CRI/A/38/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

NYEMBEZI LEKHOOA — Appellant

and

R E X — Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
Acting Judge on the 11th day of May 1994

This is an appeal from the Subordinate Court of the district of Quthing in its judgment of the 24th January 1991. The Accused was convicted and sentenced to a term of imprisonment of Five Years on a charge of Assault with Intent to do Grievous Bodily Harm.

The following grounds of appeal were filed namely:

"1.

The learned magistrate misdirected himself in allowing the accused to lead evidence in his defence when he had elected to remain silent, as a result there was a gross irregularity which resulted into a failure of justice.

2.

The learned magistrate erred in failing to read the accused rights properly, in that he told the accused that he could elect to remain silent and still be entitled to adduce evidence in his defence. As a result the accused was prejudiced in his defence consequently there was a failure of justice.

3.

The conviction is not supported by the evidence tendered in the following respects:

(a) The learned magistrate did not take into account the fact that PW1 was drunk at the material time of the commission of the offence, so that her evidence warranted a cautions consideration.

(b) The learned magistrate erred in dismissing the evidence of PW2 as nothing but a pack of lies.

(c) It is not all reasonable inferences established by the facts proved that are consistent with the accused guilt.

4.

The learned magistrate adopted a passive role in the proceedings in that he did not assist the accused in formulating his questions properly and endeavouring to

assist the accused to project his defence to the crown witnesses; as a result there was a failure of justice."

The third and forth ground of appeal I would reject outright as being devoid of substance or rather technical in the light of what transpired in the proceedings, namely, that on two occasions accused decided to keep silent. That was after the close of the Crown's case and defence case. I did not find fault with the judgment of the magistrate on merits. The evidence was just overwhelming.

It appears that after close of the Crown case the following happened (as at page 9 of the record):

" Rights explained, accused understands and elects to keep silent. Accused wants to call one Volly as his witness failing which this case will proceed if there is no reasonable excuse why his witness does not turn, and bearing in mind that accused knew that his case was proceeding to day but left his witness at home and that he is not in custody. Hearing postponed to the 24/1/91 O/R/

SGD B.S. MAKALIANA - MAGISTRATE

On the 24/1/91 accused before court, case proceeds. Accused calls his witness. D.W. 1 Volly Livestock a x/man adult aged 28 yrs s.s.: I know nothing about this case, when accused arrived at the home of Matala I was with Mazikisa and nothing happened."

Section 175(4) of the Criminal Procedure and Evidence Act 1981 reads:

"(4) At the close of the evidence for the prosecution the judicial officer shall ask the accused, or each of the accused if more than one, or his legal representative, if any, whether he intends to adduce evidence in his defence and if he answers in the affirmative he or his legal representative -

(a) may address the court for the purpose of opening the evidence intended to be adduced for his defence without commenting thereon;

(b) shall then examine his witnesses and put in an read any documentary evidence which is admissible."

The above provision is similar to the repealed section 172(4) of the Criminal Procedure and Evidence proclamation no. 59 of 1938 and the repealed section 157(4) of the Criminal procedure Act no. 56 of 1955 of the Republic of South Africa.

The requirement is that the Presiding Officer shall explain to an accused person the course open to him and should be interpreted to require that the accused be asked both whether he wishes to give evidence himself and separately whether he wishes to call any other witnesses. A conviction will be set aside if the magistrate is unable to specifically say whether he has given

an explanation of his rights to the accused, for there is a duty on a magistrate to satisfy himself that the accused has been given an explanation of the course open to him at the close of the Crown case. (see R v NQUBUKA 1950(2) SA 363(T). It is however not necessary for the record to set out the explanation verbatim: An indication of the position will be sufficient in the absence of specific allegations by the accused to the contrary (see R v MAHALOA 1953(1) 454 SA (T).

I did not find that the magistrate went wrong in that regard. But Mr. Mda was not only concerned with the alleged failure by the magistrate to explain the options. He submitted that it was irregular to have misled the Accused into calling a witness when he himself has not given evidence. There is no irregularity in that. I do not accept that the Accused was misled. The election given to the accused is that he may himself give evidence or call "any other witness". Of course the accused himself is a witness when he gives evidence. It is clear from the record that the Accused made an election, and decided not to give evidence himself. That is why he spoke of calling his witness for the following day. It is not without significance that the magistrate uses the word "elect". The accused chose one course of action as against others. He was entitled to do so.

I would find that the Appellant's attack on all grounds is unfounded and without substance. The appeal therefore is dismissed.

T. MONAPATHI
Acting Judge

For the Appellant : Mr. Mda

For the Crown : Mr. Sakoane