CRI/A/20/91

IN THE HIGH COURT OF LESOTHO

In the matter between:

'MANTAOTE NTAOTE **APPELLANT**

v

THE DIRECTOR OF PUBLIC PROSECUTION **RESPONDENT**

J U D G M E N T

Delivered by the Honourable Mrs. Justice K.J. Guni
Acting Judge on the 16th day of May, 1995

This is an appeal against the judgment of the subordinate Court of Maseru. The appellant was charged and convicted of the crime of assault with intent to do grievous bodily harm.

It appears that on 23/9/89 at about 21hrs there was a knock at the door of appellant's house. In that house that night, there were (4) four adults and four children. The adults were:

(1) the appellant
(2) her husband DW3, Mr. Bokotoane Ntaote,
(3) appellant's own sister DW2, Morongoe Lekoete,
(4) PW2 appellant's sister-in-law, 'Mathabiso Pulumo.

The appellant was still preparing an evening meal for her family. There were other preparations under way for the feast which was to be held the next day 24/9/89 for the christening of the appellant's child.

When the door was opened in response to that knock, in came the complainant. Two questions and an order were fired at her immediately and simultaneously by 'Mathabiso Pulumo and the appellant when she showed her face at the door step. "Where do you come from?" and "What do you want?" "Get out of my house. I do not want to see you". This leaves no doubt in my mind, that the complainant was not just unexpected guest but she was definitely unwanted guest at the appellant's house that night.

Before the complainant could even think of her response to the questions and that order this appellant instantly took off from the paraffin stove, the pot in which she was still cooking some food. The appellant took the stove and threw it at the complainant. It landed on her chest. It splashed paraffin all over her body which immediately became engulfed in flames.

Shocked, stunned, confused and blinded by the flames the complainant struggled a little before she could find her exit. She got out and put out the fire on her.

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The complainant ran to the neighbours of the appellant. Some ran away to hide because of her unsightly appearance. One of them helped her and conveyed her to the hospital where she was admitted and detained for approximately (10) ten weeks from 23/9/89 to 8/12/89.

The medical report and the doctor's evidence showed the trial court that the complainant sustained serious burns. 75% of her body was burnt; neck, chest, both arms and both legs. At the time of the trial, June 1990 which was about (9) nine months later after the attack the complainant had undergone two operations to rectify the contractions. These contractions according to the doctor's evidence were still going to recur. The scarring and disfigurement are permanent.

There was no attempt on the part of defence to deny that the attack, vicious as it was, was mounted by this appellant. Defence never questioned that the complainant sustained the injuries described by the doctor. The appellant accepted that she assaulted the complainant in the manner

described. It is sought here on appeal as was at the trial, to excuse this appellant from liability for her actions on the grounds that she acted under sudden and intense provocation.

What provoked the appellant?

It is not quite clear what it is that is alleged to have been done or said by the complainant to provoke this appellant. The definition of provocation as relied on by the appellant is found in Proclamation 42 of 1959. CRIMINAL LAW (HOMICIDE AMENDMENT)

The relevant provision relied on is Section 4 (a) "Provocations" means and includes, except as hereafter stated, any wrongful act or insult of such a nature as to be likely, when done or offered to an ordinary person or in the presence of an ordinary person to deprive him of his power of self control and to induce him to assault the person by whom the act or insult is done or offered."

The learned Magistrate at the court acquo rejected that this appellant was provoked. The appellant seems to claim that she was provoked by the complainant's actions coupled with the insults offered to her by the complainant. What are

those provocative actions done to this appellant by the complainant? -

(1) It is alleged that the appellant caught the complainant red handed committing adultery with the appellants husband.

(2) As if that was not provocative enough, the complainant went on to the appellant's house to insult or taunt the appellant about troubling her and/or crying for and complaining about her husband.

(3) On the night of the assault, it is alleged by the appellant that the complainant came into her house where she carried on a show or performance of a display of her leg or legs for the purpose of improperly enticing, inducing and/or corrupting her husband.

The existence of provocation must be determined from the evidence. Rex vs Thabiso Lejoetso LLR 1971-73 at page 177, Rex vs Mphosi 1963-66 H.C.T.L.R. at page 19. The learned Magistrate at the court acquo found no shred of evidence to support the allegation that this appellant was provoked. This appears in his reasons for Judgment for rejecting that suggestion that this appellant was provoked.

First of all the act of adultery according to the appellant was committed by the complainant with the appellant's husband on 25/3/89. This was too remote.

On the night in question, the appellant seemed to suggest that the complainant came to her house to jeer at her for crying for her husband.

Committing adultery with someone's spouse is an extreme and intense provocation to the other spouse, if it is committed in her/his presence.

The appellant does not suggest that she acted under this provocation for obvious reasons. This act was done, if at all, some (6) six months prior to the attack perpetrated by the appellant on the complainant.

The appellant claims that the act and insult done and offered by the complainant to which she reacted suddenly having lost her power of self control, were done and offered by the complainant on that night 23/9/89.

The appellant in her cross examination of the complainant seemed to suggest that the complainant came into the house to taunt her about complaining, crying for and/or troubling her about her husband. The appellant told the court acquo that the complainant asked her (3) three times if she (the

appellant) was still crying for her husband. The appellant's husband appeared to half heartedly support the evidence that his wife, the appellant was asked if she was still crying. There is no evidence to show the court that the appellant was found in a mood that indicated that she was crying or has been crying. I say half heartedly because he leaves out the words "for her husband". There is nothing to show the court, what could possibly have prompted the complainant to ask or remark "If the appellant was still crying. The appellant claimed that this sentence was repeated (3) three times by the complainant. Rubbing it in to that extent would be provocative.

Morongoe Lekoete who was called by the defence to support the claim that appellant was provoked, told the trial court that the complainant asked once "if the appellant was still crying about her husband". The appellant ordered the complainant (3) three times to get out of her house. Then the appellant took the burning paraffin stove and threw it at the complainant.

The three different versions of the defence allegation that the appellant was taunted by the complainant about crying about her husband made it very difficult for the trial court

to accept that it was ever done.

As regards the show of leg or legs the appellant's evidence is unsupported. The appellant's husband, the person who was to be immorally corrupted, impressed and/or enticed did not see such a performance. Morongoe claimed under cross examination that she saw the complainant raise her skirt to above her knees as they (the complainant and 'Mathabiso Pulumo) greeted each other. To Morongoe that was a sign of good friends meeting in happy circumstances. It is not clear whether Morongoe was referring to the lifting of skirts by the complainant or the embracing of the two friends.

It was argued for and on behalf of the appellant that the two friends, the complainant and the appellant's sister-in-law embraced and kissed as the complainant was let into the house by this witness. According to 'Mathabiso Pulumo's evidence nothing of the sort ever happened. Immediately the complainant showed her face into the house even before she could answer the questions asked by both ladies, the appellant and 'Mathabiso Pulumo, the appellant had already launched that attack on the complainant who received the burning paraffin stove on her bust

The learned Magistrate seems to have accepted that the attack was sudden. It happened immediately the complainant showed her face at the door step of the appellant's house. This attack as the court acquo found was not prompted by an unlawful act or insult done or offered by the complainant to the appellant. The appellant may have been offended by what she observed as an ugly face showing at her house at that night. She had every right to order what she considered an intruder to get out of her house.

The hesitation, which may have occurred while the complainant wondered how to react does not to me warrant such an attack as the one mounted by this appellant against the complainant.

This is more puzzling and calls into question the credibility of the appellant and her witnesses especially when considering that at the time she claims she found her husband and complainant committing adultery, she merely broke the window panes of the house where she claims her husband was locked in. she obeyed the marching orders made to her by the complainant. That gives the impression that the appellant has great power of self control. She turned her back against the highest

degree of provocation. She left her husband in the hands of his paramour.

The question of whether or not the actions and insults done and offered on that night amounted to provocation, did not arise. First of all the court had to be satisfied that the actions or insults as envisaged in the meaning of provocation in Section 4 (a) of Proclamation 42 of 1959, were infact done or said.

It appears to have been the finding of the court acquo that the attack was unprovoked. This disposes with the first ground of appeal. The second ground of appeal is that the court acquo erred by disregarding the fact that provocation is a partial defence. Provocation is not a defence in Roman Dutch Law which is the legal system applicable in this jurisdiction.

The statutory intervention, introduced by Proclamation 42 of 1959, makes provocation, if proved to exist, reduce a crime of murder to Culpable Homicide. The suggestion to extend the application of this statute to all other offences where intent is an essential element has not been accepted by our courts as the learned Authors in Burchell and Hunt show at

page 240.

In all the cases where provocation has been successful raised to negate the requisite intent, are murder cases. There is not a single case where provocation reduced assault with intent to do grievous bodily harm to common assault. The attempt, to raise provocation as a partial defence on a charge of assault with intent to do grievous bodily harm is being made for the very first time in this case. This is so despite the fact that the learned authors Burchell and Hunt, suggested in their book Vol.1 page 240 the possibility of the growth of the law towards that development. The book was first published in July 1970. There is no case law nor statute law adopting that approach to negate requisite intent wherever it is an essential element of the commission of the offence. The requisite intend to do grievous bodily harm was found to be firmly established by the trial court. In our present case. The facts show that the appellant threw at the complainant the burning paraffin stove.

The existence of the mens rea to cause grievous bodily harm the learned Magistrate pointed out in his judgment that it is established by the fact that the appellant used the stove.

The nature of the weapon used clearly proves the existance of the intend to do grievous bodily harm. One may ask why she used the stove in preference to the pot which she removed from that stove. she removed from that stove. The missile was fired at very close range as the person who opened the door because she was nearest, to the door was seated at that table where the stove was situated. The Learned Magistrate indicated that the appellant must have foreseen the possibility of the stove exploding on impact because of the heat. The trial court appears to have had no difficulties whatsoever to find the intent to cause grievous bodily hard established beyond reasonable doubt.

There are not two mutual destructive stories. The defence did not seek to challenge that the assault took place in the manner described. In an attempt to try and built an excuse for her action the appellant exaggerated and distorted some aspects of the same story. For example appellant claims that complainant knocked three (3) times at her door while she enquired twice; Without getting any response who it was that was knocking. The appellant further added more fact, that she was taunted or jeered at by the complainant about mourning over their love affairs with her husband. This, like the show of legs, floated like oil on top of the water, just not blending into the story.

The Court was never faces with the problem of having to make a choice of one of the two stories that were mutually destructive. The trial court was entitled to discard the trimmings added by the appellant, as they could not fit into the story.

On the question of Sentence, it has been argued for and on behalf of the appellant that the Sentence is severe especially considering that in the case of R v Nathane where death had occurred the accused who was convicted of Culpable Homicide was sentenced to the same number of years as this appellant in this case but four and half years were suspended.

In this case the court acquo found too many aggravating features. First of all the appellant and her husband endeavoured before court to shift the blame worthiness of the commission of this offence to another person. They wanted to impress upon the trial court and this court that the complainant called upon herself what she got. Despite the fact that it was the defence's evidence by Morongoe that the appellant and complainant were in good and talking terms. They regularly visited each other. To this effect the complainant and 'Mathabiso Pulumo also testified. Unexpected

sudden attack without any apparent provocation must be an aggravating feature.

Even if the complainant was not entitled to be treated with courtesy and respect because of suspicion that there was a love affair between her and appellant's husband who told the court that it had ended some nine (9)Months ago prior to the attack, the appellant while trying to enforce her rights to her husband, had no consideration for the complainants's own right to her health and\or life. The attack definitely threatened her life.

The injuries sustained by the complainant caused permanent scarring and disfigurement. The doctor pointed out in his evidence that the complainant will be permanently disabled. For mere suspicion that the complainant has an elicit love affair with her husband this appellant has punished her very severely for life. The learned Magistrate has not given his reasons for sentence. What was in his mind at the time he passed this sentence is known only to himself. At this stage without written reasons for this sentence we can do nothing but speculate as regard the factors which the learned Magistrate took into consideration when assessing

appropriate sentence. It is bearing this in mind that I feel this court can interfere with the sentence which otherwise this court would be reluctant to do.

The personal circumstances of the appellant do not seem to have been considered at all. The sentence should fit both the offence and the offender. The evidence on record shows that she too is not just a wife but also a mother. It is said the 4 children in the house that night of this terrible incident are hers and one of them was burned although slightly as it appears the child was not hospitalised.

The appellant has no criminal record. Despite this being one of the most serious offensees first offenders must be treated with some leniency.

The sentence of 5 years imprisonment is quashed and the sentence substituted by this court is one of 5 years imprisonment half of which is suspended for a period of 3 years on condition that the appellant does not within that period commit any involving violence.

K. J. GUNI
Acting Judge

For Appellant : Mrs. V. Kotelo
For the Crown : Mr. Mofelehetsi