

IN THE HIGH COURT OF LESOTHO

In the matter between:

PAKI MOAKI

APPELLANT

V.

R E X

RESPONDENT

J U D G M E N T

Delivered by the Honourable Mr. Justice G.N. Mofolo
on the 24th day of November, 1995.

In this appeal the appellant has appealed against both the conviction and sentence wherein he was charged of Common Assault in that he:

"wrongfully and unlawfully assaulted one Mothepane Nkhi by punching her with fists and kicking her with shoes on the body."

He was found guilty in the Magistrate's Court for the District of Butha-Buthe and sentenced to pay M1,000-00 or undergo twelve (12) months imprisonment. As I have said, it is against both the conviction and sentence that he has appealed to this court.

In the court a quo the complainant Mothepane Nkhi gave evidence to the effect that on 16 June, 1991 returning from church she called at So-Go Supermarket to buy. One of the Chinese running the shop had called another and told him that the complainant was a Sales Tax lady. Another Chinaman had then asked her why she had gone to Maseru and that they had said the

Chinaman was to pay Sales Tax where he buys if he did not have a number. Complainant had admitted that she worked for Sales Tax but that on this occasion she wasn't on duty and merely came to buy.

When the Chinaman invited the complainant for a chat the latter had declined the invitation but the Chinaman had dragged her and punched her face; they were next to the appellant's residence.

The complainant went on to say that the Chinaman was accused 2 at the trial. Accused 2 had then dragged complainant to where appellant was. Appellant had then emerged out of the door and accused 2 had pushed complainant towards appellant whereupon appellant had punched complainant in her face accompanying this with an insult namely: your mother's vagina, your mother's anus. you devil, civil servant - police - soldier - you are the ones who steal from the Chinese in Maseru and as he insulted the complainant he was punching her with fists and kicking her with his shoes the while she cried loudly.

Appellant while beating up the complainant asked for a gun 'to shoot this dog dead.' She had freed herself and left her jersey and hymn book behind. She had then reported the incident at the police charge office in Butha-Buthe. At the charge office she had been given a medical form to consult a doctor. Her upper

lip was swollen, she had a swelling on the right side of her face and on the jaw - her clothing had been soiled and she was in pain all over her body.

In cross-examination several suggestions had been made against the complainant that she went to the Chinaman to claim Sales Tax and if it was not paid she had threatened to close the Chinaman's business. In cross-examination and before this court it was suggested appellant was roused from his bed and he had pushed complainant out of his house.

P.W.2 who had been with P.W.1 from church supported P.W.1 in all material respects including the fact that people who had assembled as appellant continued beating up complainant refused to intervene because:

" Accused 1 (appellant) was a dangerous person and none of us although so many could come to P.W.1's rescue."

That the people at the time assembled dared not get closer to accused 1's (appellant) yard as he could insult and fight them.

P.W.2 referred to a man who asked accused 1 what he was doing to the child and to leave the child alone to which accused replied with an expletive to the effect: your mother's vagina - go out of my yard - I will shoot you.

P.W.3 Major Monyane had also given evidence to the effect

that accused 1 (appellant) mentioned he had beaten complainant because she was bad mannered.

P.W.4 gave evidence to the effect that accused 1 had been holding complainant who was in tears and inquiring what was happening accused 1 had told him to vacate his premises and he had left.

P.W.5 gave evidence to the effect that at accused 1's premises he had found complainant's jersey and hymn book which accused 1 refused to release.

Medical evidence had been handed in and showed bruises to the upper lip, slight bruise left side face. The degree of force was shown to be moderate.

Appellant had given evidence in his defence stating, amongst other things, that accused 2 on arrival with the complainant he (appellant) had asked accused 2 what the matter was and the latter had said complainant wanted Sales Tax money and he had told the complainant that as it was a Sunday Sales Tax could not be collected. Appellant went on to say that in reply to his question complainant had said that appellant had built many shops which he had rented to foreigners who did not pay tax and that he (appellant) made money out of these foreigners. He had been infuriated by complainant's assertion and pushed her out of the door.

What I find very strange is that none of the Crown witnesses present when appellant assaulted complainant or pushed her out as he said supported the appellant in this regard. If what appellant is saying is true, I also find it odd that when he was asked by some witnesses what he was doing to complainant he did not tell them that complainant was trying to exact Sales Tax from accused 2 on a Sunday.

In any event, the learned Magistrate did not believe appellant's story and on appeal I was not shown that as to the conviction the court a quo had in any way was misdirected itself. For the sake of clarity, I must state that at the trial two people had been charged of assault namely: the appellant and one Chang Jiann Jong and that both had been convicted and sentenced. I was informed by crown counsel that only appellant's appeal remained to be determined as Jong (who was accused 2 at the trial) had been deported.

At the trial appellant was claimed to be 73 years old and counsel for the appellant urged this court for purposes of sentence, even if the conviction was confirmed, to seriously consider the age of the appellant.

Ordinarily, the age of an accused is a factor that courts have to consider and having regard to the fact that appellant had a previous conviction it is probable that the court a quo

considered the age of the appellant. As for me, appellant in evidence was shown to be a man of bad reputation. As MR. RAMAFOLE for the Crown submitted, the sentence was lenient considering the degrading and humiliating manner in which the complainant was treated. The savage and unmitigated fashion in which complainant was abused and assaulted by a man of 73 years shows to what low levels some people, however old, can descent to sometimes. The fact that the trauma, humiliation and indignity visited on the complainant was by an old man of over 70 years will and is bound to trouble complainant's mind for the natural term of her life.

For me, appellant is lucky that there was no application for the increase of sentence seeing that appellant behaves like an adolescent.

As was said by Innes C.J. in R. v. MAPUMULO and OTHERS, 1920 A.D. 56 at p.57 :

"The infliction of punishment is 'pre-eminently a matter for the discretion of the trial court.' When a trial court gives a decision on a matter entrusted to its discretion, a court of appeal can interfere only if the decision is vitiated by irregularity or misdirection, or is one to which no court could reasonably have come - in other words, if a judicial discretion was not exercised."

Observations and strictures reminiscent of the present appeal are to be found in REX v JONES, 1952(1) S.A. 327(E.) where it was remarked:

He ought to be deterred from laying hands on women; and he ought to be made to realise that a siambok can be an instrument of cruelty

While I do not think that the sentence imposed on the appellant is salutary enough to deter him from laying hands on women and others, I have formed the opinion that no impelling cause arises to interfere with the sentence imposed by the learned magistrate.

Accordingly the appeal is dismissed and both the conviction and sentence are confirmed.

~~G.N. MFOLO~~

JUDGE

24th November, 1995.

For the appellant: Mr. Lehana

For the Crown: Mr. Ramafole