CRI/A/3/94

IN THE HIGH COURT OF LESOTHO

In the matter between

MAOBA JONASE NYELIMANE — Appellant

and

R E X — Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 16th day of August, 1994

This appeal has no merit whatsoever. Appellant admitted guilt before the magistrate of Leribe in terms of Section 240(1)(b) Criminal Procedure and evidence Act 1981. The magistrate returned a verdict as he was empowered to do. The minimum sentence legislation being then applicable the appellant was sentenced to five years imprisonment.

There had been a quarrel the previous day or two in which a friend of the appellant and the complainant were involved. This was followed by a fight at a beer hall in which the complainant and two friends of appellant were engaged facing the complainant. The record of proceedings goes: "Then the two

attacked and he retaliated, but he felt something stabbing him, when he turned he found that it was the accused and he hit with his fists, but due to injuries he had sustained he felt powerless and collapsed and fell unconscious."

The accused was represented by the late Attorney Mr. Mphutlane as the record amply shows. There does not appear to have been a stage where the magistrate asked the attorney for the appellant whether the plea and the acceptance of the outlined facts was in accordance with his (Attorney's) instructions. If the instructions were not in accordance with his instructions, the learned Attorney should have stood up to inform the court. This he did not do. I do not accord any weight to any ground or objection founded on this aspect. The failure to object may have been remissness on the part of the attorney but it cannot affect the proceedings. The contention that the appellant when he admitted guilt was doing an irregular thing by reason of the fact that the plea was contrary to his instruction to his Counsel, I reject as nonsense and a trick.

The evidence points out to the attack by the appellant having been unprovoked and the complainant having been facing the other way. The stab was on the back. There was no danger posed to the appellant. He could have safely run away and avoided any attack by the complainant. I was most unimpressed by the ground

of appeal wanting to suggest that the complainant acted in self-defence. I would remark that nothing by way of self defence is raised nor recorded by the magistrate. I would find no reason why the magistrate neglected to record anything touching on self defence. There was no reason why he had to pick and choose. I do not believe the Appellant. Nothing persuades me that there has been any query or objection to the way the magistrate proceeded about the matter until she returned the verdict. If there was anything alleging utter remissness one would have expected an application for review or an affidavit reflecting the content or nature of any statement allegedly left out of the record or on any reviewable ground.

I am satisfied that the charge was explained to the accused and he understood the charge. The outline of the facts was made in the presence of both the appellant and his counsel. I reject the contention that there was any statement to do with self defence that came out of the mouth of the appellant but was not recorded by the magistrate.

The appellant was charged with assault with intention to cause grievous bodily harm. The offence consist in the intent. I refuse to accept that and a verdict of common assault ought to have been returned. In this charge it is not even necessary to have caused grievous bodily harm. (in fact) (see R v Zondi 1930

TPD 107, R v Radebe 195 (2) 2 PH 261). I would say these are the facts to be considered :

(a) Nature of the weapon used;

(b) degree of force used;

(c) the situation of the body where the injury inflicted and the injury sustained by the complainant.

It has been proved as a fact that:

(a) the injury was at the upper part of the body "multiple stab wounds;

(b) a sharp/lethal instrument was used;

(c) the force used was considerable;

(d) disability was said to be moderate;

(e) complainant was hospitalized for half a month.

I have no hesitation in dismissing the appeal. The appellant is to serve his sentence of five years and his bail is cancelled. He is not before this Court. A warrant is to be issued for his apprehension in order for him to serve his sentence.

T. MONAPATHI
JUDGE

16th August, 1994

For the Appellant : No Appearance

For the Respondents: Mr. Sakoane