IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CRI) No.2/09

In the matter between:-

THE DIRECTOR OF PUBLIC PROSECUTIONS **APPELLANT**

And

'MALIAKO MOSAE **RESPONDENT**

CORAM : RAMODIBEDI, P
GROSSKOPF, JA
SCOTT, JA

HEARD : 7 OCTOBER 2009

DELIVERED : 23 OCTOBER 2009

SUMMARY

Criminal Law - Crown appealing against conviction of culpable homicide on the ground that the correct verdict should have been murder - Distinction between dolus directus and dolus eventualis - Held that the respondent was correctly convicted of culpable homicide on the ground that she ought reasonably to have foreseen that death would ensue from her stabbing of the deceased with a knife - Appeal accordingly dismissed.

JUDGMENT

RAMODIBEDI P,

[1] In this appeal the Crown is aggrieved by the decision of the High Court (Peete J) convicting the respondent of culpable homicide. The Crown contends that the proper verdict on the established facts should have been murder.

[2] The respondent was indicted in the High Court on a single count of murder. It was alleged that upon or about 5 January 2005, and at or near Noka-Ntšo, Mpharane in Mohale'shoek district the respondent unlawfully and intentionally killed one Puleng Mohlouoa ("the deceased").

[3] As indicated above the respondent was convicted of culpable homicide. She was sentenced to ten (10) years imprisonment or M10,000.00, half of which was conditionally suspended for three years.

[4] It is useful to commence this judgment with the respondent's own version that trouble between the deceased and herself started on the previous day to the deceased's killing. She

testified that on that day she had an altercation with the deceased. She said that the deceased hit her and also tore her skipper.

[5] Insofar as the events of the fateful day of 5 January 2005 are concerned, the Crown called two eyewitnesses, namely, Khauhelo Lesia (PW1) and Puseletso Lesia (PW2) both of whom were next door neighbours to the deceased. The two witnesses were sisters.

[6] PW1 testified that the respondent's elder sister, Mahase, came with a dog to the place where PW1 was sitting in the company of the deceased. The respondent accused the deceased of having hit the dog in question. She also made threatening

remarks at the deceased. It is not disputed that nasty words were exchanged between Mahase and the deceased. Mahase called the deceased "insane". The latter in turn responded by calling Mahase "thin". Hence the stage was set for a physical confrontation between the two girls. And so it occurred.

[7] It was the evidence of PW1 that she saw the deceased and Mahase grapple with each other. They were hitting each other. At that stage one Jacinta also joined the fight on the side of the respondent. She used a stick on the deceased.

[8] PW1 testified that while she and others were busy trying to separate the fighting girls, she saw the respondent standing next to her and *"throwing something like a fist and yet I*

realized that it was by the time that she was stabbing ausi Puleng (the deceased) with a knife". PW1 testified that she saw the knife which she described as a "Rambo" knife with a wooden handle.

[9] The evidence of PW2 was that she heard the deceased exclaim that the respondent had stabbed her with a knife. She, however, saw when the respondent stabbed the deceased for the "last time". It was her evidence that "Mahase and Jacinta were overpowering Puleng" (the deceased).

[10] To the extent that the respondent relied on private defence it is necessary to mention at this stage that Mahase had admittedly lost weight. PW2 frankly described her as weak. The deceased on the other hand had a mental problem.

[11] The post-mortem report which was handed in by consent revealed that the deceased had sustained two lacerations, one on the left arm and another one penetrating the left lung. She also had one open wound on the head which was most probably caused by her fall to the ground after she was stabbed. The cause of death was due to shock.

[12] In her evidence the respondent sought to raise private defence. Firstly, she said she stabbed the deceased on the arm because she was assaulting Mahase who was weak. Secondly, she testified that the deceased turned on her. She was all over her, assaulting her. This, despite the fact that it was never put to the Crown witnesses that the deceased assaulted her at all.

Nonetheless she said that the deceased was bigger. She then stabbed her in the chest as she was *"gigantic"* and was about to assault her. She did not know what else to do. She admitted under cross-examination, however, that the deceased was unarmed.

[13] In his judgment the learned trial judge appears to have been largely influenced by his finding that there was no direct evidence to the stabbing of the deceased. I regret that I am unable to agree. The learned Judge either overlooked, or failed to give sufficient consideration to the evidence of PW_1 and PW_2 as fully set out above. Such evidence, as can be seen, constituted direct evidence. I have come to the inescapable conclusion, therefore, that the trial court's finding in this regard

amounted to a misdirection entitling this court to consider the facts afresh. In adopting this approach, I draw comfort from the fact that the learned Judge a quo made no credibility findings against PW1 and PW2. But first the law on self-defence.

[14] As this Court said in **Serame Linake v Rex C of A (CRI) No. 10/08** the principles applicable in self-defence are well - established in this jurisdiction following the case of **R v Attwood 1946 AD 331**. The essential requirement which must be established for a successful defence of self-defence is that it must appear as a reasonable possibility on the evidence that:-

> *(1) the accused had been unlawfully attacked and had reasonable grounds for thinking that he was in danger of death or serious injury at the hands of his attacker;*

(2) the means he used in defending himself were not excessive in relation to the danger; and

(3) the means he used in defending himself were the only or least dangerous means whereby he could have avoided the danger.

[15] On a proper appraisal of the undisputed facts as fully highlighted above, there can be no doubt in my mind that the respondent's fatal stabbing of the deceased fails to pass muster on any of the three requirements necessary for a successful plea of self-defence. It was not disputed for that matter that the respondent stabbed the deceased two times with a knife. This, in circumstances where the deceased was unarmed and obviously posed no threat to her.

[16] On the other hand this Court reminds itself that the onus was on the Crown to prove its case beyond reasonable doubt. It is

a significant factor against the Crown that not a single question was put to the respondent that in stabbing the deceased with a knife she must have foreseen the possibility that the deceased would die. This naturally means that she was never given an opportunity of dealing with that crucial aspect of the case. In fairness to him, Adv. Mokorosi for the Crown very properly, in my view, conceded this point.

[17] Equally of importance, in my view, is the fact that at the time of the alleged commission of the offence the respondent was a young girl of 17 years of age. Her acts must therefore be judged against the fact that she was immature. In fact in terms of s2 of the Children's Protection Act 1980 she was still a child. Furthermore, it is a fundamental principle that the court

should not adopt the role of an armchair critic, of being wise after the event. As was correctly said by Holmes JA in **S v De Bruyn en'n Ander** 1968 (4) **SA** 498 (**A**) at 507:-

> *"What is needed in these cases is down-to-earth reasoning with a view to ascertaining what was going on in the minds of the appellants. This involves looking at all the facts, on the ground as it were, and allowing for human factors such as the robust truism that, when the blood is up, reason is apt to recede; or the human frailty that, when intoxicating liquor has been imbibed too freely, sensitivity is apt to become blunted, so that a man may do things which sober he would not do. One must eschew any tendency toward legalistic armchair reasoning, leading facilely to the superficial conclusion that the accused 'must have foreseen' the possibility of resultant death. And one must avoid any hindsight tendency to draw the inference in question from the fact of death. One must also be careful about applying the rubber-stamp maxim that 'a person is presumed to intend the natural and probable consequences of his act'. For one thing, the maxim contains a deceptive blending of the subjective and the objective. How far is the foreseeable the test of the foreseen? For another thing, this Court has been moving away from the notion of so-called presumptions arising from selected facts, because they involve piecemeal processes of reasoning and rebuttal; see **S. v. Sighwala**, **supra at p.** 569**H**, and **S. v. Snyman**, 1968 (2) **S.A.** 582 (**A.D.**) **at p.** 589**H**. The Court prefers to look at all the facts, and from*

that totality to ascertain whether the inference in question can be drawn."

[18] It is necessary to digress here and address a statement which the learned Judge made in paragraph [11] of his judgment. He said this:-

> *"[11] The principles of our criminal law have never demarcated any 'bright lines' marking a clear distinction between the crime [of] culpable homicide and of murder with extenuating circumstances."*

I consider it to be settled law, however, that the true test is whether in assaulting the deceased the accused foresaw the possibility of resultant death and nevertheless persisted regardless whether it ensued or not. If so, he is guilty of murder. If on the other hand he ought reasonably to have

foreseen the possibility of resultant death and such death ensued, he is guilty of culpable homicide. See, for example, **S v Ntuli** 1975 (1) **SA** 429 (**A**) at 437; **R v Selibo And Others** 2000 - 2004 **LAC** 977 at 979 - 980. Indeed this Court held in **Phumo v Rex** 1990 - 1994 **LAC** 146 at 149 and it bears repeating that:-

> "……. *the distinction between subjective foresight and objective foreseeability must not become blurred. The* ***factum probandum*** *is* ***dolus****, not culpa. These two different concepts never coincide."*

[19] In summary, the relevant facts show that the respondent rushed to the defence of her frail and ailing sister. She had in her possession a knife which she had been using at the material time to cut vegetables. Naturally, her blood must have been up, more especially considering her tender age. I

consider that the respondent, in her immaturity, did not have time to weigh up the consequences of her actions. Crucially, it was never suggested to her in cross-examination that she did. It follows from these considerations, in my view, that the Crown failed to prove beyond reasonable doubt that the respondent had the necessary intention to kill, either in the form of direct intention (*dolus directus*) or in the form of an indirect intention (*dolus eventualis).* The latter situation would obtain if she foresaw the possibility of resultant death but was reckless whether or not it ensued. Having said that however, there cannot be any slightest doubt in my mind, on the totality of the evidence, that the respondent ought reasonably to have foreseen the possibility of resultant death in the circumstances.

(**S.v. Ntuli**) supra. She was, therefore, correctly found guilty of culpable homicide.

[20] In the result the appeal is dismissed.

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M.M. RAMODIBEDI

PRESIDENT OF THE COURT OF APPEAL

I agree: _____

F.H. GROSSKOPF

JUSTICE OF APPEAL

I agree: _____

D.G. SCOTT

JUSTICE OF APPEAL

For Appellant : Adv. L.L. Mokorosi

For Respondent : Adv. L.A. Mofilikoane