

CRI/A/99/90

IN THE HIGH COURT OF LESOTHO

In the Appeal of:

'MATEBOHO SEBAPALA

Appellant

and

R E X

Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
Acting Judge on the 14th day of April, 1994

This is an appeal from the Magistrate Court of Thaba Tseka in its judgment of the 21st September 1990. The Appellant had admitted guilt to a lesser charge of Assault Common having been originally charged with Culpable Homicide, on the alleged negligent killing of MOTHEENE TLAKE who died on the 10th August 1989.

The Prosecutor's outline of the facts of the Accused's statement in mitigation and sentence does appear at page 1 and page 2 of the record as follows:-

"The evidence would show that on 9th August, 1989 the

deceased Motheene Tlake fought with one Tsebetso and one Hopolang Sebapala tried to stop the fight and pushed the deceased. Deceased stopped fighting with Tsebetso and then fought Hopolang and injured her teeth. Other children went to report to accused that the deceased fought against her daughter Hopolang. The deceased arrived at the time others were making a report and accused went with the deceased into the house to ask him why he had assaulted her daughter.

They went into the house and accused thrashed her with the twig and it broke after she ordered her to undress. Accused thereafter called one Noosi Mokhatsi to come and question deceased why he had assaulted her child. He found accused undressed and a twig on the floor that showed that he had been thrashed. He asked him why he assaulted accused's child and the deceased said she had pushed her. Deceased went to her home.

She reported to her mother that she did not feel well after she had been lashed by accused. She spent the whole day unwell and on the following day she died. The body was sent to Mokhotlong on 14th August, 1989 for post-mortem. The doctors findings were that the cause of death was not discovered by the doctor. The post-mortem report is handed in as exhibit marked exhibit "A". The matter was reported to Thaba-Tseka police where accused was cautioned and given a charge of murder. The twig was not discovered and it is not handed in as exhibit.

Accused accept facts as outlined by P.P.

Verdict:- Guilty of assault common.

P.P. Accused has no previous conviction.

In mitigation accused says:-

Accused is a woman, had no intention to assault the deceased. Extent of assault very minimal. No injuries were caused. She is a first offender. Her husband is crippled and she is a sole bread winner. She has two young children to care for. She has already been in custody for two months. I pray that accused be cautioned and discharged in terms of 319 of the C.P.&E.

Sentence:-

Accused is sentenced to M1,000.00 or 20 months imprisonment."

It is clear therefore that this involved a chastisement of the deceased by the Appellant. The Appeal is on sentence. Mr. Tsotsi submitted that:

- (a) The sentence was harsh in the circumstances.
- (b) The sentence did not appear to be consistent, uniform and equal to sentences of like circumstances.

I agree with Mr. Tsotsi. Although some of the concepts he speaks of cannot be measured with mathematical accuracy it is not always difficult to judge when like appears not to be treated alike. It is unfortunate that the deceased died. The postmortem examination was not able to reveal the cause of death. It is most probably that it is this occurrence or the fact of death of the deceased that has influenced the learned Magistrate in arriving at his sentence. One of the questions would be whether the Accused would be able to pay the fine imposed.

Mr. Qhomane wanted to persuade me that since sentence is eminently in the discretion of the Magistrate I should have no cause for disturbing the sentence. I agree with the submission that sentence is in the eminent discretion of the trial Magistrate. But it must be exercised judicially. One of the tenets of that judicial discretion is that he must demonstrate his discretion by stating reasons for his finding. Both Counsel

could not avoid strongly suspecting that the sentence was primarily influenced by there having been a death following the chastisement. If ever the Magistrate found that the chastisement was immoderate he did not state it in his judgment. I do not find that it was immoderate harsh or severe. The Magistrate has not even told us that he has considered the statement in mitigation including that the Accused has no previous convictions.

I have already said the sentence induces a sense of shock and that it was a misdirection that the Magistrate has not stated his reasons for his sentence. I have already made remarks about the latter aspect in REX v SIMON PHALA MOKOALELI R/O 3/93.

For the above reasons I would substitute the following sentence M300.00 or three (3) months imprisonment.



T. MONAPATHI
Acting Judge

For the Appellant : Mr. Tsotsi

For the Crown : Mr. Qhomane