

**CRI/T/2/2001**

**IN THE HIGH COURT OF LESOTHO**

In the matter between:-

REX

VS

TLOTLISO POLAKI

**JUDGEMENT**

Delivered by the Honourable Mrs. Justice K. Guni  
On 1<sup>st</sup> Day of October, 2001

The accused in this case, is charged with the crime of ASSAULT WITH INTENT TO DO GRIEVOUS BODILY HARM. It is alleged that on 14<sup>th</sup> of July 2000 and at or near THE MASERU MAGISTRATES COURT premises in the district of MASERU, the accused did unlawfully assault NIKIWE SETSABI by biting her and inflicting upon her certain injuries reflected in the medical

reports, with the intention of causing her grievous bodily harm.

The essential elements of the offence charged, are that (a) there must be an assault, (b) committed with intent to do grievous bodily harm. SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE, VOL.II (Common Law Crimes) THIRD EDITION By JRL MILTON page 432.

The crown led evidence from six witnesses. The facts as appear from the evidence of these witnesses are as follows: The alleged assault may be divided into three episodes. The first episode happened in the privacy of the complainant's office. During the lunch hour between one and two o'clock in the afternoon of the day in question, the complainant was in the PROBATION OFFICE. She was in the company of TSEPISO MAJORO, SEITHATI MOTSAMAI AND LIEKETSENG. They were having lunch therein when

they heard a knock at the door. The person knocking at the door was invited in. The door opened and the accused entered. Without even greeting the occupants of the office she had just entered, the accused looking at the complainant, and obviously addressing her said, "I have come to your office". The complainant, who was looking down at that moment lifted her head and noticing that the accused is talking to her, she consulted her watch and replied, " I am still having my lunch" or it is still lunch hour" or words to that effect.

The accused went on to explain to the complainant, that she has not come on official business. The complainant got up from her seat. The two, (complainant followed by the accused) left the PROBATION OFFICE for the complainant's office. On arrival at the complainant's office, complainant went round her desk. She pulled out her chair and sat down. She offered the accused a chair. The accused declined

the offer and remained standing right in front of the complainant, on the opposite side of her desk.

The accused told the complainant she has the information that the complainant insulted her husband (accused's husband) when she went to Dominic to cleanse her family's name. The complainant asked the accused who told her that. The accused pointed out to the complainant that, that is not the issue. But nevertheless she named the person who told her as one Dominic. The complainant admitted that she did talk to this Dominic but she denied ever insulting the accused's husband during their discussion. The accused quoted the words allegedly used by the complainant as "le Polaki oa satane o na le teng ha koranda li ngoloa - translated - even the satan Polaki was present when the newspaper was written or published" or words to that effect.

According to the accused this Dominic is related to her husband. She indicated to the complainant, that

because of that relationship, she could not understand why Dominic would lie. In response to this intimation the complainant enquired from the accused, if she then suspects that the complainant is a liar. This was answered in the affirmative. This being the case, the complainant pointed out to the accused that she could therefore not convince her. The best they could do is to confront this Dominic together (that is, the accused and the complainant).

The accused said to the complainant that they are not the same and they will never ever be alike in their lives. With this intimation the complainant agreed completely. The accused went on to say that the complainant is "sekatana" translated "worthless" whereupon the complainant exclaimed, "'na ? sekatana? translated me? worthless?" The accused answered in the affirmative.

The complainant laughed. She turned her head away from facing the accused and looked outside through the window behind her as she laughed. May be this gesture talked louder than any word that was ever uttered by the complainant at this point. May be the accused felt ridiculed. Her temper apparently snapped.

When the accused arrived at the PROBATION OFFICE earlier on that afternoon, when she called the complainant to her office she had a 135ml bottle of Guava juice in her hand. She was still holding it as they talked in the complainant's office. When the complainant returned her face to look at the accused, she saw that bottle of guava juice come flying towards her face. She raised her hands to shield her face. The bottle hit her on the hand and fell. The juice was splashed on the complainant overcoat, papers on her desk and the wall behind her. As she threw that bottle at the complainant the accused said, "uena satane tooe ea letekatse-translated-you satan bitch"

The complainant said she was caught off guard. She hardly expected this sort of thing to happen. I should have mentioned earlier on that these two people are magistrates. They work as such on those Maseru Magistrates Court premises. The complainant said she was so shocked that it took some moments to gather herself. When she did come round she asked, "Tlotliso u etsang? - translated - what are you doing".

The accused came round the desk towards the complainant. There was a punch on the desk. She tried to pick it up and hurl it towards the complainant, as she moved closer towards her but it fell in the process. The accused picked it up again. This time she had moved closer to the complainant. She attempted hitting the complainant on the face with it. The complainant had by then grabbed hold of the accused's hand that was armed with the punch. The punch fell down once again. The complainant picked up the telephone and tried to make a

call. She said she intended calling the Probation Officers next door. The accused rushed to the complainant and grabbed the telephone from the complainant. She tried to hit her with that telephone. It fell. She picked it up again. This time she succeeded to hit the complainant with that telephone set on the chest just below her breast.

During all this fighting the complainant kept asking the accused, "Tlotliso, what are you doing?" repeatedly. The complainant told the court that she told the accused that she is aware this accused want a fight but she will not give her a fight. The complainant ran towards the door. The accused who was still holding on to the complainant's hair ran along with her towards the door. The complainant got hold of the door handle and turned it to open the door. The accused pushed shut that door and got hold of the lock and tried to turn it in order to lock it. The struggle ensued. This struggle for the possession and control of the door went on for



sometime. The complainant was trying to open it and the accused was trying to shut it.

While they fought to open and close that door the complaint saw and/or felt the accused take a bite at her left cheek, twice. The complainant has sustained an open wound on the cheek as a result. The evidence of Dr.Maitin who testified at this trial is to the effect that that cut could have been made by teeth or nails. The counsel for the defence put it to the complainant and the Dr. that the accused will say she caught with her nails the complainants' cheek when she tried to grab the complainant's hair. The complainant claims that because she has such an oily skin on her face, the accused could not manage to grab hold of the flesh on her cheek. Her teeth slipped. While the struggle went on, somehow the complainant succeeded to open the door and ran out. As she ran back to the PROBATION OFFICE, she heard the accused say, "Tsoa ka hara lapa laka you bastard"- translated, - "Get out of my family or

leave my family affairs you bastard!” or words to that effect.

The complainant looked back and saw the accused threw an object at her. This object was the stapler. She lifted her overcoat to cover her head and quickly shut the door behind her, immediately after she re-entered into the PROBATION OFFICE. There was a loud bang “Qhuu” as the stapler smashed on that door and fell down. While on her way to take a seat, the complainant said, “Batho ba Molimo! Motho ke enoa a ntoantsa! Ha ke tsebe hobaneng. Ho ‘me nkeke ka mo loantsa.” Translated. People, here is someone fighting me. I do not know why. But I will not fight back”. One of those probation officers therein asked, “what?” in apparent astonishment. The complainant replied, “Tlotliso is fighting me!” The complainant sat for a few moments. She got up again. This time Tseviso and Seithati ((PW4 & 5) went out. The complainant followed them.

The accused was standing outside the complainant's office. PW4, 5 and the complainant went there. On their arrival PW4 asked, "what is the matter?" The question was directed to both the complainant and the accused. PW4 was pulling away from the complainant's office this accused. The accused was pulling herself away from PW4 who asked her "what are you doing?" Then the accused replied, "let me beat up or assault this prostitute." The accused succeeded to break free from PW4 and got to the complainant whom she started assaulting by hitting her with fists.

Seithati went between the accused and the complainant. PW4 got hold of the accused by her waist and dragged her away from the complainant. Seithati and Tsepiso escorted the accused away from the complainant's office. They pleaded with the accused to go to her own office. As I mentioned earlier on the accused and the complainant work as magistrate on these premises. The accused's office is upstairs. From the

complainant's office, one can get to the accused's office upstairs by using a lift or a staircase. PW4 and 5 were escorting the accused in that direction, towards the lifts or staircase. The accused seems to suggest that she went to her office on her own volition and without an escort. While proceeding thus to her office, the accused indicated to PW4 & 5 that she was going back to the complainant's office to fetch her hat. PW4 suggested to her that PW5 will go and collect it on her behalf. The accused insisted that she was going herself. She broke free from PW4's grip and returned to the complainant's office.

Meanwhile, the complainant had come to her desk and had sat down. She saw hanging from the open middle drawer of her desk, the accused's hat. At the time she rushed to the telephone to call the Probation Office and eventually ran out of her office after struggling with the accused, that hat was not there. I may just venture a supposition here, that this hat may

have fallen there during the struggle for the possession of the punch and the telephone set. This appears to be the only time when the accused according to the evidence was on that side of the complainant's desk.

As the accused re-entered the complainant's office, she said, "NIKIWE! give me my hat!" The complainant replied that it is evidence. As the accused came round the complainant's desk, the complainant stood up. PW4 & 5 were coming behind the accused in hot pursuit. Lieketseng was also present in that office this time and was the first person to go between the complainant and the accused as the accused attacked the complainant.

This hat which was hanging on the open drawer was not within sight of PW4, 5 and perhaps Lieketseng who were on the other side of the complainant's desk. It was put to the complainant that she attacked the accused when she returned to retrieve her hat. The compliant denied that accusation. She pointed out that the accused

did not attempt to pick up her hat which was still hanging on that open drawer. But she straightaway launched both physical and verbal attack upon the complainant after demanding her hat from her.

Those present in that office at the time also saw the accused hit the complainant with the fist and the altercation ensuing therefrom. Lieketseng went between the accused and the complainant and started to push them apart. The complainant retreated. The accused kept advancing and hitting the complainant. The attempt by Lieketseng to keep the accused and the complainant apart was not successful. The accused was seen taking a bite at the complainant's forearm. The complainant tried to push the accused away from her forearm by pushing at the accused's forehead. That attempt failed. The complainant with her left hand tried to remove the accused's head from her right forearm by pulling the accused by her hair. PW5 tried to pull the accused away by her hand. According to the complainant the accused

tightened her grip with her teeth on the complainant's flesh. The complainant was in pain. She kept crying, "let go".

As the complainant cried out and pleading with the accused not to bite her, PW5 grabbed the accused by her waist and dragged her away from the complainant. This time the accused let go with her teeth and spat out. After they had been successfully separated the accused bend down and picked up her hat. The complainant said to the accused, that was her evidence. The accused replied "To hell with your evidence". And she left with her hat. But on her way out of the complainant's office, the accused said she had not yet finished with the complainant.

After retrieving her hat, the accused without much difficulty left for her own office. The medical evidence by Dr. Maitin showed this court that the complainant has sustained the following injuries:-

1. Puncture wound middle of left cheek with surrounding induration due to infection.
2. Ragged laceration lower end of the right forearm. This wound measures 3x4cm with surrounding induration due to inflammation.
3. Sprain of the left thumb.
4. Tender bruise volar aspect of the right hand measuring 4x4cm
5. Marked tenderness of the 9<sup>th</sup> 10<sup>th</sup> and 11<sup>th</sup> ribs due to bruising.
6. Moderate tenderness of the left shoulder due to bruising -movement very tender.
7. Loss of hair on top of the skull.

At the close of the crown case, counsel for the accused indicated that he intends to make an application for the discharge of the accused. This application is made in terms of Section 175 (3) CRIMINAL PROCEDURE AND EVIDENCE ACT



NO.9 of 1981. It provide, "(3) if, at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged or any other offence of which he might be convicted thereon, the court may return a verdict of not guilty". (my underlining)

This section merely empowers the court to consider returning the verdict of not guilty at this stage of the trial in the cases where first of all there is no evidence, placed before that court, on which the accused might be convicted of the offence charged or might be found guilty of any competent verdict under this particular charge. There is therefore a further requirement placed upon this court by this section to examine carefully, the evidence led before it and satisfy itself that there is no evidence on which this accused could be convicted of the office charged or

any other offence under the same charge. In this particular case before me. I am required in terms of the said section, to examine carefully the evidence before me and determined in the light thereof, whether or not the accused might be convicted of the offence charged that of Assault WITH INTENT TO DO GRIEVOUS BODILY HARM or ASSAULT COMMON .

There is evidence before this court which, if believed, might result in the conviction of the accused on the offence charged. This court is urged not to believe that evidence. The defence counsel has submitted, that evidence led by the prosecution on the whole is so incredible, that it is not worthy of the court's consideration. R.V. MATETE and Others 1977 LLR page 262 was cited as authority for the above submission. In this case MOFOKENG J. (as he then was) decided that the crown has failed (1) to adduced prima facie evidence to prove

the elements it set out in the indicament and (2) in addition the evidence that the crown has adduced is  
“so patently unworthy of credit that a reasonable man acting carefully might not convict. (see page 281 R.V. MATETE Supra) (my underlining and numbering to highlight the salient point decided in that case).

There was no evidence, that established a prima facie case against the accused in MATETE’S case. Coupled with the absence of prima facie evidence, was the existence of evidence before that court that was so patently unworthy of credit that a reasonable man, acting carefully might not convict. Furthermore, that evidence did not disclose the commission of any other offence, of which the accused might be convicted. Pursuant to those findings, the court was entitled to discharge the accused at the close of the prosecution case. There is no law that obliges the court to discharge the

accused at the close of the prosecution case. Rex. V.THOBALA 1981 (2) LLR363. On that authority of Rex. V.Matete (Supra), it is clear that the evidence adduced by the prosecution must be essentially beyond criticism.

In our present case the proper analysis of the prosecution evidence, makes the criticism of its worth unjustified. For example; the evidence of the police officer PW2, who is the Investigating Officer of the case, showed this court that the papers and books were scattered on the desk and the floor in the complainant's office. This police officer visited the scene of the alleged crime (4) four days after the alleged assault had occurred. The defence seemingly entertained the possibility of interference with the scene of the crime during the interviewing period before the Investigating Officer inspected it. The doubt should have been put to rest by evidence of this witness to the effect that he

gave specific instructions to the complainant, not to enter her office before it was inspected by him. In her evidence the complainant testified to the effect that she obeyed those instructions issued to her by the police office.

While PW3, the complainant, gave evidence, it was put to her that she deliberately shuffled the papers and books on her desk. It was put to her that she was annoyed by the accused when she (the accused) pointed out to her that she believes Dominic – the informer who allegedly informed the accused that the complainant insulted her husband. It was put to the complainant that she started shuffling papers and books on her desk as she expressly promised to bring a disaster upon the accused. The defence counsel seemed to suggest that the complainant deliberately scattered those papers and books on her desk and floor of her office.

From these suggestions to the crown witnesses, the defence may seem to admit, in an oblique way, that the scene of the offence, (the complainant's office), appeared as if it had been hit by a mini earthquake or severe whirlwind. The splashes of that pink fruit juice on the coat and wall of the complainant's office, were according to both the complainant's and the defence counsel from that 135 ml bottle of guava juice which the accused was holding in her hand when she arrived at the PROBATION Office that afternoon, when she called the complainant to her office. The complainant told the court that the accused threw that bottle with content at her face. The suggestion made by the defence counsel is to the effect that the complainant is the one who threw that bottle at the accused.

The medical report from Queen Elizabeth II Hospital by Dr. Marina Punnen was produced by

consent of the parties.. The injuries sustained by the complainant are described in this report as "Laceration on the left cheek and dorsum of the right forearm". The other medical report was made by Dr. Maitin. It was also produced by the said Dr. before this court. The injuries are described therein

- as (i) Puncture wound middle of the left cheek.
- (ii) Ragged laceration lower case of the right forearm.
- (iii) Loss of hair causing mopecia areata.

The accused does not deny causing the injuries described in the two medical reports, produced before this court. The challenge was made as regards what was used to cause the open wound on the complainant's left cheek. It was put to both the complainant and Dr. Maitin under cross-examination, that it was the accused's nails or nail, not teeth, which caused the open wound in the complainant's left cheek. The accused has admitted

causing that injury. It is not very material whether it was by nail or teeth.

As the complainant was about to re-enter the PROBATION OFFICE, she saw the accused throw the stapler at her. She thought she was going to be hit on the head. She raised her overcoat to cover her head. She also closed the door behind her immediately after making the entry. That stapler hit the door and fell down. The accused admit throwing the stapler but not with intent to assault the complainant. It is claimed on her behalf that she threw the stapler in frustration when the complainant left her behind. Those in the PROBATION OFFICE testified, that they heard the bang and saw the stapler fall. The complainant was seen re-entering that office with her head covered with her overcoat.



It is an essential element of the crime of Assault with intent to cause grievous Bodily Harm that, there should be an assault. The crime of assault has in turn its essential elements. Amongst which there must be an inspiration of apprehension of fear that force is about to be applied upon the victim's person. The actions taken by the complainant in order to protect her head are indicative of her inspiration of apprehension of imminent application of force upon her person.

It is the complainant's evidence that she felt pain and she tried her level best to remove the accused's head by pulling it with the hair from her forearm. The accused seems to claim a right to bite the complainant who she accused of being in her way and preventing her from retrieving her hat. The complainant did not have in her hands the accused's hat. It was hanging on the open drawer of the complainant's desk. This is perhaps where it

fell during the previous scuffles between the parties. I do not accept that the accused had a right to bite her as a way to recover her hat under any circumstances.

There is evidence before this court on which the accused might be convicted on this charge. The prosecution has succeeded to establish a prima facie case for this accused to answer. There might be some minor discrepancies as the various witnesses observed different things or paid their attention on different aspects. This was a fight and an allowance must be made for witnesses to miss out on some aspects. On the main the crown witnesses corroborated each other's evidence on all material and relevant respects.

This application for discharge of the accused must fail. It is therefore dismissed.



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**JUDGE**

**1<sup>ST</sup> OCTOBER, 01**

For Crown: Mr. Lenono

For Defence: Ms. Teele