

CRI/A/3-4/79

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

1. EMANUEL FUMA
2. PASHO RASEPHEHI

Appellants

v

R E X

Respondent

J U D G M E N T

Delivered by the Hon. Justice F.X. Rooney
on the 8th day of August, 1980.

The appellants were involved in an incident at Qoaling Ha Seqobela on the 1st June, 1977. This led to their appearing before Mr. M.M. Qhobela in January 1978 charged with attempted murder and robbery as follows :

"COUNT 1 : That the said accused are charged with offence of attempted murder, did each or one or both of them wrongfully unlawfully and intentionally attempted to shoot John Tilo by pointing a firearm at the said complainant, with intent to kill him.

COUNT 2 : The said accused are charged with offence of robbery in that the said accused did each or one or both of them, did wrongfully and unlawfully assault one John Tilo and with force and violence did take from the said John Tilo a shot-gun his property or his lawful possession and did rob him of the same."

On the 5th March, 1978 the magistrate recorded the following verdicts:

"Count II Both accused given the benefit of doubt
Count I Accused 2 guilty of common assault
Accused 1 guilty as charged."

The first appellant was sentenced to 5 months imprisonment and the second appellant was fined R30.00 or 3 months imprisonment in default. Both were released on bail pending appeal.

The learned magistrate produced a written judgment which is undated. After reviewing the evidence the court a quo found that the two appellants were to the house of PW 2 (John Tilo) at night, that they intruded themselves upon PW 2 by giving him false names, that a quarrel broke out, that in the ensuing scuffle and struggle to disarm each other, the first appellant sustained a bullet wound on the hand and that a number of shots were fired.

The magistrate in writing his judgment proceeded with more evaluation of the testimony received. He concluded that the complainant John Tilo "became suspicious when he questioned the accused about their identity a step which was reasonable in the circumstances.....".

He accepted that this was the source of the "scuffle and struggle which followed.

He then said

"The two accused are given the benefit of the doubt on Count I. (robbery) as they took the firearm of PW 2 to the Charge Office immediately. On Count II accused 2 is found guilty of assault common for his part in the scuffle with PW 2 while accused 1 is found guilty of assault with intent to cause grievous bodily harm for injuries on PW 2".

I am at a loss to understand what the magistrate meant by these remarks which do not ally with the verdicts recorded. As Mr. Qhobela has left the service, I am unable to refer the case back to him for an explanation and I must make the best I can out of the muddle he has left behind him.

Count I alleged attempted murder by pointing a firearm at John Tilo with intent to kill him. The particulars of this charge appears to me to be inconclusive, as the pointing of a firearm does not imply an intent to kill.

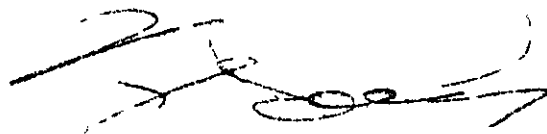
In his evidence John Tilo said that the first appellant pointed a firearm at him in his house. He caught hold of the pistol and kicked the first appellant in the stomach, knocking him down. A struggle followed for the possession of more than one firearm and shots were fired wounding Peter Nkabane (PW 3) who was outside the house. As that shot was fired by the first appellant, he might have been charged with the attempted murder of that witness, but, he was not so charged and the incident was not directly relevant. John Tilo was hit on the head by the butt of a gun which he said was used by the first appellant. He thus sustained the injury which apparently

formed the basis of his eventual conviction. But, the magistrate's verdict of guilty was entered not on Count II but on Count I. He appears to have regarded himself as entitled to bring in whatever verdict appeared suitable having regard to the evidence as a whole without an amendment to either charge. I do not think he was empowered to take such a broad view of events or to ignore the rules of criminal procedure.

It has been suggested that in this Court, I, sitting on appeal should make such amendment to the charges as will meet the justice of the case. I have not been referred to authority on this point and will merely express the opinion that if this Court has power to alter or amend charges on appeal, it may only do so if the appellant is not thereby prejudiced.

The original verdict, which amounted to an acquittal on Count II must stand. The allegation of attempted murder on Count I included particulars too remote from the eventual finding of the magistrate to justify the substitution on this count of anything more than a verdict of common assault in respect of the first appellant. However, the magistrate has not found as a fact that the first appellant pointed his gun at the complainant and the first appellant did not admit at the trial that he had done so.

The whole proceedings were botched by the failure of the prosecutor to select the right charges and the confusion with which the learned magistrate brought in his verdicts. Over three years have now elapsed since the events which led to these proceedings and it would be inappropriate to permit them to be re-opened. In the circumstances I shall allow the appeals of both appellants and set aside the convictions and sentences.



F.X. ROONEY
JUDGE

8th August, 1980.

For Appellant : Mr. Ronbenheimer

For Crown: Mr. Peete.