CRI/A/18/2001

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOTLATSI NTEO **Appellant**

and

REX **Respondent**

For the Appellant : **Mr M E Teele**

For the Respondent : **Miss L Mahanetsa**

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 5th day of February 2002

This was an appeal from the magistrates court of Leribe. The Accused had been charged with the crime of assault with intend to do grievous bodily harm of one Taolana at Malahleha at night upon or about the 13th September 1998. He was convicted and consequently sentenced to a fine of M500.00 or twelve months imprisonment.

It was common cause that the Complainant who was a policeman went into or entered into the premises of the Appellant on that night. Complainant testified to say he was drunk.

It was not gainsaid that Appellant had suffered a previous theft at his premises at night. It could not be said that that the Appellant story was not reasonably possibly true that he had feared that the Complainant was a thief and that this belief was not unreasonable in this circumstances. This Miss Mahanetsa conceded.

The Court noted that in the particulars of the charge it was alleged that the Complainant was beaten with fists (not a sjambok as claimed in the evidence). Indeed the assault was said to be severe on most accounts. Furthermore the medical report form had recorded that "the complainant had been assaulted all over the body with a sjambok". This conflict would be worrisome for obvious reasons. The Court would not take the matter further in view of concessions made by the Crown over the larger picture.

It was not disputed that it was the Accused who took the Complainant to the police station. This led the Accused's Counsel to submit that in all the circumstances the Appellant's acts were consistent with a person who had been engaged in and whose primary purpose was arrest of the Complainant.

The Accused had denied that the Complainant could have identified himself. It could not be suggested seriously that the Appellant could beat up a policeman the latter having identified himself and after assaulting him to take him to the

police station amongst his colleagues. It was submitted the Accused's story had a reasonable possibility of being a true one.

Once the above circumstances prevailed as Applicant's Counsel submitted that would make the arrest effected by the complainant a lawful one. Accused could not be convicted merely because he acted unreasonably. I was referred in that regard to **Rex v Britz** 1949 (3) SA 293 at 303. It was said that the above case would reveal that the learned magistrate had been in error in trying to weigh the seriousness of te offence and the measures used to effect arrest which arrest was said to have been resisted in the instant case. That was why (as it was submitted) even a fatal assault could be justified even if one was only stealing a spoon in a dwelling house at night. The Court was again referred to **Burchell and Hunt: South African Criminal Law and Procedure** Vol I (2nd Edition) (and cases cited therein). And **Matlou v Makhubelu** 1978 (1) SA 946. The Crown conceded most fairly that on this ground alone the appeal ought to succeed.

The Court had been addressed on what Counsel said it would be Accused's main defence. It was by way of resort to section 42(1) of the Criminal Procedure and Evidence Act No.7 of 1981 (CP&E). This section provides that a person who is entitled, inter alia, to arrest another, who has committed or is on reasonable grounds suspected on having committed an offence mentioned in part 17 of the first schedule of the CP&E and that person resists of fleas the arrester, if he kills the suspect, when no other means of apprehending the suspect than to cause his death the death shall only be guilty of justifiable homicide.

Mr. Teele added that since theft (which complainant was suspected of) is included in the offences mentioned but qualified by section 42(2) of the CP&E

which links theft to theft in a dwelling house at night, it was significant for the purpose of this case also, that included in part II offences is, inter alia, " ..... entering on premises with intent to commit or offence either at common law or in contravention of any statute."

I was asked to note that section 42(1) of the CP&E contemplates that there are various measures that in themselves may be dangerous but not fatal. It was thus admitted that even these are included in acts that would be justifiable under the section if they were employed and a person was not killed. The greater includes the lessor. The act o f beating the complainant with fists would thus be covered by the section.

There had been an alternative argument. It was that there was no evidence as to which of the assailants, that is the Appellant or the alleged others, inflicted which injury or that one was aware of what weapons (if any) others used. In the circumstances, as submitted, it could not be said Applicant had been proved beyond a reasonable doubt to have acted with intention to do grievous bodily harm.

It was further submitted that it had been a misdirection that the trial Court failed to make a finding as to whether it believed Complainant or Accused on whether the former resisted the arrest or not. This finding could only be made by the trial court as it affects credibility. The fact that such a finding was not made did not assist the Crown's case. It was quite clear, however, that the Court approached the matter like an armchair critic and failed to take other factors and probabilities into account such as the following.

That the Appellant could not have realized the drunken state of the Complainant. Second, that it was improbable that Appellant would beat up a policeman only to take him to the Charge Office and make a report. Third, that it was quite probable that being drunk and feeling that he was innocent of any wrongdoing, Complainant might well have resisted. In that case the Court would be urged to feel that it was at large to make its own findings. See **R v Dlhlumayo** 1948(2) SA 678.

It was lastly submitted that it did not necessarily follow that because Complainant lost a tooth it meant that the charge was proved. The Complainant must have been severely assaulted according to the medical report.

I heard my own reservations about the way the case was investigated or prosecuted. This did not affect the situation that at the end of the day the Crown conceded that the charge had not been proved or most specifically that the Applicant's story might reasonably have been possibly true or furthermore that the Appellant should had been given the benefit of doubt.

The appeal succeeded.

T. Monapathi
Judge

5th February, 2002