IN THE HIGH COURT OF LESOTHO

In the matter between of:

LETSEMA RALEJOANA

VS

REX

JUDGMENT

Delivered by the Honourable Mrs Justice K.J. Guni
on the 22nd day of August, 2001

This matter came before me on appeal from the subordinate court sitting in MASERU. This appellant was one of the two accused who were charged with the crime of ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM. It was alleged that on 6th day of January 1998 at or near HA MASANA in the MASERU district each or both accused did assault PHETHEHO LEBOTSO by hitting him with a butt of the gun and handcuffs on the head with intent to cause him grievous bodily harm.

One of the accused was acquitted. This appellant was convicted of Common Assault and sentenced to pay a fine of two thousand maloti (M2,000.00) or (2) two years imprisonment. He has appealed against both the conviction and the sentence on the following grounds:-

1. That the learned magistrate erred or misdirected herself in law in rejecting the version of the accused which was reasonable and probable.
2. That the learned magistrate erred or misdirected herself in law by holding that the accused had the *mens rea* to commit the crime of common assault.
3. The sentence is disproportionate to the offence and thus induces a sense of shock.

At the hearing, the two first grounds were abandoned. This appeal was in fact set down for hearing without first being placed before the Judge to deal with it in terms of section 327 C P & E Act N0.9 of 1981. The address by Counsel for the appellant, was therefore directed at attacking only the sentence. The parties agreed, that sentencing, as a general rule, is a matter primarily in the discretion of the trial court. S v ANDERSON 1964 (3) SA 494 at 495

R v MAPUMULO and Others 1920 A.D. 56 at 57

Only in exceptional circumstances, as annunciated in section 329 (2) C P & E Act N0.9 of 1981, can the court on appeal exercising the powers vested on it by the said section, set aside or alter the sentence imposed by the trial court, by reason of any irregularity or defects in the proceedings of the said trial court. The irregularity or defects in the proceedings of the trial court must be shown to have improperly influenced the trial court to misdirect itself when exercising its own discretionary powers. In terms of section 329 (2) C P & E Act N0. 9 of 1981, the court on appeal, must then be satisfied that the improper use of the discretionary power of the trial court has resulted in the failure of justice.

Coming back to this appeal, it appears from the record of the proceedings, that the accused and the complainant were by trade the members of the security firm. They are commonly known as security guards. The complainant had left employment of their security firm. But still he had in his possession the uniform and the firearm of the said security firm. The accused was instructed by his superiors at work to go to the complainant's place of residence to collect their property; According to the complainant he was ready and willing to handover the said property but he needed someone to witness the handover. For that purpose he went to his brother to invite him to come and witness the handover. It seems

the complainant's brother encouraged him to hand over the firm's property. The complainant was considering to refuse to handover the property until the firm has paid him certain moneys.

With these scruples in mind, on arrival at his place, the complainant took out the key to open the door. Instead of opening his door he pulled out his gun and hit the accused on the forehead with its butt and ordered him to get off his property. The struggle ensued. The accused called for assistance from his colleagues who had remained in the motor vehicle while he went to the complainant's house to collect the said uniform. The complainant also felt he need assistance. He then took off-running to his neighbour's house who also happens to be his chief. The accused gave chase. He caught up with him. He felt him to the ground. His colleagues arrived. The complainant was hit with the butt of the gun and handcuffs, as the scuffle confirmed. He struggled in order to free himself. The other security guards restrained him.

There is evidence to the effect that both the complainant and the accused used their guns to assault each other. The complainant was the first to hit the accused with the butt of his gun when he ordered him off his premises. The medical evidence contained in the medical form which was produced at the trial, showed the court

that the accused sustained a laceration of 1.3 cm on the left side of his forehead. Another laceration-approximately 2 cm is on the left frontal region of the forehead. In the opinion of **Dr Rathebe**, these injuries were caused by a moderate application of force accompanying the weapon used. Immediate disability suffered by the accused because of these injuries, is described as light. At the time of examination, which was the same day of the alleged assault, long term disability was not determinable according to the Doctor.

The complainant was also at the same Hospital and undergoing examination by a different Doctor. The complainant was examined and treated by **Dr Kagala**. The injuries sustained were allegedly caused by hitting with the butt of the gun with a considerable force and causing these injuries which are moderately dangerous to his life. The injuries consisted of multiple lacerations on the left temporal frontal region of the scalp. 2 - 3 cm laceration on the lateral region of the right eye.

The complainant, according to the evidence led at the trial, started the trouble and in the fight that ensued he got the worst of it. It appears he became the complainant because he felt aggrieved by losing the fight and being subdued. He claimed that he put his hand in his pocket to collect the key in order to unlock. He does not say he unlocked. He went on to claim that as he hesitated to unlock and

open his door, the accused attacked him. According to the accused the complainant did not unlock his door, while the accused waited to see when he was going to let him in as he had said some of the uniform is therein, the complainant pulled out his gun and hit the accused with the butt on the forehead as he ordered him to leave his place. This was mischievous. The complainant was now frustrating the accused in the performance of his duty. He was sending the accused off without the property which he had been specifically sent there to collect. The trial court accepted that the accused although acting in his private defence, he had exceeded the bounds of the said defence. There is evidence that the accused together with some of his colleagues, after putting the complainant down, they continued to kick him. It is not easy in a fight of this nature to draw a line demarcating where the self defence stopped and the excess which turned the accused into an aggressor, begun. There is a call for a need here of great restraint. The accused is said to have fired into the air. It is not clear at what stage was the complainant disarmed. Was it before kicking him or after kicking him while he had fallen to the ground? Was he disarmed before he ran? The learned magistrate found the accused guilty of a lessor offence of Common Assault in those circumstances.

It has been argued on behalf of the appellant that the sentence is disproportionate

to the offence. The learned magistrate has furnished no reasons for sentence. It has been said that the court of appeal will not alter a determination arrived at by the exercise of a discretionary power merely because it would have exercised that discretion differently. S.V. ANDERSON 1964 (3) SA 494 at 4495. MATIA and Another v Rex 11979 (1) LLR 139 at 145. The court that interferes with the sentence imposed by a lower court, itself exercises a discretion when it imposes a new sentence.

After the accused had addressed the court in mitigation of sentence, the record shows only the sentence and the end of the matter. It is a duty of the trial court to consider all the relevant factors and to expressly say so before passing sentence. It has been said many times and on numerous cases that come before this court by way of appeal or review, that the accused is entitled to know why the trial court imposes this or that type of sentence. The reasons for sentence should not be furnished only after the notice of appeal is noted. *KHUNONYANE v REX CRI/A/53/76. MATHABO MOJELA v REX 1977 LLR 321.* In our present case there are no reasons at all for sentence meted out to this appellant.

In mitigation of sentence the accused informed the trial court that he has a wife and three children. He is the sole bread winner. The offence of which he had been

convicted was committed in the line of duty. He carried a burden of not to be found wanting in the performance of his duty. He might have been over zealous. But this is not easily determinable because the accused insisted that he was only doing his job. This should be looked in the light of his level of education and the fact that he was a mere security guard.

Having failed to furnish any reasons for sentence this court is in the dark with regard to the factors which if at all any, were considered before sentence. The interference with the sentence imposed by the trial court in this circumstances is warranted.

The sentence of the fine of two thousand maloti (2000) or 2 years imprisonment is set aside. It is substituted with the sentence of a fine of five hundred maloti (M500) or 3 months imprisonment.

K.J. GUNI
JUDGE

For Appellant : **Mr Matooane**
For Respondent : **Miss Mofubelu**