

IN THE LESOTHO COURT OF APPEAL

C of A (CRI) NO. 10/97

In the matter between:

JOHN KETSO LETSEKA

APPELLANT

and

R E X

RESPONDENT

**Held at:
MASERU**

**Coram:
L. VAN DEN HEEVER, J.A.
C.E.L. BECK, A.J.A.
D.L.L. SHEARER, A.J.A.**

JUDGMENT

BECK, A.J.A.

In the Maseru Magistrate's Court the appellant was charged with and convicted of the offence of attempted murder and he was sentenced to 2 years imprisonment. An appeal to the High Court against both conviction and sentence was dismissed, but leave to appeal to this Court against conviction only was granted.

It is not in dispute that on the 22nd of January 1994 the complainant was shot in the abdomen by the appellant who was armed with a 9 mm pistol. Some time prior to the shooting of the complainant a child of the appellant, in the course of playing with other children in the vicinity of the complainant's house, had broken a window pane which allegedly cost R98 to be repaired. When this occurred the complainant was away from home and his wife sought to obtain from the appellant the cost of replacing the broken window pane, but she was unsuccessful. Some weeks later the complainant returned home for a week-end and it was expected that he and the appellant would meet and sort out the problem of payment for the window that the child had broken.

The two men did indeed meet and the issue of paying for the window was raised. It was the appellant's evidence that he went first of all to the complainant's house where he and the complainant had an amiable discussion in the course of which the complainant said that there was no problem and that the appellant could pay for the window as soon as he had the cash available to do so. The complainant then saw the appellant to the gate of the complainant's property where they parted amicably. Shortly thereafter however, so the appellant said, the complainant arrived at the appellant's home together with appellant's wife in her car and angrily

demanded the money for the window. The complainant refused to be mollified and the appellant ordered him out of the house. At the appellant's gate the complainant's wife and children were gathered and they were also angry and rowdy. The complainant and his family departed, but five minutes later the complainant was back again, repeating his angry demands for payment. The appellant pushed him to the gate and turned to go back into his house when he heard a shot. He took cover behind a vehicle and a pile of bricks in his yard, drew his pistol and fired a shot at the complainant. He did not see what happened to the complainant, and went into his house. Next morning he was arrested. He told the police that the complainant had first shot at him.

The trial Magistrate understandably found this account of events by the appellant to be most improbable. The alleged angry and doggedly confrontational behaviour of the complainant is irreconcilable with his conciliatory and friendly attitude of only minutes earlier; and the assertion that after firing at the complainant the appellant did not see what happened to him, was unaware that he had shot him, and simply entered his house and took no further interest in events, seems extremely unlikely.

Apart from the inherently improbable and unsatisfactory version of the appellant however, the evidence of his own defence witness, Thabo Motlamelle, is inconsistent with his case. This man lives in a flat rented from the complainant and situated on the complainant's property just behind the complainant's house. According to him, the houses of the complainant and of the appellant are some 400 to 500 metres apart, and he testified that a gun-shot from the appellant's house would have to be

from a big gun if it were to be audible to anyone inside his flat situated at the back of the complainant's yard. While inside his flat Motlamelle heard a single gun-shot which seemed to him to have emanated from somewhere between his premises and the appellant's house, but nearer to his flat, and a moment later he heard a man's voice crying out. The complainant's wife was with him at the time and they rushed out of his flat together to see what was happening. They met the complainant as he came hurrying to Motlamelle's flat where he collapsed, and he had nothing in his hands.

Motlamelle's evidence that the single shot that he heard was fired from somewhere closer to his flat than to the appellant's house accords with the evidence of Masingoaneng Tlabaki, who was employed at the time as a domestic worker by Thabo Motlamelle. She testified that the complainant came to Thabo Motlamelle's flat, spoke to him and departed, and then she heard a gunshot. She thought she heard the sound of one shot only. She next saw the complainant being taken from the door to Motlamelle's flat and carried into the flat. According to her evidence the complainant was shot on his own premises not far from Motlamelle's flat as the complainant was on his way to his own house after going out of Motlamelle's kitchen door.

Masingoaneng Tlabaki was called by the State, but she appears to be an independent witness with no motive to falsify her testimony in any way. Her evidence, and that of the defence witness Motlamelle, not only goes to discredit the improbable version of the appellant, but it supports the evidence of the complainant that he was shot on his premises at the corner of his house by the appellant.

There is considerable confusion in the evidence of the Crown witnesses concerning the movements of the complainant, the complainant's wife, the appellant and the appellant's wife, and concerning what passed between them, before the stage when the complainant was shot. In my view however, these imperfections in the evidence of the complainant and his wife are of no benefit to the appellant. The evidence of Motlamelle and of Tlabaki that I have broadly outlined above establishes beyond a reasonable doubt that the complainant was not shot at the appellant's house, but on the complainant's premises, as the complainant testified, and that the complainant did not fire a shot immediately before the appellant shot him. That being so, the appellant's contention that he acted in self-defence in the manner that he described is shown to be false. No other justification for his behaviour in shooting the complainant can be found, nor has any been suggested.

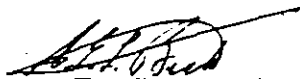
It only remains to add that even if the appellant's version were to be regarded as reasonably possibly true, the contention that he fired in legitimate self-defence would still have to be rejected. There is no evidence that the appellant was, or that he thought that he was, in imminent danger of death or serious bodily harm when he shot the complainant. For all he knew, the shot that he claims to have heard the complainant fire may have been fired in the air and not at him. It was not followed by any further shots from the complainant and the appellant was able to ensconce himself safely behind a motor vehicle and a pile of bricks in his yard. It is from behind the protection of that cover that he says he drew his pistol and shot the complainant who was some 15 to 20 metres from him. He does not suggest that when he shot the complainant the

latter was seeking to fire any further shots. There is no evidence that the complainant at that stage still had his pistol drawn and ready to fire in the appellant's direction. Indeed, nowhere in the appellant's evidence does he ever say that he was at any time in fear of his life or of injury.

This is not to take an armchair critic's view of the situation, as Mr. Matoane urged us not to do; it is simply a matter of there being no evidence from the appellant that he considered himself to be in imminent danger when he shot the complainant; nor is there any evidence from which it could be inferred that he was in fact in any danger when he decided to fire.

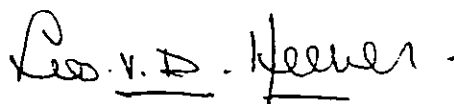
Accordingly in my view the appellant was correctly convicted of the offence of attempted murder and the appeal against conviction falls to be dismissed.

Dated at Maseru this ~~4~~^{4th} day of February 1998



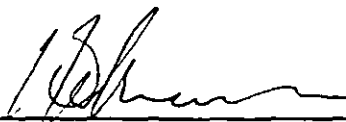
C. E. L. BECK A. J. A.
ACTING JUDGE OF APPEAL

I agree:



L. VAN DEN HEEVER
JUDGE OF APPEAL

I agree:



D. L. L. SHEARER
ACTING JUDGE OF APPEAL