CRI/A/105/90

IN THE HIGH COURT OF LESOTHO

In the Appeal of :

'MASAMUEL MANTSOE Appellant

v

R E X

J U D G M E N T

Filed by the Hon. Mr. Justice M.L. Lehohla
on the 4th day of February, 1991

This is a double-barrelled appeal. The first aspect of the appeal is against the refusal by the Subordinate Court to grant bail pending appeal to this Court. The second aspect relates to the finding by the Court below that the appellant was guilty of assault with intent to do grievous bodily harm. The appellant is also aggrieved by the severity of sentence.

During the course of argument on behalf of the appellant regarding bail pending appeal the Court inquired if the Crown would have any objection to the granting of bail. The Crown had no objection and accordingly the appellant was released on her own recognizances pending appeal against conviction and severity of sentence.

The appellant's counsel was invited to address the Court on the appeal against conviction and sentence after ascertaining from the Crown that its understanding of today's proceeding was that the appeal on merits would be dealt with . In fact the Crown was of the mistaken belief that bail had previously been granted.

/The facts

The facts presented before the Court below were that P.W.2 the complainant 'Mantai Tsasanyane and the appellant are co-workers at a factory known as G.C.M.

On the day in question the complainant had occasion to put aside an apple she had been eating in order to look at an album being shown around by one of her colleagues at the factory. It was around lunch hour.

When the complainant sought to resume eating her apple she discovered that someone must have been helping herself to it judging by the considerable reduction in its size. She accordingly threw it down. Unfortunately it either hit the appellant or rolled on the ground and finally hit her. The complainant apologised when the appellant asked her why she hit her with an apple.

The appellant who was apparently not gratified with the complainant's apology started indirectly insulting the complainant by her mother's private parts. What appeared initially to be an oblique verbal thrust at the complainant became more and more of an invitation to put her hat in the ring. An exchange of swear words ensued between the two. Thanks to P.W.3 'Mankopo's intervention some semblance of peace was maintained and manifested by the parties' compliance with the request by P.W.3 to keep quiet. Indeed the prevalence of this fragile peace was further manifested by the fact that when the parties knocked off some 5 or so hours after the angry exchange of words the two went out together in the company of P.W.3 and headed for the gate in the fence outside the factory shed.

It was when the trio were about making the gate when the complainant felt someone hit her on the head. She looked back and saw the appellant was holding a shoe in her right hand and asking her to say what she had earlier been saying: obviously referring to the incident that had occurred some 5 hours earlier.

The appellant slapped the complainant on the face. The latter laughed thinking that this was some form of a joke. The appellant dealt the complainant some further blows with the shoe. The complainant ran away but the appellant chased after her having thwarted P.W.3's efforts to intervene. More blows were rained on the complainant who was caught up with by the appellant. No doubt feeling that it scarcely served any useful purpose to expose her back to her assailant's blows by further running away, the complainant picked up a stone, turned and hurled it at the appellant's head. The two grappled at each other. The complainant butted the appellant three times with her head but when she missed her on the fourth time the appellant bit off a chunk of flesh from the complainant's right ear as well as biting her left hand and her finger.

Mr. Peete for the appellant submitted that it is arguable that because there was this element of provocation coupled with the general set - to that these women engaged in, the appellant could not be said to have intended to cause the complainant any grievous harm. He buttressed his submission by saying that the appellant was not armed when she caused the injury which could be said to be grievous; such injury having been caused by use of the appellant's teeth. He argued further that the learned magistrate was misled and wrongly influenced by the medical evidence of an inexperienced doctor who testified that she had qualified only three years earlier and who made no distinction between what injury can be said to be dangerous to life and one such as an injury on the cartilage of an ear which by all accounts can hardly be described as grievous after the manner of this doctor.

Mr. Peete submitted that if indeed this injury was said to be that grievous the appellant could as well have been charged with attempted murder. He accordingly submitted that the appellant was at worst guilty of common assault for it could not, he submitted, be said the

appellant had beyond reasonable doubt formed the intention to cause grievous bodily harm. Moreover, so the argument went, all there could be said to be reflected by the facts of the case was loss of self-control.

My difficulty with the well put submissions on behalf of the appellant is that enormous lapse of time expired before the hostility was resumed by the appellant. It speaks volumes for the innocence with which the complainant viewed this resumption of hostility that she treated it as some form of a joke. That the appellant persisted in it can amount to only one thing, namely, that she intended to injure the complainant. The appellant had her full array of arsenal consisting of a shoe, slapping hand and teeth and was not content with exclusively using one form of weaponry until the most effective one was employed against a person who for the most part was running away from her.

As stated earlier Mr. Peete very ably made a plea to the Court to consider that it might be arguable that the intent to do grievous bodily harm was negatived by the provocation and or the general fracas that ensued.

I have already stated that what provocation there was, it appears, the length of time that expired between it and the assault should have enabled the appellant to cool down. Mr. Peete further submitted that in fact the provocation he was referring to related to the manner of the response that the appellant received from the complainant immediately before the assault. To my mind there is nothing untoward regarding the manner the complainant replied the appellant when the latter asked her to say or do again what she had said or done 5 hours earlier. Evidence shows that the complainant treated this as a joke, and that because she regarded the appellant as her mother she decided to run away instead of engaging in a duel with the appellant. So clearly, the alleged insult discernible from

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the complainant's behaviour bears no reasonable relationship to the treatment she was subjected to.

Mr. Peete's submission that there is something arguable in favour of the appellant is not borne out by the facts. It can possibly be granted if the Court were to project its view on the philosophical plane which admits of the view that there are a minimum of two sides to everything except the truth. Indeed even a sphere which seems to present only one side to the observer's eye i.e. the outside, has also the inside!!

Mr. Peete referred me to the unnumbered case of Khabang Sello in which Isaacs AJJ. as he then was, upheld the appellant's appeal in circumstances which revealed that she bit off her lover's tip of the tongue. In that case the facts revealed that the appellant's lover was thrusting his tongue into the appellant's mouth against her will. Thus the victim had constituted himself an intolerable nuisance. In this case it cannot be argued that the victim was thrusting her ear into the mouth of the appellant. The facts reveal that the appellant in her attempt to use one form of weapon after the other finally settled on using her teeth with which she sought, found and bit off the victim's part of the ear.

Much of the facts placed before the Court below was common cause. The complainant does not deny using a stone which landed on the appellant's head. But it seems the complainant resorted to this means only when the appellant's blows with a shoe rained without a let-up. Otherwise the complainant was hit with the shoe while she had sought means of avoiding a confrontation with the appellant.

It is significant that the appellant denies ever using the shoe to molest the complainant with. Amazingly though, she pointed out this shoe to P.W.1 - P.W. Rampa, the investigating officer who collected it as well as the piece of flesh torn from the complainant's ear.

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The only reasonable inference to draw from the denial regarding the appellant's use of the shoe to molest the complainant is that she wishes the Court to be of the view that it was for no reason and to quel no danger that the complainant resorted to using a stone to hit the appellant on the head and thus giving the appellant good enough reason to attack the complainant with her last and devasting arsenal, namely, teeth.

It is for this reason that I find that the Crown's submission that the use by the appellant of the shoe clearly showed her intention to injure the complainant. Thus she had no reason to go a step further and use teeth against a fleeing victim.

As long as the intention to injure has been proved it would seem irrelevant that, generally speaking, the resultant injury is only slight or even non-existent. It is for this reason that it would appear unfair that for this kind of situation minimum sentence was prescribed for otherwise a far less severe sentence could have sufficed.

However regrets have no place in establishing what offence has been committed . I accordingly dismissed the appeal against conviction but regret that the Court's hands are tied therefore the minimum sentence prescribed cannot be interfered with once the conviction for assault with intent to do grievous bodily harm has been secured.

J U D G E

4th February, 1991

For Appellant : Mr. Peete

For Respondent: Mr. Lenono