IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) NO. 10/08

In the matter between :

SERAME LINAKE
APPELLANT

AND

REX **RESPONDENT**

AND IN THE CROSS-APPEAL OF:

THE DIRECTOR OF PUBLIC PROSECUTIONS
APPELLANT

AND

SERAME LINAKE
RESPONDENT

CORAM: RAMODIBEDI, P
GROSSKOPF, JA
SCOTT, JA

Heard : 23 March 2009
Delivered : 9 April 2009

SUMMARY

Criminal law – Murder – Appeal against both conviction and sentence – Self- defence - Crown's cross-appeal against leniency of a sentence of 8 years imprisonment for murder.

JUDGMENT

RAMODIBEDI, P

[1] The gravamen of this appeal concerns a challenge by the appellant in the main appeal directed against his conviction of murder and a sentence of eight (8) years imprisonment imposed upon him by the High Court. The Crown on its part has cross-appealed against the sentence on the ground that it is shockingly lenient, having regard to the circumstances of the case.

[2] It was alleged in the indictment that the appellant was guilty of murder in that upon or about 23 July 1999 and at or near Linareng in the district of Mokhotlong, he unlawfully and intentionally killed Tau Setene ("the deceased").

[3] The facts leading up to the deceased's death are fairly simple and straightforward. On the fateful day in question, six policemen headed by Sgt Matšumunyane left

Mokhotlong Police Station in the direction of Linareng. They were all armed with SLR rifles. They were following a tip-off concerning an alleged illegal possession of a firearm by two young men, Vunathela Komisi ("Vunathela") and Thabang Saete ("Thabang"). The police intended to arrest both of them. The appellant, a police Lance Sergeant in the Lesotho Mounted Police Service at the time, was one of the policemen in question.

[4] On arrival at the place where Vunathela and Thabang lived, the police conducted a search. They found two 9mm bullets. They then arrested the two suspects and headed back in the direction of the police station with them. However, a large group of people suddenly gathered. They hurled insults at the policemen, accusing them of bias in "frequenting" their place while not doing the same to the neighbouring village of Ha Ntšasa.

[5] It is convenient to digress there and mention the appellant's own account of the events. He testified that he shot in the air with an SLR (Self Loading Rifle) which he was carrying. The reason for so doing, as he put it, was "that those people would stop insulting us." However, the insults intensified. He conceded that he turned back towards this crowd of people at that stage, a decision he will probably rue for the rest of his life. Indeed, as PW6's unchallenged evidence showed, the policemen had already gone past the crowd of people in question. There was no reason for going back to them at that stage. Be that as it may, the appellant testified that when he approached the forecourt, he was confronted by a group of many people who pelted him with stones and hurled insults at him. He retreated and fired in the air twice. However, this had no desired effect. The group just kept coming at him. There

were also dogs which were set on him. He testified that he could no longer retreat because there was a heap of stones behind him. It was then that he shot the deceased. The latter fell to the ground. As can be seen from this brief resume of facts on appellant's version, he relied on self-defence. More about this later.

[6] Several witnesses testified on behalf of the Crown. These were Malang Komisi (PW1), Paseka Setenane (PW2), Limakatso Setenane (PW3), Pesa Setenane (PW4), Motlalepula Setenane (PW5), Tpr Qhobela (PW6) and Teboho Molapo (PW7). Apart from these witnesses, the Crown relied on formal admissions made by the defence. These comprised statements made by Tpr Nhlapo (Exh "A"), Tpr Ranko (Exh "B"), Sgt Matšumunyane (Exh "C") and Sgt Jane (Exh "D"). A ballistic report, too, was handed

in by consent as (Exh “E”) and so was the post-mortem report which was handed in as (Exh “F”).

[7] The star witness for the Crown was no doubt PW1. He was an eye witness to the events which led up to the deceased’s death. According to his evidence, he first heard a gun report. He then saw the appellant chase a boy who outran him. The appellant chased another boy, namely PW2. The latter ran to his home. The deceased who was “lying down on a stable” asked the appellant what the child had done. Rather than answer the question, the appellant, who was “very angry”, pointed a gun at the deceased and “started shooting”. PW1 heard a gun report three times. He saw the deceased, who was unarmed for that matter, fall to the ground. He was only 10 paces away from the appellant and 15 paces from the deceased. He

observed 3 wounds on the deceased's body. Crucially, he described them in these terms:-

> *"PW1: Yes. It was a wound below the buttocks which had pierced through two thighs. The other one was above the knee. The third one was at the back of the heel."*

[8] In cross-examination, PW1 denied the suggestion that the appellant was attacked by a group of boys and men with stones. He remained unshaken in his evidence that there were no people carrying stones. He denied that the appellant was cornered "as there was no one there or around at the time he (the appellant) was shooting." In this, he was corroborated by PW6, appellant's fellow policeman who testified that the crowd of people in question merely hurled insults at the police. They did not attack them at all.

[9] PW2 was the younger brother of the deceased. He testified that on the fateful day in question he had just enkraalled his cattle when the appellant called him "very

angrily" pointing a gun at him. PW2 ran away into the house. He corroborated PW1 that the appellant was chasing him. While inside the house, PW2 heard a gun report three times. When he came out of the house he saw the deceased lying on the ground. There was a lot of blood where he had fallen. Crucially, PW2 testified that he did not see anybody throwing stones at the appellant. There was no heap of stones as alleged by the appellant or at all.

[10] PW3 was the younger sister of the deceased. She, too, testified to seeing PW2 run into the house. According to her, there were no other people in the vicinity except family members. Immediately after PW2 entered the house, a policeman appeared below the stable. It is common cause that this was the appellant. When he saw the deceased, he advanced towards him while calling "come here, come here". The deceased's mother persistently enquired from the appellant what the matter

was but he “never responded”. Instead, the appellant fired a gun at the deceased three times. The deceased was unarmed. PW3 was only seven to eight paces away from the appellant. Significantly, PW3 testified that there was no group of people with the deceased. She corroborated PW2 that there was no heap of stones where the appellant was standing.

[11] PW4 was the deceased’s father. He came to the scene of the crime after the deceased had already been fatally injured. According to him, the deceased “was no more able to walk, he was being dragged” by the policemen. He corroborated both PW2 and PW3 that there was no heap of stones where the appellant had been standing. This was also confirmed by the appellant’s own colleague, namely PW7. PW4 further testified that he saw five wounds on the deceased’s body.

[12] The evidence of PW5 simply showed that he was the deceased's uncle. He, too, heard a gun report three times. He later found the deceased lying prostrate near the stable. He had sustained injuries. PW1 handed him three shells which he had picked up from the scene of the crime. PW5 in turn handed the shells to the police.

[13] It is important to observe that the appellant's claim to self-defence was not supported by his own colleagues. In this connection PW6 testified as follows:-

> *"I found the accused kneeling next to him and trying to dress him of the wound that he had sustained. I inquired into what had happened, and he told me that he shot the person in defending himself as the person was throwing stones at him. Be that as it may, I do not recall seeing any stones that may have been a threat or any other weapon next to the place whereby the victim had fallen.*
>
> *CC Did you see any heap of stones in the vicinity of the area where the deceased had fallen?*
>
> *PW6 No, except for the kraal that was way backwards there is no other heap that I saw."*

Indeed PW6 testified that the appellant had sustained "no injuries at all." The villagers, as PW6 testified, did not throw stones at the police.

[14] The evidence of PW6 in effect amounted to showing that the appellant over-reacted in the circumstances leading up to his killing of the deceased. In this regard PW6 said the following:-

> *"PW6 I think as policemen we need to develop tolerance because we have been insulted by our mothers and if at all a police officer is insulted with his mother and he starts shooting he is going to kill everyone else who may insult him."*

[15] The admitted depositions of Tpr Ranko (Exh "B"), appellant's fellow policeman, showed that at the time he arrived at the scene of the crime there were no other people there except the appellant. This must clearly give a lie to the appellant's claim that he was attacked by a group of men. It is true that Tpr Ranko did refer to "people who

were sitting on the hillock". It was his admitted evidence, however, that those people "had no interference with us about the people we had arrested." Indeed he added quite significantly:-

> *"We had already gone past them. The hurling of the insults did not interfere with those people we had arrested."*

As can be seen from paragraph [8] above, this admitted version corroborates PW6.

[16] The appellant's claim that the villagers set dogs on him is also refuted by the admitted depositions of Tpr Ranko. In his statement he did not recall ever seeing any dogs nearby. Indeed he never heard any barking of dogs except gunshots.

[17] The admitted depositions of Sgt Matšumunyane (Exh "C") are also crucial to the determination of this matter.

While he confirmed that the people on the hillock were hurling insults at the policemen, he stated, however, that those people retreated when the policemen advanced towards them. He confirmed that he ordered the appellant to come back at the time the latter proceeded to confront the crowd. It is common cause that the appellant defied the order.

[18] In his admitted depositions Sgt Jane also gave a damning report against the appellant. According to this admitted report, the appellant had attempted to cover-up the shooting incident. He did so by handing in to the police a firearm which he had not used when he shot the deceased. It was only later in August 1999 when he handed the correct firearm serial number 23522 to Sgt Ranko. The ballistic report (Exh “E”) proved beyond

reasonable doubt that this was the firearm which the appellant used to shoot the deceased.

[19] The appellant's explanation that he shot the deceased only once was equally refuted by the post-mortem report (Exh "F") which was handed in by consent. According to this admitted report, the deceased had sustained the following injuries:-

> *"On the external appearance section; wound on the right thigh [medial] aspect and wound [Internal] aspect of the right thigh; wound on the right heel, and Archilles tendon wound on the leg below the knee. The right wound on the left thigh lateral aspect."*

[20] After a careful analysis of the evidence in its totality, the learned Judge *a quo* came to the conclusion that the deceased was alone and unarmed. I consider that this conclusion is fully supported by the facts as set out above. Nor can anyone justifiably criticize the learned Judge in making the following remarks in her judgment:-

> *"In addition, the evidence of P.W.7 a former officer who went to the scene of the incident as part of the investigating team corroborated all the witnesses to the effect that there was no heap of stones at the forecourt of P.W.5's home for if there had been he would have certainly included it in his report. None of the other police officers deposed to having noticed a heap of stones that a person could have been cornered against as it was suggested by the accused who also went further to opine in his evidence that there appeared to be a house under construction. This was refuted by all the witnesses who testified and it was not supported by those whose depositions were admitted."*

[21] The principles applicable in self-defence are well-established. At this stage I should like to repeat what I said in the Court of Appeal of Botswana in the case of ***Bobe v The State* [2006] 1 BLR 254** at 257 (Grosskopf JA and Lord Coulsfield JA concurring), namely:-

> *"Now, it is a fundamental essence of this principle that where an accused person raises self-defence, the state bears the onus to negative such defence beyond reasonable doubt. Indeed, it is well established that this is so even though an accused person does not rely on self-defence. If the evidence suggests the existence of self-defence as a reasonable possibility then the accused is entitled to an acquittal. See for example S v Ntuli 1975 (1) SA 429 (A).*
>
> *As a general principle, there are three requirements for a successful defence of self-defence, namely, if it appears 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. See R v Attwood 1946 AD 331.*

It is also salutary to bear in mind the apposite remarks of Lord Morris in Palmer v R (1971) 55 Cr App R223, PC at p242 namely that:

'It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances..... It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be .... If there has been no attack, then clearly there will have been no need for defence. If there has been [an] attack so that defence is reasonably necessary, it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action.'"

[22] Applying these principles to the present case I am driven to conclude that there was no need for the appellant to defend himself. The vital point on this aspect of the case is that the appellant had ample opportunity to retreat. But he did not. His explanation to the contrary cannot reasonably possibly be true in the circumstances fully set out above. No fault can be found with the trial court's finding in the following terms:-

> *"On the totality of the evidence, I came to the conclusion that on that fateful day, there was no physical attack on the accused nor was there any imminent danger to his life save to accept that he and the other police officers were insulted, mocked and taunted by the villagers of Linareng who were unhappy because one of their own had been arrested. It is my opinion that the accused turned back to deal with the unruly mob and unfortunately vented out his frustration on the young and defenceless deceased whom he came upon as he was looking for the culprits who had been swearing at them. I do not accept his story that the deceased attacked him at all."*

[23] It is, however necessary to comment on a statement made by the trial court in the course of its judgment, namely:-

> *"However, for the fact that the accused is a firearms expert, was armed with a very lethal long range rifle which he fired at a very short distance, it is my view that he ought to have foreseen that death might ensue from such conduct but he nevertheless reconciled himself with that eventuality. He accordingly had the indirect intent to kill the deceased person."*

The first sentence in this statement is unfortunate. The use of the phrase "ought to have foreseen" is in my view inappropriate in the circumstances of the case. What the trial court obviously meant to say was that the appellant must have foreseen the possibility of the resultant death

but he persisted regardless of the consequences. Hence a finding that the appellant had the indirect intention to kill the deceased (*dolus eventualis*), a finding correctly made in the second sentence in the statement made by the trial court. For a correct formulation of the principle, see for example ***S v Ntuli 1975 (1) SA 429*** at 437. See also ***Molikeng Ranthithi and Another v Rex* C of A (CRI) No. 12/07**; ***Basia Lebeta v Rex C of A (CRI) No. 1/08*****.**

[24] Apart from the correction made in the preceding paragraph I am satisfied that the appellant was correctly convicted of murder. His appeal on this ground falls to be dismissed.

[25] It will be convenient to deal with the appellant's appeal against sentence together with the Crown's cross-appeal. A good starting point is to recognise that sentence

is a matter which pre-eminently lies within the discretion of the trial court. Generally speaking, an appellate court will not interfere with sentence unless there is a misdirection resulting in a miscarriage of justice. It is of fundamental importance to bear in mind, however, that this Court has additional powers, apart from misdirection, to interfere with sentence in terms of s 9 (4) of the Court of Appeal Act 1978 if it thinks that a different sentence should have been passed. This section provides as follows:-

> *"On an appeal against sentence, the Court shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution [therefor] as it thinks ought to have been passed, and in any other case shall dismiss the appeal."*

[26] At the outset, it must be recorded that **Adv Masiphole** for the appellant readily conceded that the learned trial judge did not misdirect herself in any way. He submitted, however, that the sentence of eight (8) years imprisonment is shockingly inappropriate.

[27] At this stage it is no doubt instructive to have regard to the following apposite remarks of this Court in the ***Molikeng Ranthithi*** case (supra), namely:-

> *"As regards the consideration relating to the crime committed, there can be no doubt that murder is a very serious offence indeed. This Court believes in the sanctity of human life. It is in the interests of society that people convicted of murder be put away for a long time. This is so in order to protect society itself against such people. There must also be a distinction drawn between sentences for murder and sentences for culpable homicide. Viewed in this way, I accept that the sentences in this case, ranging as they do from "a sentence to a period until the rising of the court" in respect of the third, sixth and eighth respondents, to an effective sentence of 4 years imprisonment in respect of the second respondent, are woefully inadequate for a murder conviction in the circumstances of this case. Such sentences in my view amount to a travesty of justice."*

[28] There can be no doubt, in my view, that the trial court paid insufficient weight to the guidelines laid down in the ***Molikeng Ranthithi*** case (supra). This was a serious case of the murder of a defenceless and unarmed person. The appellant shot the deceased not once but three times. As a trained policeman of the rank of Lance Sergeant at the time, the appellant should have led by example.

[29] There is reason to conclude that the trial court's imposition of a sentence of eight (8) years was influenced by the court's finding that "when he fired the shot(s) the [appellant] avoided pointing the firearm at the deceased's most vulnerable parts of the body but targeted his lower body." The evidence reveals, however, that the trial court misdirected itself in making this finding. In his own words the appellant testified as follows, admittedly yielding to the pressure of the cross-examination:-

> *"CC I realize that you must have been very careful not to shoot the deceased on the fatal parts of his body.*
>
> *DW1 That is correct My Lord.*
>
> *CC And I believe that you must have taken a very good aim of the deceased?*
>
> *DW1 <u>Without aiming at him</u> (the deceased) I think it was just a matter of pointing or holding the gun in the manner that I had been taught that I should point which way when holding a gun." (Emphasis added.)*

[30] The trial court's misdirection as set out in the preceding paragraph means that this Court is now at large to interfere with the sentence in question.

[31] Finally, it is necessary to record that this Court has given serious consideration to the extraordinary state of affairs pertaining to this matter. As mentioned earlier, the events leading up to the deceased's killing took place as far back as 23 July 1999. The appellant's trial only commenced in July 2008, an unconscionable delay of nine (9) years. In the meantime, not only did the appellant continue in his work as a policeman but he was also promoted to the rank of full sergeant. Although the Crown has submitted that the sentence in the matter should be enhanced to twelve (12) years imprisonment, we consider that the sentence proposed in the order hereunder will

serve the triad consisting of the offender, the crime and the interests of society.

[32] All things being considered, the following order is made:-

(1) The appellant's appeal in the main appeal is dismissed.

(2) The Crown's cross-appeal on sentence is upheld.

(3) The sentence of eight (8) years imprisonment imposed by the trial court is set aside and is replaced with the following sentence:-

"Ten (10) years imprisonment."

_____

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. B.M.R. Masiphole
(With him Adv. T.L.L. Thibinyane)

For Respondent : Adv. L. Mahao