

IN THE HIGH COURT OF LESOTHO

In matter between:

WANDA PHEKO

Appellant

vs

REX

JUDGMENT

**Delivered by the Honourable Chief Justice, Mr Justice
J.L. Kheola on the 2nd day of June, 2000**

The appeal was heard on the 25th February, 1996. Judgement was reserved. It seems that the file was removed from my desk and filed away. The appellant never reminded the Registrar that the judgment of his appeal was reserved. Unfortunately his attorney, the late Mr. Pheko passed away in 1998 before he made any inquiries about this appeal. It was only after four years after the appeal was heard that the appellant approached the office of the Registrar and made inquiries about his appeal and its judgment that a diligent search was made and it was found. I am sorry that the file was removed from my desk before I wrote the reasons for judgment. I had forgotten all about it.

The appellant was charged with two counts of assault with intent to do grievous bodily harm. He was found guilty on both counts and sentenced to pay R100 or three months' imprisonment on each count; sentences were to run consecutively. The appeal is against both convictions and sentences.

The appellant is the husband of 'Matsepang Pheko who was P.W.1 at the trial. At the relevant time she was estranged from the appellant under the custom of "ngala". Under that custom the husband and wife live separately while their parents are trying to reconcile them. The wife is usually expected to live at her maiden home while the negotiations are still going on.

P.W.2 Bernard Moeletsi is the second victim of assault by the appellant. He worked with P.W.1 at Metro Wholesalers in Mohale's Hoek. He owned a motor vehicle which could be hired by people to transport their goods. On the 10th January, 1995 P.W.1 hired P.W.2's vehicle to transport her goods from the place where she lived during her separation from her husband. They picked up the goods and P.W.1's children. As P.W.2 was driving along the road the appellant suddenly blocked the road with his motor vehicle and forced P.W.2 to stop his vehicle.

P.W. 1 testified that as soon as their vehicle stopped the appellant got out of his vehicle and approached them on the driver's side. He pulled out a gun and pointed it at P.W.2 and insulted him. He then asked P.W.2 if he was the one who had been running about with his wife. P.W.2 replied that it was P.W.1 who had asked for transport. The appellant did not heed the answer but came to the driver's door and tried to open it by force. P.W.2 resisted this move. The two men struggled over the door for some time without any success to have it opened. Realising that the door could not be opened the appellant picked up stones and hit the two occupants of the car with them. He hit them through the open window.

P.W.1 says that she decided to get out of the vehicle because it was clear that her children who were in the vehicle with her would sustain injuries. As soon as she got out the appellant hit her with fists on the face, he kicked her all over the body and also hit her with stones. After he had satisfied himself he ordered her to return to the place where she came from and to stay there. P.W.1 says that after that she left everything in the car and slept at the home of 'Mabrown that night. On the following day she reported the matter to the police. She was given a medical form and was examined by a doctor.

According to the medical report which is Exhibit "A" P.W.1 had a

periorisital swelling on the right eye and subdural haemorrhage, bruised chest wall posteriorly. Abrasion right knee.

The evidence of P.W.2 is substantially the same with that of P.W.1. He testified that on the day in question P.W.1 asked him to transport her goods from Qalakhoeng to a place where she was then going to stay during her separation with her husband. After picking up the goods and driving through Qalakheng P.W.2 says that he saw appellant's car blocking their way. The appellant got out of his car and approached P.W.2's car. When he came to him (P.W.2) he accused him of breaking up his marriage and insulted him. He failed to drag P.W.2 out of the car. He then pointed at him with a gun but immediately put it back into his pocket and hit P.W.2 with stones. The window on the driver's side was open. He hit P.W.2 on the ribs several times with stones. P.W.2's right arm and wrist were injured. It was only after P.W.1 had got out of the car that P.W.2 managed to get through the passenger's door and tried to run away. He saw when the appellant assaulted P.W.1 outside the car. After assaulting P.W.1 he went to P.W.2's car and removed all the goods of P.W.1 and put them in his own car and drove away.

P.W.2 then got a chance to go back to his car and found that it had been slightly damaged.

According to medical evidence (Ex. "B") P.W.2 had the following injuries.

Bruised chest wall Right lateral. Swollen Right wrist.

The version of the appellant is more or less the same with the evidence of P.W.1 and P.W.2. He denies that he insulted P.W.2 and pointed a gun at him. He says that there were many people who witnessed his fight with P.W.1 and P.W.2. His long story relates to his quarrels with his wife (P.W.1) before the date of the assault in question. His wife had run away (ngalaed) from him on several occasions. It is common cause that during those earlier quarrels or misunderstandings his wife ran away without having been assaulted by him. His story about their struggle over the car door is that it was P.W.2 who was furious and wanted to get out and assault him. After the struggle over the door P.W.1 opened the passenger's door and went out. P.W.2 followed her through the same door.

The appellant says that after P.W.2 had come out of the car he came to him and tried to hit him with a fist. He (appellant) warded off that blow. He then hit P.W.2 with a fist on the right side under the armpit, P.W.2 fell down while he was fighting with P.W.2, P.W.1 hit him on the back with fist and pulled his clothes. When he turned he kicked P.W.1 and hit her with a fist. She stumbled and went

away.

The first question put to the appellant by the public prosecutor was this:

Q: Do you agree that you assaulted the two (2) complainants?

A: Yes. It's true.

It seems to me that the appellant's answer settles the whole dispute between the parties. In other words the appellant admitted that he had committed the crime of assault. The medical reports of P.W.1 and P.W.2 clearly shows that the injuries were serious and are consistent with the use of dangerous weapons such as stones. The appellant is not telling the truth that he hit P.W.2 below the armpit only once. He had several other injuries which were seen by the doctor. He is again not telling the truth that he hit P.W.1 with a fist only once. She then stumbled and ran away. She also had several other injuries.

The first ground of appeal is that the learned magistrate erred and/or misdirected herself in law in not approaching the evidence of P.W.1 and P.W.2 with caution in the circumstances of this case. There is no merit at all in this ground. The complainants were not accomplices and gave their evidence in the most straightforward manner that there was no reason to suspect that their

evidence was false. In fact the appellant has admitted that he assaulted the complainants.

The second ground of appeal is that the learned magistrate erred or/misdirected herself in not holding that the appellant was acting in self-defence and under extreme provocation. The appellant was not acting in self-defence. He attacked the complainants in a car and hit P.W.2 with stones while he was still in the car. He went to P.W.2's car and attacked him with stones. P.W.2 only came out of the car through the passengers' door and ran away. He never attacked the appellant who was the aggressor from the beginning of the encounter to the end.

The third ground is that the judgment is not supported by evidence. There is no merit in this ground of appeal. The evidence of the attack of the complainants by the appellant is overwhelming and is corroborated by medical evidence which shows that the complainants had fairly serious injuries.

The fourth ground is that in the light of the medical evidence the sentence passed therein raises a sense of shock. I do not agree with this ground. Parts of the bodies of complainants were bruised and the eye of one of them was swollen and there was subdural haemorrhage. I am of the view that the sentence was on

the lenient side.

For the reasons stated above the appeal is dismissed.

J. L. Kheola
JL. KHEOLA
CHIEF JUSTICE

2ND JUNE, 2000