

IN THE HIGH COURT OF LESOTHO

In the Appeal of:-

MOEKETSI THABO KANONO

Appellant

VS

R E X

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 8th day of March, 1991

The appellant appeared before the subordinate court for the district of Maseru charged with the offence of assault with intent to do grievous bodily harm. He pleaded guilty to the charge and admitted the summary of the facts of the case as stated by the public prosecutor. The learned Magistrate found that the facts disclosed the offence charged and returned a verdict of guilty as charged. I have no difficulty with that verdict and agree entirely with the learned Magistrate.

The facts of the case were very clear and were as follows: The complainant is an old woman of seventy-three years of age. The appellant is her grandson. On the 28th May, 1989 the complainant was planting aloes at her place when the appellant arrived. He appeared to be very angry and suddenly attacked the complainant with his stick. He hit her on the head three times, once of the ribs and once of the shoulder. On the 28th May, 1989 the complainant was examined by a doctor at Scott Hospital, Morija. He found three wounds on the head and sutured them. He also found a wound on the shoulder and on the ribs. He formed the opinion that the wounds on the head were dangerous to life and that the force used to inflict them was moderate.

On being called upon to plead in mitigation of sentence the appellant said:-

"This thing happened to me as a surprise. As I am still under care because of a sickness I have of ancestors (Balimo). I had a blackout, thereafter immediately went to police to report myself. I got frightened as I am still struggling at home to make ends meet. I am still struggling to get a cattle (sic) so that I could be cured. There is nobody who is helping me in my sickness; everything is on my shoulders. I ask for forgiveness before court of law. I am not a traditional doctor. I am still a trainee, I do not know what will in the end happen to me."

After commenting on the gravity of the offence the learned magistrate sentenced the appellant to five (5) years' imprisonment.

The appellant is now appealing to this Court against both the conviction and sentence on the ground that the learned Magistrate erred in passing sentence on him when it became clear before then that he had a defence to the offence charged which, if successful, would, at least, have reduced the offence to one of common assault. The learned Magistrate ought to have terminated the proceedings at once and referred the matter to the High Court for a review and setting aside of the conviction and the remittal of the matter to the subordinate court for re-trial before a different Magistrate.

The second ground of appeal is that the wounds were more consistent with common assault than with assault with intent to do grievous bodily harm.

I agree with the first ground of appeal and on that ground alone the appeal must succeed (See S. v. Mfesi, 1978 (4) S.A. 28; S. v. Mandlasi, 1987 S.A. (4); S. v. Van As, 1989 (3) S.A. 881). In the present case the appellant clearly pleaded guilty and later accepted the facts which undoubtedly disclosed an offence, whether it was the offence charged or common assault, I propose not to express any opinion at this stage. The learned Magistrate duly returned a verdict. In his mitigation of sentence the appellant raised what appears to me to be a very genuine defence of a complete blackout apparently due to some mental illness. I agree that the defence was raised at a very late stage in the proceedings, however, the learned Magistrate was not entitled to ignore it. He was dealing with an ordinary Mosotho man who was

not represented by a legal practitioner. The appellant was not even raising it as a defence as such, but he was merely saying in passing sentence the learned Magistrate must know that at the time of the commission of the offence he had a blackout or he did not know what he was doing. The learned Magistrate ought to have stopped the proceedings at once and to have sought the assistance of this Court.

I earlier said the defence was a genuine one and is supported by the evidence of the Crown. The appellant and his grandmother had not quarreled before this incident and there is no evidence that he had any grudge or any complaint against her. The complainant did not provoke him in any manner before he assaulted her. There is no evidence that the appellant is a violent person. All these things tend to suggest that the appellant's defence is a genuine one but as a layman he did not know that a blackout is a defence and I think it is only fair to give him a chance to prove it in a re - trial before another magistrate. It will be for the trial court to decide whether blackout has been proved or not.

For the reasons stated above the appeal is allowed. The conviction and sentence of the court a quo are set aside. The matter is remitted to the Subordinate Court for re - trial before a different magistrate.

J.E. KHEOLA

JUDGE

8th March, 1991.

For the Appellant - Mr. Sello
For the Crown - Miss Moruthoane.