IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI) 8 OF 2008

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant
(Respondent in the cross-appeal)

And

TEBANG KHAMA

Respondent
(Appellant in the cross-appeal)

CORAM: RAMODIBEDI P
MELUNSKY JA
MAJARA JA

HEARD: 3 OCTOBER 2008
DELIVERED: 17 OCTOBER 2008

SUMMARY

Criminal Law – murder – respondent convicted of murder in High Court and sentenced to two years imprisonment – appeal by appellant against leniency of sentence – cross-appeal by respondent against conviction.

Deceased and respondent involved in a physical fight which commenced in a bar – combatants separated by others outside building. Shortly thereafter respondent returned to bar armed with a 9mm pistol – respondent assaulted by deceased and fired a number of shots towards deceased – deceased sustained bullet wounds and died as a result of internal bleeding.

Held on the facts: Respondent's guilt established beyond reasonable doubt.

Held on sentence: Significant disparity between sentence that this Court would have imposed and that imposed by High Court – Court of Appeal entitled to interfere.

Cross-appeal accordingly dismissed. Appeal allowed – sentence on murder count increased to ten years imprisonment.

JUDGMENT

MELUNSKY, JA

[1] The respondent, a police officer in the Lesotho Police force, was the accused in the High Court. He was indicted before Nomngcongo J and assessors on two counts: Count 1 was charge of murder, the material allegation being that he unlawfully and intentionally killed Charles Lefosa ("the deceased"). Count 2 related to the unlawful possession of a firearm (a 9mm pistol) without holding a valid firearm certificate.

Both offences were allegedly committed on 20 May 2006 at or near Hlotse Caltex petrol station in the district of Leribe. Despite his plea of not guilty, the respondent was convicted on both counts and was sentenced to two years imprisonment on the first count, the Court having found that extenuating circumstances were present, and to a fine of M1000 or one year's imprisonment on the second, both sentences to run concurrently.

[2] This is an appeal by the Director of Public Prosecutions against the leniency of the sentence on count 1 and a cross-appeal by the respondent against the conviction on the same count.

[3] The charge of murder had its origin in what can best be described as a bar-room brawl between the respondent and the deceased, both of whom were inebriated. The precise lay-out of the place where the incident occurred does not appear clearly from the evidence. It seems to be reasonably clear, however, that a bar, a shop, a restaurant and a petrol filling station formed part of a complex. The respondent and two of his colleagues, Maepe and Fusi, went to the bar for the purpose of watching a football match on a television screen in the premises. The deceased

and a number of other patrons were also present in the establishment. The respondent and his colleagues drank copious amounts of brandy before, during and after the conclusion of the match. The trial Court, correctly in my view, accepted the respondent's version of the events giving rise to the initial skirmish between him and the deceased. The trouble started when the deceased kicked the respondent's glass of liquor that had been placed on the floor, resulting in the contents being spilled. When the respondent drew this to the attention of the deceased, he, the deceased, became both aggressive and uncouth. Not only did he speak disparagingly of both the respondent and the liquor that he had been drinking but he struck the respondent's face with his fist. Not unexpectedly this led to the respondent retaliating and he and the deceased wrestled with each other and they were pushed outside the premises where they continued their struggle until they were separated.

[4] There are conflicting versions of what occurred thereafter. What seems to be clear – and this is essentially the version accepted by the Court *a quo* – is that the deceased, apparently on the advice of PW2, went to wash his face at the nearby petrol bowser, while the respondent went around or behind the building. In the meantime the deceased had

re-entered the building and was standing inside, behind a glass door. Some time thereafter the respondent returned to the shop. There is a discrepancy between the respondent and the Crown witnesses as to the time it took for him to return. The trial Court accepted the respondent's version that he had merely gone to wash the blood off his face and that he had come back after about three minutes. The Crown witnesses estimated that he was away for about fifteen to twenty minutes. The length of the time that he took before returning does not seem to me to be of much moment. What is crucial for the outcome of this appeal is what occurred on his return. On this aspect as I have mentioned, there is a sharp divergence of views between the respondent and the Crown witnesses. I turn now to identify the main points of difference.

[5] The respondent testified that he returned to the shop accompanied by Maepe to collect some of his belongings – liquor and money – which he had left there. He also intended to purchase cigarettes. He said that as he entered the shop the deceased suddenly and without warning hit him repeatedly. To avoid this onslaught the respondent moved back and was outside the shop when he took a pistol out of his pocket. Despite this the deceased continued to advance towards him and the respondent

cocked the firearm and fired a single shot, intended as a warning to his assailant. The deceased, he said, was undeterred and persisted moving towards the respondent who reacted by firing a second shot in the direction of the deceased's legs. All of this took place while the combatants were still outside the shop but, according to the respondent, he was unable to move further back because of a crowd of people behind him. Moreover the deceased grabbed hold of him and a further struggle ensued apparently within the shop, this time for possession of the pistol. The respondent claimed that during the fracas he "lost control of the firearm" because the deceased had "twisted" his hand; that at that stage of the fight he heard a further gunshot; and that the deceased then fell to the ground.

[6] As I have indicated the evidence of the Crown witnesses differs considerably from that of the respondent. This is not to say that there were no discrepancies between their various accounts but there is no doubt in my mind, and also in the mind of the trial Court, that the Crown witnesses gave a logical, coherent and generally consistent version of what had occurred. The details of the evidence of each witness are contained in the judgment and also very fully in the heads of argument

of counsel for the respondent. In the circumstances it would be superfluous for me to repeat what is already on the record and I will content myself by giving a brief resumé of the relevant events.

[7] PW1, for instance, was a petrol attendant. He saw the respondent and his companion approach the glass door while the deceased was still inside the premises. The respondent took out his pistol and PW1 attempted to intervene but the respondent, after retreating a few steps, fired two shots through the glass door and towards the deceased. The respondent then entered the shop and fired about three shots in the direction of the deceased who then rushed at the respondent and tried to wrest the firearm from him. There was a short struggle before the deceased collapsed.

[8] PW2 told the trial Court that after the earlier fight he pleaded with the deceased to leave the shop but before the deceased did so, the respondent returned and hurried towards the door. According to the witness, the following then occurred:

The deceased, who was inside, hit the respondent once with his fist, the respondent moved backwards and, while outside, started shooting through the glass door; PW2 pulled the deceased away from the door and took shelter with him behind a pillar; the respondent by then had entered the premises and fired about four more shots towards the deceased. The rest of PW2's evidence is largely confirmatory of the evidence that PW1 had given.

[9] PW4 was one of the people who separated the deceased and the respondent during their initial fight outside the bar. After this she returned to her home which was in, or close to, the Caltex complex and while there she heard the sound of gunshots. She hurried to the shop where she found the deceased, who was barely alive, lying on the floor. Significantly enough she observed some holes, which to her appeared to be bullet holes, in the glass doors of the shop.

[10] PW5, who was a petrol attendant at the Caltex filling station, saw the respondent firing two shots into the shop, and observed that he entered the shop. Thereafter he heard two or three gunshot reports. Similar evidence was given by PW6, also a petrol attendant. And this

evidence was corroborated in many material respects by his colleague PW7.

[11] The remaining evidence which needs to be noted on count 1 was not in dispute. First, there is the post mortem report which established that there were gunshot wounds to the epigastrium and the right leg of the deceased and that he died due to the internal bleeding following "gun shot injury", presumably to the epigastrium. There is also a medical report dated 20 May 2006 relating to the respondent. From this it appears that the respondent sustained moderately severe facial injuries.

[12] On behalf of the respondent it was submitted in the heads of argument that the Crown evidence in the Court *a quo* was so contradictory that it was unsafe to place reliance on it. Counsel detailed some of the discrepancies which he considered to be material. It is not necessary to deal with these in this judgment. Firstly, the Court *a quo* was well aware of the discrepancies and took them into account. Where the witnesses differed, it said, was not because of any sinister motive but because

> "no two people can observe the same thing in the same manner".

Clearly the witnesses made their observations from various positions and the scene which they observed was a fast moving fight followed by an attack with a pistol, which in itself was enough to disturb the equilibrium of all but the most imperturbable. What is more all of the Crown witnesses were unbiased, impartial observers, with no motive to implicate the respondent or to favour the deceased or his family. Moreover, the evidence which PW4 gave of the apparent bullet holes in the glass door was inconsistent with the respondent's version. She was the manageress of the restaurant in the complex and was clearly an observant witness who was appalled by the violence that took place.

[13] It should also be emphasized that there were no misdirections on the part of the trial Court and none were relied upon by the respondent. From all of this it inevitably follows that the Crown has established the guilt of the respondent on count 1 beyond reasonable doubt. The cross-appeal, therefore, cannot succeed.

[14] Both counsel accepted that extenuating circumstances were present in this case and rightly so. Nothing further needs to be said on that aspect. It is clear, however, that although the initial fight had ended, the appellant's return to the scene was not due to his desire to collect his belongings or to make any purchases. His intention was to resume the fight and, if the occasion warranted it, to use a firearm to overcome his opponent. This was a serious error of judgment on his part and one which a police officer, in particular, should not have made. And the fact that it was his duty to uphold the law and not to break it adds to the severity of the offence.

[15] Accepting as I do that the deceased was the original aggressor and that he immediately struck the appellant on the latter's return to the shop, the appellant's response went far beyond the bounds of what was reasonable. It is plain that he reacted by firing shots at the deceased firstly through the glass door and thereafter inside the building. The deceased was unarmed and had no means of defending himself. There was, it is true, a degree of provocation by the deceased due to his aggressive and insulting behaviour and it is also possible that the respondent's judgment might have been affected by the liquor which he

had consumed but none of this warrants a sentence of such leniency as that imposed by the trial Court. Indeed counsel for the respondent fairly and properly conceded that the appeal against the sentence should succeed in the event of the conviction being confirmed.

[16] The test to be applied in this matter is to determine whether there is a striking disparity between the sentence that this Court would have imposed and that actually imposed by the Court *a quo*. If the answer is in the affirmative this Court is entitled to interfere with the sentence. In my view, the trial Court failed to take into account the seriousness of the offence and, in particular, that after a period of cooling off the respondent, a police officer, returned to the scene of battle with aggression in his mind and a loaded pistol in his possession and that he fired a number of shots at a man who had ceased to be a threat to him. Having regard to all the facts of the case it is my considered opinion that a sentence of ten years imprisonment would be a reasonable sentence. Consequently there is indeed a striking disparity between the sentence imposed by the trial Court and that which is appropriate and fair, taking into account the personal circumstances of the respondent, the gravity of the crime and the interests of society.

[17] There is one additional aspect which causes the members of this Court considerable concern. That relates to the fact that during the course of the initial fight and while the participants were outside the shop, PW4 intervened and persuaded the respondent to stop fighting. In fact she held onto the respondent. She told the trial Court that several other police officers, friends of the respondent, were also in the immediate vicinity. Not only did they do nothing to stop the battle but one of them actually objected to PW4's intervention in order that the fight should continue. Eventually the officers acceded to her pleas and promised to take the respondent home. The conduct of the police officers in failing to intervene and, indeed, in encouraging the respondent to fight was deplorable. The behaviour of PW4, on the other hand, was commendable. Furthermore at least one of the police officers accompanied the respondent on his return to the shop when he must have realised that the respondent was bent on aggression. The Director of Public Prosecutions is requested to draw all of the above facts to the attention of the officer commanding the police station at which the police officers in question are stationed to enable the officer to take whatever action he considers appropriate.

[18] The result is the following:

1. The cross-appeal is dismissed and the convictions on both counts are confirmed;

2. The appeal succeeds and the sentence on Count 1 is set aside and is replaced with the following:

   "Ten years imprisonment".

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L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

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M.M. RAMODIBEDI
PRESIDENT OF THE
COURT OF APPEAL

I agree:

_____
N. MAJARA
JUSTICE OF APPEAL

COUNSEL FOR THE APPELLANT: ADV. L.L. MOKOROSI

COUNSEL FOR THE RESPONDENT: ADV. J.T. MOLEFI