C.of A.(CRI) No.3/95

IN THE LESOTHO COURT OF APPEAL

In the matter of :

'MANTAOTE NTAOTE Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTION Respondent

CORAM

BROWDE, J.A.
LEON J.A.
V.D. HEEVER, A.J.A.

J U D G M E N T

V.D. HEEVER A.J.A

The appellant was convicted in the Magistrate's Court at Maseru of assault with intent to do grievous bodily harm, and sentenced to five years' imprisonment. She was granted bail pending appeal to the High Court. On 16th May, 1995, her appeal against the conviction was dismissed, but the sentence imposed on her was reduced, in that half of the five years was suspended on appropriate conditions. The matter is before us on further appeal with the leave of the

Judge, Guni A.J. who dealt with the matter in the second instance, on the grounds that guidance as to the effect of provocation in matters other than murder charges, would be useful. Proclamation No. 42 of 1959 - the Homicide Amendment - deals expressis verbis only with the effect of provocation, if proved to exist, in relation to murder; which is then reduced to culpable homicide.

The charge related to the events which occurred in the home of the appellant and her husband during the early evening of 23rd September, 1989. The outline of what happened, is not in dispute. The details are disputed - mainly as regards what preceded the admitted assault perpetrated by the appellant on the complainant.

Facts which were common cause may be summarised as follows. Four adults were sitting at the table, when the complainant knocked at the door of the Ntaote's home. They were the appellant, her sister Morongoe Lekoete, her husband Bokotoane, and his sister 'Mathabiso Palumo. The brother and sister were drinking beer. Appellant was cooking over an open flame on a small paraffin stove. Ms Pulumo opened the door. Complainant came in. The appellant ordered the complainant out of the house, removed the pot of food from the stove and threw the stove itself at

complainant. It struck her on the chest and set her clothes alight. The fire spread and others were injured too: we know of Ms Pulumo, and a child of the appellant and her husband.

It was also common cause that there had been difficulties between the appellant and the complainant earlier, in May of 1989, when the appellant broke windows at the complainant's home. The details of why this happened are disputed.

At the trial, the appellant pleaded not guilty, and conducted her own defence. In cross-examining the complainant, she indicated what her version of the events would be: she, the appellant, had on one occasion, at night (since the lamp was on) found the complainant having intercourse at the complainant's house, with the appellant's husband. The complainant chased the appellant away, locked her husband in, and taunted the appellant then and often afterwards with being no match for complainant herself in her ability to satisfy her husband sexually. On the 23rd September, when the complainant entered the appellant's house, she asked the appellant several times "if I was still troubling you with my husband" (I gather this meant, whether the appellant still suspected the complainant of having (an amorous) relationship with the appellant's husband).

The complainant had denied in her evidence in chief already, that the appellant had found her husband in her - the complainant's - house, but admitted that the appellant had during May of 1989 broken windows of the complainant's house, in search of her husband. The appellant had come a few days later and apologized, and the complainant forgave her. In reply to questions by the Bench, she said that she thought their problems had been ironed out, since they visited to and fro in neighbourly fashion after the window-breaking episode. She denied that she had taunted the appellant in the past or had questioned her as suggested on this occasion: The attack on her had been completely unprovoked.

Complainant's evidence was corroborated to the hilt by the sister-in-law of the appellant, 'Mathabiso Pulumo, older sister of Bokotoane Ntaote. She told the court that on the night in question, preparations were in hand for the baptism, the following day, of the Ntaotes' child. She herself sat at the table and was nearest to the door, so opened it when there was a knock. The complainant came in. Ms Pulumo asked where the complainant had come from. The appellant also spoke to the complainant but before she could reply, the appellant took the pot off the stove and threw the latter at the complainant. The witness said

as the younger Ntaote child did to its head. She testified that the complainant had neither done nor said anything before the stove was thrown at her. She knew of an earlier quarrel, and that there had been a reconciliation: she had often seen the appellant at the complainant's house in the company of her younger sister Morongoe. This was not challenged by the appellant. Mrs. Pulumo knew nothing of her brother having been found under one blanket with the complainant on 27th May, 1989, and denied a suggestion that she had been party to an episode during which the complainant had enticed him away from home on that day.

The two women were the only prosecution witnesses on the merits. Medical evidence was adduced from which it is clear that the complainant suffered severe burns, has been permanently scarred, and underwent a series of operations: initially, for skin grafts, and thereafter in (unsuccessful) attempts to correct flexion contractures of the neck.

The appellant, her younger sister, Morongoe Lekoete, and her husband testified for the defence. Their versions differed in material respects, and contained details that the prosecution was given no opportunity to meet, not having been put to the prosecution witnesses. Similarly, what now appears to

be relied on as a defence was not pertinently alleged by either the appellant or either of the witnesses she called, so that it could be tested by cross-examination. I return to this below.

According to the appellant, when there was a knock at the door that night, she herself asked who was there, but received no reply. This happened a second time. At the third knock, Ms Pulumo opened the door and the complainant came in. After the complainant and Ms Pulumo had greeted one another amicably by touching cheeks, the complainant came next to the table "holding her dress on one side ...(and) asked if I was still complaining about my husband". The appellant reprimanded her for asking such a question and ordered her out. (None of this had been put to Ms Pulumo) The complainant not only refused to go, but repeated the same question three times. The appellant became so angry that she "lost all perceptions of self-control", took the burning paraffin stove and threw it at the complainant. She says that she and her husband had often quarrelled "on matters relating to his love affairs with the complainant". However, her replies under cross-examination by the prosecutor are incompatible with the truth of a story, in itself improbable, of an arrogant mistress coming to challenge the injured wife not only in her own home, but in the presence of her

husband and other relatives. Pertinently asked, for example, the appellant said that the complainant's lifting of her dress had partially exposed her thighs - one surmises that she suggests, to entice the husband and/or challenge the wife - but could not explain satisfactorily why she had omitted to put this in cross-examination to the complainant. She had "forgotten" to do so.

She called her younger sister as a witness. Her testimony differed in material respects from that of the appellant herself. When the complainant knocked on the door, nobody responded. The complainant's action in raising her dress, when she kissed Ms Pulumo was "a sign of good friends meeting in happiness". She herself often visits her sister, the appellant, and never heard of any quarrel concerning the complainant. The appellant and her sister-in-law Ms Pulumo are on good terms (ergo, Ms Pulumo has no motive to lie in testifying for the prosecution). She did not suggest that Ms Pulumo's evidence, that the sisters had been seen together at the complainant's house, was false.

The last defence witness, was the appellant's husband, Bokotoane Ntaote. His version also differs in detail from that of the appellant. He does not speak of the three knocks on the door, and the

appellant's questions as to the identity of the person knocking. He does repeat the highly improbable story that the complainant challenged the appellant in her own home before witnesses and persisted despite having been ordered out. The story may be regarded improbable because Bokotoane himself, though admitting that he had on 27 May 1989 been found by his wife sleeping with the complainant, says that the affair came to an end on that day, and he no longer loved the complainant. He conceded under cross-examination that the complainant after this alleged episode continued to visit the Ntaote house. He tries to explain this - despite the alleged adultery - with reference to the friendship between the complainant and his sister Ms Pulumo; who, however, has her own home where this friendship could have been nurtured. He did not see the (provocative?) conduct to which the appellant testified; i.e. the complainant's pulling up her dress.

It would be as well, before determining where this evidence leads us, to start with a clarification of terms and concepts.

If I provoke someone, it means no more than that I do, or say something which irritates that person, makes him angry. That an accused person was angry when he performed a certain act, may be relevant in

both morality (which could have a bearing on the sentence) and in logic (which has a bearing on conviction).

If an accused was angry because of some injustice done to him - for example, that someone tripped him as they passed one another, or swore at him - that injustice and resultant anger may, from a moral point of view, constitute a mitigating or an aggravating factor, should the accused punch the person who so aroused his anger, depending on the circumstances. It could (not must) be a mitigating factor should the accused have reacted forthwith and should his reaction not be disproportionate to the particular provocative act. It would remain morally inexcusable, for example, to stab someone who merely poked fun at the hat you were wearing. The norms of a particular society determine whether a reasonable member of that society would have reacted in the same way to the provocation undergone. Provocation may be an aggravating circumstance, for purposes of sentence, where the reaction to it was not immediate. Where an accused delays action and, having had time to reflect, plans and in due course executes revenge, that is normally regarded as morally reprehensible by society, since it perpetuates the unrest within the society originating in the poor behaviour of the complainant. And anger can never be a mitigating factor for

purposes of sentence, where the conduct of the complainant is lawful and proper. Again merely as an example, a rapist who assaults the husband of his victim has no moral claim to compassion for having become angry when the husband tried to thwart the rapist's intentions.

So much for morality and sentencing.

As regards logic and the law: the onus burdens the Crown to prove that an offender intended the consequences of his actions: had the necessary mens rea, in other words. There is a presumption of logic, not of law, that normal people know the difference between right and wrong and are ordinarily capable of acting in accordance with this distinction. The South African Appellate Division said in Kinsley v. The State, 9th March, 1995, not yet reported, at page 37

> "Criminal law for purposes of conviction ... constitutes a set of norms applicable to sane adult members of society in general, not different norms depending upon the personality of the offender. Then virtue would be punished and indiscipline rewarded: the short-tempered man absolved for the lack of control required of his more restrained brother. As a matter of self-preservation society expects its members.... to keep their emotions sufficiently in check to avoid harming others and the requirement is a realistic one since experience teaches that people normally do. Cf S v. Swanepoel, 1983(1) SA 434 (A), 458 A-D."

In Roman-Dutch law, in short, provocation alone does not ordinarily constitute a complete defence to a criminal charge. The existence of provocation may negative the customary inference that a particular accused was, under the circumstances established by the evidence, mentally capable of forming, and did in fact form, such specific intention as may be an integral ingredient of the particular offence charged: to cause the death of his victim, on a murder charge; or to cause grievous bodily injury, in a case such as the present one. In South Africa it has been accepted that non-pathological criminal incapacity may constitute a complete defence to a criminal charge, where a particular accused, though sane, was because of particular circumstances revealed in the evidence, incapable of forming any illegal intention at all. See e.g. S. v. Laubscher 1988(1) SA 163(A), 167 F-G; S. v Stellmacher, 1983(2) SA 181 (SWA), 188 B; S. v. Campher, 1987(1) SA 940 (A), 959 C, 965 H; S. v. Van Vuuren, 1983(1) 12 (A), 17 G-H; S. v. Bailey 1982(3) SA 772 (A), 796 C-D. Where this defence is raised, the onus burdens the State to prove beyond reasonable doubt that an accused could not only distinguish between right and wrong, but was at the time capable of acting in accordance with the appreciation of that distinction. Cf Campher's case, supra, at p.966 F - I; S. v. Calitz, 1990(1) SACR 119 (A) at 126H.

The Court a quo was correct in regarding the statutory provision relating to the effect of provocation in a murder charge, as not being applicable to other offences. Cf by analogy S. v. Mokonto, 1971(a) SA 319 (A), 326G. And it is unnecessary and indeed undesirable for present purposes to decide whether non-pathological criminal incapacity should be recognised as a complete defence in Lesotho, since a foundation must be laid in the evidence from which inferences may be drawn; as opposed to indulging in mere speculation. In the unreported judgment in Kinsley's case, referred to above, the court warned that the evidence of an accused that he did not know what he was doing - there, because of extreme anger superimposed on severe intoxication - should be viewed with circumspection. Normally a sane adult, despite anger, has criminal capacity even when under the influence of liquor. In the matter before us, there was no attempt to lay any foundation in the evidence for a defence of non-pathological criminal incapacity due to intense emotion.

The appellant did not testify that the evidence of her sister-in-law that the appellant and her younger sister visited the complainant, was false. The complainant denied that she had taunted the appellant in any way. She was corroborated both by

the probabilities and the appellant's sister-in-law who had no axe to grind against the appellant. Most important: the appellant's allegation that she lost her self-control means no more than that she did not control her impulse. It cannot mean that she was incapable of doing so. She is a mature woman, the mother of four children, and there was no suggestion that her normal societal inhibitions were relaxed on the grounds that she, too, had been drinking. Her actions certainly do not warrant the inference, as a reasonable one, that her actions were involuntary, unintentional. It was, as the trial magistrate pointed out, not the first object to hand that she threw at the complainant. She first removed the pot of food from the stove. This could only have been either to ensure that the family's meal would not go to waste or to use the far more injurious weapon against the complainant, and speaks of rational, not automatic, conduct. There can in my view be no suggestion that she was not aware that the burning stove would probably cause the complainant grievous injury. She herself when asked, contrasted the injuries received by the complainant and those received by others in the room:

"Q: Why did you burn other people in the house other than [the complainant]?

A: It was during a fight and that was not

intentional at all."

As regards the sentence, even assuming that the appellant was angered by challenging conduct in her own house by a woman she perceived as a rival, the complainant was cruelly injured and badly scarred. There is no suggestion in the record of any remorse on the part of the appellant, nor any apology or attempt to make amends. In my view, there are no grounds which would justify interference with the sentence imposed on the appellant as reduced by the court a quo.

In the result, the appeal is dismissed both as regards the conviction and the sentence.

LEONORA VAN DEN HEEVER
ACTING JUDGE OF APPEAL

I agree

J. BROWDE
JUDGE OF APPEAL

I agree

R. N. LEON
JUDGE OF APPEAL

Delivered on the 19 day of January, 1996.