C of A (CRI) No.1 of 1987

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

In the matter between:

MATLASELO JOHANNES MOLAPO — Appellant

and

R E X — Respondent

Coram:

MAHOMED P
ACKERMANN JA
BROWDE JA

J U D G M E N T

BROWDE JA

The charge against the appellant was that on or about the 4th day of April 1985 and at or near Thibella in the district of Maseru he did unlawfully and intentionally kill one Ezekiel Bashemane. The appellant was tried by Molai J sitting with an assessor and was found guilty of murder with extenuating circumstances. He was sentenced to 9 years impriosonment.

Although the appeal was noted against the conviction and sentence, argument before us was directed against the conviction only. It appears from the evidence of L/Sgt Mohlahatsa that on the night of 4 April 1985 at about 8 p.m.

he accompanied the deceased, who was like him a member of the Royal Lesotho Mounted Police, to a cafe in Thibella where the deceased wished to purchase some meat. They were both wearing blankets and, according to the witness's evidence-in-chief, they were not carrying anything in their hands. On their way to the cafe they encountered four people walking towards them whom they greeted by saying "Lumelang banna". Although Mohlahatsa says "they appeared to be dis-satisfied" he and the deceased walked on only to find that the cafe was closed. On leaving the cafe they were followed by a man who, when he came close to them, said "I am the one". The man then passed them, turned towards them and produced a rifle from underneath his blanket. It is not clear exactly how near to them the man (identified in Court by the witness as appellant) was when he produced the rifle but Mohlahatsa said that when the appellant repeated the words "I am the one" the deceased took four steps forward trying to "sidestep or bypass" the appellant. The witness then heard a gun fire and the deceased fell to the ground. The witness said he did not know how many shots were fired but in the post-mortem examination which followed "three small round wounds, one penetrating into the abdomen" and which were bullet wounds were found in the body of the deceased. Death was established as having been due to "massive abdominal bleeding".

In the cross-examination of Mohlahatsa it was suggested that the greeting "lumelang banna" (which was interpreted in the Court a quo as meaning "Hullo men") was provocative

but the witness stated that he did not know it was and it appears that it was not intended to be. The crucial propositions that were put to the witness were that

(i) Members of the police force were special targets of insurgents. This was admitted by Mohlahatsa.

(ii) The witness and the deceased were armed when they went to Thibella. This was denied by the witness who, however, according to the record said "For all I know he could have had a weapon under his blanket" and "I do not know if one of the first people (who got to the deceased) may have removed deceased's firearm or weapon".

(iii) The deceased rushed at the accused, with his arm raised and that he appeared to be holding "something that looked like a firearm". This was denied by the witness who repeated that the deceased had no gun. He admitted, however, that at the stage when the deceased and the accused first faced each other the accused took "about two steps" backwards while the deceased moved forward.

Despite being pressed in cross-examination to admit that the deceased rushed at the accused with his hand raised and holding "what appeared like a gun", the witness steadfastly denied this. If, therefore, this witness' evidence is accepted the appellant, for no apparent motive (unless he was one of the persons to whom it was addressed and who found "lumelang banna" to be provocative) fired

three shots at the deceased at point-blank range and killed him.

It was argued in the Court a quo and before us that the Crown had not proved beyond reasonable doubt that the appellant, when he fired at the deceased, did not act in self-defence. The onus of proof in this regard is, of course, on the Crown

R v Maleko 1955(2) SA 401 (AD)

R v Patel 1959(3) SA 121 (AD) at 123-124

What the Crown has to prove beyond reasonable doubt is that the appellant did not subjectively believe that his life was in danger when he fired the fatal shots. The only two witnesses whose evidence is directly relevant are Mohlahatsa and the appellant. The latter told the Court that after leaving "Alice's place", having partaken of some beer there, he had an altercation with a stranger who appeared to the appellant to be drunk. Thereafter he proceeds towards Morakabi's cafe where he encountered three people, one of whom we know to have been the deceased. He was asked his name several times but all he told them was that he was a soldier. He said in evidence that as a soldier he was on the look-out for insurgents as attacks on soldiers, particularly in locations such as Thibella, were rife at that time. From the admission in this regard made by L/Sgt Mohlahatsa there would appear to be substance in this allegation. The appellant proceeded to say that he was going on his way when he heard what he described as "quickened footsteps" behind him. He turned round to find

the deceased very close to him and that he appeared to have a firearm in his right hand. Believing he was an insurgent about to attack him, he fired the rifle which he had apparently cocked as he walked away from the deceased and his companions.

Certain inconsistencies appear in this story when the other evidence which was led is considered. I refer, for example, to the appellant's statement which he made to the magistrate, in which he stated that when he looked back he "noticed that here was a person following him. That person was raising up his hand and about to strike him". The quotation is not from the statement itself but from the learned judge a quo's rendering of it. The reason for this is that the statement has not been included as part of the record on appeal. It need hardly be stressed that this is unacceptable and that it is imperative that all the evidence that is placed before the Court on trial must be copied and included in the record on appeal.

Another inconsistency arises from the evidence of Corporal Kholopane. He met up with the appellant shortly after the shooting. The appellant, so Kholopane alleges, told him that "he was threatened with something which looked like a firearm by three people and as a result he shot one of them." Prima facie this is not the same as the appellant's evidence but could reasonably be explained, I think, by the appellant associating the deceased with his companions and therefore attributing the threat to all three rather than to the deceased alone.

The evidence of Mohlahatsa was accepted by the court a quo. In dealing with the contradiction in the appellant's evidence relating to the attack by one as against three people the learned judge stated that Mohlahatsa impressed him as a truthful witness. He then went on to say "I am prepared to accept his story as the truth and reject the accused's version as false on this point. That being so, I have no alternative but to come to the conclusion that the accused's claim that he shot the deceased in self-defence is yet another of his lies." It is not clear to me what "other lies" are here referred to but I agree with appellant's counsel that this finding comes very close to saying that because the court believed the Crown version the defence version had therefore to be rejected. This is a wrong approach. S v Guess 1976(4) SA 715 (AD) at 718 E-719A. What is required in the circumstances of this case, before one rejects the appellant's evidence as to his subjective state of mind, is proper consideration of all the facts. In my judgment one cannot reject that the appellant was a soldier, walking at night alone in a township in which soldiers had often been attacked by insurgents; that he was, for a reason which is not clear, followed by two or three men one of whom actually caught up with him from behind. It must also be accepted, in my view, that when he turned and saw the deceased near him, the appellant retreated while the deceased advanced, albeit over very short distances, namely a few paces. These circumstances lend credence, I think, to the accused's evidence as to his subjective state of mind, namely that he feared an

attack. Further weight must be given to the fact that unless one accepts the accused's alleged state of mind the shooting was completely without motive - a circumstance which I find improbable, particularly as the appellant, shortly after the event, reported the matter to his superior officer. This was not the action of a man with a guilty mind. I therefore am of the view that the evidence does not prove beyond reasonable doubt that the appellant when he fired the fatal shots, did not subjectively believe that he was about to be attacked.

That, however, does not end the matter. The question which now arises is whether, in the circumstances prevailing at the time, the appellant's shooting of the deceased was the action of a reasonable man. Put another way, was his apprehension that he needed to shoot to protect himself reasonable? See, in this regard

S v Ntuli 1975(1) SA 429 (AD) at 436.

It seems to me that the answer to that question must be in the negative. A trained soldier facing his would-be assailant should surely have warned him that he would be shot if he did not immediately stop his advance; he would also, I believe, not have fired unless he was reasonably sure that the assailant was armed. In this regard the best the appellant could do was to say the weapon "appeared like a firearm." And if the appellant thought, as in his statement to the magistrate he said he did, that the deceased was about to strike him, shooting was not the act of a reasonable man. He should have taken other avoiding action.

In the result I find that the appellant's conduct in firing at the deceased was unreasonable in the circumstances and he should, therefore, have been found guilty of culpable homicide.

As our finding differs from that of the court a quo it is necessary for us to consider what the appropriate sentence should have been. The offence is obviously a serious one. Members of society who because of their calling are armed, must be made aware that their weapons are only to be used with the greatest circumspection; shooting must be regarded as the last resort and even then every effort must be made to avoid fatalities. Both counsel before us agreed that the appropriate sentence would be 6 years imprisonment and that seems to me to be the proper sentence.

In the result he conviction and sentence in the court below are set aside and there is substituted therefor the following:

The accused is found guilty of culpable homicide and sentenced to imprisonment for six years.

Delivered at Maseru this 26th day of July 1991.

J. BROWDE
JUDGE OF APPEAL

I agree

I. MAHOMED
PRESIDENT OF COURT OF APPEAL

I agree

L.W.H. ACKERMANN - JUDGE OF APPEAL