C OF A (CRI) NO. 9 OF 2003

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

RETŠELISITSOE RATSEBE **Appellant**

And

REX **Respondent**

HELD AT MASERU

CORAM:
Plewman, JA
Melunsky JA
Kumleben AJA

Summary

Criminal law – murder – culpable homicide – self-defence – appeal against conviction and sentence – appellant found to have acted in self-defence – consideration of liability for murder or culpable homicide when in so acting a third person is fatally injured.

JUDGMENT

Kumleben AJA

The appellant stood trial in the High Court on two counts: the murder of one Tsotetsi Mokete (the "deceased") and the attempted murder of Mokoanyane Lepolesa (the "complainant"). The court (Molai

J) found him guilty on both counts and sentenced him to imprisonment for 10 and 2 years respectively. This appeal is against sentence and conviction.

The complainant and the appellant gave conflicting accounts of the events leading to these two charges. They are in fact the only witnesses to the occurrence itself. The judgment fails to state explicitly which version was accepted. The learned judge did say in his judgment "that he could find no good reason to disbelieve the accused in his testimony that he was the person who aimed, opened fire and shot at [the complainant]" and expressed some – questionable – scepticism of certain aspects of the appellant's evidence. No proper appraisal of his evidence appears from the judgment nor is there any adverse finding on his credibility. The court "assumed" the correctness of his evidence when considering whether the appellant had acted within the bounds of self defence. I should add that there was similarly no appraisal of the complainant's evidence that, in my view, on the record reads unconvincingly. In the result the appellant's version, together with some other undisputed facts, must be accepted for the purpose of deciding the merits of this appeal.

On the night in question the appellant was on duty as an armed

security guard at premises in Mafeteng. He was seated at a fire with two others in a shelter as it was raining. The complainant and deceased had been drinking beer for four hours before they arrived on the scene, during which period over two gallons of beer had been imbibed. On their arrival they demanded meat since, as they thought, meat was being cooked. When told that there was no meat they became aggressive and abusive and refused to leave. The complainant said " Oh, man since there is no meat here we are giving you your mother" and snatched at the appellant's firearm. The two of them grappled for its possession. As they struggled the appellant managed to wrest his "gun" from the complainant's grip but in doing so fell backwards to the ground. As he did so he cocked the gun and fired as the complainant "rushed to me." As it happened this one shot caused a superficial chest wound to the "target", the complainant, but proceeded to fatally wound the deceased. With the shot both the deceased and complainant fled despite being wounded. The appellant and others at the scene chased after the intruders with a view to arresting them. The police were summoned and the appellant explained what had taken place. Under cross-examination the following questions and answers are recorded:

"CC: So why did you shoot them?

DW1: I shot at them because they appeared dangerous to me because if they started fighting for my gun it showed that they were up to something

CC: The man whom you were struggling over the gun with him, he tried to snatch the gun because you were trying to shoot them?

DW1: No, that is not so." (Emphasis added.)

One notes that it was "CC" who introduced the plural pronoun. But the evidence makes it clear that the one deliberate shot was aimed at the complainant. This is confirmed by the following extract from appellant's evidence:

"HL: So why do you say the person you shot is not the person you struggled with over the firearm?

DW1: Because the person who had fallen down [the deceased] was not the one we (sic) were struggling over the arm with, he [the deceased] was facing at the corner to the people he had ordered to lie down ……… ."

Thus one must distinguish between the deliberate act of shooting the complainant, (in respect of which the issue of self-defence arises) and the unintended fatal result of the shot fired.

Turning first to count 2 and the question of self-defence, certain further relevant facts ought to be stressed. The appellant was a 24 year old security guard on duty at night. The two intruders were unknown to him and were to a substantial degree intoxicated. They were aggressive. The complainant as he lay hold of appellant's firearm said "…. we are giving you your mother." The precise meaning of this in the argot of aggression does not appear from the record but counsel were agreed that it amounted to a threat to severely assault the appellant. As they grappled for the firearm the appellant was entitled to conclude that had

the complainant gained possession of it, he would have used it in the light of his threat. There was in the circumstances no opportunity, as counsel submitted, for a warning shot – assuming that one would have been heeded by the intoxicated brazen assailant. Taking these circumstances into account, and bearing in mind that the appellant was obliged to act in the heat of the moment, it cannot be said beyond reasonable doubt that the appellant exceeded the bounds of self-defence. The conviction on this count cannot stand.

As regards count I, the murder charge, the learned judge, after finding that it was not the deceased that was threatening the appellant reasoned as follows:

> "Assuming the correctness of his evidence that at the time he opened fired at Makoanyane he was aware that Tšotetsi was standing only 4 metres behind him (Makoanyane), I am convinced that the accused was aware of the possibility of the bullet fatally hitting Tšotetsi as well. He nevertheless opened fire regardless of whether or not Tšotetsi would be fatally hit. In my finding, the accused did have the requisite subjective intention to kill, at least, in the legal sense."

But on the facts there can be no question of a "subjective intention to kill the deceased". To conclude that he actually foresaw in the heat of the moment that in shooting at his assailant he might fatally injure the other person would be to attribute to him peripheral perception and appreciation which he could never have possessed. As pointed out by Jansen JA: "The distinguishing feature of *dolus eventualis* is the volitional component: the agent (perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he takes it into the bargain." S v Ngubane 1985 (3) SA 677 (A) 685D.

The further question is whether the evidence justifies a conviction of culpable homicide. The requirements for liability in this regard, applying equally in the field of criminal law, are thus set out in Kruger v Coetzee 1966(2) SA 428 (A) 430 E – F

" For the purposes of liability *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant-

(i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) Would take reasonable steps to guard against such occurrence; and

(b) The defendant failed to take such steps."

As to (i), I do not consider that the fatal ricochet was reasonably foreseeable within the time the appellant was to react – if at all. As to (ii), as I have concluded, that the appellant was entitled to act in defence of his life, and that since the chances of someone else being shot are no more than remote – as I also conclude – this would be a risk that a reasonable person would not have to guard against.

For these reasons the convictions cannot stand. The appeal is allowed and the sentences are set aside.

Delivered at Maseru this 7th Day of April, 2004.

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M. Kumleben
Acting Judge of Appeal

I agree:

C. Plewman
Judge of Appeal

I agree:

L. Melunsky
Judge of Appeal