CRI/A/13/94

IN THE HIGH COURT OF LESOTHO

In the matter between:

MAMECHELE LESAOANA **Appellant**

and

REX **Respondent**

J U D G M E N T

Delivered by the Honourable Chief Justice Mr. Justice J.L. Kheola on the 5th day of August, 1994.

The appellant was charged with assault with intent to cause grievous bodily harm. He was found guilty as charged and sentenced to five years' imprisonment.

It is common cause that one day the appellant appeared before the Resident Magistrate for the district of Leribe. I say one day because there is no date on the first page of these proceedings. After the charge was read to her she pleaded not guilty. The matter was postponed to the 11th January, 1994. On that day the appellant appeared before a different magistrate who asked the appellant to plead again. She pleaded not guilty. The trial went on and at the end of the trial the appellant was found guilty as charged and sentenced to five years' imprisonment.

The appellant is appealing to this Court on the following grounds:

1. The learned Magistrate Mr Nthabi committed a fatal irregularity by hearing a case that was part-heard before Her Worship Ms. Ramahloli the latter having taken a plea.

2. By hearing the matter instead of adjourning it for trial by Her Worship Ms Ramahloli His Worship Mr. Nthabi deprived the appellant of her rights to demand an acquittal following a plea taken by Ms. Ramahloli thereby led to a failure of justice.

3. The learned Magistrate's conviction was against the weight of evidence and was bad in law there being a reasonable possibility that appellant's story was true.

4. The sentence of 5 years imprisonment was too harsh in the circumstances and induces a sense of shock. Appellant reserves a right to add to or vary the existing grounds of appeal.

Mr. Teele submitted, on behalf of the appellant that the learned Magistrate, Mr. Nthabi, committed an irregularity in proceeding with a matter thus part-heard before Miss Ramahloli and that on that ground alone the proceedings ought to be set aside despite the provisions of section 8(2) of the High Court

Act, 1978. The subsection reads as follows;

> "When considering a criminal appeal and notwithstanding that a point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record of proceedings, unless it appears to the High Court that a failure of justice has in fact resulted therefrom."

The question to be decided by the Court is whether by making the appellant to plead twice before different Magistrates that a failure of justice has in fact resulted therefrom. In his submission **Mr. Teele** referred to the cases of **Manare v. Regina**, 1959 H.C.T.L.R. 12 and **Rex v. Letsie Bereng & others**,1926-53 H.C.T.L.R. 108. In both case evidence of several witnesses had been heard by one Magistrate when the cases were postponed. When the hearing resumed on a later date another Magistrate continued to hear the evidence of other witnesses. The witnesses who had given evidence before the first magistrate were not recalled. Obviously this was found to be a very serious irregularity which amounted to a failure of justice.

I agree with the decisions in both cases. In order to reach a proper decision a judicial officer must hear the witnesses because that enables him to see the witnesses and be in a proper situation to form an impression on their demeanour and

credibility.

In the present case no evidence was heard by the first magistrate. All what transpired was that the appellant pleaded not guilty. She merely recorded that plea and immediately postponed the case. At the resumed hearing another magistrate asked the appellant to plead again. She again pleaded not guilty without raising any objection.

I agree that in the narrow sense it can be said that the case was already part-heard by the first magistrate. However the present case can be easily distinguished from the Manare's and Bereng's cases (supra). No evidence was led before the first magistrate in the present case.

Mr. Teele submitted that section 162(5) of the Criminal Procedure and evidence Act 1981 provides that once an accused person has been called upon to plead he shall be entitled to demand that he either be acquitted or found guilty. He submitted that the legislature entrenches the accused's right, which is also a principle of our common law that there must be finality to litigation. Failure to bring an end to litigation is **per se** a prejudicial exercise. He submitted that the appellant, by pleading guilty before the first magistrate, was entitled to the benefits contained in section 162(5) of the Criminal Procedure and Evidence Act 1981.

Section 162 (5) provides that any person who has once been

called upon to plead to any charge, save as is specially provided in this Act or in any other law, shall be entitled to demand that he be either acquitted or found guilty. It is the accused who has pleaded to a charge who is entitled to make such a demand. It is common cause that in the present case the appellant did not make such a demand. She cannot be heard to raise her own failure to exercise her right as a ground of appeal. She does not even allege in her grounds of appal that she did not know the law.

Mr. Teele has referred to a munber of civil cases dealing with the principle of waiver. In particular he quoted from **Ex parte Sussens** 1941 T.P.D.15 at p.20 where Murray, J. says:

> "The necessity for full knowledge of the law in the case of waiver follows from the principle that waiver is a form of contract, in which one party is taken deliberately to have surrendered his rights; there must therefore be proof of an intention to surrender, which can only exist where there is knowledge both of the facts and the legal consequences thereof."

I have already said that all the cases referred to are civil cases and do not seem to have any relevance to a criminal trial.

In Swift's Law of Criminal Procedure, 2nd edition by Harcourt at page 289 the learned author says:

> "Similarly, where a Special Court constituted in terms of section 112 of the Act is unable to arrive at a decision, and the State President constitutes another court for the retrial of the accused for the same offence, it is probable that the accused is not entitled to a verdict by reason of the failure of the court to agree (see **R. v. Long**, 1929 AD 52, in which the matter was left open), certainly in those cases in which no demand in terms of the sub-section has been made by the accused. Where the proceedings are rendered abortive, as for instance, district before the conclusion of the trial, sub-section (6) of section 169 does not apply (**R.v. Mhlanga**, 1959 (2) S.A. 220(T))." (My underlining)

It is quite clear that it is the accused who has to exercise his right and demand that he be either acquitted or be found guilty.

The mere fact that due to a postponement the accused is called upon to plead twice will not invalidate the proceedings if there has been no prejudice as a result (**The State v. Booi** (1885), 2 S.A.R.67, **The State v. Schut**, 2B & S 303, See Swift's law of Criminal Procedure - supra - at page 290).

I shall now deal with the question of prejudice. At the first hearing the appellant pleaded not guilty. She repeated the same plea at the second hearing. If he had changed his plea to one of guilty, it might be said that there was some prejudice because the different consequences that flow from the two pleas have different advantages as well as disadvantages. It seems to me that by repeating the same plea the appellant suffered no prejudice.

Mr. Teele referred to **The State v. Moodie** 1961 (4) S.A. 752, in which it was held that a deputy sheriff commits a grave irregularity in remaining closeted with a jury throughout their deliberations. This irregularity is of such a nature as to amount **per se** to a failure of justice. I agree that that was a very serious irregularity which can, under no circumstances, be compared with a situation where the accused has been called upon to plead twice before two different magistrate.

The following rules were stated in regard to irregularities (at page 758):

(1) The general rule in regard to irregularities is that the Court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial Court would inevitably have convicted if there had been no irregularity.

(2) In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is **per se** of a failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial Court would inevitably have convicted if there had been no irregularity.

(3) Whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity."

In the view that I take the minor irregularity in the present case falls under the first category. In terms of section 8(2) of the High Court Act 1978 I have formed the opinion that no failure of justice has in fact resulted from the irregularity.

The appeal against conviction must also fail because there is overwhelming evidence that on their way to the charge office the appellant was following the complainant. The former insulted the latter by referring to her as a prostitute. The complainant turned and attempted to confront the appellant. The husband of the complainant pushed her and forced her to proceed in the direction of the charge office. As soon as she turned and proceeded on her way, the appellant rushed at her and struck her on the right temporal region with a quart bottle from which she

was drinking beer. According to the finding of the court **a quo** the complainant was attacked from behind. There was no question of self-defence. This was a finding of fact with which I have no quarrel because it was based on the evidence of witnesses who appeared before the learned magistrate. He was in a better position to observe their demeanour that this Court.

I have considered the sentence imposed by the court **a quo** and have come to the conclusion that it differs substantially from what this court would have imposed. It is too harsh and produces a sense of shock. The complainant suffered a stab wound on the right temporal region - bleeding ++. Although the bleeding was somewhat considerable it was stopped within a fairly short time because the complainant was taken to the clinic immediately after the assault. The injury was dangerous to life but the danger was immediately attended to. The complainant was not even admitted into hospital but was sutured and discharged on the same night.

In his judgment the learned magistrate states that he took into account that the appellant was a first offender. In **Seeiso Makopo v. Rex** 1978 LLR 216 Mofokeng, J said:

> "There was also the fact that Appellant was a first offender. This later factor is not commented upon at all by the magistrate. Since these two important factors have not received the attention they deserved can

> this court say that the court **a quo** exercised its discretion judicially. The question is not whether the sentence is right or wrong. In my view, there was an improper exercise of the discretion by the learned magistrate."

It seems to me that in the present case the learned magistrate did not exercise his discretion judicially. A first offender must, where possible, be given the option of a fine. But a first offender who has committed a very serious offence must not expect any leniency from the court. As I have already stated above the assault in the present case was not a very serious one.

The accused must have been under the influence of liquor because he was still drinking beer from the bottle with which she hit the complainant.

For the reasons stated above I set aside the sentence imposed by the court **a quo** and substitute therefor the following:

"M1~~000-00~~ or two years imprisonment

The appeal on conviction is dismissed.

(J.L. KHEOLA)
CHIEF JUSTICE

5th August, 1994.

For Appellant - Mr. Teele
For Crown - Mr. Mohapi.