CRI/A/51/91

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

CHABASEOELE EDWARD MAHLOKO	1st Appellant
LEKHOTLA MAHLOKO	2nd Appellant
TSABALIRA MAFOTHA	3rd Appellant
v	
R E X	Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
Acting Judge on the 31st day of March, 1994

This is an appeal from the district of Mohale's Hoek under case number CR 81/91 in which the learned magistrate Mr. A. V. Moruthane found the Appellants guilty of assault with intent to do grivious bodily harm and thereafter sentenced these Appellants to imprisonment for five (5) years. That was on the 23rd April, 1991.

Originally Appellants, three accused were charged and these were the following Chabaseoele Edward Mahloko, Lekhotla Mahloko and Tsabalira Mafotha. It was alleged in their charge that on

or about the 19th April 1991 at or near Qalakheng in the district of Mohale's Hoek the said accused did each or other or all of them assault a policeman namely Detective Trooper Pelesa by stabbing him with a knife on the left side and also by hitting him with fists on the head and all over the body with an intent of injuring him or causing some grievous bodily harm. It will be clear that as against the other accused the appellant was found guilty on his own admission that is he admitted guilt to the crime charged. At that stage what should normally happen is that there should be a separation of trials in the event that the other accused do not admit guilt.

The Magistrate decided then to direct that as regards this appellant at outline of the facts in accordance with Section 240(b) of the Criminal Procedure and Evidence Proclamation be made. This was correct. It revealed that on the 19th April at Qalakheng, Detective Trooper Pelesa was there at 10.20pm, accused were there with other people, accused then fought Trooper Pelesa and asked why he arrested him for car theft. The statement goes further to say that it was true as alleged that in the past police had taken action against the accused. Accused produced the knife and stabbed policeman on his left back side and again made other stab wound on the right side of the policeman's back. One Mafotha refused when people wanted to separate the accused in fighting the policeman. Another person helped accused in the

fight by beating the policeman with fists. At long last they were separated and Trooper Pelesa later reported the matter at Mohale's Hoek Charge Office. Trooper Pelesa went to the Medical Officer on the 20th April, 1991. Injuries were not serious. They were sutured by a Medical Officer and under treatment as an out patient. There were no reasons making the accused to stab the policeman while on duty. Indeed the Medical Officer's report was attached marked exhibit A. That was the end of the Prosecutor's outline.

It will be seen that this accused was convicted accordingly after having confirmed that what the Public Prosecutor was telling was the whole truth. What followed was the aspect of mitigation. In mitigation the accused says : "I pray for mercy Sir, I also told Trooper Pelesa to forgive me. Please do not give me a heavy punishment, it was not my intention to fight him. He first "bit" me up with a fist. He fired near me that is all I used that knife, I am married no children. I do mine work. I get R600.00 per month." That is all as far as the mitigation is concerned. It will be very clear from his address in mitigation that he indicates in no unclear terms and that he was fired at, that is a gun was used to shoot at him. What he did was in self defence.

This accused person was unrepresented. If what happened is

to be believed, it means the accused should not have admitted guilt to the charge. The learned Counsel for the Crown has admitted that this in itself amounts to a mistrial, in that it was incumbent for the Presiding Officer to have entered a plea of not guilty, in a way to quash all the proceedings as at the stage and to commence de novo as it were. This is what Mr. Sakoane for the Crown submitted. This in itself does bring this complication, being as Mr. Sakoane submits that he would instead advise that matter be tried de novo. The ground of appeal of the Appellant are as follows:

(a) The outline of the facts does not disclose the offence charged.

(b) The learned magistrate erred and misdirected himself in law in failing to attach due weight to the Appellant's plea in mitigation.

(c) The sentence of five years imprisonment induces a sense of shock under the circumstances of the case.

I might as well in this case indicate that in terms of the minimum sentences law existing as time the time of the judgment this sentence of five years imprisonment would be proper and for an offence with which the accused was charged. But this brings

in another complication namely that : If the outline of the facts does not disclose an offence, what it means is that a lessor offence could be verdict. I must say that originally before Mr. Sakoane rose up to indicate that a mistrial had occured, I had a feeling that the whole proceedings be quashed meaning that an entry of not guilty be made. I have thereafter thought about this matter along the following line : It is very true that as he does admit the accused did cause the injuries. In the interest of justice, a proper verdict would be if self defence succeed, this person would be found guilty of a lessor offence namely common assault. I am inclined however, to say that we have a situation where this aspect has not been investigated at all. These matters are complicated even more these days where you will find that the magistrate has not made a full written statement of his findings.

Counsel in this case, referred me to the case of Malejone Mokemane vs DPP (C of A (CRI) 4/93). An offence was not disclosed in the Prosecutor's outline or alternatively that the outline of the statement in mitigation did disclose that there was a defence. The case went on appeal to the High Court and dismissed summarily in terms of Section 327 of the Criminal Procedure and Evidence Act. This dismissal had not been known to the accused nor to his representative for a period of about a year. An appeal was noted to the Court of Appeal which dealt

with so many aspects of the of the history of the case including the defence or the nature of the charge. Then the Court of Appeal had to comment in this manner at page 11 of the record:

" Should we as the Court of Appeal add an epilogue to the Appellant chapter of misadventure 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 in orderly delays we could have well 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 in not an empty slogan. It is not impossible that such a step could result in further disadventure. In any event having a five year prison sentence hanging over your head for nearly five years, appellant was convicted on April 11th 1989 is long enough.

I incline to review that a robust approach requires us to set aside the conviction and the sentence. I would substitute the conviction of assault with intend to do

grievous bodily harm to one of guilty to common assault, and substitute for the sentence of five years imprisonment for one of six months imprisonment suspended for three years on condition that Appellant is not convicted on an offence involving an assault upon person or another which is committed during the period of suspension in respect of which she is sentenced to a sentence of imprisonment without an option of a fine."

Court of Appeal went on to set aside both the conviction and the sentence in the manner I have prescribed. This judgment is very helpful in that it deals with this aspect of the disclosure of an offence and disclosure of a defence in both the Prosecutor's outline and the statement in mitigation very well. In this instant case we have an almost similar situation, but for the long delays. The Director of Public Prosecutions concede that both statements do not reveal that a case of assault with the intention to do grievous bodily harm has been proved and one is therefore faced with a situation where one may elect to sent this matter to the magistrate, or a retrial, or to impose a sentence that is commensurate with the verdict in the list of the competent verdicts, that is competent in the circumstances of this appeal. I have exercised a lot of thought the last time that Counsels were before me, that is on the 14th March 1994 when this matter came before me. I would enter a verdict of guilty of

common assault and I would impose a sentence of 12 months imprisonment or a fine of M300.00, half of which is suspended for a period of three years on condition that the appellant is not convicted of an offence involving violence upon the person of another which is committed during the period of suspension. The conviction and sentence are set aside and the above conviction and sentence is substituted therefor.

T. MONAPATHI
ACTING JUDGE

For the Appellant : Mr. Malebanye

For the Respondent : Mr. Sakoane