CRI/A/29/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

THABO MPOKA

v

REX

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu
on the 19th day of February, 2001

On the 2nd February 2001 this appeal was heard. Mr Tšenoli appeared for appellant and Mr Hoeane for the Crown. After hearing both counsel, the court made the following order:

> The sentence is reduced to two years imprisonment - half of which is suspended for two years on condition that accused is not found guilty of any other offence involving violence during

/....

this period.

Reasons will be filed later.

THESE ARE THE REASONS:

In this judgment I have referred to the appellant as the accused throughout.

This is a case of domestic violence between husband and wife. The husband was charged with assault with intent to do grievous bodily harm.

The appeal was against sentence only, as the accused had pleaded guilty.

The trial court had sentenced him to four years' imprisonment half of which is suspended for two years on condition that during the period of suspension accused is not found guilty of an offence involving violence.

Accused had no previous conviction and he was unrepresented. In his plea in mitigation, accused had said the following:

"I ask for mercy and that is all, I have nothing further."

The court had then asked him what his occupation was, and accused replied "I am a traffic inspector."

The court then sent accused for psychiatric examination within fourteen days. Three days later, the medical officer made a report in which he stated the following about the accused:-

"...was seen today and was fully examined. He was found to be mentally and physically stable. He has no psychiatric problems."—Signed Medical Officer

This medical officer did not specify what his qualifications are. He seemed to have assessed the accused's present psychiatric state. The record

also gives the impression that what was required was the current psychiatric condition of the accused. This report was therefore inappropriate for a case such as this one.

The reason I say this is that in cases of this nature, a person who commits a crime under normal conditions of is often normal. Many people who are temporarily insane are found to be normal and stable after a very short time. By the day of trial (which takes place several months or even years later) they are as normal as any other man. Such a person is often found not "likely to repeat a similar act".—*Rex v T Makaba* 1977 LLR 229 at 234. This court quoted the following passage from the *Runciman Commission on Criminal Justice* Report CM2263 HMSO (1993) paragraph 70:

> "Expert witnesses must expect to have their evidence tested in examination and cross-examination in the same as other witnesses. Serious miscarriages of justice may occur if juries are too ready to believe expert evidence or because it is

> insufficiently tested in court"—See *Rex v M.A. Chobokoane* CRI/T/90/99 (unreported).

In other words, the magistrate acted on the untested evidence of a medical officer who might not even be a psychiatrist. His report is irrelevant because it does not deal with the accused's state of mind at the time of the commission of the crime.

For the best of motives, the magistrate referred the accused for psychiatric examination. This reference to medical examination is normally made to determine whether the accused is fit to plead. Once the accused has pleaded and is fit to plead, there is a presumption that he is normal. If he claims he was not, he bears the evidenciary onus to elicit facts that show that he was not normal at the time of commission of the a crime. In *S v Trickett* 1973(3) SA 326 at 530 Marais J put this principle as follows:

> "Universal sanity in the sense of the accused being *doli capax* is presumed. Whoever wishes to rely on a deviation from this general norm, has to establish it on a balance of probabilities: it is only then that the prosecution has to disprove the deviation

from the norm."

The magistrate ought to have noted this. If the accused did not put his mental state in issue the trial court ought to avoid interfering. The reason being that consequences of temporary insanity are very drastic. They could be an indeterminate detention at His Majesty's pleasure. While the magistrate has a duty to protect the community at large from insane people, he certainly will not be doing the accused a favour by having him imprisoned idefinitely.

I considered the following words in the reasons for sentence of the magistrate a serious misdirection:-

> "In mitigation accused merely said he asked for mercy and nothing else - and this does not give an impression that he is remorseful despite pleading guilty."

While the court in assessing credibility of a witness takes into account his demeanour, it cannot convict on that alone. The court has to convict on

facts. To conclude that because accused is not vocal he is not showing remorse strikes me as simplistic. Surely a person who is ashamed of his acts becomes tongue-tied. Courts do not convict on impressions alone. It is not unknown for a vocal, bold liar to make a good impression merely because he is a good actor. If the magistrate had thought about this more carefully, he might not have reached such a conclusion. I consider this statement an error of judgment.

The accused was unrepresented, he saw clearly that he had done an inexcusable thing. What more should he have said? If he considered what he had done inexcusable, why should he waste everybody's time by making all sorts of excuses. The accused might legitimately have felt he might say what might aggravate his situation in the eyes of the court. For an example, the court might not take kindly to what his counsels said before this court when counsel said that since the accused was the family's main bread-winner, the court should have considered this fact in approaching sentence. I asked counsel whether he meant husbands should always batter their wives in the full knowledge that they will not be punished (as harshly as they might

be) because that will be punishing the children. In other words, the accused might have thought that he is in a no-win situation.

The court nevertheless should have found out what the accused's personal circumstances were. We do not know how many children they have. Since accused was not represented, the court should have found out why he did this. He could well have had a hang-over from intoxication the previous day. From the summary, the assault occurred for no apparent reason - but it could well be that there is something that triggered this assault. In matters of husband and wife, a great deal happens that never surfaces.

I noted that accused did not accept the facts as outlined by the Crown in their entirety. In a majority of cases, it would have been an irregularity not to hear full evidence. Accused accepted the facts as outlined by the public prosecutor "except that he denies hurling insults". If the trial court did not enter a plea of not guilty, it did not commit a major irregularity in the circumstances of the case. In terms of section.....of the *High*

Court Act of 1978, I need not set aside the proceedings on grounds of an irregularity, because such an irregularity must be a serious one. In any event accused does not challenge his conviction in the court below. The appeal is only on sentence. Nevertheless the trial court should have been on guard when it approached the question of sentence. It should have looked deeper into the surrounding circumstances, which it was bound to elicit from the accused where he has pleaded guilty.

The record shows when accused asked his wife to look for his passport "accused seemed very angry". Surely a person does not become very angry for no reason. The least the trial court should have done (as accused was unrepresented) is to find out why accused was so very angry. There is only the issue of the accused's salary cheque, which followed the demand for accused's passport. Why ask for accused's salary cheque when his wife had found accused's passport as required? This becomes even more puzzling because the month ended on the 31st of July 2000. Why demand the salary cheque from the wife on the 4th August 2000? What did the accused mean when he said "I did not sleep for this cheque of mine" before he commenced

the assault on his wife? These facts might have seemed not worth investigating, but if the unrepresented accused person pleaded guilty, they should have been looked into.

At the beginning of the Crown's summary, there seems to be an unclear suggestion that the wife was also going to work on the day of the assault. Counsel for appellant said the complainant (wife) was the Clerk of Court of the very court in which the Magistrate served. It is for this reason that the 3rd ground of appeal is the following:

> "The court *a quo* imposed the sentence it did - out of anger not out of considerations of justice and fairness."

The record is silent on where the wife of the accused worked. If indeed he was this Magistrates' Clerk of Court, then the magistrate was in a dilemma. If the accused pleaded guilty and wanted this case out of the way, the magistrate might have decided to be helpful and deal with the case speedily. If the magistrate felt he could deal with this case fairly and impartially, he

was in law entitled to hear the matter. If he felt he was emotionally involved because a member of his staff had been hurt, then he should have recused himself. The principle that justice should be seen to have been done is an important one. It is wise therefore to anticipate potential objections by withdrawing from a case where a judicial officer's impartiality might be questioned. This is because:-

> "The judge who gives a right judgment while not appearing to do so may be thrice blessed in heaven, but on this earth he is no use at all."—Lord Devlin in *The Judge* qoted in *Commonwealth Judicial Journal* Vol 13 No4 4th December 2000 page 10.

Now it was being argued that justice cannot have been seen to have been done, because accused does not like the sentence. The accused's problem is that this objection is a belated one. There are circumstances in which this court might intervene, if there is a manifest irregularity. In this case, I do not think it would be right to interfere as there is no clear irregularity. But nevertheless in retrospect, it now seems from the accused's current

perspective, the magistrate should have recussed himself. The accused did not think so at that time. In any event the question of where the accused's wife worked was not disclosed in the court below.

This issue of sentence and the trial court's attitude is crisply captured in the following words:

> "However, the court is most amazed by the fact that the accused assaulted the complainant for no apparent reason, and by the nature of the injuries."

I have already said the court did not even try to find out from the accused the "apparent reason" for the assault. It only contented itself with the summary given by the prosecutor which must have come from the statement of the complainant in the docket - and whatever the prosecutor might have got as supplementation from complainant. Even as the record stands, it is very one-sided and vague. At the sentencing stage the trial court was expected to find out balancing factors (as best as it could).

The trial court only asked the accused what his occupation was and ended there.

I have already said that there was no remorse merely because he asked for mercy and said nothing further. Actions speak louder than words. There was really no need for a saddened accused person to say more.

The injuries on the complainant are very disturbing. The degree of force applied was severe. Accused fractured his wife's left distal radius of her arm, and the left patella of the knee. In the assault of his wife, accused was hitting his wife with fists and kicking her. In modern times, it is doubtful if in our society people still believe husbands still retain he customary right of moderate chastisement on their wives. This court has held that such a right is obsolete. Even in the first half of the twentieth century an assaut of this nature would have been classified as immoderate and therefore punishable.

It is sometimes forgotten by criminologiests that corts of law have

duties that encompass not only the accused, the victim and the community but the judicial system as well. One of these duties (which the courts keep in mind in sentencing) is the maintenance of their authority and the keeping of the respect of the general public for the criminal justice system. Is is for this reason that Schreiner JA in *R v Karg* at page 236B said:

> "It is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice might fall into disrepute and injured persons may incline to take the law into their own hands."

I have already pointed out that in case of domestic violence courts in punishing violent spouses cannot ignore the adverse effect this is bound to have on the children when they have to impose a custodial sentence. This may encourage violent spouses to believe they will not get the punishment they deserve. In the case of *Rex v M.A. Chobokoane* CRI/T/90/99 (unreported) this court observed:

> "A law abiding man (in cases of domestic violence can take liberties with his wife, in the belief that she will not press charges for the sake of the children whose breadwinner he is. An angry person might be under the belief that all will be forgiven."

This has led to very unfortunate consequences. In *Maru Masakale v Mampolokeng Masakale & Others* CIV/APN/389/99 (unreported) a husband assaulted his wife and expelled her from the marital home. The brother of the wife (either by themselves or with the wife) in retaliation , assaulted the husband and killed him. It is to avoid cases of wronged parties taking the law into their hands that the court have to consider the sentences they hand down carefully. This aspect in sentencing is often overlooked by the progressive or enlightened criminologists, and academics. In short, sentencing is a balancing act in which many considerations come into play.

Domestic violence is a problem that this court can never eradicate. Courts have to do what they believe they can, they can never successfully deter spouses from battering each other. The *Oxford Pocket Dictionary* attests to the fact that the battering of women anbd babies is an old practice.

It is an abuse of physical strength that males possess that has been scandalous and the magistrate was right to punish it as best as he could. In the case of *R v Karg* 1961(1) SA 231 at page 236 BC Schreiner JA said:

> "It is not wrong, that the natural indignation of interested persons and the community at large should receive recognition in the sentences that the courts impose,.... Naturally righteous anger should not becloud judgment."

In the case of *Karg*, the accused had shot a boy. He believed the boy who had trespassed into his property was about to steal his property in circumstances in which no reasonable man could expect the boy to have stolen his property. He was a first offender and after a full trial was sentenced to two years' imprisonment, full evidence had been heard at a trial.

I have already come to the conclusion that the learned magistrate misdirected himself and that his general approach to the facts on the question of sentence was not correct. Yet he had duty to punish the accused in order to exhibit the revulsion of the community towards the accused's act, and

hopefully to deter him and others from such acts. There can be no doubt that this particular assault called for a stiff sentence - otherwise wives would develop a sense of grievance and feel unprotected by the law. As I have already said, domestic violence is mankind's perpetual problem, which cannot be eradicated but which has to be controlled, punished and denounced as unacceptable. Whether punishment will deter the accused and other's like him in future, courts cannot be sure, they can only hope a salutary sentence might.

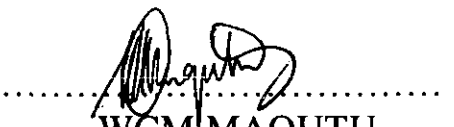
I set aside the sentence of four years' imprisonment, half of which is suspended for two years because it is excessive and induces a sense of shock in me - although I still consider the assault brutal.

I consider the sentence I imposed in the place of the one that the magistrate imposed as severe. As Schreiner JA said in *R v Karg* at page 236A

> "While the deterrent effect of punishment has remained as important as ever, it is, I think correct to say the retributive

> aspect has tended to yield ground to aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach."

In the case of domestic violence and abuse of women, this court found itself mixing the elements of deterrence and retribution in the sentence it was at large to impose once it had found a misdirection. In my view, a sentence of two years' imprisonment, half of which is suspended meet the ends of justice adequately.



WCM MAQUTU
Judge

For appellant :
For the Crown :