CRI/A/52/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

MATSEPO LENKO
MANTEBOHELENG MAROKA
MANCHAKHA MAEMA
MANTATA MAEMA

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice W.C.M. Maqutu
on the 25th day of March, 1996.

The appellants were charged with culpable homicide. They were convicted with assault with intent to do grievous bodily harm on the 11th February, 1991.

First appellant was sentenced to 3 years' imprisonment.

Second, third and fourth appellants sentenced to

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2 years' imprisonment.

They have all appealed against conviction and sentence.

The record of proceedings was forwarded to the High Court duly typed on the 3rd May, 1991. The Registrar of the High Court received it on the 31st May, 1991, and registered it as Criminal Appeal No.52 of 1991.

I am saddened by the fact that this appeal was only heard on the 13th March, 1996. This is five years after the date of conviction and sentence of the appellant. Fortunately for the appellants, they were released on bail pending appeal. Even so, this remains a case in which justice delayed is justice denied.

The appeal was first put on the roll on 21st May, 1993, but could not proceed because the appellants had not been served. I proceeded with the appeal in the absence of the appellants because their Counsel was present.

I dismissed the appeal against conviction. Appeal against sentence partially succeeded and

Accused 1 ad 3 were sentenced o 9 months' imprisonment with an alternative of a fine of M600.00. Accused 2 and 4 were sentenced to six months' imprisonment with an alternative of a fine of M400.00.

I promised to furnish my reasons later.

I dismissed the appeal against sentence because the deceased who was a woman had multiple whip-marks all over the body and these had been inflicted with a *sjambok*.

A *sjambok* tears tissue below the skin and inflicts injuries that take several weeks to heal. The immoderate use of a sjambok on the delicate body of a woman cannot have been used without an intention to inflict grievous bodily harm. A few whip marks might rebut an inference of an intention to cause grievous bodily harm. In this case an obese woman had multiple whip-lash marks all over the body. I therefore came to the conclusion that the learned Magistrate's verdict of guilty of assault with intent to do grievous bodily harm was correct.

Mr. *Ramodibedi*, who appeared for all four accused in the Court below, took the point (for the first time on

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appeal) that the record does not reflect that the depositions of the witnesses were read to the appellants. This case had been remitted for trial before the magistrate after a preparatory examination. The case was heard by the Magistrate who presided at the preparatory examination. He conceded that he had read the preparatory examination on behalf of the appellants before the trial commenced. Furthermore he had proceeded to cross-examine witnesses having afterwards. Mr. *Ramodibedi* based his submission on Section 181 of the *Criminal Procedure and Evidence Act* 1981:

> "(2) When the presiding officer at the trial of a case under this section is the same magistrate before whom the preparatory examination was taken .... it shall be competent and sufficient to read the evidence or deposition of such witness."
>
> (3) The Magistrate may, with the consent of the accused or his legal representative, dispense with the reading of any evidence or deposition under this section."

When Mr. *Ramodibedi* was asked why he did not take this point in the Court of first instance, Mr. *Ramodibedi* said he was not aware of this section. Whatever was not reflected on the record could not be deemed to have taken place in the Court below.

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Relying on <u>Swift</u>'s *Law of Criminal Procedure* 2nd Edition page 338, Mr. *Ramodibedi* argued that because according to the record the evidence of the preparatory examination was not "read at all there is simply no evidence at all at the new trial under remit". Mr. *Ramodibedi* further argued that as the record does not disclose that the accused or his Counsel ever dispensed with the reading of the evidence in open Court, then it cannot be said the accused consented to the admission of that evidence.

Mr. *Ramodibedi* did not read page 339 of <u>Swift</u>'s *Law of Criminal Procedure* 2nd Edition where the following is written:-

> "if there appears on record to be sufficient evidence of the guilt of the accused, then, although failure to read the depositions is an irregularity, the conviction will not be set-aside because the irregularity will not be considered to have resulted in a failure of justice."

In *R v. Monokoa* 1949(2) S.A.3 on which Mr. *Ramodibedi* relied, does not disclose that the appellant in that case was represented by Counsel or an attorney in the Court of first instance. Although that case is otherwise on all fours with this one Reynolds J at page 276 noted

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the law should not be reduced "to a game of forfeits". Mr. *Ramodibedi* had exercised the right of the accused in terms of <u>Section 181(6)</u> of the *Criminal Procedure and Evidence Act* and,

> "at the time of trial, to inspect without fee or reward, all evidence and depositions....".

After that he had all witnesses recalled and cross-examined. What witnesses said under cross-examination does constitute evidence.

At the beginning of the trial Mr. *Ramodibedi*, for the accused, had tendered a plea of assault-common on behalf of all the accused. The Crown had refused the offer. After the accused had pleaded not guilty to culpable homicide the Crown had handed the record of the preparatory examination as evidence. It was accepted by the Court without objection from mr. *Ramodibedi* who at the appellate stage, stated no evidence was offered. Since he had read the record and chose to have the entire preparatory examination record admitted as evidence, he cannot be now heard to say no evidence was offered. All witnesses had been subpoenaed and Mr. *Ramodibedi* cross-examined them, and did in fact do so. He dispensed with the cross-

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examination of others.

This case differs fundamentally from *R v. Monokoa (supra)* because appellants were represented. As Mofokeng J said in the case of *R v. Ntoi* 1978 LLR 143 at page 158:-

> "...., in our legal system, a lawyer is the mouthpiece of his client. The client is bound by what his lawyer says in Court until his mandate is terminated."

Therefore what Mr. Ramodibedi said, did or left unchallenged *is binding on an appellant.*

In the light of the aforegoing, I can safely say the formal reading of evidence was dispensed with, because Mr. *Ramodibedi* wanted it to be dispensed with. He had read the record and therefore allowed time to be saved by not having what he had read to be read again. If he had re-read the record of proceedings, (and has assessed the way he conducted the appellants' defence) I do not think he would have taken the point he took at the beginning of the hearing of the appeal before me.

I interfered with the sentences because they induce a sense of shock. The appellants were also complainants.

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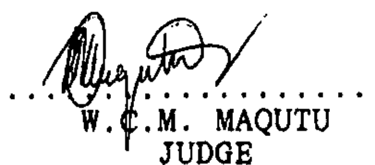
They were trying to extract a confession from the deceased. The atmosphere was an emotionally charged one and an element of punishing deceased crept into the investigation. These factors the Magistrate lost sight of. The appellants' agony of waiting and the fact that the appeal took five years to dispose of also influenced me in the sentences I imposed.



W.C.M. MAQUTU
JUDGE

For the Crown :
For the Accused : Mr. M.M. *Ramodibedi*