C. OF A. (CIV) NO.4/93

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

'MALEJONE MOKEMANE APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

HELD AT

MASERU

CORAM

STEYN J.A.
BROWDE J.A.
LEON J.A.

JUDGMENT

STEYN J.A.

The Appellant was convicted in the Magistrates' Court on a charge of Assault with intent to do grievous bodily harm. The legislature having prescribed a minimum sentence of 5 years' imprisonment upon conviction of such an offence this was the sentence which was imposed on her.

According to the unchallenged averments of the Appellant in an affidavit in support of an application for

/...

leave to appeal to this Court, the history of this matter is summarised as follows.

The Appellant pleaded guilty to a charge of assault with intent to do grievous bodily harm. She says that she did so "because I understood the charge to be that my guilt stemmed simply from my having inflicted injuries on the complainant".

The Crown case was presented through the medium of a summary outline which was read into the record by the prosecutor. This was - so the Appellant alleges - based on the complainant's version.

According to this version there had been a dispute between the complainant and the appellant which was "before their chief at the time". On the day in question however, a fight ensued between these two persons. Appellant produced a knife (she alleges it was a pen knife) and in the scuffle she inflicted two stab wounds on the complainant. The latter saw the doctor the next day who described the two wounds as:

(i) a laceration on the cheek some 10 - 15 cm long and 5 cm deep, and

(ii) what appears to be a superficial laceration some 2 cm deep on the left collar bone.

Complainant was treated for these injuries as an out-patient.

Appellant was also examined by a doctor. The medical report presented at her trial "discloses bruises on the head and body caused by a blunt object "with light force".

The record reflects that "the accused accepts the facts". She was accordingly found guilty as charged.

In mitigation, appellant who was a first offender said that she was married with 1 child aged 10 years. She went on to say "I was provoked by complainant who had gone to insult me at my home".

She was then sentenced to the compulsory sentence of 5 years' imprisonment.

Some two weeks later an appeal was lodged by Appellant's attorney and again some two weeks later a bail application was made. This was acceded to in an amount of R200.

In the notice of appeal, Appellant advanced the following grounds:

"1. The learned magistrate erred in passing sentence on the Appellant when it became clear before then that the Appellant had a defence to the offence charged with, if successful, would, at the least, have reduced the offence to one of assault common. The learned Magistrate ought to have terminated the proceedings at once and referred the matter to the High Court for the review and setting aside of the conviction and the remittal of the matter to the Subordinate Court for re-trial before a different magistrate.

2. The learned magistrate erred in convicting the Appellant when the nature of the wounds inflicted on the complainant is clearly more consistent with the offence of assault common than with the offence charged."

It is common cause that no hearing ever took place in respect of this appeal.

The appellant's affidavit records the circumstances in which this occurred as follows:

> "On or about the 2nd August 1993 I received a letter from my said attorneys calling upon me to report to them as a matter of urgency. I did so on the 3rd August on which occasion they informed me that their messenger had brought, from their pigeon hole in the High Court, a form indicating that my appeal was dismissed summarily on the 2nd September, 1992. A copy of this form is annexed hereunto as part of the record. I respectfully call attention to the fact that this form is addressed to every possible interested party excluding my attorneys and I. My attorneys told me that they had laid their hands on this form after the period had expired within which I am allowed to make any application for leave to appeal to this Honourable Court."

The Appellant's statement that her attorneys were not advised of the fact of the dismissal of the appeal is borne out by the contents of the form which indicates to whom the notice of dismissal was communicated.

The summary dismissal of the appeal was executed in

accordance with the provisions of section 327 of the Criminal Procedure and Evidence Act of 1981. It reads as follows:

> "327. If an appeal against a conviction or sentence from a subordinate court has been duly noted, the court of appeal on perusing the record of the case, including the appellant's statement setting out the grounds upon which the appeal is based, and any due notice of amendment thereof, and any further document that may have duly become part of the record, may if it considered that there is no sufficient ground for interfering, dismiss the appeal summarily."

Appellant has now applied to this Court for leave to appeal against her conviction and to condone the late lodging of her application for leave to appeal.

Mr. Thetsane who appeared on behalf of the Crown in closely reasoned heads of argument resisted the application primarily on the ground that sec.8(1) of the Court of Appeal Act, 1978 precludes this Court from granting Appellant relief. This section reads as follows:

> "Any party to an appeal to the High Court may appeal tot he Court against the High Court judgement with the leave of the judge of the High Court, or, when such leave is refused, with the leave of the Court on any ground of appeal which involves a question of law but not on a question of fact nor against severity of sentence".

(underlining mine).

In support of this contention Counsel cited a judgment of this Court in the case of LIRA MOTLOMELO C. OF A. (CRI) NO.9 OF 1990. In this case this Court held that only in the event of the High Court refusing leave to appeal could the Court of Appeal entertain an appellant's application.

Mr. Sello who appeared for Appellant did not contest the validity of this approach. However, the Court having indicated to him that we had a concern as to whether a miscarriage of justice had not occurred, and would be prepared to consider the matter under our powers of review, proceeded to urge us to interfere. This contention was resisted by the Crown.

The question we have to decide is has there been a failure of justice which would justify this Court to avail itself of a power which should only be used with great circumspection and in very special circumstances.

Let us examine the events in both Courts in order to determine this issue.

In the first place, at the time appellant appeared in the Magistrates' Court, the imposition of a minimum sentence

of 5 years imprisonment was obligatory in respect of the offence with which appellant was charged.

It seems to me that in view of this fact, the Magistrate would have done well to have informed the unrepresented accused of the consequences of a plea of guilty. It is notorious that an ignorant accused unassisted by legal advice, may well not appreciate the implications of a plea of guilty to a charge of an offence which includes an allegation that there is an intention to commit grievous bodily harm, let alone that she faced the awesome prospect of an obligatory 5 year term of imprisonment if convicted.

It may well be that the failure of the Magistrate to inform the appellant of the serious consequences of her plea did not on its own constitute an irregularity, although Counsel advised us that it was common practice at the time to do so. It would certainly, in my view, have been highly desirable for the Court to have advised the appellant accordingly.

However the matter does not end there. When the statement of facts is analysed three things become clear. The first is that there was a pre-history of animosity between the complainant and the appellant. Secondly, that there was a scuffle between these two parties , and thirdly

that appellant herself was assaulted, albeit not as seriously as the complainant was. These facts should have flashed some warning lights at the presiding officer as to the validity of the plea of guilty.

This unsatisfactory situation is further compounded by the statement made by the appellant concerning provocation; this statement being made by her after conviction. In the light of these facts it would have been most prudent for the Magistrate to have stopped the proceedings and to have referred the matter to the High Court to set aside the conviction and to send the matter back for trial before a different Magistrate. See in this regard S v Mabaso 1980(2) SA 790 (O) and S v Hlongwa 1963(1) SA p.14 (N).

That this is also the case in the Kingdom of Lesotho would appear from a judgment given by the Honourable Mr. Justice Kheola in the High Court in the case of Kanono v Rex CRI/A/43/90 which was kindly supplied to us by Mr. Sello after the hearing of the appeal and at our request.

Again, however, the failure of the Court to have acted in this manner may not necessarily on its own have amounted to an irregularity although it is my view that it would have been fair and just for the Court to have done so.

The supervening events however add a further flaw to the already flawed proceedings. The invocation of the provisions of the law entitling the High Court to dismiss an appeal summarily must surely only be resorted to when the Court is of the view that the appeal is frivolous or totally devoid of merit.

Whatever may be said of this matter it clearly cannot be categorised in these terms. In my view the Judge who ordered the summary dismissal of this appeal, knowing that it would result in a first offender having to serve a sentence of 5 years imprisonment for an assault which could well have been committed in circumstances in which the Crown would be hard-pressed to prove an intention to cause grievous bodily harm, perpetrated an injustice.

The travails of the appellant are however not over. Due to what I presume must have been an administrative over-sight, neither she nor her attorney are advised of the decision so to dismiss her appeal. Only almost 12 months after the event and long after the period within which she is obliged to lodge an application for leave to appeal has expired her attorney is informed.

Her legal adviser finally compounds what we believe to be a series of miscarriages of justice by lodging an

application for leave to appeal to the wrong Court.

Should we as a Court of appeal add an epilogue to the Appellant's chapter of misadventures by declining to act because we do not have explicit jurisdiction to do so? I believe not.

Justice has not been done in this case. In the circumstances set out above I am of the view that we should interfere. The question is how? Had it not been for the inordinate delays we could well have sent the matter back to the Court of first instance for retrial before a different Magistrate. However, the statement that justice delayed is justice denied is not an empty slogan. It is not impossible that such a step could result in further misadventure. In any event having a five year prison sentence hanging over your head for nearly five years - appellant was convicted on April 11, 1989 - is long enough.

I incline to the view that a robust approach requires us to set aside the conviction and the sentence. I would substitute for the conviction of assault with intent to do grievous bodily harm one of "guilty of common assault". I would substitute for the sentence of 5 years' imprisonment one of 6 months' imprisonment suspended for 3 years on condition that appellant is not convicted of an offence

involving an assault upon the person of another, which is committed during the priod of suspension, and in respect of which she is sentenced to a sentence of inprisonment without the option of a fine.

The conviction and sentence are set aside and the above conviction and sentence substituted therefore.

.....
J.H. STEYN
JUDGE OF APPEAL

I agree .....
J. BROWDE
JUDGE OF APPEAL

I agree .....
R.A. LEON
JUDGE OF APPEAL

Delivered at Maseru This 22nd Day of January 1994.