on the fact that the appellant failed to put his case to the Crown witnesses. The appellant is not experienced in court procedures and he is not legally trained. I say he is inexperienced in court procedures because it was said that he was a first offender. I am of the opinion that by placing too much emphasis on failure to put the defence case to the Crown witnesses the court misdirected itself on a point of law.

In R. v. Jawke and others, 1957 (2) S.A. 187 (E.D.L.) it was held that it is undesirable, especially in criminal proceeding in the magistrate's court, where the persons appearing often have little experience, to draw the conclusion that the evidence of a witness is accepted as the truth from a failure to cross-examine unless this intention is clearly indicated.

In Phipson on Evidence, 7th Edition at page 460 the learned author, quoting from the case of Browne v. Dunn, 6R.67 (which is not available to me) says:

> "Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character....."

In Rex v. Phaloane, 1980 (2) L.L.R. 260 at page 278 Rooney, J. said:

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> "I think it is unfortunate that the Crown witnesses and in particular Motlaka were not given an opportunity of dealing with the accused's version of the incident. It was certainly not the duty of Crown Counsel to question the witnesses on the evidence given by the accused at the inquest, as it could not be assumed that he would adhere to that version at this trial. But, the failure to put his case does not in this instance imply an acceptance of the evidence of the Crown witnesses although it may weaken criticism of of these witnesses. The evidence for the accused is entitled to the same careful consideration as if the elements of the defence case had been put to the witnesses for the Crown."
> (My underlining)

In the present case the question is whether the trial court gave a careful consideration to the appellant's evidence as if the elements of the defence case had been put to the witnesses for the Crown. On page 21 of the record Lines 19 - 21 the trial court had this to say:

> "It seems accused 2 agrees so because he merely asks 'when you arrived you sat down' and the answer is "yes". He does not follow that with any negative question."

This is a clear indication that the trial court treated lack of experience or knowledge of cross-examination as an admission that the appellant accepted as true the evidence of the complainant that he sat down after entering into the house. It is not correct that the appellant accepted complainant's version. In his evidence he explained how the complainant entered with the complainant hot on her heels and that immediately they entered they grappled with each other till they fell down. It is very clear from appellant's story that the complainant never sat down before the start of the struggle.

In his reasons for judgment the learned Resident Magistrate has pointed out a number of contradictions in the evidence of the three defence witnesses as follows:

1. That the appellant said that he saw the complainant pass near the window but he does not mention that he spent a long time outside after he passed near the window.

2. That A1 does not mention that she at any stage saw the complainant pass near the window while she was in the house. She merely says she found him outside standing by the corner of the garden.

I do not think that the mere fact that A1 did not see the complainant when he passed near the window indicates a contradiction in the evidence of the appellant and A1. It is possible that when complainant passed there, A1 was not looking in that direction.

3. That the appellant says that when A1 entered she sat down for some time before complainant entered. The other defence witnesses give the impression that there was no time for her to sit down.

I agree that this is an obvious contradiction in their evidence, but such discrepancies are not unusual in a case in which the events took place at night and in a quick succession.

The above three conflicts in the evidence of the defence seem to be the only ones that made the trial court to reject the defence story. In addition to that it came to the conclusion that

the appellant failed to put his case to the witnesses for the Crown. I am of the opinion that the discrepancies were not material to the issue of appellant's guilt or innocence. The trial court ought to have given a very careful consideration of the appellant's story whether it was not reasonably possibly true. The criminal standard of proof was set out by Greenberg, J. in R. v. Difford, 1914 A.D. 370 at 373 as follows:

> "..... no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal."

Mr. Sakoane, counsel for the Crown, submitted that in an appeal purely upon fact, an appellant court will not seek anxiously to discover reasons adverse to the conclusions of the trial court. It matters not that the case against the appellant was a very weak one or the appellant court feels some doubt as to the correctness of the decision. If there was evidence to support the conviction the appeal will be dismissed (Marcus Leketanyane v. Regina 1956 H.C.T.L.R.1 at p.4).

In the present case the appeal was not purely upon fact. I have said earlier in this judgment that by placing undue emphasis on failure by the appellant to put his case to the witnesses for the Crown, the trial court misdirected itself on a point of law. I said there was nothing to show that it gave a careful consideration and treatment of the appellant's story. So

the decision of the trial court was not based purely upon facts.

I am of the opinion that the Crown failed to prove beyond a reasonable doubt that the appellant's story was false. I think this is a proper case in which the appellant ought to have been given a benefit of doubt and acquitted. His version was corroborated on material points by two people who were in the house where the fighting took place. The improbability of the complainant's story had to be taken into account, that people with whom he had no quarrel could attack him in the manner he had described. The possibility that during the struggle he did not see who struck him had to be taken into account.

In the result the appeal is upheld.

J.L. KHEOLA
JUDGE

21st July, 1989.

For the Appellant - Mr. Teele
For the Crown - Mr. Sakoane.