CRI/A/24/95

IN THE HIGH COURT OF LESOTHO

In the matter between:

JAKOTE KHELEMETHE APPELLANT

v.

R E X RESPONDENT

JUDGMENT

Delivered by the Honourable Justice G.N. Mofolo
on the 9th day of November, 1995.

Appellant was charged in the Magistrate Court for the District of Leribe in that on or about the 20th October, 1993 at or near Makokoane in the District of Leribe

> accused did wrongfully and unlawfully assault Thipa Motoboli by hitting him and stabbing him with a knife with the intention of causing him grievous bodily harm.

Appellant had pleaded not guilty but on being found guilty had been sentenced to 3 years imprisonment.

Before this court Mr. Fantsi for the appellant had abandoned the appeal against conviction and challenged the sentence which he claimed to be not consistent with the offence committed and in the circumstances arousing a sense of shock.

He pointed out that this was a family matter the altercation and attendant injuries having flowed from strained relations between the complainant and the appellant who was complainant's

son-in-law. That the fact that the complainant had taken away appellant's wife and the children exarcebated the relationships: this, submitted Mr. Fantsi, amounted to provocation and is a factor which the Magistrate along with other factors should have taken into account in sentencing the appellant. Moreover, Mr. Fantsi submitted that although it was alleged dogs were set on the complainant medical evidence had not shown there were dog bites. The sentence was justified if the complainant had sustained permanent injuries or was defaced but these were not borne out by medical evidence.

Mr. Ramafole for the Crown contended that the court can only interfere with sentence if particular reasons had been advanced. He submitted that a son-in-law assaulting his father-in-law was in itself so degrading that this, in itself, called for harsh sentence. Whether dogs had injured the complainant or not this was immaterial in that setting dogs on a person is so degrading as to amount to an aggravating circumstance; and even if it were to be said that injuries on the complainant were not so serious, the act of the appellant coupled with the fact that complainant spent a number of days in hospital and was not treated as an out-patient merited the sentence which the Magistrate imposed.

The difficulty, so went on Mr. Ramafole, was while there was nothing wrong with the sentence it is not clear why the learned Magistrate did not give the appellant an option of a fine given the person and circumstances of the appellant and that if the

learned Magistrate had used his discretion judiciously he would at least have given the appellant an alternative of a fine.

The reason appellant was sentenced to 3 years imprisonment seem to be, from the point of view of the learned Magistrate:

> "Accused was the aggressor as he went out of his way to assault complainant a relatively elderly man and unleashed dogs at him and at the same time swearing at him. The dogs bit him and tore his trousers and accused hit and knocked him down. Lying on the ground helpless like that accused continued to hit him with the stick and stabbed him. Even though the medical report does not reflect multiple injuries I am convinced beyond doubt that the manner in which complainant was assaulted is indicative of the fact that accused had the necessary intent to cause complainant grievous bodily harm."

Nobody has any quarrel with the finding of the court a quo but nowhere did the complainant say that dogs bit him. All that the complainant said was he

> unleased dogs on me which even tore my pair of trousers.

The court a quo was also disturbed by the fact that the appellant insulted the complainant and taking the fact that dogs had bitten complainant and appellant had insulted complainant found the cumulative effect of these circumstances so great that he imposed a sentence of 3 years imprisonment. If the learned Magistrate had been right there would perhaps be nothing wrong with his sentence. But here again although P.W.1 the complainant did say that appellant insulted him, what appears in

the original transcript is he insulted me with my mother, he said "ngoan'a 'mao". The original script and the type-written script is the same. Significantly, the Magistrate did not say P.W.1 said appellant insulted him by his mother's private parts, he said he insulted me with my mother, namely: 'ngoan'a mao:' with respect this is not an insult and to say it is is stretching the language too far. If perhaps the learned Magistrate was at odds with the spelling, he could have translated the insult as is normally done.

Medical evidence disclosed that injuries were caused by a stab would in which a 'sharp object' was used; injuries were not dangerous to life and were 'minor limited.'

I do not think that in arriving at a sentence it is right for the court to ignore medical evidence for this kind of evidence is adverted to in order to establish injuries caused and their nature. When, however, there is no medical evidence the court is at large and is entitled to listen to the testimony of witnesses as to the injuries caused and their nature. I may add that medical evidence also guards against exaggerations to which some witnesses may be prone.

In passing sentence the court recorded that it had taken into account the following factors:

(a) accused had no previous convictions

(b) accused and complainant are son-in-law and father-in-law.

(c) accused's personal circumstances.

I doubt if the learned Magistrate had taken above factors into account he would have passed a sentence of 3 years imprisonment as it is. I am saying this because although Mr. Fantsi for the appellant abandoned the appeal on conviction, there was evidence by D.W.3 that a knife had been wrested from P.W.1 showing, in my view, that there was fighting between P.W.1 and the appellant necessitating the appellant to defend himself. This evidence favoured the apppellant and the learned Magistrate should not have ingnored it and should have at least taken it into account for purposes of mitigation i.e. that the appellant was provoked into having to defend himself against his own father-in-law.

I do not agree that the appellant was the aggressor for evidence showed that it was on appellant accosting P.W.1 about the whereabouts of his wife and children that fighting erupted. I do not approve of parents being cause of conflict and separation between young, married couples. In my view P.W.1 had no business whatsoever in keeping appellant's wife and children away from the Appellant and this, in itself, was highly provocative and likely to ignite emotions at any time especially in view of the fact that appellant had appealed for release of his wife and children to the complainant and chiefs all in vain. These are personal circumstances of which the Magistrate spoke of and had he taken them into account would not have resulted in the sentence passed by the learned Magistrate.

In S. v. Mokaloba En Andre, 1964(1) S.A. 697(0) it was held

> The courts of appeal should only interfere with a sentence of a lower court on the ground that it induces a sense of shock where there exists a real and substantial difference between their opinion as to what is a proper sentence and that of the lower court. Where this is without doubt the case it is the duty of the court of appeal to interfere.

There is also the question of Medical evidence which, according to the learned trial Magistrate's judgment showed the injuries were not dangerous to life. This is a factor which the court a quo should have taken into account in imposing the sentence.

I arrive at the conclusion that the sentence which the learned Magistrate imposed is not the only sentence which could have been reasonably imposed if the learned Magistrate had taken all the factors in favour of the appellant into account.

Accordingly the appeal on sentence succeeds but to the extend that the sentence of 3 years imprisonment is set aside and substituted therewith with a sentence of payment by appellant M200-00 (Two Hundred Maloti) in default thereof 3 years imprisonment.

G.N. MOFOLO

JUDGE

9th November, 1995

For th Appellant: Mr. Fantsi
For the Crown: Mr. Ramafole