CRI/A/8/90

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

LELOKO NHLAPHO

v

R E X

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla
on the 6th day of February, 1991

The accused was charged with the crime of Assault with intent to do grievous bodily harm ;the charge was read on the 28th November 1988 in respect of an offence allegedly committed on the 21st of February 1988. The Charge Sheet stated that the accused had intentionally assaulted Kompi Komota by stabbing him on the chest and arm with a knife with the intention of causing him grievous bodily harm.

Evidence was led in the court below which showed that on the day in question P.W.1 and two others had occasion to go and impound the appellant's cattle. These cattle were being tended by an old man who gave no resistance when it was explained that the purpose of this company was to impound the appellant's cattle for trespassing on reserved pastures.

When the cattle were about cleared from this reserved area or were starting to move the appellant pitched on the scene. He had been in the company of a woman called 'Matumo Nkhasi. The appellant happened to have appeared from a

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donga nearby. He challenged P.W.1 telling him that P.W.1 had been under a terrible mistake whereby he, the others and their chief had been deceiving one another thinking that this area where cattle were impounded belonged to them. He told them that the area belonged to his own chief - thus implying that they had no right to impound his cattle.

P.W.1 testified that the appellant rushed at him and pierced him with a knife on the arm and that P.W.1 tried to hit the accused who either thwarted the blow or hit back at P.W.1. But the crux of the matter is that P.W.1 fell and the accused stabbed him with a knife on the chest. P.W.1's colleagues came to his assistance.

The accused gave his own evidence and it hardly touched on what one could refer to as giving local colour as to what was happening on that day in question. What could have caused him to engage in this attack was never put to the Crown witnesses. He told the Court for the first time when he was giving evidence that the complainant had hit him with an iron bar on the finger and on the lower lip. P.W.1 had given evidence before that court. There was no reason why this aspect of the evidence by the accused was never put to him. That court also heard for the first time when the accused was giving evidence that these cattle of his were there because he was about to inspan them to do some ploughing or planting on his field which is nearby. Had this been true nothing would have stopped the accused putting this question to the Crown witnesses nor could the old man who was cooperative have withheld this explanation from the men who came saying that they were coming to impound these cattle.

As has been stated time and again the use of a knife is a serious matter. Using it on the upper body of a fellow being is an even more serious matter. The doctor has indicated that the use of this knife on this particular occasion resulted in severe bleeding of the liver - a very

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vital organ of the body.

With regard to intention it has time and again been said that it can be gathered from the nature of the weapon used; the area or the spot where the blow with such a weapon has been inflicted; and the force with which the delivery was applied. Evidence has not been challenged of one of the Crown witnesses who showed that the appellant was not being attacked when he embarked on this unlawful use of a knife on a fellow being. For these reasons I find that the appellant was properly convicted in the court below. I accordingly dismiss the appeal against conviction.

The learned Magistrate who happened at that time to have been a First Class Magistrate had passed a sentence of five (5) years' imprisonment for the offence against the appellant. The offence had been committed long before the enactment of the law enhancing the sentencing powers of his class. But when the matter came for hearing the Magistrate's powers had been enhanced. Thus the learned Magistrate mistakenly believed that he had power therefore to impose a sentence in accordance with the enhanced jurisdiction that he had just had.

Reference to the case of Sigcau v Q (1895) 12 SC 256 at 266 shows that De Villiers CJ said: "there is a strong presumption ..... against any construction of the act 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 No. 10 of 1988 does not expressly say that the increased penalty should be retrospective; nor indeed does the Subordinate Courts Order of 1988. It looks like

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the learned Magistrate fell victim to a temptation to apply these two Orders retrospectively relying on an old mistake which is made mention of by Cockram at page 66 as follows :

> "At one time the South African Courts, under the influence of British decisions (e.g. DPP vs Lamb (1941) 2 K.B 89) preferred the view that an accused becomes liable to punishment only upon conviction of an offence, and thus if between the 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".

This Court in the case of Rex vs Ndabahleke Qhosheka CRI/S/10/88 (unreported) at 5 had this to say :

> "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 AD that :
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> > 'where an amending statute provided the death penalty for Robbery with Assault and intent to murder, this penalty could not be imposed where the Robbery had taken place before amending statute was passedh".

In the case that I am referring to which was decided by this Court it was further stated on page 6 -

> "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 penalty section. In any event, and as an alternative approach to the foregoing, it would be doubtful whether the lawgiver 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 have been told from the Bar that as at the time of the offence referred to in this case the First Class Magistrate's sentencing powers extended only to two (2) years. So it was obviously wrong of him to have imposed five (5) years' imprisonment relying, as the Judgment shows, on the minimum Penalties Order of 1988. The sentence

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therefore imposed by the Court below is set aside.

Having set aside this sentence I have to consider what suitable sentence is to be imposed regard being had to the seriousness of the offence. As stated by Mr. Lenono for the Crown the complainant was only lucky that he got immediate medical attention. His liver had been stabbed and he had bled profusely. That would lead to nothing but death if medical attention was not rendered quickly. Having said that I find that the least sentence that the Court imposes is that you have actually served your sentence. You were properly convicted. Your sentence starts from the date when the Magistrate imposed it and it ends today.i.e. after you have served an effective jail term of 1 year and 4 months.

J U D G E

6th February, 1991

For Appellant : Mr. Teele

For Respondent : Mr. Lenono