

CRI/A/171/90

IN THE HIGH COURT OF LESOTHO

In the matter between:

THABANG HABAKA

APPELLANT

AND

REX

RESPONDENT

Before the Honourable Chief Justice Mr. Justice B.P. Cullinan on the 6th day of July, 1990.

For the Appellant : Mr. M.M. Ramodibeli  
For the Crown : Mr. S.P. Sakoane, Crown Counsel

JUDGMENT

The appellant was convicted by the Subordinate Court for the Berea District of stock theft and was sentenced to five years' imprisonment.

There is in effect but one ground of appeal. The appellant has filed an affidavit in which he deposes to the fact that before his trial he was severely assaulted by members of a so-called "Prevention of Theft Association", a form of vigilante group. The group of individuals, he claims, also discharged a firearm at him, some twelve times, apparently not with the intention of injuring him, but with intent to intimidate him and force him to plead guilty at his trial.

This he eventually did, an attempt at vacillation on his part

being met with glares of anger from the vigilante group, who were present in court.

The learned trial Magistrate has also filed an affidavit. He of course has no knowledge of the appellant's claims as to the vigilante group's activities. He denies however that there was any vacillation on the appellant's part and deposes that he pleaded guilty from the start.

The general rule as to the admissibility of fresh evidence (even by way of affidavit) on appeal, is that an appellate court will decline to admit such evidence where it was available at the trial. The contents of the appellant's affidavit were of course available at the trial. The appellant has deposed however to the fact that he was physically intimidated into pleading guilty and in particular from revealing such to the court. It seems to me that it would in the circumstances be a miscarriage of justice not to consider the contents of the appellant's affidavit therefore.

As to the allegation of assault, the Crown has endeavoured to obtain an affidavit from the members of the vigilante group. The learned Crown Counsel Mr. Sakoane has informed the Court that apparently no member of the group can be traced.

It may well be that the appellant has embellished the facts in claiming that he verbally vacillated in court: he may have done

so mentally, but both the learned trial Magistrate's affidavit and the record weighs against the appellant. As to assault before the trial however, the appellant's affidavit, as his learned Attorney Mr. Ramodibeli submits, stands uncontested. While of course the affidavit has not been tested in any way, nonetheless I can see no good reason for not accepting the particular evidence.

I wish it to be understood that I do not in any way seek to set a general rule in the matter. Everything must depend on the facts of each case, that is, as to whether any evidence, viva voce or by affidavit, will be admitted on appeal. I say no more than that in the present case I consider that the court should act on the appellant's affidavit.

I accept that the appellant was assaulted and physically intimidated before the trial, causing him to plead guilty. The learned trial Magistrate could not be expected to be aware of that fact and quite clearly he would not have accepted the plea of guilty had he been so aware.

In all the circumstances the appeal is allowed, the conviction and sentence are set aside and I order that the appellant be retried before another magistrate.

Delivered at Maseru This 6th Day of July, 1990.



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B.P. CULLINAN

CHIEF JUSTICE