IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA

Criminal Appeal No. 6 of 1982

In the matter between:

NTHITI MOENG — Appellant

and

THE STATE — Respondent

CORAM: MAISELS, P
AGUDA, J.A.
KENTRIDGE, J.A.

Mrs. M. Motsemme for the Appellant

Mr. R. J. Chakalisa for the State

JUDGMENT

KENTRIDGE, J.A.

This case is the consequence of a family quarrel which took place on a farm in September, 1981. This quarrel unhappily resulted in the death of the mother of the accused who is the present appellant. He was charged with and convicted of murder. The learned Chief Justice who heard the case found extenuating circumstances and imposed a sentence of seven (7) years' imprisonment. The quarrel to which I have referred took place in the first instance between the accused who was then about 19 years of age and his younger sister. She had refued to lend the

accused money, this angered him and he assaulted her with a fan-belt. She retaliated by hitting him with the belt and she also hit him with a brick or piece of brick which caused him to fall down. At that stage his mother came out of a hut in the vicinity, probably to try to stop the quarrel. She appeared to the accused, at any rate, to be taking sides with his sister, and he exchanged words with her. When he was on the ground he had picked up a brick and in his anger, he threw it at her. The brick struck her on the head, causing injury to the brain from which she shortly afterwards died.

The facts as I have stated them were not seriously in dispute. The principal dispute in the Court below arose from the assertion made by the accused that he had not realised that his mother had come on the scene and that he had intended to throw the brick at his sister. The learned Chief Justice with good reason rejected this part of the evidence of the accused. In any event, even if the intention of the accused had been to throw the brick not at his mother but at the sister, that would not have affected his guilt.

The basis on which the learned Chief Justice found the accused guilty was that he had killed his mother with malice aforethought in terms of section 207 of the Penal Code. In terms of section 209 of the Penal Code, malice aforethought is deemed to be established <u>inter alia</u>, by evidence proving an intention to do grievous harm to any person whether such person is the person actually killed or not. The learned Chief Justice found that the accused had had the intention to cause grievous harm to his mother by reason of the fact that he had thrown a heavy brick at her. In his judgment the learned Chief Justice said this:-

> "I believe and find as a fact that the accused threw the brick exhibit 'B' at the deceased and that in so doing he intended to cause her grievous harm as is evidenced by the short distance from which he threw the brick namely 5 to 6 feet, and the weight and dimensions of the brick itself, which the accused could not fail to know would cause serious injury."

This finding causes me some concern. It was necessary for the State in order to obtain a conviction for murder to show that the accused, beyond reasonable doubt, had the intention to cause grievous harm. Such an intention may be proved and indeed usually is proved as a matter of inference from the nature of the assault carried out by the accused on the victim. But the inference to be drawn from the facts must be an inference that the accused had the subjective intention of causing grievous harm. See in this regard judgment of the House of Lords in <u>Hyam v Director of Public Prosecutions</u>

(1974) 59 C.A.R. 91. Some forms of assault will clearly give rise to such an inference. The question here is whether the throwing of the brick inall the circumstances gives rise to the inference that the accused had the necessary intention, and that that is the only reasonable inference to be drawn. The brick used is indeed a heavy object and the throwing of the brick must give rise to the inference that the person throwing it intended harm. But was grievous harm intended? It has been said that "grievous" harm in the context of the law of murder means "really serious injury" (see Director of Public Prosecutions v Smith (1960) 44 C.A.R. 261).

In the present case, the learned Chief Justice found that the accused acted in anger and that he and others present had partaken of liquor in the course of the evening. What is more, there seems to be some doubt, with respect, whether the learned Chief Justice was justified in finding that the accused threw the brick from the distance of only 5 feet to 6 feet from the deceas[illegible] The events took place at night and some of the prosecution witnesses gave evidence that the brick was thrown from the distance of two to three paces; but that was not the only evidence. The husband of the deceased placed the distance at 12 feet. What is more important, the Police Sergeant who gave evidence had had pointed out to him by the prosecution witnesses the position of the various persons at the time of the incident.

/.

He had drawn a plan on this information and according to this plan the deceased was not two but eight paces away from the accused at the time of the incident. I do not think that the accused must necessarily have realised that a brick thrown from that distance would cause grievous harm.

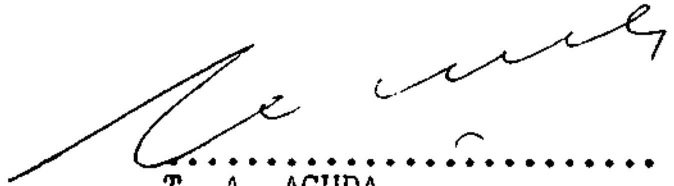
In my view there must be some doubt whether in all these circumstances it can be said that the accused intended to cause grievous harm i.e. really serious injury to his mother. Indeed the fact that the victim was his own mother, makes it less likely that he had such intention. That the accused intended to cause harm is beyond doubt. In my opinion therefore, the proper verdict ought to have been one of manslaughter.

The sentence of seven (7) years' imprisonment for murder was far from heavy. It was a merciful sentence which took into account the youth of the accused, and the remorse he felt at having killed his mother. However, the reduction of the gravity of the offence must in my opinion bring with it some reduction in the sentence imposed and I would reduce it from seven (7) years to five (5) years' imprisonment. The sentence is to

commence, as did the original sentence on the 19th September, 1981 being the date when the accused accused was first taken into custody.

....
S. W. KENTRIDGE
Judge of Appeal

I agree: ....
I. A. MAISELS
Judge President



I agree: ....
T. A. AGUDA
Judge of Appeal

LOBATSE
7th December, 1982