IN THE HIGH COURT OF SWAZILAND

Crim. App. No.60/88

In the matter of

THE DIRECTOR OF PUBLIC	Appellant
PROSECUTIONS	
vs	
MANDLENKOSI MTHEMBU	Respondent
CORAM:	HANNAH, C.J.
FOR THE APPELLANT:	MR. HASELDEN
FOR THE RESPONDENT:	MR. SIMELANE

JUDGMENT

(7/12/88)

Hannah, C.J.

On the 25th March, 1988 the Mbabane Magistrate's Court dismissed a charge of common assault laid against the respondent on the ground that the charge was defective. The prosecutor thereupon made a written request that the magistrate state a case for the consideration of this Court and the magistrate purported to comply by providing written reasons for his ruling. The prosecutor's grounds of appeal were incorporated in the request to state a case and accordingly the matter was then set down for hearing.

I recite this brief history of the steps taken to bring the matter before this Court because it seems to me that the procedure envisaged by section 85 of the Magistrates' Court Act has not strictly been complied with. Strictly speaking the notice of appeal should follow the stating of a case and in certain cases it would not be possible properly to formulate the grounds until a case has been stated. However, no unfair prejudice has been caused by the course which has been followed in the present matter

and I am prepared to waive any technical irregularities.

The charge before the magistrate's court alleged that;

"The accused is guilty of the crime of common assault in that upon or about the 7th day of September 1987 at Mbabane Police New Camp in the district of Hhohho the said accused unlawfully assaulted Elcaine Mabina Dlamini by striking him on the face with a fist."

The learned magistrate ruled that this charge was fatally defective in that it failed to allege that the assault was intentional. He was led to this conclusion by the following passage contained in Hunt on South African Criminal Law and Procedure Vol.11 at page 445:

"What might be called the "traditional" common assault indictment contains no allegation of intention. This is probably due to the fallacy that common assault requires no "specific intent". In fact it is trite that common assault cannot be committed without mens rea in the form of intention. It is accordingly submitted that the "traditional" indictment is defective. Intention to assault must be alleged."

Initially the Crown did not seek to appeal against the magistrate's ruling that an express averment of intent is essential to a charge of common assault. It relied instead in its notice of appeal on the lateness of the defence objection to the indictment and the fact that the magistrate did not exercise the discretion conferred on him by section 154 of the Criminal Procedure and Evidence Act to amend the charge. However, leave to appeal against that ruling was granted at the outset of this hearing and accordingly the point now falls

to be considered.

I am in complete agreement with Hunt's statement that "it is trite that the common assault cannot be committed without mens rea in the form of intention" provided that by "intention" is meant "legal intention". See Beale v R 'n 979/81 SLR 35. I am also prepared to accept that common assault requires a specific intent in the sense that an assault consists of the intentional application of force or threat of force to the person of another. Unintentional application of force such as accidentally tripping and falling against another or accidentally bumping into another in the dark does not constitute an assault or at any rate an unlawful assault. But where I respectfully part company with the learned author is when he says that the "traditional" common assault indictment is probably based on a fallacy that common assault requires no specific intent. In my view the "traditional" common assault charge alleging only an "unlawful" assault is based on no fallacy at all. It is based on the fact that to add the word "intentional" would be mere surplusage because that element is a concomitant circumstance of assault. It is for this reason that we find a specimen indictment for common assault set out in Archibald's Criminal Pleading Evidence and Practice (42nd ed) at page 20 - 121 as follows:-

"Common Assault AB on the day of assaulted JN" and in Gardner and Lansdown's South African Criminal law and Procedure Vol.11 at page 1579 as -

"That A, hereinafter called the accused, is guilty of the crime of assault: In that upon or about and at the accused did wrongfully and unlawfully assault B, and did then and there strike

him with his fists upon the face and body giving hto him then, there, and thereby, certain wounds, bruises, injuries and hurts."

I say nothing to encourage the use of such formal language as set out in the latter specimen and to my mind the simpler the language used the better: but what is noteworthy is that in neither specimen does the word "intentionally" appear.

Section 122 (1) of the Criminal Procedure and Evidence Act provides that an indictment or summons shall set forth the offence with which the accused is charged in a manner which is reasonably sufficient to inform the accused of the nature of the charge. In my opinion where the charge is one of common assault it is sufficient compliance with this section to aver that the accused unlawfully assaulted AS on a particular day and at a particular place coupled with brief particulars of the nature of the assault. It follows that the learned magistrate, in my opinion, erred in making the ruling he did and his decision to acquit the respondent must therefore be set aside. In the circumstances I find it unnecessary to deal with the Crown's alternative submission concerning the stage of the proceedings at which the objection to the charge was made.

The case is remitted to the Magistrate's Court and the magistrate is directed to continue with the hearing.

N.R. Hannah

CHIEF JUSTICE