C OF A (CRI) NO. 3 OF 1998

IN THE LESOTHO COURT OF APPEAL

In the matter between:

TSELISO MAKOTOKO

v

REX

Held at:
MASERU

Coram:
Steyn, P
Browde, JA
Shearer, JA

JUDGMENT

STEYN P:

It is common cause that the appellant shot and killed the deceased. The appellant was at the time a police officer who - on the evening in question - visited a shebeen. It was during an altercation in this drinking house that the appellant shot the deceased with his rifle.

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The Crown called two witnesses who were at the scene on that evening. They were one Makate - also a policeman (P.W.1) - and one Monyako (P.W.2). Although there were two other persons present at or around the time that the shooting took place, they were not called. The appellant himself did not testify.

On the evening of the 28th of November, 1991, there was "a farewell party" at the shebeen -the home of one Mrs. Matsumunyane. Both the appellant and the deceased were present. According to P.W.1, the deceased "ordered" the appellant to leave the premises; he was still on duty and was wearing his uniform. To this "Order" there was no response.

It is not clear when but some time shortly thereafter - whether in response to the appellant's failure to comply with his "order", or for some other reason - the deceased produced a pistol. The bystanders, including the witness, got hold of the deceased and grappled with him in an attempt to disarm him. In the ensuing fracas, the pistol went off.

P.W.1 - obviously alarmed at the serious turn of events - requested the appellant to leave and accompanied him off the premises, walking some distance with him. After the witness returned to the house and some 20 - 25 minutes after the appellant's original departure, the appellant returned and started firing shots at the homestead. The deceased returned the fire with his

pistol. After the firing had ceased - it appeared that the deceased had exhausted his ammunition - the appellant returned to the house and in circumstances which I will debate below shot the deceased at point blank range.

The next witness, P.W.2 gave a version which differs in many respects from that of the P.W.1. Thus e.g. P.W.1 says that there was a party going on whereas P.W.2 denies this. P.W.1 says he accompanied the appellant when the latter left the house; P.W.2 was adamant that P.W.1 never left the house.

What is of very considerable importance, however, is to try to determine what occurred immediately before the appellant shot the deceased. P.W.1 says that after the "shoot-out" had ceased, the appellant returned to the house. He said "take out that shit of yours". The witness goes on to say: "The deceased raised up his hands and then said "my friend let us stop fighting". According to P.W.1, the deceased was sitting, took out his pistol and held it in his left hand. He says that "it was as if in a shooting position, it was just lying in his palm, nothing indicated that he could press the trigger any time". He also added: "I don't think it was pointing at him, it was just lying flat in his palm but this hand facing in his direction (the accused)". At the same time, according tithe witness, the deceased said: "let's bury the hatchet - pleading to keep peace".

P.W.2 was involved in the attempt to disarm the deceased at the point earlier in the evening when the pistol was discharged. He, however, decided to get out of shooting range and hid under the bed. He heard the subsequent "shoot-out" from this vantage point. This went on for a long time until he heard "the deceased saying that he was running short of whatever". He did not see the appellant shooting the deceased but heard P.W.1 say that "he has finished him". At this point, the witness left his hiding place, went into the room where he found the deceased lying on the floor and the appellant sitting on the chair in the sitting room. According to him, the appellant said that he did not shoot the deceased, "he just scared him and he had fainted". He confirms that the deceased was holding the pistol in his hand as he lay on the ground.

There is one further piece of testimony I should record. In re-examination P.W.1 was questioned and responded as follows:

"DC: And most finally it has been suggested that when the accused shot the deceased he did so in self defense, can you comment on that?

PW1: I think that is the way he thought and found it necessary to do that.

HL: No, answer the counsel's question is "you were there, you saw what happened and the counsel for the accused has suggested that when the accused shot the deceased it was self defense. His (deceased) life was in danger. Our question will be: "do you think the accused life was in danger at that stage or any time?

DC: Please answer. You were there, you saw what happened.

HL: Yes, you have said what you are saying. Do you think accused life was in danger?
Well he asked for excuses, for forgiveness and so on and so forth. Was he putting the accused life in danger? Was the accused life in danger?

PW1: I don't remember it being so."

This evidence tends to indicate some uncertainty of the part of the witness concerning the state of mind of the appellant at the time.

I have already indicated that the appellant did not give evidence, neither was any evidence tendered on behalf of the defence.

It was on this evidence that the Court convicted the appellant of murder. In its judgment the Court says the following:

> "According to the evidence which this court believed, accused and appellant were acting in a most disquieting and irresponsible manner shooting wildly in and outside the house in which they were as if it was Guy Fawkes day. At no time in their errant shooting were there any particular targets nor were any 4 - letter words exchanged. The evidence has not disclosed that at any time the deceased aimed at the accused. And yet it was when deceased pleaded for peace that accused shot him. I have already expressed the reason why deceased was shot and that, at the time of the shooting deceased was overcome with remorse and pleading for peace. At the time there was nothing which deceased did which could remotely be construed as imperilling accused's safety nor was the situation in any way tense or imminently foreboding. The deceased had not chased accused around and even if earlier the deceased had 'pushed accused a little' and told him to go to work, the provocation if any should have subsided. Besides, I do not think deceased was wrong to remind accused of his duties.

Watermeyer, J.A. in *Rex v. Molife,* 1940 A.D. 202 at 204 said that

> '...Homicide in self-defence is only excusable under certain strictly limited conditions, that the means of defence must be commensurate with the danger; that dangerous means of defence must not be adopted when the threatened injury can be avoided in some other reasonable way - that homicide in self-defence, which is not entirely excusable in law, may yet be committed in such circumstances that the crime is reduced to culpable homicide.'

I have believed P.W.1's version of events and fail to understand why accused returned to the scene unless his motive was to execute the deceased. I have said there was no evidence that deceased was hunting accused down and this court fails to appreciate why, on accused returning from being seen off went to confront deceased. He confronted deceased because he had noted the hopeless and hapless condition in which the deceased was. If accused feared for his life the question is when such fear arose for, had accused either on his own or on being told by deceased to go to work or when he was accompanied by P.W.1 had he not returned to the scene, all would have been well; of importance is that at the material time accused was expected to be at work but defied everybody."

I am in agreement with the view expressed by the Court *a quo* that on the evidence read as a whole and in the absence of evidence which contradicted the testimony of P.W.1, it would be fanciful to find that the appellant acted in self-defence. It is clear that the Crown discharged the onus that the appellant had acted unlawfully in shooting the deceased.

I am, however, not convinced that the Judge's finding that the only motive the appellant could have had when returning to the scene "was to execute" the deceased. This does not seem to me to be the only reasonable inference to be drawn from the proved facts. Indeed, if this is so, the appellant

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would have fired at the deceased the moment he re-entered the house. Certainly, P.W.1 could have not entertained the doubts expressed in his evidence cited above if this had been his perception of what had occurred.

As the evidence indicates, there was at least some discourse between the deceased and the appellant - which led to the deceased producing his pistol and presenting it with the barrel pointing in the direction of the appellant. It is only at this point that the appellant fires his rifle at the deceased.

Whilst therefore the deceased's conduct could not reasonably have engendered a belief in appellant's mind, that he was at risk of being shot, the production of the pistol by the deceased may well have been the trigger that caused him to lose control of himself and to act as he did. It must be borne in mind that both the deceased and the appellant had consumed a considerable amount of alcohol, that there had been an altercation inside the house in which the deceased had been the first person to produce a firearm and had to be disarmed before he could fire it, followed by the exchange of shots between the two contestants. In these circumstances, it seems to me that the court should have entertained a doubt as to whether the appellant enraged, provoked and intoxicated as he was actually intended to kill the deceased. His comments after the event also lends some support for this view.

In the circumstances - as counsel for the Crown conceded - a finding of

"guilty of culpable homicide" appears to us to be the appropriate verdict. Bearing in mind the diminished moral guilt which such a finding entails, a lesser sentence would also be appropriate.

In the result, the appeal succeeds. The verdict of guilty of murder and the sentence of 10 years' imprisonment is set aside. In its place the following is substituted:

> Guilty of culpable homicide and sentenced to 7 years' imprisonment.

J.H. STEYN
PRESIDENT OF THE COURT
OF APPEAL

I agree:

J. BROWDE
JUDGE OF APPEAL

I agree:

D. SHEARER
ACTING JUDGE OF APPEAL

Delivered at Maseru this 31st day of July 199 .

For appellant :
For respondent :