CRI/T/90/99

IN THE HIGH COURT OF LESOTHO

In the matter between:

THE CROWN

V

MOKOROSI ABIEL CHOBOKOANE

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu
on the 16th day of August, 2000

On the 23rd May 2000 this case commenced. Mr *Griffith* was for the Crown and Mr *Loubscher* was for the accused.

Accused is charged with the crime of attempted murder:

> In that upon or about the 27th January, 1997, and at or near Ha Keiso, Lithabaneng in the district of Maseru, the said accused, did unlawfully shoot Malekhoba Manapo Chobokoane with the intention of killing her.

To this charge, accused pleaded not guilty.

The first witness was Malekhoba Chobokoane who will hereinafter be referred to as Mrs Chobokoane. She was the wife of the accused on the 27th January, 1999 when the events with which the accused is charged occurred.

Mrs Chobokoane told the court that they were married on the 6th April 1985. There are three children (all of whom are boys) born of the marriage. Mrs Chobokoane told the court that the marriage was happy, but it had problems before the end of a year. Before the end of 1985 they had problems because of the love affair between accused and a lady by the name of Thato. Mrs Chobokoane became aware of this love affair towards the end of 1985. They had many arguments once she had discovered this fact. There were daily arguments after this. Thereafter the court discouraged Mrs Chobokoane wife from disclosing the details Mrs Chobokoane might have wished. The court was under the impression that the washing of dirty linen in public should be kept to the minimum. Mrs Chobokoane said she found photographs, but that was not pursued.

Theirs were fights that were verbal but which sometimes led to physical violence. Mrs Chobokoane was at the insistence of the court confined to the most important incidents. On one occasion when she had found photos of Thato among the things of the accused there was an argument which led the accused to assault her. Because of the courts interruption Mrs Chobokoane was not given an opportunity to say more about this matter. She only limited herself to saying

there were many quarrels which ended in fights.

Prior to the 27th January 1997, the most serious quarrel was over the baptism of their child. About four months before, accused had decided without consulting her to go and baptise their youngest child who was a baby. Accused wanted her to prepare the child and go along with the arrangements the accused had made. They had never discussed the matter because their relations were strained. Accused decided to take the baby by force, Mrs Chobokoane held on to the child and they began to pull the baby of six to seven months in different directions. Eventually Mrs Chobokoane let the child go and took the keys of accused's car and the jacket of the accused. Mrs Chobokoane says she ended taking away the accused's jacket at the time she was running for her life leaving the accused with the baby. Mr *Loubscher* objected to this matter being pursued because it was irrelevant. His objection was sustained, consequently Mrs Chobokoane never told us what she felt was important. The court was of the view that while family matters should be pursued, this should be done in moderation.

At that stage Mr *Loubscher* disclosed that the accused defence would be "sane automatism". The court noted that Mr *Loubscher* had not disclosed this defence earlier. The court called both counsel to its Chambers and told both counsel that it had never heard of such a defence in Lesotho before in a case of this nature. Mr *Loubscher* assured the court that such a defence now exist in Lesotho and produced a judgment of *Rex v Moteane* CIV/T/5/97 that had just

been delivered by my brother Lehohla J on the 8th May 2000, less than two weeks before. I was stunned and humbled because this court does not always have paper, and it is short of paper for months, its judgments are not often circulated. For this reason a judge of this court often does not know what his brother judges are doing, and the judgments of this court save his own.

On the 27th January 1997 in the morning, Mrs Chobokoane opened the brief-case of the accused and found a letter. On its envelope was written Thandi. She suspected the letter was written by her husband to her husband's lover Thato, and that was what she was looking for. She put the letter in her handbag and left. The letter was handed in and marked exhibit "A". The letter was in Sesotho and the court ordered it to be translated. Mrs Chobokoane read the letter at the place of her work. Around 10 or 11 a.m accused came to Mrs Chobokoane's office. Accused wanted her to come and talk to him in private, but she should bring her handbag with her. Mrs Chobokoane told him to come at 1 p.m. so that they could talk. Immediately after the accused had left, Mrs Chobokoane asked from her boss for leave to go to Maseru. She got permission and went to see her lawyer Mr Matsau with the letter. Accused who was also attending school at Roma had spoken to her politely.

Later that day after she had come back home, accused came at 7 p.m. and found her in the kitchen. Mrs Chobokoane was carrying a baby and was with a domestic servant. Accused wanted them to go to the bedroom to talk. Mrs Chobokoane insisted that they should talk in the kitchen. She asked the domestic

servant to go out with the child. Accused shouted at Mrs Chobokoane (after the servant had left). He asked her why he calls him a rag. It came to her mind that she had called him a rag before accused's sister, where Thato was staying because Thato's husband had expelled her.

Accused was now close to her and her reply was that accused should shoot her and then shoot himself because after that he would lie in sorrow. Accused at that time clapped her with an open hand. Mrs Chobokoane picked up a chair and threw it at the accused although she does not recall if she succeeded.

As she was holding the back of accused's shirt, she realized that accused automatic pistol had fallen on the floor. It had been at the waist of the accused. Accused had it on the waist before the fight. Accused wanted to go for the pistol, so Mrs Chobokoane pulled him away from it to the door leading to the passage. Mrs Chobokoane says she did so in order to be able to get out of the house. She ran through the a passage got out of the house down the steps of the verandah and as she ran towards the gate she fell in the garden area. Accused came down the stairs holding his pistol. As he approached, she heard some sound of the pistol, but it was not shooting. Mrs Chobokoane told the court she does not know what accused had done to the pistol as she is not familiar to firearms.

Accused then got to her, on the right side, he knelt down next to her, at this time she was also kneeling, accused then took her right hand and raised it up. Shot her on the right arm towards the elbow and the bullet went through.

After that the accused raised her left arm and shot it near the armpit. Accused shot the arm from the right and the bullet exited on the right. At that time accused had knelt on her left side.

Accused then rose up, and walked 3 paces, and she heard him talking on the cell-phone say father, father I have made some mistakes. He was moving towards the house and she was sitting waiting for him. A lady who was a neighbour came before the shooting, was shouting "Ntate Chobokoane, Ntate Chobokoane and accused said get away, get away. After that accused entered the house. When accused came back to where Mrs Chobokoane was, accused asked her to go to the doctor. Mrs Chobokoane's reply was, how could she stand up because accused had cut her hands. Her job was that of secretary, hands which work for him and the children

Accused then got her into his vehicle and took her to hospital. On the way accused asked Malikeleli Maphalla to help her. Mrs Chobokoane had injuries on both arms. Her left arm was in fact fractured according to X-rays. At Queen Elizabeth II hospital she was told she had another would on the stomach. It was at the lower part of the abdomen. The X-ray people said there was a bullet in the stomach.

The left hand is still numb. She no more can rub hard when she washes clothes. The medical report was handed and marked Exhibit "B. There was no objection. The firearm was also handed in by consent. It is a CZ ·83 7·65

calibre automatic pistol serial number 04075 made in Czechoslovakia. It is marked Exhibit 1.

Under cross-examination Mrs Chobokoane said she lives with Bahlakoana the last born of her three children. Accused visits Bahlakoana on a regular basis. The two other children live with her father and mother-in-law. Bahlakoana loves his father. Accused is partly a good father.

The marriage began to be unhappy in 1985 because of accused's lover Thato. Around 1988 to 89 they moved to their own house. Mrs Chobokoane did not like to live with her in-laws. As time went on, their marital problems became serious. Sometimes she did not even cook for the accused. Their problems would go on for weeks. There was no intimacy at night as a result of the problems. There would be no sexual relations. Mrs Chobokoane said she does not remember how long this would go on. She stopped having sexual relations regularly with her husband between 1994 and 1997. It went on longer, even when she got pregnant accused had forced her to have sexual relations with him. Mrs Chobokoane says she did not sexual relations because accused was not asking for them. Accused no more wanted them to have sexual relations. He was not asking. He never asked except the day she fell pregnant. She was unwilling that day. After she fell pregnant they had sex though not on a regular basis. Once every three to four months.

It is correct that during the month before the shooting they had had no

sexual relations.

Accused was a student at Roma University. He got the diploma in Law before marriage. The BA degree during marriage. After getting a degree he went back to the High Court, as Assistant Registrar. Accused obtained his LL.B degree in 1997. Mrs Chobokoane says he does not know if he became a Magistrate after the LL.B degree, because they were no more living together.

She took the letter from accused's brief case, and left for Roma, they no more went together. Accused did not ask for the letter at Roma. He was desperate to get the letter though he did not say so. Mrs Chobokoane admitted, she was in contact with the husband of Thato (her husband's lover).

On the 25th December 1996 (on Christmas Day) Thato's husband came to accused's home early in the morning. During their talk with her husband he said "Chobokoane I am giving you Thato as your wife. She will be yours". Their conversation was brief and longish. They were not exchanging words. Asked to explain, Mrs Chobokoane said Ralengana arrived and said "Chobokoane I give you Thato to be your wife. I am tired of seeking and chasing you. You leave your wife in the house and start chasing after our wives". That is the whole conversation.

Asked if her husband (the accused) was threatened. Mrs Chobokoane said she is not sure if the accused was threatened that day or before. What is a fact

is that two policemen had come to her place of work and complained that accused's father had complained that she was arranging with somebody to have his son assaulted. Her answer was "Gentlemen, old as you are, you have been sent from the Office of Mr Makoaba to come and look after the prostitution of the accused, what do you expect me to do?" She took the photographs of Thato that had been in the possession of the accused. These were now in her possession. The police looked at them apologised and left. The police asked to be taken to the residence of the accused. They met accused on the way, and she showed them the accused and left.

Mrs Chobokoane did not comment on the accused's version concerning the letter on the day of the shooting, because accused never asked for the letter. Mrs Chobokoane denied accused ever asked for the letter in the kitchen. Mrs Chobokoane repeated the third time that accused never asked for the letter. He did invite her to the bedroom and she refused. Accused never went to look for her handbag and for the letter. Mrs Chobokoane was emphatic that accused never left the kitchen to go and look for the letter. Mrs Chobokoane denied she ever switched off the main switch while accused was looking for the letter. She denied she switched off the light four times, she says there was light in the kitchen all the time.

The only point of agreement was that accused's gun fell at one stage. She agrees a scuffle broke out for possession of the gun and she tore the shirt of the accused and ran out of the house.

Mrs Chobokoane agreed they did not normally fight that way, that was unique. Mrs Chobokoane denied that the accused did not remember what happened.

After the shooting, accused did go to light the house which had not been lit. The woman Malekhethoa might have come before or after the shooting. Mrs Chobokoane is not sure.

Mrs Chobokoane denied Thato's husband ever threatened accused on Christmas Day. Mrs Chobokoane says Thato's husband said he was not armed and even raised his hands. She added that she is not sure if Thato's husband was drunk. She denied they talked outside the house. Accused could not go outside as he only had a trousers on but no shirt.

The next witness was Malikeleli Maphalla. Duly sworn, she told the court that she was their neighbour. She had earlier heard a gun report. Later accused asked her husband to allow her to help him take his wife to hospital. Mrs Chobokoane on the way to hospital told her to tell the world if she should die that accused shot her when she reprimanded him. Accused did not say anything. PW2 Malikeleli Maphalla was followed by PW3 Trooper Badela who is his sworn evidence said he took accused statement on the 27th January 1997. He then read it to the accused and accused signed it. The statement was Exhibit "C" when it was handed in.

Mr *Griffith* for the crown asked for a postponement because he had not been aware of the accused's defence. There was a time (during trial) that he was under the impression it would be temporary insanity now Mr *Loubsher* has made it clear that the accused's defence would be "sane automatism". He would ask for a postponement so that accused could be examined by a psychologist or psychiatrist that had been obtained by the Crown. The case was adjourned and accused was ordered to submit to medical examination.

When the case resumed, Dr N Olivier was the fourth witness for the Crown. Duly sworn, he said he was a psychologist in private practice He held a Masters and Doctorate in Philosophy of Orange Free State University. He had lectured at the Universities of Orange Free State and Stellenbosch. He had given evidence of a psychological nature in divorces and criminal cases. He had had a part-time practice is psychology since 1990. From 1996 he was in full time practice. Dr Olivier had examined and evaluated the accused on the 27th June 2000. Accused had been referred to him by Mr *Griffith*, the Crown Counsel. After that he prepared a report which he read to the court and handed it in. This report was marked Exhibit "D". Dr Olivier's conclusion was that accused was not acting automatically when he shot his wife. If accused was "sanely automatic at the time he shot his wife, he would have shot her indiscriminately. In the case before the court accused's behaviour was rational and controlled. Accused absolutely knew what he was doing.

Under cross-examination Dr Olivier said when he compiled his report he

had the benefit a summary of evidence already given in court when he evaluated and interviewed the accused. The psychological term they use for "sane automatism" is personality decompensation. When a person suffers personality compensation, it is where a person has had build up of extreme stress, which reaches a culmination point (unless he has adequate emotional and stress pressure reduction internal mechanisms). When there are no internal coping mechanism, the dam of emotional stress fill up to the brim. If a person is in that state is involved in a stressful incident that can act as at trigger mechanism, and the emotional dam bursts. In that state such a person does not know what he is doing, his actions are automatic and he will not remember what happened when he was in that state. Actions of such a person are typified by extreme and uncontrolled violence. Very few people ever suffer from personality decompensation or "sane automatism. A domestic scene can build up to an extreme level of stress in which personality decompensation can occur.

Dr Olivier found signs of a tendency towards impulsive behaviour in the accused. Accused also suffered from severe anxiety of behaviour. Accused is normal because no person is perfect. Normality is a relative term and its scope is broad. Every person has feelings of doing a lot of antisocial and even illegal acts but there are internal and external controls such as society's expectations of good manners, morals, conventions and laws in society. Accused, because of his high level of anxiety is a candidate for personality decompensation.

If accused was sleep-walking, he could have loaded, a pistol and if he is

very proficient in the use of a firearm, cock it and fire it. These can be automatic actions. Dr Olivier says he differs from Professor Weyer (who was his teacher) because (when accused shot his wife) he shows himself to have inflicted injuries in a manner and at spots of the body that lead him to the conclusion that the accused had executive and cognitive control of the shooting.

He has the highest esteem of Professor Weyer, but it has to be noted that while most of their findings are the same, Professor Weyer did not have the summary of the evidence given at the trial, while he had it. If accused had not raised one arm of his wife, shot it and then raised the next arm, but instead shot his wife all over the body or the chest he might have agreed with Professor Weyer. Personality decompensation is characterised by absence of executive planned cognitive acts. Dr Olivier said he did not ask accused about his love for his wife, but it is a strange way of loving a person by shooting both arms of a loved one. If what accused did is the result of personality decompenstion, then lawyers and magistrates in the position of the accused cannot commit crime. Dr Olivier conceded that he could be wrong but he was sure he was right.

Answering questions from the court Dr Olivier said the terms used and the theory of psychology change all the time. In the past personality decompensation was regarded as temporary insanity. Today even the term insanity is not used any more in psychology. The problem lies in the use of words. Law has its own definitions. Mental disease comes from a model of characterisation of mental states. The medical model differs from the psychological one. Both models are

changing all the time as knowledge and classification of conditions of the mind develop.

The Crown closed its case.

The defence called the accused, who gave sworn evidence. Accused said he is 43 years old. He had been married to his wife for 12 years. From the beginning, it was never a happy marriage. They married in 1985 but by 1986 he had a love affair with Thato, shortly after their marriage. Entering into an extra-marital affair made things worse. He did not intend to divorce his wife, the love affair came as an accident, it was not intended. Accused said the idea of terminating his relationship with Thato came to his mind. Thato's husband was told of this love affair by accused's wife.

On the day Thato's husband came to accused's home he was in the bathroom. Thato's husband invited him outside, so that they could talk, as he was not armed. When they got outside, Thato's husband said many things (as he was drunk) he said accused should get away from his wife otherwise he would kill him. He took the threat seriously as Thato's husband was a criminal. Accused already had a licensed fire-arm. Up to that time he was not in the habit of carrying a fire-arm. Accused told the court that from that day he always carried a fire-arm in case Thato's husband attacked him.

Accused said his studies were difficult and stressful because of his domestic

situation. His mind was not at ease when he was studying. On the 27th January 1997 his wife had tried the door while he was in the bathroom. It was locked, he knew it was his wife because she is the only one who used to do so. He then went to Roma where he was studying together with the children who attended school there. When he got to Roma, he discovered that his letter was missing from his brief-case. What was there was only the envelope. He was afraid that his wife would give the letter to his lover's (i.e Thato's) husband. He was afraid of Thato's husband. He went to his wife's office and asked for the letter. His wife said he did not know about it and asked him to leave as she was busy. They would meet during the lunch hour.

At this time accused was so stressed and frightened that he attended only a few of the lectures. He came down to Maseru and found his wife at home at about 6.30 p.m. He found her in the kitchen. Accused asked her to come to the bedroom but she refused. He wanted to ask her about the letter, and she told the maid to get out. Accused asked his wife to bring back the letter but she denied knowledge of it. Accused said his wife should bring the letter that belongs to a rag. His wife asked him why he said that, accused did not reply because he knew, she had said that to his own sister.

He asked her to search for the handbag but she refused. Accused said he would search the whole house. There was no light on when he switched the light on. His wife switched off the light and said she was the only one who paid for the electricity. Accused says he switched it on, she switched it off. Accused says

he slapped her. She lifted the chair trying to hit him with it. He blocked the chair. As he did this, his cell-phone and pistol fell down. His wife went for the gun, accused stopped her as he was afraid she might shoot him with it. Accused says he only remember that they fought over the gun. From then on, he does not remember anything. They had both left the chair the moment the gun fell.

Accused says he only remembers someone calling his name and that he said go away. She saw his wife kneeling on the ground next to the car. It was as if he was waking up from a deep sleep. He was standing next to his wife near the car. She was bleeding all over the body. He tried to think of what had happened, he found he did not know what had happened. He suspected that because his wife was bleeding and he had a gun in his hand, he must have done something terrible.

Accused then 'phoned his father, but found his mother. He told her that he thinks he must have done something terrible. He then carried his wife to the car. He went to look for the children next door. When he could not find them, he drove off. On the way he collected a neighbour to support his wife. After taking his wife to hospital, he went to the police where he handed in his gun and said he had shot his wife. He continued to go for lecturers. Two weeks later he was told to appear before a magistrate for a remand.

Accused said he was frighted that day and sweating. He was angry and stressed. He got even angrier when his wife kept on switching off the light, to stop him looking for the letter. When he saw his wife bleeding he was

remorseful, frightened and afraid she might die. He never thought of shooting his wife. Listening to his wife giving evidence, he says this was the most serious incident in their marriage. They are on good terms now even though they are now divorced.

In cross-examination accused said he never had problem with his studies. He never failed any subjects between 1995 and 1997. This shooting incident had no effect on the examinations he wrote at the end of April 1997, about three months later. He was Assistant Registrar from 1989 to 1997. He started sitting as a magistrate in September 1997. His career had been in law and he has studied law extensively. He suffered stress because of family relations and studies.

Accused says his relationship with Thato began in 1986 after he had married his wife in 1985. Accused says he felt betrayed but does not elaborate by saying how. Accused says he tried to sort his marital problems without success. He agrees with the suggestion that he thought having an affair was the answer to his problems. This led to stress because he could not cope because the marriage was still there. The affair with Thato still continues even after 14 years. Even if he had stopped the affair, his marital problems would continue. His solution to his marital problems was more involvement in the love affair. His wife found out about the love affair between 1994 and 1995 before that she was only suspicious. Thato's husband had been jailed between 1990 and 1991.

He learned from Thato that his wife had told Thato's husband of their love

affair. The love affair still continued, fear of Thato's husband was not a major factor. Accused corrected this statement and said the fear of Thato's husband was a major factor. He could not stop the affair because his wife would still ill-treat him. He was threatened in 1997 two weeks later the shooting incident occurred.

He never attempted to terminate the love affair with Thato because he never treated it as important, his marriage was more important. The fear of the husband (although it compounded his problems) did not stop the affair. Accused disagreed with counsel that had he stopped the affair, that would remove the stress because somehow it lessened the stress in the family— in him to be direct. Divorce would not help.

In his view, the incident of physical violence in the kitchen was the most serious they had ever had. In 1994 when his wife was stopping her from looking for his passport he slapped her, and she slapped him back. In 1996 they had fought over the baptism of their child. He had warned her of his intention and the date but she said nothing as they were not on speaking terms. When he wanted to wash the baby himself, she stopped him physically. She then took the keys of the vehicle and his clothes. Eventually he took the baby to his parents' house to wash him there.

The incident over the passport according to accused led to much more, he was not given an opportunity to explain. It was not only that he assaulted her and she smashed the windscreen of the car. In fact they had spent over sixteen hours

with the wife carrying a stone threatening to smash the car. She was still being served with refreshments while he could not move for fear that she would get a chance to smash the car. In the morning of the following day, the wife made as if she was going away. That was when she smashed the windscreen of the car after evading him.

On the issue of being stabbed with a knife accused said the wife did not stab her. She took out a knife from the drawer at the time they were squabbling over the telephone. During the struggle over the telephone, he had a slight cut in the hand. He cannot even remember where he was cut. She did not bother when he was bleeding. He completely forgot about the knife incident.

About the intention to divorce his wife that the letter discloses, he was not serious. He was lying to Thato, it was a love letter.

Accused said he had forgotten about telling the policeman the full details. In fact his wife had refused with the letter and added that accused had rather shoot her. He does not remember following her and shooting her. He only told the policeman what he thought happened, not what actually happened. At the time he felt he would rather take the blame. He did so expecting the statement to be used in evidence against him. He did not shoot with the pistol often, he had shot 3 to 4 times before. He had received no training in the use of fire arms. He disagreed with counsel when counsel says he shot his wife deliberately.

The second witness was Professor Almero Weyers. In his sworn testimony he told the court that he was Professor of psychology at the University of the Orange Free State. He obtained both the MA and Doctrate in Psychology at the University of Orange Free State. He started lecturing in psychology in 1965. He has written extensively on the subject, written a book on Developmental Psychology and given evidence in many criminal trials after evaluating people. He appears in courts on the average 15 times a year. Professor Weyers had evaluated the accused on the 11th May 2000 after Mr *Loubscher* (Counsel for the accused) had referred the accused to him, and he prepared a report. After reading the report, it was handed in and marked Exhibit "E". He said their job is to help the court not to give evidence favouring any side.

People differ and they handle stress differently. Problems in love affairs, fear of a husband and an unhappy marriage can lead to personality decompensation in some people, not all. Anxiety makes a person a candidate of personality decompensation. His scale is divided into ten degrees. At the 10th degree a person is fully decompensated. At the first degree decompensation is beginning. At the tenth degree of the scale he uses a person will not know what he is doing. At the first degree a person might know what he is doing, but he will not be able to stop himself. There is no way of knowing, we can only take a guess. He compiled the report without knowing where accused's wife was shot. The more decompensated a person is, the greater the violence. There are no hard and fast rules. When decompensation takes place, a relatively peaceful person like the accused starts acting violently. In evaluating a person, you look at the

whole picture. Decompensation does not deprive a person of the ability to shoot.

The shooting of the hands may be symbolic, because it is the hands that hand over the letter. There is little control, behaviour is out of character when a person shoots the person he loves most. Accused was angry and emotional. There was a build up of anger, fear and frustration, it came to a point where accused could not handle it.

In his field, they use the use no scientific measuring instruments, they use words, concepts, and ideas to delve into the mind - with these they build patterns. Memory is a very difficult thing because a person can lie. There were no indications of lies in his interview. He would say accused was in some degree of Decompensation.

In cross-examination, the Professor said non-aggressive people commit the most serious murders. For example shoot a victim for up to 28 times. Uncontrolled violence such as strangling and cutting the victim all over the body. There are two approaches, namely taking all the facts or looking at the nature of the violence and the personality of the accused. He belongs to the second school that looks at the nature of the violence and personality of the accused. In personality decompensation the action is automatic and there is no plan. Where there is no personality decompensation there is cognitive executive action, less emotion, planned action and the perpetrator remembers very well what he has done. Loss of temper is part of personality decompensation. In psychology like

all sciences which deal with human behaviour two plus two is not always four. Lying is an attempt to create an amnesia. In this case the shooting was irrational.

Answering questions from the court, the professor said law used to see personality decompensation as insanity. To fall into the area of madness, it should take at least six months. Fifty or sixty years ago, personality decompensation would have been classified as insanity. The professor went so far as to say personality decompensation might have been classified as temporary insanity a little over ten years ago.

The defence then closed its case.

Before addresses began, it was clear that the court could not even determine the question of guilt before it had determined whether the accused had the capacity to commit crime.

The term "sane automatism" is new but automatism is not. In the past, it was kept quite distinct from insanity. These days we hear of "insane automatism" and sane automatism. In *R v Ahmed* 1959(3) SA 776 at pages 780 to 789 we find that automatism has its theoretical base in English law. In practice such a defence (as will be shown later) did not often succeed in practice. It will be shown that in the application of English and Scots laws, there is a clear reluctance to acquit sane offenders who plead automatism when they have committed criminal acts.

Automatism has received a rough reception in Scotland. Lord Justice General Clyde (sitting with Lord Justice Clerk Grant and Lord Carmont) in the case of *HMA v Cunningham* 1963 SLT 345 was faced with a special defence (after a plea) of not guilty that the accused "was not responsible on account of the incidence of temporary dissociation due to epileptic fugue or other pathological condition". Lord Justice General Clyde at page 346 to 347 said:

> "As I see it the so-called "special defence" in the present case constitutes an attempt to extend the categories of the special defences in order to include a new one, namely, something short of insanity which would lead to acquittal. For this I can see no warrant in principle. On the contrary as has ben pointed out more than once in previous cases such a novel type of defence would be a startling innovation which would lead to serious consequences so far as the safety of the public is concerned. After all, safety is one of the considerations to which we have to have regard when we are asked to sanction a complete acquittal if a defence of this nature is sustained by the jury on facts....
>
> It follows that if the present so-called special defence is to be made into a true defence, as understood in the law of Scotland, it would require to include an averment of insanity."

Scottish case law had up to 1978 followed the negative attitude of *HM.A v Cunninghan* towards automatism. Gordon in his *Criminal Law* 2nd Edition (3-27) at page 80 to 81 found this rigid attitude towards automatism still unchanged by 1978.

English law like Scottish law was not willing to let people who had

committed offences go free because of automatism. They would rather keep them in lunatic asylums and prisons for as long as it shall please Her Majesty the Queen to keep them there. The case of *R v Burgess* [1991] 2 All ER 769 classified sleep walking which had resulted in a crime of violence as insanity within the M'Naghten rules. Diabetes and its hyperglycaemia which had been made worse anxiety and depression was classified under diseases of the mind—See *R v Hennessy* [1989] 2 All ER 9. That meant it was legal insanity. Lane CJ sitting with Rose and Pill JJ went further and dealt with exacerbating factors at page 14 as follows:

> "In our judgment, stress, anxiety and depression can no doubt be the result of external factors, but they are not, it seems to us, in themselves -or separately -or together external facts of the kind capable in law of causing or contributing to a state of automatism. They constitute a state of mind which is prone to recur. They lack the feature of novelty or accident, which is the basis of the distinction drawn by Lord Diplock in *R v Sullivan*. It is contrary to the observation of Devlin J to which we just referred in *Hill v Boxter*."

In English law "disease of mind embraces both organic and functional disorders of the mind, but excludes external causes, such as drugs, hypnosis and concussion".—Blackstone's *Criminal Practice* 1998—A3·7 at page 7. Although there is on the accused the onus of proof to prove insanity, actually in practical terms the special verdict was a calamity. "Until recently, even this possibility was a largely theoretical one since the consequences of an insanity verdict were so unattractive that seldom would an accused seek one." —Blackstone's *Criminal*

Practice 1998.—A3·12 at page 42. However Lawton LJ in *R v Quick* [1973] 3 All ER 355 GH said English law is in a quagmire seldom encountered nowadays.

Returning to automatism in the law of South Africa before the case of *S v Chretien* it seems automatism was already there.

In *R v Ahmed* at page 780BC Marais J said:

> "It is, as has been laid down in the case of *R v Mkize* 1959(2) SA 260(N), a good defence to any criminal charge that he accused, *when committing the act complained of, was in an unconscious state*, having neither judgment, will, purpose, nor reasoning. If the story of the accused in the present case is true, namely, that he has no recollection of the occurrence and that during his conscious existence he had no desire or motive to kill or assault the complainant, then he was in such an unconscious state at the critical moment, and no criminal liability attaches to him. That is our law."

It will be observed that at that time, the Lesotho *Criminal Law (Homicide Amendment) proclamation 43* of 1959 had not been passed. South Africa at the time seems to have applied English case law in a way the English would not have. South African judges did not take into account the deterrence aspect of English mental law. They emphasised logic and clarity to the detriment of the deterrence dimension. *R v Dhlamini* 1955(1) SA 120, the accused who had stabbed the deceased in a nightmare could not be guilty of either murder or culpable homicide. There are no grounds in law for saying automatism of this kind (which is not of an insane person) is foreign to the theory of our law. It seems to have

a long history in English law, see Gordon *Criminal Law* 2nd Edition at page 74 where he refers to Sir JF Stephen. *History of Criminal Law* (London 1883) Vol.II page 100 dealing with somnambulism. Today this statement appears to have been the author's opinion together with other statements that were made in judgments orbiter not to reflect the law accurately.

In *Bralty v A.G. Northern Ireland* [1963] AC 386 at page 410 Lord Denning observed that "it is apparent that the category of involuntary acts is very limited. So limited indeed that until recently there was hardly any reference in the English books to the so-called defence of automatism." In *R v Sullivan* [1983] 2 All ER 673 at page 677 HI. Lord Diplock and four other Law Lords in the House of Lords were very unhappy with the meaning of insanity and he noted:

> "The nomenclature adopted by the medical profession may change from time to time...I agree with Devlin J in *R v Kemp* [1956] 3 All ER 249 at 253 that "mind" in the M'Naghten Rules is used in the ordinary sense of mental faculties of reason, memory and understanding. If the effect of a disease is to impair these faculties so severely as to have either to have consequences referred to in the latter part of the rules, it matters not whether the arteriology of the impairment is organic, as in epilepsy, or is functional or whether the impairment itself is permanent, transient and intermittent, provided it subsisted at the time of commission of the act. The purpose of the legislation relating to the defence of insanity ever since its origin in 1880, has been to protect society against the recurrence of the dangerous conduct.".

The unsatisfactoriness of the classification was regrettable but it was felt a change

would have to be made by Parliament.

It should now be clear that personality decompensation falls under insanity according to the current legal set-up in Lesotho. Because Professor Weyers and Dr Olivier say half a century ago it was regarded as insanity. If it is of a very short duration, it is temporary insanity. Both Professor Weyers and Dr Olivier are in agreement on this point. In fact Dr Olivier says even the term insanity is no more used in psychological circles

When we deal with "sane automatism" we have to note that (according to Snyman *Criminal Law* 3rd Edition page 222) it is dealt with in two ways, namely the Separation doctrine approach which descended from English and which dominated South African legal thinking up to 1970 and the *General Principles Approach* which descended from *S v Chretien* 1981(1) SA 1097. Lesotho with its *Criminal Liability of Intoxicated Persons Proclamation* 60 of 1938 and the *Criminal Law (Homicide Amendment) Proclamation 43* of 1959 follows English law thinking.

The point of departure in which South African law took a decisive turn on capacity to commit crime was the case of *S v Chretien* 1981(1) SA 1097. In *Rex v Tsitso Matsaba* CRI/T/18/89 (unreported) which was decided on the 1st June 1990, Lehohla J disapproved of the *S v Chretien* which had in fact had been cited in argment. He quoted *AG for Northern Ireland v Gallacher* [1961] 3 All ER 299 at pages 304 and 314 where Lord Goddard and Lord Denning stated the law of

England. These cases stated clearly that drunkenness does not affect a person's legal capacity to commit crime. In disapproving of the use of *S v Chretien* in Lesotho at page 27 of *Rex v Tsitso Matsaba* Lehohla J said:

> "Our law governing criminal liability of intoxicated persons is to be found in *Proclamation 60* of 1938 which is in keeping with the English authorities...."

This judgment of Lehohla J was confirmed by the Court of Appeal of Lesotho in *Tsitso Matsava v Rex* 1991-96 LLR 615. The case of *Rex v Mosuoe Moteane* CRI/T/5/97 (unreported) differs from this one in the following respects:- first according to both Professor Weyers and Dr Olivier "sane automatism" of the kind accused had (which they call personality decompensation) would have been classified as temporary insanity fifty or sixty years ago. Secondly this fact was not brought to the attention of the court that day . In Lesotho the law has not changed, therefore personality decompensation should still be temporary insanity. The concept of absence of criminal liability for intoxicated person as found in *S v Chretien* has widened the gap between Lesotho and South Africa. *S v Nursingh* 1995(2) SACR 331 being based on *S v Chretian* cannot be an authority in Lesotho because of Lehohla J's judgment in *Rex v Tsitso Matsaba.*

It will be observed that Scott JA of the South African Supreme Court of Appeal said in *S v Henry* 1999(1) SACR 13 at page 20E the same personality decompensation results in

> "Criminal conduct arising from argument or some or other emotional conflict is more often than not preceded by some sort of provocation. Loss of temper in the ordinary sense is a common occurrence. It may in appropriate circumstances mitigate, but it does not exenorate. On the other hand, non-pathological loss of cognitive control or consciousness arising from some emotional stimulus and resulting in involuntary conduct i.e. psychogenic automatic automatism, is most uncommon."

Scott JA was in *S v Henry* was rescuing South African law from the legal quagmire that was developing. Accused cannot claim personality decompensation merely because he lost his temper and did a stupid thing like any other normal man.

For purposes of this case, I will assume "sane automatism" of kind *S v Chretian* might be the law of Lesotho, although it is not. The case of *R v Ahmed* 1959(3) SA 776 is similar to this one in some respects because it involved violence on a woman. Ahmed had stabbed a woman (almost fatally). Therefore he was charged with attempted murder. It differs from this one because Ahmed had an "Intelligence quotient somewhat below normal" according to medical evidence. That was also the impression he gave to the court. See page 779 of *R v Ahmed*. What is missing is an event that triggered the black-out in *Ahmed*'s case. He had earlier only said he was unwell, while accused did not say so.

The case before me is in some ways similar to *S v Arnold* 1985(1) SA 256. In Arnold's case, accused was besotted with his wife, in the case before me accused is not, he is in fact having love affairs with other women. In Arnold's

case, there was accused's mother-in-law who was ruining the marriage of accused and his wife and had disturbed the harmony between accused's wife and accused's son by his former marriage. The similarity is that both Arnold and this accused were in the habit of going about armed with a pistol. Both claimed to have shot their wives as a result of a quarrel which is alleged to have triggered a black-out.

There is a background of failure and harassment in *Arnold*'s case. In *S Nursingh* 1995(2) SA CR 331 there a history of child abuse, just as there is in *S v Moses* 1996 SACR 701. All these cases are accompanied by extreme violence that has no plan or inferrable logic. In accused's case he claims to have been a victim of his wife's unpleasantness, yet he began a love affair at the beginning of the marriage of which (according to accused) the wife became suspicious almost when it started. Relations deteriorated because of it. Indeed on the day accused shot her, the letter he had written to his lover was the immediate cause of the confrontation.

Although the onus of proof had always been on the Crown, *S v Trickett* 1973(3) SA 526 had emphasised "universal sanity in the sense of the accused being *doli capax* being presumed. Whoever wishes to rely on a deviation from this general norm, has to establish it on the balance of probabilities: it is only then that the prosecution has to disprove the deviation from the norm — see Marais J at page 530A of *S v Trickett*. By the time cases such as *S v Kok* 1998(1) SA 532 were heard it was now being emphasised that although the onus of proof is on the State, the prosecution is assisted by the natural inference that (except in

exceptional circumstances) sane persons engaging in conduct which gives rise to criminal liability do so consciously and voluntarily. It is therefore necessary for the defence to lay a proper basis to upset this inference. Between 1985 and 1996 there had been a tendency to wrongly over-emphasise the onus on the State without emphasising the position of strength from which the State begins.

In this case before me two psychologists gave evidence. Professor Weyers who classified accused as a case of personality decompensation or "sane automatism" never had the benefit of the summary of the evidence from crown witnesses. Dr. Olivier did and he incorporated the evidence of accused's wife and other Crown witnesses in his report. Professor Weyers only observed the accused giving evidence in court. Both psychologists agree that accused violence was not absolutely extreme and senseless like most cases of personality decompensation where the emotional dam bursts. Professor Weyers says cases are never identical, accused was essentially peaceful and non-violent, but he became violent that day.

Both psychologists readily conceded that although they believe they are right, they could not exclude the possibility of being in error. After all, accused might mislead them although their tests reduce the possibility because they cross check within their system. There are no scientific machines, everything is interviews which produce data which forms patterns from which conclusions can be reached. Dr Olivier says accused never had a black out, his actions were deliberate and carefully planned that he should not kill his wife but only wound

her. Accused lifted the first arm and shot it, then lifted the next arm and also shot it. He did not shoot his wife all over as cases of personality decompensation often do. Professor Weyers confirmed that this is often the case as he remembers in one case where the accused had shot his victim twenty six times. In psychological cases two and two is not always four, because many factors come into play and people are not often the same.

An examination of the information Professor Weyers extracted from the accused shows it was far less. Even Dr Olivier did not get as much information as he might have got because the court stopped the wife from washing as much dirty linen in public as she might have wished. The reason was that Mr *Loubscher* did not reveal what the nature of his defence was initially. For an example, we were left without knowing why accused's wife had to run for her life while they were fighting over the baby on the day of that baby's baptism.

The Runciman *Royal Commission on Criminal Justice Report* CM2263 HMSO (1993) paragraph 70 states:

> "Expert witnesses must expect to have their evidence tested in examination and cross-examination in the same way as other witnesses. Serious miscarriages of justice may occur if juries are too ready to believe expert evidence or because it is insufficiently tested in court. We believe that the overall aim in this area should be the objective presentation of expert evidence in a way which jurors who are not themselves expert can follow.

I can only congratulate both Professor Weyers and Dr Olivier for giving a

complete, wholesome and fair picture in their evidence. They made a difficult topic compehensible to us.

I saw and heard both Mrs Chobokoane and the accused. I was impressed with Mrs Chobokoane and that she was telling the truth. She told the court that her marriage was initially happy, but the accused poisoned it with her love affair with Thato. She did not hide that relations deteriorated so badly that they did not speak to each other for weeks and did not have sexual relations for up to four months sometimes. Accused claimed his wife was at fault and that she betrayed him without saying how. He said his love affair happed by accident. Which could be plausible, but sometimes said it was because of his wife. Nowhere does he seem to have found it necessary to terminate the love affair to preserve his marriage. Yet he expected the wife to be happy with being compromised that way.

Accused lied that he was threatened for the first time on Christmas Day of 1996 when he must have been threatened much earlier. Thato's husband's words show it was earlier. On Christmas Day the husband of Thato went to accused's home to tell him that he was unarmed and that he had given him Thato to be the accused's wife. He would not more bother the accused as he had been doing earlier. I believe Mrs Chobokoane on this and not the accused.

On the 27th January 1997 I also believe Mrs Chobokoane that accused never asked for the letter either at Roma or at home. At Roma he was told they would

meet at Lunch but when accused got home in the evening they quarrelled even before accused could get very far. The reason being that Mrs Chobokoane had gone and called accused a rag to accused's sister. Mrs Chobokoane was in a bad mood, even before accused could get very far with their conversation, she said accused should shoot her because she had heard he wanted to shoot her. The probabilities of expecting his wife to give her the letter are there but the impression one gets is that the accused could not expect the wife of the type Mrs Chobokoane was to give him the letter. It is also unlikely though possible that accused could expect to find the letter in the house if he believed it was in the house.

I note that accused avoided to refer to the fact that his wife had said he should shoot her when he narrated the sequence of events. It is because this was incompatible with his story that they fought over the switching on and off of the lights in the kitchen. I accept that the kitchen was lit at the time of the fight. What was not lit was the rest of the house. This was lit by the accused after the shooting.

I do not believe the accused when he says he had a black-out. He did not, I accept that he lost his temper and did not intend to kill his wife. He deliberately shot his wife, one arm after another with the intention only of wounding her. When he finished he took her to hospital and went to make the statement to the police. I note that he did not say he had a black-out. I also note and believe it is possible for a person to neglect to say what he might have said out of

forgetfulness or for one reason or the other. In *Molefe v Mahaeng* 1999(1) SA 562 at page 569 Melunsky JA noted that though respondent did not mention the black-out to the nurse and the doctor who attended to him there was evidence aliunde that it did occur. In this case there is nothing of a factual nature to lead me to the conclusion that accused's version of a black-out is probable.

This is a case of domestic violence. It is in some respects similar to the case of *S v Henry* 1999(1) SACR 13 which was decided by the South African Supreme Court of Appeal. In that case the accused had before making a statement before the police seen his attorney. In this case accused one year four months later was seen by a psychologist sent by his counsel. In *S v Henry* the accused had committed an even more violent senseless killing than this one because of shooting both his former wife and her mother three times each. After scrutinising the evidence, the trial court did not find any "sane automatism. As I have already said this wounding was done with care and caution so that a death does not occur. He exaggerated a small cut with a knife held by his wife as a stabbing with a knife to psychologists.

I watched the accused's demeanour, and I was not impressed with it, he tailored his evidence to suit his circumstances and was false. He claims that he had just been threatened by Thato's husband when he had been threatened some time earlier and the police had even investigated the matter. On the Christmas Day of 1996 when Thato's husband had come to say he has given up, he can have Thato, he claims he was threatened, something his wife (whom I believe) says is

untrue. When he really meant to divorce his wife he claims he was lying to Thato in the letter! He claims to have loved his wife and that he still loves her. Running around openly with another woman and not finding it not necessary to discard her and make up and mend relations with a loved one is a strange way of loving a wife. Yet the most improbable affairs of the heart can be true, especially where a person is the type which only considers itself alone.

A law abiding man (in cases of domestic violence) can take liberties with his wife, in the belief that she will not press charges for the sake of the children whose breadwinner he is. An angry person might be under the belief that all will be forgiven. Unfortunately the wife who is not a compellable witness has chosen to press charges.

Accused is lucky that his defence of "sane automatism" has not succeeded. Had it succeeded it might have been open to me to consider whether he was not a case of temporary insanity. I say this because both psychologists agree that personality decompensation over fifty years ago was a category of insanity. The terminology has changed but the Laws of Lesotho have not. I have been assured by both psychologists that cases of personality decompensation are rare. The court in *S v Henry* was also assured that the personality decompensation is a very rare occurrence.

Having rejected the evidence of a black-out, since the *actus reus* is undisputed and there is no other inference save that the offence of assault with intent to do grievous bodily harm has been proved.

Mr *Griffith* did not press for conviction of attempted murder.

Stand up accused. I find you guilty of assault with intent to do grievous bodily harm.

My two assessors agree.

.....
WCM MAQUTU
JUDGE

SENTENCE

After hearing addresses in mitigation –

Accused is sentenced to twelve month's imprisonment or in lieu of imprisonment, a fine of M2000-00. The firearm is forfeited to the Crown. Accused is given 30 days to pay the fine.

.....
WCM MAQUTU
JUDGE

For the Crown : Mr *Griffith*
For the accused : Mr *Loubscher*