

**IN THE COURT OF APPEAL OF LESOTHO**

C of A (CRI) 3/10

In the matter between:

**MOTHOBI ALEXIS MOHOLI**

**APPELLANT**

AND

**R E X**

**RESPONDENT**

**CORAM:** SMALBERGER, JA  
MELUNSKY, JA  
SCOTT, JA

HEARD : 11 APRIL 2011  
DELIVERED : 20 APRIL 2011

**SUMMARY**

Criminal Law – Murder – appellant, a police officer, shooting deceased in the back – deceased fatally injured – found guilty of murder in High Court and sentenced to 8 years imprisonment.

Held, on appeal, appellant's evidence contradicted by credible Crown evidence and so implausible that it could not reasonably possibly be true. Crown discharged the onus – Sentence reasonable – appeal dismissed.

## **JUDGMENT**

MELUNSKY, JA:

[1] The appellant was indicted in the High Court on a charge of murder in that he allegedly killed Thabiso Shao (“the deceased”) on 1 July 1995 at or near the Crocodile Inn in the Butha-Buthe district. He pleaded not guilty before Moiloa AJ and assessors (one of whom, however, was discharged before the conclusion of the case) but was convicted as charged and sentenced to eight years imprisonment. This is an appeal against the conviction and sentence.

[2] The post-mortem examination of the deceased was performed by Dr. Lyimo, an expatriate medical practitioner who has since left Lesotho and whose whereabouts were not known at the time of the trial. His report of the post-mortem examination was admitted in evidence in terms of

the provisions of the Criminal Procedure and Evidence Act 1981. Dr. Lyimo's findings were:

- 1) A penetrating wound of the left posterior chest at the level of T7 below the shoulder blade;
- 2) The wound penetrated the left lower lobe of the lung, resulting in a hemi-pneumothorax and causing a fracture of rib no 5 anteriorly;
- 3) "The bullet emerged" at the anterior chest about 5cm above the left nipple along the anterior mid – clavicular line.

The doctor's concluding remarks under the heading "Additional Observation" are:

"The wounds are most probably from a 'gun-shot' at close range – from behind".

It is also clear from the evidence of PW2, Dr. Oyebanji, that the deceased died as a result of a gun-shot wound which entered his back and exited at the front of his chest. PW2 was called for the purpose of explaining the contents of the

post-mortem report and, despite objection by the defence, his evidence was correctly admitted by the learned judge a quo.

[3] It is not disputed on the appellant's behalf that the deceased indeed died as a result of a gun-shot wound; that the weapon used to inflict the wound was a police SLR rifle; and that the appellant pulled the trigger that fired the fatal shot. According to the appellant, however, he fired the shot in self-defence in circumstances that will be detailed later. It is only necessary at this stage to record the trite principle of law that, included in the Crown's duty of proving the appellant's guilt beyond reasonable doubt, is the duty of rebutting the particular defence raised in this matter.

[4] At the time of the incident giving rise to the charge, the appellant was a trooper in the Lesotho Mounted Police,

stationed at the Qalo police station in the Butha-Buthe district. He worked together with Trooper Hlaele, PW5, who was stationed at Butha-Buthe but lived next door to the appellant. On the night of 1 July 1995, PW5, the appellant and Trooper Mpasi went out to search for the deceased who was suspected of having committed a robbery in Butha-Buthe. The appellant was armed with a SLR rifle and Mpasi had a side arm. PW5 was apparently unarmed. They eventually found the deceased outside the Crocodile Inn. He was walking towards the policemen. As the deceased passed them, PW5 pointed him out to his colleagues. At this time that PW5 said that he commenced conversing with a certain Mokeke, who appeared to the witness to be in the company of the deceased. PW5 testified that while momentarily speaking to Mokeke he heard a “gun report” and he observed that the deceased had fallen down on his face. The appellant was then a

matter of metres from the deceased. PW5 went to the deceased who was then still alive. He and Mipasi took the deceased to hospital where he was pronounced dead on arrival. They then proceeded to the Butha-Buthe charge office where they reported the incident to Sergeant Mokhele (PW6).

[5] PW5, according to his evidence, did not observe the circumstances in which the deceased was shot. The only Crown witness who gave direct evidence concerning the shooting of the deceased was PW1, Motsoane Tlali, a friend of the deceased. On the day in question he accompanied the deceased and another person to a tavern where they drank beer. Sometime later they went to the Crocodile Inn where they continued to drink. At about 10.30 they left that establishment with the intention of walking to another village some five kilometers away. PW1 testified that at “a

corner” about 10 paces from the entrance to the private bar of the Crocodile Inn, they came across the three police officers. When they were about a metre apart, PW5 pointed out the deceased to the other troopers. As soon as this occurred PW1 and his two friends ran towards the gate of the Inn. He estimated that he was only five paces away from the appellant when he heard the report of a firearm. The deceased immediately fell down but PW1 continued to run towards the gate. After going through the gate he heard the sound of two other gun shots. He did not see what had happened to the deceased but he went to report the occurrences to the deceased’s father.

[6] A different version was given by the appellant. He told the trial Court that he knew the deceased and recognized him when he emerged from the Crocodile Inn’s private bar; that the deceased headed toward the hall of the Inn; that

he (the appellant) put his hand on the deceased's shoulder to prevent him entering the hall; and that the deceased, with the permission of the appellant, went to urinate. Immediately thereafter, according to the appellant, the deceased attacked him with a Rambo knife and actually caused a "big open wound" on his left shoulder. He then repeatedly tried to stab the appellant and a struggle ensued between them during the course of which the appellant used the rifle to parry the deceased's attempts to injure him again. The deceased managed to grab hold of the barrel of the gun but despite this they continued to struggle. Eventually, said the appellant, he kicked the deceased, the force of which caused the deceased to turn around, while still not loosening his grip on the barrel of the rifle and still trying to stab the appellant. The appellant then discharged the rifle while the barrel was pointed over the left shoulder of the deceased. He explained



that it was his intention to shoot into the air to frighten the deceased or so that the heat generated by the firing of the bullet would cause the deceased to let go of the rifle. Immediately after firing the shot, however, the deceased fell down but the appellant said that he had no intention of shooting him. He told the Court, that he then accompanied PW5, DW2 and the deceased to hospital and to the charge office where the incident was reported to PW6.

[7] Trooper Mpasi (DW2) was called by the defence. He told the trial Court that he, like PW5, did not see the actual shooting, that he was some distance away and was in fact on his way to call PW5 when he heard the sound of a rifle being fired. He hurried back to where the appellant was and observed that the deceased was on the ground. The Rambo knife was close to him.

[8] It is also necessary to outline the evidence of PW6, Senior Inspector Mokhele. In 1995 he was a sergeant. In the early morning of 2 July PW5 and DW2 arrived at the Butha-Buthe charge office where he was on duty. They reported to him that the appellant had shot and apparently killed a suspect. The witness immediately went to the appellant's home. He found the appellant there and asked him where the firearm was. The appellant handed over a SLR rifle and a knife with which, he told PW6, the deceased had tried to stab him. There were no signs of blood on the knife.

[9] The trial Court made important credibility findings. It held that PW1 was undoubtedly truthful and that he gave his evidence in a clear and forthright manner. Further findings were that the appellant's evidence was patently

false and unacceptable but that the evidence of PW6 was accepted as truthful in all respects where it differed from that of the appellant.

[10] It is not in dispute that the deceased was shot in the back by the appellant and that the firearm used was a SLR rifle. The appellant's account of how this happened was implausible in the extreme. His evidence of a struggle between him and the deceased was not witnessed by either PW5 or DW2. It is surprising that they did not see the actual shooting of the deceased as the whole purpose of the expedition to the Crocodile Inn was to effect his arrest. It is quite possible that they tried to protect the appellant, their colleague, by testifying as they did but it is obvious that if there was a struggle between the appellant and the deceased it would have been observed by PW5 and DW2 and they would have given evidence to this effect.

[11] According to PW5 and DW2, they alone took the deceased to hospital. The appellant's version that he accompanied them is obviously false. If he had gone to the hospital the apparently fairly serious wound to his shoulder would have been treated. In actual fact nobody noticed such a wound. Moreover the appellant told PW6 that the deceased had only tried to stab him. PW6 testified that although the appellant should have reported the incident to him at the charge office, he did not do so. The report was given only by PW5 and DW2, and this was confirmed by the two police officers. The appellant's version that he accompanied them to the charge office was clearly untruthful.

[12] The trial Court's conclusion that PW1 and PW6 were credible and truthful witnesses was clearly justified if

regard is had to the evidence as a whole. Counsel for the appellant attacked the credibility of PW1 on the grounds that he was young, a self-confessed “naughty boy” and under the influence of liquor to some extent, all of which were candidly admitted by the witness and, if anything, only supported the veracity of his testimony. The fact that PW1 said that he heard two further gun shots after the deceased was fatally wounded was contradicted by other evidence and was clearly wrong. It does not, however, detract from the general account of the events that he gave.

[13] The appellant’s evidence, on the other hand, was clearly untrue in the various respects detailed above. It was contradicted by PW6, PW5, DW2 and PW1 none of whom had any motive to implicate him. His assertion that he was stabbed by the deceased was a figment of his imagination and his account of how the deceased was shot

was so improbable that it could not possibly be true and it was correctly rejected as false by the Court a quo. The appellant was not attacked by the deceased and his life was not in danger at any stage. It was unnecessary for him to shoot the deceased. The facts clearly establish that he had the intention to kill the deceased. The Crown, therefore, has proved the appellant's guilt beyond reasonable doubt.

[14] Very little was said to persuade this Court that the sentence imposed by the Court a quo was unreasonably harsh. If anything, a sentence of eight years imprisonment, in the circumstances of this case, was lenient and the appellant can, perhaps, consider himself fortunate.

[15] It is ordered that the appeal is dismissed.

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**L.S. MELUNSKY**  
JUSTICE OF APPEAL

I agree:

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**J.W. SMALBERGER**  
JUSTICE OF APPEAL

I agree:

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**D.G. SCOTT**  
JUSTICE OF APPEAL

For the Appellant : Adv M.S. Rasekoai

For the Respondent: Adv S.A. Seema