CRI/A/28/99

IN THE HIGH COURT OF LESOTHO

In the matter between:

THOLANG LEHLOENYA **APPELLANT**

and

R E X **RESPONDENT**

J U D G M E N T

Delivered by the Honourable Mr. Justice G.N. Mofolo
on the 8th day of February, 2000

The appellant was charged in the Subordinate Court of the District of Leribe it being alleged that

Count 1

> The said accused is charged with attempted murder in that upon or about the 2nd day of September, 1994 near or atHa Lejone in the Leribe district the said accused did unlawfully and acting unlawfully and with intent to kill did shoot at one Peter Titisi Sefali.

Count II

The said accused is charged with the offence of assault with intent to cause grievous bodily harm in that upon or about the 2nd day of September, 1994 near or at Ha Lejone in the district of Leribe the said accused did unlawfully and intentionally assault Morenene Lethaha with a blunt object on his body with intent to cause him grievous bodily harm.

Count III

The said accused is charged with the offence of Assault with intent to do grievous bodily harm in that upon or about the 2nd day of September, 1994 near or at Ha Lejone in the district of Leribe the said accused did unlawfully and intentionally assault one Lehlohonolo Phakoe with fists on his body with intent to cause him grievous bodily harm.

It is to be noted that the offences charged occurred at one place and on the same day. The magistrate had convicted the accused on all the three(3) counts and sentenced him to 5 years imprisonment, M200-00 or 2 years imprisonment and M200-00 or 2 years imprisonment respectively. It was also ordered that sentences run consecutively.

The appellant had lodged an appeal on grounds that:

1. The learned magistrate misdirected herself in holding that the version of the prosecution outlining the manner of the infliction of the injuries on complainant in the first count was not challenged.

2. The learned magistrate misdirected herself in rejecting the version of the accused when such version was reasonably possibly true.

4. The judgment of the learned magistrate is against the weight of evidence and bad in law.

5. The sentence of the magistrate is harsh and induces a sense of shock.

Before this court in argument Mr. Mathafeng for the appellant concerning Count 1 said it would seem P.W.6 had rushed at the appellant to fight him and while P.W.6 was engaged in a scuffle with the appellant the latter had produced a gun and then there followed a struggle between P.W.6 and the appellant for the control of the gun. This struggle had attracted P.W.2 who, on advancing on the appellant and P.W.6 had been shot. Mr. Mathafeng has submitted it is wrong to say appellant shot P.W.2 for the shot was discharged while appellant and P.W.6 were struggling for the possession of the gun and this viewed from any angle it could not be said that the

appellant had the necessary intention to shoot P.W.2. As for P.W.6, Mr. Mathafeng says it's true he was injured but here again it was in course of the fracas which had ensued between the appellant and P.W.6 and it cannot be said appellant had the intention to injure P.W.6. He says in going off it is wrong to say the gun was pointed in a particular direction or for that matter in P.W.2's direction as then the appellant had had no altercation with P.W.2 and had no reason to point a firearm at him. It was also wrong to say that appellant discharged the shot that injured P.W.2 based on the inference by the court *a quo* that because the gun was appellant's he must have pressed the button. Mr. Mathafeng says facts as deposed to by P.W.2 are not in harmony with what actually happened for P.W.2 says he was hardly 2 steps into investigating the squabble when he was shot. He says where there is no intention the law does not punish. He says where a shot goes off in a struggle for possession of the gun there can be no question of negligence. He says in struggling over the possession of the gun appellant was defending himself and that to this extend appellant's version could reasonably be true.

According to Mr. Mathafeng, appellants story was that he was being attacked by P.W.6 and his fellow employees with sticks and knives and the appellant was entitled to resort to means at his disposal to repel the attack. He says commensurability of weapons is not the norm for this would make mockery of self-defence. He says an eye for an eye has no room in the practice of law. He says in Count 1 the version of the crown is not consistent with probabilities nor is appellant's version so demonstrably false as to be rejected out of hand. He says the court a quo failed to apply its mind to whether appellant's story could have been reasonably true.

As for Count II Mr. Mathafeng has admitted that appellant bludgeoned P.W.5 with the gun in warding off the attack by P.W.6 and his co-employees and according to P.W.2's evidence this had occurred before P.W.2 was shot. He says while the assault is admitted it was not unlawful for it was in course of the appellant defending himself from P.W.6 and his co-employees attack and in the event appellant was entitled to repel the attack. He says there's nexus between P.W.5 and P.W.6 for they were P.W.2's (Sekhele's) employees. Mr. Mathafeng says the aggressor was P.W.6 and but for his aggression the incidents would not have materialised. Mr. Mathafeng says in Count I & II there was no corroboration. He says P.W.5 is the only witness of how he sustained his injury in Count II while in Count 3 P.W.6 is the only witness as to cause of the assault. He says punching or boxing one cannot amount to Grievous Bodily Harm. He says sentences were harsh considering complainants have fully recovered.

Mr. Kotele for the crown has submitted that the totality of evidence before the court a quo had shown appellant to have pointed a gun at P.W.2 - a fact testified to by P.W.3, 5 & 6. He says no witness testified to appellant being attacked with sticks and knives nor has D.W.1 supported appellant's story. While agreeing it was in a beerhall, Mr. Kotele says there is no evidence as to the state of drunkenness of the appellant. Mr. Kotele says it was in fighting with P.W.6 that P.W.5 in intervening P.W.5 sustained a scratch, a swollen right eye and bled. He agrees offences committed at the same time sometimes, run concurrently.

P.W.2 Peter Titisi Sefali's evidence is that he was shot by the appellant to whom he had previously spoken to. According to P.W.2, he had asked appellant to

go to his office alternatively to hand over his gun to him to keep and surrender the same the following day to appellant's office. According to the witness appellant had asked for pardon. When appellant had asked P.W.2 to go outside and have a chat, P.W.2 had declined the invitation saying he was tired. Later P.W.2 had received a report relating to Morenene who had sustained a wound and was bleeding on his head. In trying to go to the appellant the latter had shot him, so said P.W.2. He says when he was shot by accused no word had been uttered between the accused and P.W.2. In cross-examination P.W.2 has denied that it was while appellant was fighting over the gun with Phakoe, (P.W.6), Morenene (P.W.5) and other employees of Sekhele (P.W.1) that that gun went off. Actually question was, at p.13 of the record:

> 'Accused will tell the court that at time he shot you, it was an accident because he was fighting over the gun as Phakoe, Morenene and other employees of Sekhele were fighting for that gun, is that so?'

Answer: That is not true.

P.W.2's evidence was denial of an accident or that the appellant shot him accidentally. According to P.W.3, he had seen appellant and Phakoe pulling each other and did not know if they were fighting. It was P.W.3's evidence that he had suggested P.W.2 talk to appellant and Phakoe but even before P.W.2 did so he had seen appellant shoot at P.W.2. According to P.W.3, appellant was holding his gun in his left hand when he shot at P.W.2; according to the witness, the appellant and Phakoe were standing close to each other when appellant shot at P.W.2 and appellant and Phakoe were not fighting. The witness says appellant had pointed the gun at P.W.2. In answer to counsel for the defence, the witness testified that when

P.W.2 was shot 'Phakoe and accused had stopped pulling at each other'. see page 16 of the record. The witness asked on page 16 of the record what he said to P.W.2 replies on p.17 by saying:

> Answer: 'I said I saw accused was pulling at Phakoe and that I was going to close down the accordion music so that P.W.2 could find out what they were fighting for and even before I did that I saw accused pull out his gun by his left hand and shoot at P.W.2.'

It was also P.W.4's evidence that accused shot at P.W.2 while the latter was advancing towards the appellant (see page 20 of the record). P.W.4's evidence in material respects was no different especially his reference to 'accused holding his gun with his left hand' and 'P.W.2 going towards accused.'(page 20 of the record). Clearly, because P.W.2 was going towards the appellant the latter must have figured that P.W.2 was a threat to him.

P.W.5's evidence was to the effect that he had heard a gun shot as a result of which P.W.2 fell. He had had a quarrel with appellant over fish; after opening the tin of fish appellant had taken it and eaten it. Accused had then taken out a gun and bruised the witness on the head with it. He says before appellant assaulted him he had not fought accused in any way. He says when he heard a gun report he had already sustained the injury.

In cross-examination at pages 27 - 28 of the record this was P.W.5's evidence:

Q. According to your evidence, the accused assaulted you with a gun, did you ever report your case in relation to that incident to the police?

A. No.

Q. Do you agree with me that you have been forced to come and say you were assaulted?

A. I realised that.

Despite the answer, notice that the witness insisted appellant hit him with his gun causing the witness to run away from appellant. Also please notice a question asked by counsel for appellant at p.31 of the record, namely:

Q. Accused says he took out the gun and hit you with it as you fought him for having eaten your fish and he say you were armed with a knife too?

A. That is not so.

Q. He says he held one person who was armed with a knife and one of the people held his left hand in which he was holding the gun with which he had assaulted you?

A. That is not so. There were only two of us when he hit me with his gun. I did not see anybody hold accused's gun.

Q. Accused tells me that it was as that other person was holding his gun that a bullet was fired and that bullet hit the complainant out?

A. I do not know about that.

According to P.W.6 appellant had asked him to buy beer for him and when he said he had no money for beer accused had said Tlale's driver's were selfish and had hit him with a fist below his right eye. He had then gone to accused intending to fight back and by putting his right hand by his wrist he knew appellant was taking out a gun. He says he held to accused's right hand and accused had taken out the gun with his left hand and as he did so he shot at P.W.2 who was standing behind the counter (see page 32 of the record). He says at the time appellant shot at P.W.2 no one was fighting the accused (see p.33 of the record). It will be seen that in his allegations the appellant has no support from either the crown witnesses or his own witness D.W.1.

To be precise, according to D.W.1 Tpr. Sefali, appellant was fighting with P.W.5 and other people were intervening. According to the defence witness, he has not testified that there was wrestling for the possession of the gun or appellant was being fought by the host's (P.W.2's) employees. Of importance is this testimony by D.W.1 at p.39 of the record:

Q. What happened to accused after he shot at P.W.2?

A. I saw him running away and people chased after him.

In other words, D.W.1 admits that it is the appellant who shot at P.W.2 and ran away after shooting at P.W.2. If it was not guilty knowledge why, then, did the appellant run away?

Appellant has said that he was defending himself and the question arises as

from what he was defending himself. For eating P.W.5's fish without authority and on being stopped by P.W.5 from hitting P.W.5 on the head with his (appellant's) gun? Or is it for P.W.6 refusing to buy appellant beer and protesting he had no money that earned P.W.6 to be punched? It would seem the appellant wanted everybody to do his bidding lest all suffer.

For all these wrongful acts appellant says he was defending himself. Visser and Mare' in their General Principles of Criminal Law through the cases - 3rd Ed. at p.181 say to give rise to a situation warranting action in private defence or as it were self-defence, there must be an unlawful attack, which has commenced or is imminent, upon a person's legal interests. The attacked person may in such a case ward off the attack by reasonable means directed at the attacker.

In the first place, no unlawful attack was directed at the appellant, it is the appellant who initiated the attacks. There was no legal interest the appellant was protecting and the means he used were unreasonable in the circumstances.

R. v. Zikalala, 1953 (2) S.A. 508 (A) is illustrative of the concept of self-defence. In this case in a crowded hall the deceased supported by a number of friends made a murderous attack upon the appellant with a businesslike knife. The appellant avoided two thrusts by dodging and jumping over a bench. To repel further attack, he opened a small pocket knife then in his possession and stabbed the deceased. He was charged with murder and he raised private defence. The trial court thinking the appellant had 'gone too far' convicted him as, according to the court, he should have kept on jumping from bench to bench to thwart deceased's

attacks. In upholding the appeal, the Appellate Division had reiterated attitudes of eminent writers in Roman-Dutch Law like Mathaens (48 5 3 7), Moorman (2 2 12) and Van der Linden amongst others who said where a man can save himself by flight he should flee rather than kill his assailant. Damhonder with his ideas of defence against honour is shown as expressing a different viewpoint for, according to him, no one can be expected to take to flight to avoid an attack, if flight does not afford him a safe way of escape in that a man is not bound to expose himself to the risk of a stab would in the back, when by killing his assailant he can secure his own safety - see also Moorman (2 2 12).

As we have seen, in the instant case there was no unlawful attack upon the appellant; on the contrary, he deliberately provoked P.W.5 and P.W.6 and having done so assaulted them. The appellant in the instant case would have this court believe the appellant was subject-matter of an attack by P.W.5 and his co-workers, a fact which is not borne out by facts in the case and was denied by prosecution witnesses.

It follows that appellant's version of what took place cannot be reasonably true and the court a quo was justified in believing the prosecution witnesses and rejecting the defence version. Courts are creatures of evidence and where there is direct evidence as was the case in the instant appeal, this is to be preferred than engaging in unnecessary speculation and inferences in direct conflict with tendered evidence.

This court has read the learned magistrate's judgment and found she has not,

in material respects, misdirected herself. Accordingly, the appeal against convictions is dismissed and the convictions are confirmed.

On sentence, it has variously been pressed home that it is better if doctors give evidence in support of their medical reports busy as doctors are. The advantage of doctors giving evidence is that they are able to amplify their reports and bring the court on board to appreciate the nuaces of medical examination. In this case, the medical reports are clear and the defence freely admitted their production and consequently there is no prejudice. In the result the appeal on sentence is also dismissed and the sentences are confirmed. By reason, however, of the offences having occurred at the same time and place, it is ordered that sentences on the three (3) counts run concurrently.

G.N. MOFOLO
JUDGE
24th January, 2000.

For the Applicant: Mr. Mathafeng
For the Crown: Mr. Kotele