

there they saw a man standing in the shadow of a wall of the house with a blanket around his head. The plaintiff asked him who he was standing there in a dark place and the man, who in fact ^{was} the defendant, replied, "If you want to know you can follow me." The plaintiff and his father then left the place and, according to them, this apparently small and insignificant incident amounted to what they called a quarrel and resulted in the later assault of the plaintiff. I find it very difficult to believe.

The defendant's version was that it happened in the day time not at dusk and that, when the plaintiff asked him who he was, the defendant replied, "How can you ask me who I am during the day time?" He added that the plaintiff was very drunk at the time and that he tried to stop the defendant from walking away by standing in front of him. But the defendant merely walked around him and went home. The defendant said that he did not speak and did not take offence. He left the plaintiff uttering "scolding" words as Mamotebang and one called Lokali arrived at the place. He said he did not meet the plaintiff again that night and did not assault him.

According to the plaintiff and his father (PW2), the plaintiff was not drunk and both men swore that they never touched alcohol of any sort at any time. They both said that it was dark by the time they started to walk back home but there was bright moonlight and they could see well.

On the way Palo (PW2) went to a river to relieve himself and the plaintiff waited or proceeded slowly. As

Palo left the river and started to catch up with the plaintiff, the defendant appeared from the opposite direction. He was carrying a panga and, without a word, he aimed it at the plaintiff's head and cut his cheek below the left eye and he fell unconscious. Palo (PW2) said that he was then about five paces away from them and he recognised the defendant whose head was uncovered. He asked him, "Moeti, why are you hitting the child?" and the defendant replied, "If you are like him you are O K, too."

Palo said that he seized the defendant, holding him around his waist, and they struggled and Palo slipped and fell down. The defendant then ran back to the plaintiff and cut him with the panga on the head once again. The plaintiff had been crawling on his hands and knees but he fell prostrate when cut again. Palo raised an alarm and someone called Moholi came and the defendant ran away. This Moholi was not called as a witness.

Palo said that he helped the plaintiff to his feet but that he (Palo) then felt tired and he sat down. The plaintiff walked away alone with some flesh hanging from the left side of his face. Palo said he saw four teeth on the ground. The plaintiff was bleeding profusely. According to the plaintiff he fell unconscious after the first blow and woke up in hospital. He said nothing of walking away from the scene. But it appears that he did so because an old woman aged about 70 years, Mampale Tsanyane (PW3), testified that he walked to her house on that night in

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the condition already described above. She went to call the village headman, Ralekoala Makoae (PW4), who was even older than she.

When they both came back to her house they found the plaintiff lying on the floor in a pool of blood. He was muttering and trying to speak. Mamapale thought he said something like "shoo-shoo". Ralekoala told Mamapale that he believed he heard the plaintiff say "Mosiuoa" which was the name of the headman's son. Ralekoala claimed to be hard of hearing, but he did not express any surprise whatever, either then or in Court, at hearing his son's name mentioned in such circumstances.

Apparently his son Mosiuoa was attending a feast at the home of someone called Nkoko on that night. I have to point out that some of the testimony of this old man Ralekoala was disconnected, contradictory and inconsistent and consequently not always very reliable. But piecing together what the various witnesses said about the subsequent events, it appears that Palo did not arrive at the old woman Mamapale's house until after she and the headman got there.

When Palo did arrive it seems that he said nothing about the defendant being the one who had assaulted his son. According to Mamapale, Palo said nothing at all. She described him as being silently furious. All he did was to obtain transport and then he took the plaintiff to Machabeng Hospital in Qacha's Nek. In Court Palo insisted that he

did tell the headman that night about the defendant being the assailant. But Ralekoala himself did not agree. In his testimony he said, "That night I heard as if my son was responsible for the assault." He added that when Palo returned from the hospital later the next morning he told the headman (Ralekoala) that he had obtained evidence that the person who had injured his son was the defendant and that he was present when the defendant assaulted the plaintiff. If that was so, it would tend to corroborate the old woman Mamapale's (PW3) testimony that Palo did not say anything about the defendant, or any other assailant, while they were in her house that night with the plaintiff lying bleeding on the ground.

Furthermore, the headman Ralekoala was so convinced that his son Mosiuoa had been accused of the assault, that he sent messengers to fetch Mosiuoa from the feast to explain himself. At first in Court Ralekoala said that when he confronted his son Mosiuoa about the matter he said that he had never left the feast that night. Ralekoala added that, as a result, he was satisfied that he was innocent.

However, later in his testimony, Ralekoala contradicted this and said that he called for his son and detained him and later handed him over to the police who arrested him. If he did that it does not appear that he in fact believed in his innocence. In addition Ralekoala said that after Palo had later accused the defendant of being the assailant, he waited for three days before informing the police that the defendant was a suspect. He did not explain this

peculiar delay but it seems to indicate that he still believed that his son Mosiuoa was the real assailant.

The plaintiff stated that he knew nothing of this but that he made a statement to a police officer who came to see him later in hospital and that he told the officer that it was the defendant who assaulted him. He added, however, that the defendant was not arrested until he had been discharged from hospital four weeks later.

The defendant's version was that, on the day after the incident, his chief told ten of the villagers, including the defendant, that they were required to report to chief Ralekoala at his village because of an alarm which had been raised there. On the way there they met people who told them of a place where there were bloodstains on the path and they went to look at it. At the village they found Ralekoala (PW4) with Palo (PW 2) and other people. Ralekoala told them of the incident and of hearing his son Mosiuoa's name spoken by the plaintiff and added that when Ralekoala asked the plaintiff which Mosiuoa he meant, the plaintiff replied, "yours", presumably meaning his son. While Ralekoala was relating this the plaintiff's father, Palo (PW 2), was present and remained silent. Then Mosiuoa arrived and was questioned by his father, but he denied any knowledge of the incident saying that he was at Nkoko's all of the previous night. Ralekoala told Mosiuoa to stay there as he had sent for the police. The rest of the people including the defendant dispersed and he said that on the way he saw the police coming to the scene. There was no explanation of why Ralekoala had sent for the ten villagers

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including the defendant.

The defendant said that he was arrested over three weeks later and taken to Sekake Police Post where he found Mosiuoa in the lock-up. After three days Mosiuoa was released and told to keep reporting to the police. The defendant said that he was interrogated and tortured by the police and eventually taken to the magistrate's court at Qacha's Nek and charged with assault. The prosecutor called only three witnesses for the prosecution, the plaintiff, his sister-in-law Mamotebang and a police officer. Strangely enough the plaintiff's father, Palo, and the old woman Mamapale (PW 3), and the headman Ralekoala (PW4) were not called although they were apparently in attendance at the court and available.

Apparently, and this was not disputed, the magistrate found that the defendant had no case to answer and acquitted him without hearing the defence case. I have not seen the lower court file but it seems to be an extraordinary decision if the defendant really was named and identified by the plaintiff in that court. It is also difficult to understand why the only alleged eye-witness, Palo (PW2), was not called to testify. Unless the police and the prosecutor were hopelessly incompetent the only other likely explanation seems to be that they were not told the same version of the incident as was related by the plaintiff and his father in this Court.

I do not mean to say that in that case the defendant

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would certainly have been convicted, but only that Palo would have been required to testify as the main eye-witness and the defence would have been heard of necessity and then a judgment delivered. The fact that none of this happened seems to indicate that some of the present witnesses may well have changed their stories in the intervening three years.

If Palo had really been present at the assault then surely he would have told the headman about it immediately that he met him on that night and he would not have waited to make his report until after he had returned from taking the plaintiff to hospital. Furthermore, the early actions of the headman indicate that he was quite convinced that his son Mosiuoa had been named as the assailant. His later detention of his son and then handing him over to the police confirms this, in my view. I refer again to the extraordinary point that Ralekoala at no time expressed any surprise at the accusation directed at his son. He seemed to accept it as a reasonable probability. He did not dismiss it as being absurd. That was why I asked him in Court whether there was a grudge or a quarrel between his son and the plaintiff, because that would to some extent explain Ralekoala's ready acceptance of the accusation. But Ralekoala denied this, though I suspect that he was not being truthful on this point.

However that may be, there is no doubt that Mosiuoa was the first suspect and the defendant was only brought

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in later. The plaintiff claimed to have been unconscious all the time and so was unable to assist the Court about what he may have said at Mamapale's, until he later identified the defendant as his assailant.

The plaintiff was taken to Machabeng Hospital and later transferred to Queen Elizabeth II Hospital in Maseru and discharged on 21 December 1985. He thus spent four weeks in hospital. He said that he has continued to receive outpatient treatment since then. He did not produce his medical treatment book, which he said he had left at home, nor any medical report on his injuries. This was unfortunate for him and most unhelpful to the Court. From the unsightly scars on his face it was clear that he had been seriously injured. He had lost his left eye and had an artificial replacement. He had various scars on his forehead, around his left eye, on his cheek and above his mouth. There was also a scar on his left hand that might have been caused when he tried to protect his face. But he could not explain about any of them since he stated that he fell unconscious at the first blow to his head.

His father Palo (PW2) insisted that only two blows were struck by the assailant but, from the position and shape of the various head scars, I would say that there would probably have been at least four blows or cuts. The plaintiff claimed that he lost a total of nine teeth as a result. He said that three were knocked out at the scene and six were later extracted in hospital. Again there is no report to confirm this, though he had gaps in his mouth.

The plaintiff also claimed that when he recovered and went back to work in the mine at Grootvlei he was told that his injury was serious and, as it had not been caused at their mine, they could not accept him back there for work. No doubt they wanted to make sure that there would be no compensation claim made against them at any time in relation to the injury.

According to the plaintiff he had not worked since the incident but he and his wife and children merely relied upon their father for support. The plaintiff is expected to mitigate the result of his injuries by taking some steps to help and support himself. He is still a young man and he looks reasonably strong and fit. The loss of one eye is no reason for him to sit around doing nothing for the rest of his life. He has a family to support and he should find suitable work, even if it is only agricultural. He is by no means totally incapacitated but merely partially handicapped. He claimed that he earned R32,99 per day, six days a week, in the mine and that now he earns nothing at all. There was no proof of that.

Without his medical treatment book there was no evidence that he still requires to undergo out-patient treatment or check-ups. His hospital receipts (exhibit 'B') are for M60,80 on 18 December 1985 and for M48 on 3 February 1986 and nothing since then. That is a total of M108,80 as claimed in his summons. He also claimed for transport for treatment (exhibit 'A'), producing eight bus tickets dated from 18 December 1985 to 18 March 1986, all to Qacha's Nek. They total M40,75 and not M41,23 as claimed. Other /tickets 444

tickets and receipts he said were destroyed when his clothes were washed.

He also claims M15,000 for pain and suffering and M25,000 for loss of amenities, and M5,000 for contumelia. No awards in other cases of loss of an eye were cited but I would say that the amounts claimed are, as usual, grossly exaggerated in the circumstances.

Before going any further into that, the important matter to be decided is whether or not the defendant is liable to the plaintiff. The onus is on the plaintiff to prove to the satisfaction of the Court that on the balance of probabilities the defendant assaulted and injured him as he claimed.

As witnesses I found that the plaintiff was unreliable and his father, Palo (PW2), was shifty and unconvincing. If he really saw all that he described in this Court then he would surely have been called in the magistrate's court as the prosecution's main witness. He could not have been left out, unless the prosecutor was either out of his mind or a total incompetent.

My impression of the plaintiff's case in this Court is that it was the result of afterthought and perhaps some discussion and planning by the plaintiff and his father Palo during the three years since the incident. There is no doubt that the plaintiff most unfortunately received serious injuries to his face including the loss of an eye. They appear to me to be of such a severe nature that his assailant

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surely must have had a very serious grudge against him, unless it was done by a mad man. There are indications that it could have been Mosiuoa who was responsible.

I find it very difficult to believe that merely asking the defendant who he is would be a sufficient provocation for him to appear later that night and carry out such a dreadful and deliberate assault unless, perhaps, he was very drunk or insane. But there is no such evidence against the defendant.

As usual in cases of this type the full story has not been revealed in Court. The truth has been suppressed, hidden or mutilated beyond recognition by some of the witnesses. I agree with Mr Maqutu that there is something very fishy about this case.

I think that it is quite likely that the plaintiff did not see and identify his assailant, or if he did, he has chosen to name the defendant instead of the person whom he really saw. With regard to his father Palo (PW2), I suspect that he either did not return from the river, after relieving himself, in time to see the assailant, or again, that he and the plaintiff have conspired to blame the defendant for reasons best known to themselves.

In any case I do not consider that the plaintiff has satisfactorily discharged the onus on him to prove his claim on the balance of probabilities. I find that there is considerable doubt in my mind in this case and that the plaintiff

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and his witnesses were altogether unsatisfactory, unreliable and unconvincing. Consequently I see no need to go through the process of assessing the damages.

Accordingly, the plaintiff's claim is dismissed with costs to the defendant.

P. A. P. J. ALLEN
J U D G E

13 February 1989

Mr Pheko for the Plaintiff
Mr Maqutu for the Defendant