IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CRI) NO. 3/2012

In the matter between

MOKETE MOKHOBO **APPELLANT**

AND

REX **RESPONDENT**

CORAM: RAMODIBEDI, P
HOWIE JA
HURT JA

HEARD: 2 APRIL 2013
DELIVERED: 19 APRIL 2013

SUMMARY

Criminal law – Murder – The appellant convicted of murder on count 1 but the court a quo omitting to determine extenuating

circumstances – On appeal the irregularity addressed – Section 296 (1) of the Criminal Procedure and Evidence Act 1981 – The appeal on count 1 partly succeeds to the extent that the verdict of guilty of murder is altered to one of guilty of culpable homicide – The sentence of 25 years imprisonment set aside and replaced with a sentence of four (4) years' imprisonment – Plea of guilty to count II (unlawful possession of firearm) accepted by Judge in High Court - No record of formal conviction on count II, but appellant sentenced to six months' imprisonment - Only inference that appellant had been convicted on count II - The appeal on count II dismissed.

JUDGMENT

THE COURT

[1] The appellant, a member of the Lesotho Police Service, faced an indictment in the High Court (Guni J) comprising two counts, namely, murder on count I and unlawful possession of a firearm contrary to s 3 (2) of Act No. 17 of 1966 as amended by Act No.4 of 1999 on Count II.

[2] It was alleged in count I that upon or about 20 October 2008, and at or near Lithoteng in the Maseru district, the

appellant unlawfully and intentionally killed one Makamohelo Mokhobo ("the deceased"). On this count he pleaded not guilty.

[3] The allegation against the appellant in the second count was that on the same date and place referred to in the preceding paragraph, he unlawfully and intentionally had in his possession an unlicensed firearm, a 7.65 mm pistol,contrary to s 3 (2) of Act No. 17 of 1966 as amended by Act No.4 of 1999. On this count he pleaded guilty and the Crown accepted his plea.

[4] At the conclusion of the trial, the appellant was found guilty as charged on count I. Without determining the existence or otherwise of extenuating circumstances, the learned Judge proceeded to sentence the appellant to 25 years imprisonment on Count I. Without formally returning a verdict the Judge sentenced him to 6 months imprisonment on Count II. The sentences were ordered to run concurrently.

[5] As guidance for the future it is necessary to state that by failing to deal with the issue of extenuating circumstances the learned Judge committed a fundamental gross irregularity. See **Director of Public Prosections v Marabe 2000 – 2004 LAC 385**. A

determination on extenuating circumstances is an integral part of criminal proceedings in murder cases. It constitutes what is sometimes referred to as the "second phase enquiry". See, for example, **Letuka v R 1995-1999 LAC 405.** This approach is necessitated by section 296 (1) of the Criminal Procedure and Evidence Act 1981 which provides as follows:-

> *"296 (1) Where the High Court convicts a person of murder, it shall state whether in its opinion there are any extenuating circumstances and if it is of the opinion that there are such circumstances, it may specify them".*

It is plain from this section that a determination on whether or not extenuating circumstances exist is mandatory.

[6] As will become apparent shortly, the facts giving rise to the deceased's demise are disturbing. It is a typical case of domestic violence between husband and wife at its worst literally leading to death, as it happened.

[7] The appellant and the deceased were husband and wife. On 19 October 2008, the deceased left the marital home at Lithoteng early in the morning with her husband's

knowledge and permission. She travelled to a place called Ha Rampai together with her colleagues to attend the official opening of a new branch of the Lesotho Funeral Service where she was employed as Human Resources Manager. She parked her own car at work and travelled both ways with others. On the return journey she was in a minibus driven by one Tefo Mapesela (PW2) who was the Deputy Managing Director of Lesotho Funeral Service. One of the other occupants of the vehicle was one Mojabeng Matsoso (PW1) who also worked at the Funeral Service.

[8] The evidence shows that trouble started when the deceased arrived home at midnight with Mapesela and Mojabeng. The appellant claimed, he had gone to the deceased's work place during the day and had not seen the familycar parked there. It turned out that it had not been parked at the place where it was usually parked in the past. This apparently confirmed the appellant's suspicion that the deceased had been up to some mischief. He alleged that he had on the previous day overheard the deceased and her friend, Sebabatso, talk about going "somewhere".

[9] The evidence of Mojabeng and Mapesela was that the appellant was very angry although the appellant tried to

suggest that his mood was more one of exasperation than anger and that his intention was to stay out of any quarrel, we think the probabilities are heavily in favour of the version of the Crown witnesses. The deceased who was afraid of the appellant, on the unchallenged evidence of Mapesela and Mojabeng, explained that they had just arrived back in Maseru. She expressed her love for the appellant. She even told him that she had brought drinks for him. Mapesela, too, tried his best to convince the appellant that they had just come back from the function but to no avail. The appellant wanted to know where the family car was, adding with reference to the deceased, "I cannot be cheated by [a] minor like you. I am a member of intelligence division." He ordered the deceased to go away and leave the family house with her companions, literally shoving her away in the process. The deceased was, however, adamant that she was going nowhere, adding "I have come home. You are my husband. I love you."

[10] It is common cause that, at some stage the appellant armed himself with a pistol. The appellant's version is that he only picked up the firearm in order to protect himself when going to a nearby shop that night. He says that he stood in the bedroom doorway, removed the magazine, reinserted it and cocked the pistol while he

stood in the doorway. It is common cause that the deceased and the appellant began arguing about whether he should go to the shop. According to Mapesela, the appellant suggested that she should leave with Mapesela. Mapesela's repeated pleas, directed at the appellant to desist from his aggressive attitude, fell on deaf ears and he continued to act in a truculent and angry manner. The appellant denied this but, again, we think the probabilities are that he was acting in this way. We say this because the unchallenged evidence of Mapesela and Mojabeng is that, when they eventually left the house, they travelled immediately to two police stations in the district to report their fears that there was about to be violence, possibly fatal, in the Mokhobo household and to ask the police to intervene there.

[11] Shockingly, undisputed evidence shows that the police at Lithoteng Police Station did not render any assistance. They claimed that they were afraid of the appellant when he was drunk. He was not, on this occasion. Mapesela and Mojabeng were forced to go and report the incident at Maseru Central Charge Office. Amazingly, the police there, too, were uncooperative. They, too, claimed that they were “afraid.” According to the evidence of Mapesela, they told him not to "bring noise at the Charge

Office". They even threatened to lock him up in the cell. They also said, "*It doesn't matter she is his wife*". If true, that was an attitude deserving the strongest official condemnation.

[12] In his evidence the appellant stated that he was "angry at the situation" (i.e. that his wife had come home so late) but that he hoped that he and his wife could discuss matters rationally the next morning. What exacerbated his anger, he said, was that Mapesela and Mojabeng did not leave the premises as soon as they had dropped off the deceased.He claimed that what had also irritated him was that, at 6 o'clock that evening he had called the deceased enquiring about her whereabouts. She had informed him that she and her companions were already back in Maseru. They, however, only arrived at the house at midnight. He asked Mapesela about the whereabouts of his car which the deceased had driven away in the morning. Mapesela's response was that the deceased was too drunk to drive the car, an allegation which the deceased refuted.An argument ensued between Mapesela and the deceased. At that stage the appellant says that he felt the urge to smoke. He decided to go to the shop in order to buy cigarettes. He cocked the firearm in question as he "normally" did whenever he left the house at night. The deceased, however, refused to

give him the key to the gate saying “I won’t give you the key. I have bought you a 20 pack of cigarettes and it is there in my bag”. However, the appellant said that the deceased was unable to show him the pack of cigarettes that she had allegedly bought and that he wanted to get out of the house to avoid being embroiled in all the quarrelsome talk.

[13] It is common cause that, later that evening, the deceased died as a result of a shot fired from the accused's pistol.The cause of death was recorded as having been due to cardiac tamponade and left haemothorax. According to the evidence of Dr Piet McPherson (PW3) who was called to comment on the post mortem of the deceased which had been conducted by another doctor, there was an entry gunshot wound on the right chest and an exit wound on the back, left sub-scapular region. There was no evidence which described the appearance of the entry wound so as to assist in determining whether the shot had been discharged at point blank range or from a distance.

[14] If the evidence up to the point when Mapesela and Mojabeng drove away from the appellant's house had been all of the factual evidence before the court, the inference may well have been irresistible that the

appellant had intentionally killed the deceased. Guni J rejected the appellant's evidence as to what happened after Mapesela and Mojabeng left and she concluded that the Crown had discharged the onus of proving the appellant's guilt.But she appears to have overlooked the circumstance that, once the appellant entered the witness box and gave an explanation of what had happened she could not simply reach her decision on the basis that she believed the Crown witnesses and disbelieved the appellant. The rule in ***R v Difford*** **1947 AD 370** at p 373 then comes into play, viz

> *"If [the accused] gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal . . ."*

[15] The appellant testified that, after Mojabeng and Mapesela had driven off, the deceased followed him. He said that as he turned the corner towards the shop, the deceased grasped him at his waist and he felt that she had one hand on the pistol. She insisted that he give her the pistol, saying that she was afraid he might shoot himself.

He said that they struggled for possession of the firearm. In the process, it went off. The deceased fell to the ground. He realised that she had been shot. As can be seen from this evidence, the appellant's defence was that the deceased had been shot accidentally. The court *a quo* rejected the appellant's explanation as false, describing it as "a cock and bull story". Plainly, Guni J approached the analysis of the evidence on the wrong footing and she failed to apply the rule in ***R v Difford***.

[16] Of significance in the decision whether there was a reasonable possibility that the appellant's evidence might be true, was the objective evidence that the deceased's body had been found some 500 metres from the appellant's house. Also the cartridge case had been found in the vicinity of this point. The witness who gave expert evidence in regard to firearms, confirmed that a pistol, even with the safety catch on, may be accidentally discharged if two people are trying to wrest it from each other. These aspects all tended to support the possibility that the appellant's version might be true.

[17] On the other hand, the doctor who performed the post mortem was not called to give evidence, so that it was not possible for the court to decide whether the fatal shot had been fired from a distance (which would have been

destructive of the appellant's version) or at close quarters (which would have been consistent with it). Nor did the prosecutor test the version of the struggle by cross-examining the appellant as to the precise circumstances in which the deceased came to sustain the injury which she did. Attention to these details by the Crown may have cast the appellant's evidence in a materially different light but, as it was, his version was left unscathed at the end of the cross-examination.

[18] We should mention also, in this regard, that there were some pertinent questions directed to the appellant, mainly by the Judge, as to whether the deceased's "bravery" in taking the aggressive role which he had described was not surprisingly uncharacteristic of her. The appellant acknowledged that it had surprised him and said that he could only explain it on the basis that she was under the influence of liquor. His explanation in this regard finds support from Mojabeng who testified that the deceased had had so much liquor that she did not drive her car back that night. Mojabeng had to assist her to carry her bag and drinks.

[19] It follows, therefore, that although it may seem improbable, the appellant’s explanation that the deceased wrestled with him for possession of the firearm

may reasonably possibly be true. He was accordingly entitled to an acquittal on the murder count

[20] The remaining question is whether, on the evidence properly considered, the Crown had discharged the onus of establishing that the death of the deceased was attributable to negligent conduct on the part of the appellant, a verdict of "guilty of culpable homicide" being a competent verdict on an indictment for murder. In this case the test for negligence may conveniently be formulated with respect to the well-known statement by **Holmes JA** in ***Kruger v Coetzee*** **1966 (2) SA 428 (A)** at page 430 E-F in these crisp terms:

> *"For the purposes of liability, culpa arises if:*
>
> *(a) a [reasonable man] in the position of the defendant*
> *(i) would foresee the reasonable possibility of his conduct injuring another in his person; and*
> *(ii) would take reasonable steps against such occurrence; and*
> *(b) the defendant failed to take such steps."*

The same test applies in a criminal case.

[21] According to the firearm expert, one or other of the two contestants for possession of the pistol must have had a finger on the trigger to have caused the discharge of the pistol. The probabilities seem to favour the conclusion that it was the appellant's finger. The position of the entry wound and the path of travel of the bullet would make it highly unlikely that the deceased could have caused the trigger to be pulled. But we do not think that it is necessary, for the purpose of deciding the issue in hand, to resolve the question of who pulled the trigger. The firearms expert said that it was not surprising that an accidental discharge occurred while two people were fighting for possession of a cocked pistol. Indeed, the appellant agreed that this was so. The following exchange took place during his questioning by the Crown counsel:

> *"CC: And you were aware at the time when you were struggling over the possession of this firearm with your wife that it can shoot during this struggle?*
>
> *DW1: Yes my Lady."*

The expert witness also described how, even if the safety catch was on, it could, by virtue of hands exerting

pressure on the butt during the contest, become dislodged to the "off" position.

[22] The appellant was a trained policeman. He had received training in the handling of firearms. A reasonable man in his position would undoubtedly have foreseen that a pistol could be accidentally discharged in the course of such a struggle. All the more so because the appellant had set off with the pistol cocked and ready for rapid use in case of any danger he might encounter en route to the shop. In response to a question in cross-examination, he confirmed that the safety catch was on at the time when the deceased tried to take the pistol. He said that when the struggle started he felt that he was constrained to persist in his efforts to wrest the pistol from the deceased because she knew nothing about guns and he was afraid that she might accidentally injure herself or him if she obtained possession. He freely acknowledged that he was not in any fear that the deceased might try to use the pistol as a weapon against him.

[22] If, indeed,the safety catch was on, and if he had let the pistol go as soon as he knew that the deceased was disposed to try to take it from him, there could hardly have been any danger that the deceased might discharge it accidentally. By persisting in the struggle, he should,

as a person who had had training in the use of firearms, have foreseen that there might be an accidental discharge with possible fatal results. Accordingly, the conclusion must be that, in not desisting from the contest for possession, he failed to measure up to the standard expected of a reasonable man. Of course, if, contrary to his evidence, he had not set the safety catch into the "on" position when he left the house, that in itself would have constituted a failure to act as a reasonable man would have done.[1]

[23] In light of these factors, we are satisfied that on his own version the appellant was negligent. Since it is clear that such negligence was a cause of the death of the deceased, the appellant was guilty of culpable homicide.

[25] In the result we conclude that the appellant was guilty of culpable homicide as opposed to murder on count I.

[26] The appellant's appeal against his conviction on count II is without merit. His ground of appeal reads as follows:-

> *"7. The learned Judge erred and or misdirected herself by holding that the appellant was guilty on*

[1] Cf ***Young v Nortje*** **1979 (4) SA 97 (CPD)** at p 100 F - H; ***S v Malik*** **1987 (2) 813** at p 819 B - C

count 2 even though the Crown disclosed in its evidence that no investigations were made in respect of the firearm."

The truth of the matter, however, is that when the charge was read to the appellant he pleaded guilty on count II on legal advice. Indeed, his own counsel is reported as having said the following:-

"DC: The plea is according to the instructions My Lady."

Not only that, but the evidence that was subsequently led by the Crown was solely in respect of Count I.

Now s 240 (1) (a) of the Criminal Procedure and Evidence Act 1981 provides as follows:-

"240. (1) If a person charged with any offence before any court pleads guilty to that offence or to an offence of which he might be found guilty on that charge, and the prosecutor accepts that plea the court may –

> *(a) if it is the High Court, and the person has pleaded guilty to any offence other than murder, bring in a verdict without hearing any evidence."*

That applies to this case. The appellant having pleaded guilty on legal advice, the court *a quo* was fully entitled to bring in a verdict of guilty on count II without hearing evidence. Plainly, the trial Court intended to do so. In terms of s 9 of the Court of Appeal Act 1978 and s 329(1)(c) of the Criminal Procedure and Evidence Act this Court is empowered to return such a verdict, as we hereby do.

[29] The fact that the appellant is guilty of a lesser offence of culpable homicide as opposed to murder on count I means that this Court is at large to consider sentence afresh. Doing the best we can in balancing the triad consisting of the offence, the offender and the interests of society, we consider that a sentence of four (4) years imprisonment would do justice in the matter.

[30] In all the circumstances of the case the following order is made:-

(1) The appellant's appeal on count I partly succeeds to the extent that the verdict of guilty of

murder is altered to one of guilty of culpable homicide.

(2) The sentence of 25 years imprisonment imposed upon the appellant on count I is set aside and is replaced with a sentence of four (4) years' imprisonment.

(3) The appellant's appeal on count II is dismissed.

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M.M. RAMODIBEDI
PRESIDENT OF THE COURT OF APPEAL

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C.T. HOWIE
JUSTICE OF APPEAL

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N.V. HURT
JUSTICE OF APPEAL

For Appellant : Adv L.P. Nthabi

For Respondent : Adv T. Fuma