C. of A (CRI) No. 8\91

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

MALEFETSANE BELEME APPELLANT

and

REX RESPONDENT

HELD AT MASERU

Coram:

STEYN J.A.
BROWDE J.A.
KOTZE' J.A.

JUDGMENT

KOTZE' J.A.

Lehohla J and assessors tried and convicted the appellant on an indictment of murder in which it was alleged that on 2nd December 1987 at Ha Bale he unlawfully and intentionally killed Chibiriti Daemane Molantoa (the deceased). Extenuating circumstances having been found to exist he was sentenced to 10 years imprisonment and now appeals against the conviction.

It cannot seriously be disputed nor was it, that the deceased died on the date alleged as a result of two pistol

wounds. Further facts not in dispute are the following:

1. Appellant visited the deceased at his cafe' at Ha Bale on 2nd December 1987. They spent some time together outdoors and later entered the cafe' where the appellant bought a beer for each of them.

2. Appellant and the deceased thereafter entered the kitchen attached to the cafe' in an amicable spirit.

3. Mamothori Molantoa (the deceased's daughter) and two other witnesses heard gun shots, (they were not in agreement whether more than one shot was audible), they entered the kitchen where appellant pointed a gun at them and they then ran away.

4. Mamothori and the two other witnesses found the deceased prostrate on the floor. Two wounds were noticed on his body. He was dead.

5. The police arrived, received information as

> to appellant's whereabouts, forced his removal from a house in which he was hiding and effected his arrest.

A ballistics expert, Lt. Telukhunoana, received from the police a 7,65 mm Lamma pistol in good condition, a 6,35mm Junior pistol not in good condition and incapable of firing and three 7,65mm cartridge cases. The Lamma pistol was handed to the police by the appellant after his arrest. The Junior pistol was found in the room where the deceased died. Lt. Telukhunoana, whose evidence was unchallenged, submitted the Lamma pistol to microscopic examination and established that the three 7,65 cartridge cases had been fired from it.

Detective Trooper Mothibe of the criminal investigation department testified that after administration of a proper caution the appellant replied to a question whether he could furnish an explanation of the deceased's death - he said that he had shot the deceased who cheated him after they had "clashed over diamonds."

Testifying in his own defence, the appellant raised a defence of self-defence. He stated that he and the deceased were friends. During November 1987 he lent the deceased 1,500 Maloti which he agreed to repay (presumably on demand) at any time

during the following month. On a day in December - no doubt the 2nd - he went to the deceased at his cafe' at Ha Bale. He was warmly received but was only offered 200 Maloti. He refused this amount and demanded payment in full. The deceased told him to leave his property and took from his waist the 6.35 pistol referred to above. The deceased cocked it twice whereupon he (the appellant) produced his own weapon i.e. the 7,65 pistol and fired a single shot at the deceased as he was "expecting death". He did not appreciate that the deceased's pistol was not in working condition and regarded it as a lethal weapon. He left immediately, went to Ha Makolanyane,took refuge in a room where the police later arrested him. He denied having fired more than one shot and explained the finding of three 7.65 cartridge cases by saying that after his arrest the police fired two shots from his weapon and dishonestly claimed to have found them with the case which was ejected when he fired the single shot. Cross-examined the appellant denied that he shot the deceased because he refused to pay him his money and adhered to his version that he acted in self-defence after he was threatened by the deceased in the manner referred to above. He persisted in his evidence in chief that he fired only one shot and could not explain the existence of two wounds. Eventually after extensive and persistent questioning by both counsel and the trial Judge the appellant said "possibly through confusion as in a fighting mood... I may have pulled the trigger for the second time."

I do not propose to recount at greater length the course of the cross-examination. The above-mention resume' sets out in broad outline the factual background against which the trial court came to the conclusion that "the story purveyed by" the appellant is "completely false". The existence of two wounds, the appellant's persistence in maintaining that he fired only one shot and the justifiable rejection by the trial court of the appellant's evidence that the police "planted" two empty shells at the scene of the shooting led the court to conclude that "excessive force was employed to quell the apprehended danger", that he "exceeded the bounds of self-defence" and consequently that a verdict of guilty of murder was warranted.

The appellant's version that he fired only one shot was clearly untrue - the findings of the three shells establishes that he fired three shots. Yet, as Mr. Mdhluli the Director of Public Prosecutions fairly and very properly conceded in argument before us, the absence of evidence to gainsay that the deceased took out his Junior pistol to induce the appellant to leave his premises requires a finding that this part of appellant's evidence may reasonably possibly be true. The fact that the deceased's weapon was incapable of firing would not have been apparent to the appellant. Furthermore, in the absence of contradictory evidence, the following further portions of appellant's version may reasonably be true:

1. That deceased refused to repay his debt in full.

2. Such refusal led to tension and an order by the deceased that the appellant should leave his property.

3. Appellant's refusal to leave induced the deceased to produce his pistol in an attempt to achieve compliance with his order.

4. In response the appellant fired three shots, two of which struck the deceased and caused his death.

Mr. Sooknanan, on behalf of appellant, contended that the evidence looked at as a whole does not rule out a finding that the appellant acted in self-defence. There is substance in this contention but, decisive in my view, is the fact that the appellant fired three shots at the deceased when a single warning shot would have sufficed. On an acceptance of the situation outlined above the correct finding ought to have been that the appellant exceeded the bounds of self-defence and that a verdict of guilty of culpable homicide should have been returned - a verdict which Mr. Mdhluli conceded to be proper in the

circumstances. A reduced sentence of three years imprisonment seems appropriate.

In my view the appeal succeeds to the extent that the conviction of murder and sentence of ten years imprisonment is set aside and substituted by a verdict of guilty of culpable homicide and a sentence of three years imprisonment.

Delivered at Maseru on this 22nd day of January, 1994.

G.P. KOTZE'
JUDGE OF APPEAL

I agree

J. H. STEYN
JUDGE OF APPEAL

I agree

J. BROWDE
JUDGE OF APPEAL