IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CRI/A/06/10**

In the matter between**:**

REX **APPELLANT**

VS

MOTLOHI MALIEHE **RESPONDENT**

SUMMARY

Appeal by the Crown against the acquittal of the Respondent (accused) by the court a quo on a charge of assault with intent to cause grievous bodily harm – evidence before court a quo considered – evidence revealing assault (common) – appeal upheld – matter remitted to trial court for appropriate sentence.

JUDGMENT

Delivered by the Honourable Madam Justice L. Chaka-Makhooane on the 29th November, 2010

[1] This matter came before me by way of an appeal against the decision of the magistrate's court, whereat the Respondent was given the benefit of doubt and acquitted on a charge of assault with intent to cause grievous bodily harm ("Assault gbh"). It should be noted from the outset that the complainant in the court *a quo* and the present Respondent (accused in the court *a quo*) were husband and wife at the time.

[2] The particulars of the charge before the court *a quo* were that on or about the 21st September, 2008 and at or near Ha Thetsane, Maseru the Respondent (Accused) assaulted 'Maboiketlo Maliehe with intent to cause grievous bodily harm, by kicking her on the body.

[3] The Crown led the evidence of three (3) witnesses one of who (PW3) was the son of 'Maboiketlo the complainant and the Respondent, while PW2 was the Respondent's brother's daughter, who lived with the couple. PW1 was the complainant herself. The investigating officer's report and the medical report were admitted as part of the evidence by consent.

[4] It will be assumed that the Respondent pleaded not guilty to the charge. I have however, observed that the entry on the original manuscript and the typed record show the learned Magistrate as having entered a plea of guilty, See first day of proceedings in the original record of proceedings, dated 28.07.09 (record has not been paginated) and page 2 of the typed record. If this was a mistake which I assume it was, fortunately it was not one that was prejudicial to the Respondent.

[5] The appeal is vehemently opposed by the Respondent. The Crown is basically appealing against the finding of the court *a quo* whereat the learned Magistrate disbelieved the Crown witnesses and accepted the Respondent's evidence

[6] PW1 the complainant and the Respondent's wife, testified that on that day her husband had not slept at home and when he did come home he was with one Seretse who it appear was his driver. PW1 was with PW2, PW3 and one Napo. Some boxes were put in the Respondent's car from the garage. When Respondent and Seretse arrived they did not say anything to PW1, not even to greet her. It was her evidence that as the boxes were being loaded she told Serete never to come to her home again. She explained that she said so because some of her stuff had gone missing from the garage after Seretse had been there and also Seretse took things from that garage without telling her.

[7] The Respondent left with his son, PW3 and Seretse. After a while they came back and that is when the Respondent came to PW1 in the bedroom and shouted that Seretse had been employed by him so that she should not tell him not to come to the house. PW1 testified that, that is when the Respondent pulled out a gun and pointed it at her and said he would kill her. He put it back and insulted her also adding that he does not eat corpses. PW1 says she went out through the kitchen and the Respondent followed. She saw Seretse and then she went up to him and told him once more never to come to her house again. The Respondent then charged at her. He hit her with a fist around the stomach area and also kicked her. As she was about to fall, PW2 and PW3 intervened.

[8] PW2, Itumeleng Maliehe is the Respondent's brother's daughter who was living with both PW1 and the Respondent. Her evidence pretty much corroborated that of PW1, that after the car came back the second time, the Respondent went into his and PW1's bedroom and soon thereafter, she heard

noise made by PW1 and the Respondent quarrelling. She testified that she heard when the Respondent said he does not eat corpses. She heard the Respondent going out to the car while PW1 followed him. She says PW1 talked to Seretse reminding him that she had asked him not to come to her home. This is when she saw from the kitchen window, the Respondent getting out of the car and going to PW1 whereat he kicked her. As he was getting out of the car he was saying, "I will kick you so that you shit as this is not your home". PW2 testified that she and PW3 intervened by separating the two (2).

[9] Under cross-examination PW2 eventually showed that he did not actually see how the fight started but he heard the kicking and he rushed out to intervene at the time that the Respondent was holding PW1.

[10] PW3's testimony further corroborates PW1's and PW2's evidence. PW3 is the Respondent and PW1's son. His evidence in part is that he went shopping with his father, the Respondent, with Seretse driving. On the way PW3 heard Seretse inform the Respondent that PW1 had told him never to come back to her house again. Apparently this angered the Respondent who even commented that PW1 wanted to get him into trouble and also that she was expelling someone hired by him. They got back with some groceries. The Respondent is said to have gone into the house while PW3 was putting the groceries away.

[11] They (PW1 and Respondent) came out with the Respondent in front and PW1 following. As the Respondent got into the car, PW1 asked if Seretse had heard what she had said and he confirmed that he had heard her. The Respondent who was already in the car, got out and headed towards PW1. He asked her if she wanted to get him into trouble and that she had turned herself his Satan. PW1 did not respond according

to PW3. When the Respondent reached PW1 he kicked her. She turned and tried to escape by going behind the house. PW3 testified that he and PW2 intervened. He pulled his father into the house while PW2 held PW1.

[12] In his defence the Respondent (accused in the court *a quo*) showed in part that he found PW1 doing laundry outside. He had come with Seretse his driver. He went into the house without greeting PW1 because they had not been on speaking terms for months. Some items were loaded into his vehicle then he left this time with PW3, his son. They came back with groceries and he went into their bedroom where he found PW1. PW2 was in the kitchen while PW3 was in the car with Seretse. It appears PW1 left the bedroom and the Respondent followed her via the kitchen. PW1 is said to have leaned against a veranda pillar near the kitchen and asked Seretse whether he had heard that he should stop coming to her house.

[13] The Respondent testified that at that time he was behind PW1 and asked that she has power to expel Seretse even though he was employed by him. She turned to face him, insulted him and then slapped him. He further showed that he held her hand and then they started pushing each other. He showed that he was then hit by a brick from the pillar on the shoulder. He told PW1 that, "you are silly, I will kick you." It was at this time that PW2 and PW3 intervened and separated them. According to the Respondent he had to struggle to remove himself from PW1's clutches because she had had held him very tightly by his clothes at the neck even with PW1 and PW3 between them.

[14] Essentially the Respondent denies ever having pointed a firearm at PW1. Most importantly he denies having kicked PW1 and instead he speculated that she could have been hit by the pillar like him, as they were pushing each other.

[15] The medical report which was admitted into evidence shows that PW1 was treated as an outpatient at Queen Elizabeth II hospital on the 27th August, 2008. The doctor who examined her filled in the report thus; painful area, no external injury in the upper part of the body. There was hematoma on the thigh area on both legs. The doctor also showed *inter alia* that the degree of force inflicted was considerate.

[16] It is the Appellant's (Crown) contention that the court *a quo* erred in dismissing the evidence of the Crown witnesses on the ground that it was contradictory. The learned magistrate says in part that:

> "…witnesses stories were different while they ought to have been similar as they were all eye witnesses."
>
> (See last paragraph on last page of court *a quo's* judgment).

[17] I find it hard to agree with the learned magistrate where she says the Crown's evidence is so different that there is no common thread. Infact, I find that there is a common thread.

PW1 was the complainant, PW2 and PW3 respectively are relative and child and at the time lived with both the Respondent and PW1. Up to that point no real reason was advanced by the Respondent to indicate why his brother's child and his own son would lie about the kicking that they said they saw and heard. No suggestion was intimated that there was bad blood between PW2, PW3 and the Respondent such that there is no apparent reason why they would lie against the Respondent.

[18] I agree with the Appellant that PW1's evidence to a large extent was corroborated materially by PW2 and PW3's evidence on the issue of the Respondent kicking PW1. Both witnesses including the Respondent himself informed the court that they intervened and separated the two (2).

[19] The Respondent on the other hand insists that he did not kick or assault PW1, instead the injuries described in the

medical report might have been caused by PW1 hitting against the kitchen pillar while they were pushing each other. The Respondent's version is highly improbable unless he actually shoved PW1 against the pillar. The injuries were at two (2) different areas of the body and this would probably be consistent with being kicked than with hitting against a pillar.

[20] I find that the Respondent went a long way to show that PW1 lied in her evidence about being pointed with a gun. He insisted that had this happened at all she would have run out of the house screaming and telling every one about it. When she did not, it shows that she was lying. I find that since no other witness mentioned a firearm, then they probably did not see this scene. However, the charge that was read to the Respondent at the court *a quo* was that of assault gbh, based on the kicking and not about the firearm.

[21] I am thus persuaded by the Appellant that the learned magistrate erred in not finding that, based on the evidence adduced by the Crown witnesses, including the medical report, that there had been an assault on PW1 by the Respondent. In this regard I concur with **Saldulker AJA** in **Mdlongwa v The State (99/10) [2010] ZASCA 82 AT 82 C-D** where he said:

> "A court does not base its conclusions, whether it be to convict or to acquit, on only part of the evidence.
>
> The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond a reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable; and some of it might be fount to be only possibly false or unreliable; but none of it may simply be ignored."

[22] The learned magistrate in the court *a quo* gave the Respondent the benefit of doubt and acquitted him. It is my opinion that the court *a quo* over looked the Crown +witnesses' evidence who may have differed on how they saw thing, which is only human, but corroborated each other unshakably on material facts. It is my finding that the Crown in the trial court had established that the Respondent had indeed assaulted PW1.

[23] I am however, perturbed by the charge that the Respondent faced in view of the evidence that was brought by the Crown. So far no evidence of assault gbh has been revealed by the facts.

[24] In the light of the evidence it is clear that the Respondent cannot possibly be guilty of assault gbh. I therefore, make the following orders:-

1. The appeal by Crown succeeds.

2. The acquittal of the respondent is set aside and an - appropriate verdict of guilty of assault (common) is substituted in its stead.

3. The matter is remitted to the trial court for the imposition of an appropriate sentence.

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L. CHAKA-MAKHOOANE
JUDGE

For Appellant : Ms. Mofilikoane

For Respondent : Mr. Masiphole