

CRI/A/13/91

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

FINIASE MOTSAMAI & OTHERS Appellants

vs

R E X Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice W.C.M. Magutu
Acting Judge 22nd the day of March, 1994.

In this case the eight appellants were charged with assault with intent to do grievous bodily harm. The assault with which they stand charged took place on the 21st October, 1988. They were all found guilty and sentenced to five years imprisonment each on the 25th September, 1990.

Most of the Appellants were not present before Court at this hearing of their appeal. The only Appellant who was represented was Kilase Khang, the Third Appellant. The Crown was not represented.

The appeal was nevertheless heard. The court noted that all the Appellants were on bail.

At the outset, it would seem that the guilt of the accused is based on the fact that they had common purpose to commit the crime charged. Evidence does not disclose the participation of the accused to have been the same.

The problem the court has is that the first and seventh Appellants claim they were acting as agents of the chief. They went to P.W.1, the complainant to inform him that the chief would like to see him. It is an offence to refuse to obey a chief's lawful order. It is not clear whether these Appellants went to P.W.1 determined to force arrest him. Nevertheless because P.W.1 refused to obey the chief's summons. Appellants decided to take him by force. P.W.1 says the actual people who first assaulted him are the late Thabo, Appellant Number 1 and Appellant Number 7 together with several other men not before court. P.W.1 was assaulted with sticks until he fell into a farrow. After that Accused Number 1 tied the hands of P.W.1 together and drove him to a cattle post in the mountain after they had given him a blanket.

It is not clear why these men took P.W.1 from his home where he was ploughing his garden. It emerges later that they were taking him to a circumcision school. Because he was injured, he was not admitted to the circumcision school. Taking people to a

circumcision school or taking any human being to where he does not want is illegal. Indeed laying hand on a man without his permission and using any force on him even if he does not get injured is an assault.

P.W.1 says later Appellants numbers 3,4,5 and 8 joined the group and also assaulted him. Where this happened is not disclosed. The nature of their assault is also not disclosed. The part of the body where P.W.1 was assaulted is also not disclosed.

According to P.W.1, Kibase, the father of Appellant number 3 who was from Chief Selomo a senior chief came and ministered to his wounds and said he should go to a clinic and then to school. What this school was is not clear. Appellants 3 and 4 tied him to a horse with a rope. These two accused were also assaulting him. He noticed Appellants Numbers 2 and 6 were also assaulting him. Before they arrived at the school he was kept in a cave by Appellants 1, 5 and 6. Appellant 7 kept watch while the others were absent. The owner of the school Lebusa accompanied by Ntjoetseng and Limema asked him if P.W.1 wanted to go to the school. P.W.1 said No. Lebusa said he does not admit corpses at his school. He was taken to Butha-Buthe hospital for treatment.

P.W.2, Mahlomola Ntjayela only mentions six men

including Accused No. 7 as responsible for the assault. P.W.3 Njoetseng Mahamo tells the court he found P.W.1 with deep open wounds on the head. He advised the men he found to take P.W.1 to take him to a medical doctor. P.W.4 Limema says he found P.W.1 who had been brutally assaulted in the presence of Appellants Numbers 3 and Number 4. He advised them to take P.W.1 to a doctor. Under cross-examination he said Appellant Number 7 assaulted P.W.1.

I looked for the medical evidence which was handed in but it was not part of the record. In so doing I wanted to compare the nature of the injuries with the evidence. Without viva voce evidence from the doctor I would have been at a loss to evaluate the evidence even if the medical report had been available. The court has to be satisfied beyond reasonable doubt as to the nature of injuries in such serious case. There is no explanation as to why the doctor has not been called. Since the accused were represented by an attorney and he consented to the handing in of the medical report. The court is obliged to assume all was well.

The trial court did not evaluate the evidence with care. There was no clear proof of common purpose: Only Appellant Number 1 and Number 7 are shown to have really assaulted P.W.1 in a serious

manner. Appellants 3, 4, 5 and 8 are said to have assaulted P.W.1 much later. The nature of their assault is not specified not even vaguely. Appellants Number 2 and 6 are only mentioned in passing. While the evidence of P.W.1 is clear in all material respects against Appellants 1 and 7, it cannot be said to be the same in respect of the other accused.

I believe the trial court ought to have given Appellants numbers 2 and 6 the benefit of the doubt because P.W.1 is a single witness. P.W.1 says against these witnesses, he noticed at one stage they were assaulting him.

As for Appellants 3, 4, 5 and 8 nothing much is said about the nature of their assault for all we know it might have been moderate. On this assault, P.W.1 gives satisfactory evidence that is clear as to assault common but certainly not assault with intent to do grievous bodily harm.

Appellant Number 3's counsel said his alibi should be believed. The trial court rejected it with respect to the assault at the cave in the mountains where he admits under cross-examination to have been present. In fact all these four appellants tried to distance them from the assault. They were disbelieved.

It is Appellants number 1 and 7 who are clearly implicated in the immoderate assault of P.W.1. Accused No. 7 actually claims P.W.1 threw an iron at him. He blames one Thabo for the assault on P.W.1. This Thabo who is blamed for everything according to Appellant Number 1 died in October, 1989. According to Appellant Number 1, P.W.1 attacked Appellant Number 7 with a stick. Appellant Number 7 hit P.W.1 with a stick three times on the head and P.W.1 fell into the farrow. Appellant Number 7 claims he went back home. The trial court did not believe the evidence of these two appellants. P.W.2 corroborates P.W.1 that Appellants Number 1 and 7 and the late Thabo assaulted P.W.1 with sticks, assaulted him and fell him down.

I will assume in their favour that P.W.1 resisted (as he ought to have done) when his rights were invaded. The intention of the Appellants 1 and Appellant Number 7 was to take him to the circumcision school. Whether the Chief had anything to do with this has not been proved. On this basis, I will, therefore, find them guilty of assault Common. Their blood was boiling and the assault was committed in the heat of passion.

In conclusion, convictions and sentences are set aside in respect to all accused. In their places the following verdicts and sentences are

- (a) Appellants Numbers 2 and 6 are found not guilty and are discharged.
- (b) Appellants Numbers 3,4,5 and 8 are found guilty of assault common and are each sentenced to a fine of M300.00 or two months' imprisonment.
- (c) Appellants Numbers 1 and 7 are also found guilty of Assault Common and are each sentenced to a fine of M800.00 or 9 months' imprisonment.



W.C.M. MAQUTU
ACTING JUDGE.

22nd March, 1994.

For 3rd Appellant : Mr. Nathane
For Crown : -