IN THE HIGH COURT OF SWAZILAND

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| HELD AT MBABANE. | CRI. APP. NO. 19/1981 |
| In the matter of | |
| MAJOZI NDZIMA | 1st Appellant |
| GIRLY DLAMINI | 2nd Appellant |
| vs. | |
| REGEM | Respondent |
| CORAM | NATHAN, C.J. |
| | WILL, A.J. |
| APPEARANCES: | |
| For Crown: | Mr. Masina |
| For 1st Appellant: | Mr. Van Heerden |
| For 2nd Appellant: | Mr. A. S. P. Nxumalo |

JUDGMENT

(Delivered 5th February, 1982)

Will, A.J.

Both the Appellants, to whom for convenience I shall refer as the Accused, were charged with assault with intent to do grievous bodily harm, it being alleged that they intentionally assaulted Charles Dlamini, to whom I shall refer as the Complainant, by chopping him with a bushknife on his forehead and face.

Accused No 1 was convicted as charged but Accused No 2 was convicted of being an accessory after the fact. Although it is not stated in so many words she was obviously convicted of being an accessory after the fact to the assault by Accused No 1 to do grievous bodily harm.

Accused No 1 was sentenced to 2 years imprisonment and Accused No 2 to 18 months imprisonment. Half of the sentence in each case was conditionally suspended. Appeal was noted in each case against both conviction and sentence.

I deal with the appeal of Accused No 1.

Accused No 2 was married to the complainant but she had obtained an order against him to restore conjugal rights to her by 31st August 1981.



The complainant travelled from Hlatikulu to his home at Nhlangano where Accused No 2 Jived for the purpose of restoring conjugal rights to her. Accused No 2 complained that she was ill and asked her brother to procure transport from Accused No 1 to convey her to hospital. A vehicle pulled up near the complainant's house. It was driven by Accused No 1 who appears tohave been on very intimate terms with Accused No 2. The complainant went out of his house to the car when it pulled up. There were words

between Accused No 1 and the complainant. Accused No 1, according to the facts found proved by the Magistrate, slashed the complainant across the face and forehead with a bushknife. It is clear from the medical report that the wound which was inflicted was a serious one. According to the doctor it was six inches long and was 1 centimetre deep. It extended from his right eye across his forehead. He received treatment in hospital for 9 days. According to the complainant he is still unable to close his eye, and the Magistrate stated that the complainant was disfigured. After seriously wounding the complainant Accused No 1 drove off without rendering assistance to the complainant.

The evidence of Accused No 1 was that when the Complainant came out to the car he hit at the Accused with a stick but the Accused avoided the blow. The Complainant, according to the Accused, was also carrying a stone. The Accused then slashed the bushknife in front of the Complainant not for the purpose of injuring him but only for the purpose of frightening him; but he accidentally cut the Complainant. I interpose here to say that if it was an accident it was strange that he did not render assistance. Accused No l's explanation for his possession of the bushknife was that he always carries it with him when he is called out at night.

The Magistrate gave very full reasons for his judgment. He came to the conclusion that Accused No 1, as Accused No 2's intimate friend, drove his car to the area of the Complainant's house. He went there expecting to see the Complainant and armed himself with a dangerous weapon with which he slashed the Complainant. He found that it was Accused No 1 who attacked the Complainant and rejected the Accused's evidence of Complainant's abortive attack upon him with a stick.



This is an appeal against the Magistrate's findings of fact and the power of this Court in overruling the Magistrate are therefore much circumscribed. With some hesitation I have nevertheless come to the conclusion that the Accused's explanation that he was first attacked by the Complainant with a stick may reasonably be true. I consider that I am entitled to come to that conclusion because, generally, the Magistrate's reasons for findings against Accused No 1 are not very clear, and also because the Magistrate appears merely to have "preferred" the evidence of the Complainant to that of the Accused.

In his reasons he stated "I tend to prefer that version of P.W. 2 (i.e. Complainant) that he had not used a stick or a stone on Accused No 1 that day."

Merely preferring the evidence of the Complainant was not, of course, sufficient in a criminal case. The Magistrate was required to accept the evidence of the Complainant, and, on good grounds, to reject that of the Accused.

But even if the Complainant was the aggressor there can be no doubt that whatever the Complainant might have done to the Accused No 1 with a stick was not sufficient to justify the vicious slashing of the Complainant with a bushknife.

The Accused, on his own showing, avoided the blow with the stick which fell to the ground. In my opinion Accused No 1 was guilty as charged on this approach to the case.

We are entitled to interfere with the Magistrate's sentence because he sentenced the Accused on findings of a more serious nature than those on which we have decided this appeal.

In my opinion the sentence imposed by the Magistrate should be set aside and that, instead, the Accused should be sentenced to a fire of E250 or 6 months imprisonment, together with a sentence of 6 months imprisonment which should be suspended for 3 years subject to his not being convicted during that period of an offence in which assault is an element.

I turn now to consider the case of Accused No 2. It was because of her relationship with the Complainant and Accused No 1 that this assault was committed. This relationship alone was not sufficient to implicate her in the assault itself.

After the assault, however, Accused No 2 told the police that she had caused the injury to the complainant. This, of course, was not true and her obvious intention in making the false statement was to protect Accused No 1. The Magistrate convicted her of being an accessory after the fact.

The appropriate charge for what the Accused did was probably attempting to defeat the course of justice but, in the view I take of the case, it is not necessary to decide whether the facts also gave rise to a change of being an accessory after the fact to the charge of assault with intent to do grievous bodily harm.

The general test of a good charge, as appears from Section 122(1) of the Criminal Law and Evidence Act, is that it should inform the Accused in a manner "reasonably sufficient" of what he is alleged to have done.

The charge in this case is that Accused No 2 chopped the Complainant with a bushknife, but she was convicted only because she falsely took the blame for what Accused No 1 had done.

This charge was clearly defective insofar as it involved Accused No 2 as an Accessory after the fact. This finding is not, however, the end of the matter because I have to consider the effect of Section 181 of the same Act which specifically provides that a person charged with an offence may be convicted as an accessory after the fact of such offence. In my opinion Section 181 is not repugnant to Section 122(1). They can be read together to mean that it is permissible to convict an Accused person of being an accessory after the fact on a charge as principal offender provided that there is some relationship between the charge and the facts relied on for a conviction as an accessory after the fact.

Where, however, as in this case, there is no relationship whatever between the facts alleged in the charge and those relied on for a conviction as an accessory after the fact the charge, or further particulars to the charge, or notice to the Accused, must direct his attention to what is really alleged against him. I find some support for what I have stated in Harcourt and Swft 2nd Ed. p. 344.

That the Accused may well have been completely misled by the charge as framed probably accounted for Accused No 2 closing her case without calling evidence, She no doubt took the view



that there was no evidence whatever of her participation in the assault. If she had realised that what was really alleged against her was that she had falsely taken the blame for the assault in order to shield Accused No.l, she may well have conducted her case differently.

It is a relevant factor that in the Prosecutor's argument in opposing the application for discharge at the close of the Crown case there was no mention of the Accused's false report to the Police, or even of the possibility of conviction as an Accessory after the fact. The argument wa solely on the basis that she participated in the assault itself.

Mr. Masina, Crown Counsel, conceded that the Appeal of Accused No 2 should be allowed for the reasons I have stated.

D.D. WILL

ACTING JUDGE

Nathan C.J. I agree: the appeal of Accused No 1 against his conviction is dismissed but. his appeal against sentence is allowed to the extent that the existing sentence is set aside and a sentence is imposed of a fine of E250 or 6 months imprisonment together with 6 months imprisonment suspended for

3 years subject to his not being convicted during that time of an offence of which an assault is an element. The appeal of Accused No 2 against both conviction and sentence is allowed.

C.J. NATHAN

CHIEF JUSTICE