IN THE HIGH COURT OF LESOTHO

In the matter between:

MATLI LINOKO

V

REX

Before the Honourable Chief Justice Mr. Justice B.P. Cullinan on the 19th day of December, 1991.

For the Appellant : Mr. T. Monaphathi
For the Respondent : Mr. S. Sakoane, Senior Crown Counsel

JUDGMENT

The appellant was convicted by the Subordinate Court for Maseru of assault with intent to do grievous bodily harm and was sentenced to 5 years' imprisonment.

The complainant was deaf and dumb. The learned Attorney for the appellant, Mr. Monaphathi, points to the fact that the Crown did not pursue the adducing of the complainant's evidence by means of an interpreter familiar with sign language. It may be however that the complainant could not communicate by such means.

The learned Senior Crown Counsel Mr. Sakoane submits that the proposition that the absence of a complainant weakens a prosecution case of assault, is not a valid proposition: that is apparent, he submits, when one applies the underlying principle to a case of murder. I respectfully agree.

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It seems that the learned trial Magistrate did not accept the appellant's entire evidence, but gave no reasons for rejecting it and in any event did not apply the test of whether or not the appellant's evidence might reasonably possibly be true.

Applying that test, it was the appellant's evidence that he heard the noise of pigs squealing at night in his pig sty. On investigation he found three persons there, in the process of stealing his pigs, some of whose feet were bound with wire. The complainant indeed dropped a pig. He and the other thieves hurled stones at the appellant, the complainant hitting him in the chest with a stone. The other two fled. He approached the complainant and struck him some five times on the head, with a stick, the latter falling to the ground. Thereafter he and another carried the complainant to his (the appellant's) house. He then sent a message to the Chief to the effect that he had arrested a thief.

The complainant was subsequently hospitalised for a few days, medical examination revealing a haematoma or swelling on both wrists, indicating, it seems, that the complainant's wrists were at some stage tied. The examining doctor found some four superficial lacerations on the head, with haematoma in both eyelids, with bleeding from the nostrils. The doctor regarded the injuries as 'moderate'.

There was evidence that the appellant continued to belabour the complainant with an iron bar, all over the body, as he lay prostrate on the ground. That evidence, which was denied by the appellant, simply cannot be true, in the light of the medical evidence, and the appellant's evidence of assault must be accepted.

Taking the appellant's evidence, however, it cannot be said that he was acting in defence of property: two of the thieves had fled and the complainant had dropped the pig he carried. Secondly, assuming that it was reasonable for the appellant not to have fled the scene, in case of further assault with stones, I cannot see that he thereafter acted in reasonable self defence. I cannot see that it could be said that it was necessary to strike the complainant five times on the head with a stick, to the extent indeed that the complainant was himself unable to flee and was disabled.

There is the aspect however that the appellant acted in the arrest of a thief, as he was entitled to do, under sections 27, 29 and 30 of the Criminal Procedure & Evidence. The two other thieves had fled, and it seems to me that the appellant would be entitled to use such force as was reasonably necessary in order to prevent flight by the complainant.

That is an aspect which the learned trial Magistrate did not investigate. The question then arises whether it was necessary

to disable the complainant in order to arrest him. It has been said so many times that a Court cannot place itself in the position of an arm chair critic in such matters. One must bear in mind that the appellant acted in the dark of night, disturbed upon finding thieves in his pig sty. In all the circumstances I am not satisfied that had the learned trial Magistrate considered these aspects that he would inevitably have found that the appellant used excessive force.

It would be unsafe to allow the conviction to stand therefore. In passing I observe that the learned trial Magistrate considered himself bound by the terms of the Revision of Penalties (Amendment) Order 1988 and imposed a sentence of five years' imprisonment. The transaction took place on 23rd April, 1988, however, that is, before the advent of the Order on 14th July, 1988. Under the terms of section 59 of the Interpretation Act 1977 therefore the Order did not apply, so that the learned trial Magistrate had a discretion in the matter of sentence.

In any event, the appeal is allowed. The finding and sentence in the Court below are set aside and the appellant is acquitted.

Delivered at Maseru this 19th Day of December, 1991.

B.P. CULLINAN
CHIEF JUSTICE

CIV/T/149/91

IN THE HIGH COURT OF LESOTHO

In the matter of:

TEK APPLIANCES (PTY) LTD Plaintiff

vs

DAVID NTLHASINYE Respondent

Before the Honourable Chief Justice Mr Justice B. P. Cullinan on the 16th day of December 1991

For the Plaintiff : Mr. T. Mahlakeng

For the Defendant : Mr. S. Phafane

JUDGMENT

Cases referred to:

(1) Von Siegler & Anor v Superior Furniture Manufacturers Ltd (1962) 35A 399;

(2) Steelmetals Ltd v Truck and Farm Equipt Ltd and Anor (1961)2 SA 372;

(3) Dickinson v South African General Electric Co. (Pty) Ltd (1973) 2 SA 620 (A);

(4) Plascon Evans Points (Tvl) Ltd v Ming and Another (1980) 3 SA 378.

This is an application for provisional sentence. The defendant is a director of Modern Kitchen and Cupboards (Pty) Ltd. On 11th September, 1990 he signed a cheque made out to the plaintiff company in the amount of M17,766.00. The cheque was dishonoured. The defendant deposes that he signed the cheque on behalf of the former company. There is nothing on the face of the cheque to indicate that such is the case.

I have considered a number of authorities, in particular that of Von Siegler & Anor v Superior Furniture Manufacturers Ltd (1) per Trollip J. There is no doubt that on all the authorities the defendant is *prima facie* liable on the cheque, that is, *ex facie* the cheque.

There is however the question of rectification. The defendant, by inference, raises such defence in paragraphs 5 and 8 of his affidavit. There are two points in his favour. He deposes that the account number on the cheque is that of the company and not his. There is no evidence indeed that the defendant had an account at the particular bank or branch thereof see Steelmetals Ltd v Truck and Farm Equipt Ltd and Anor (2) at p. 375 at F per Trollip J.