

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CRI) NO.6/2013

In the matter between

SELLO JABAVU PAAMO

APPELLANT

And

REX

RESPONDENT

CORAM : THRING, JA
LOUW, AJA
CLEAVER, AJA

HEARD : 17 OCTOBER 2014

DELIVERED : 24 OCTOBER 2014

SUMMARY

Murder conviction based on intent in the form of dolus eventualis changed on appeal to culpable homicide – Attempted murder convictions changed on appeal to

convictions of assaults with intent to cause grievous bodily harm – sentences reduced accordingly.

JUDGMENT

LOUW, AJA

[1] The appellant was convicted at a trial in the High Court (per **Hlajoane, J**) on 21 August 2013 on one count of murder and three counts of attempted murder. On 4 September 2013 the appellant was sentenced to 8 years' imprisonment on the murder conviction and to 2 years' imprisonment on each of the attempted murder convictions. The sentences were ordered to run concurrently and the effective sentence is therefore 8 years imprisonment.

[2] The appellant appeals against the convictions and sentences imposed.

[3] The charges against the appellant arose from actions taken by the appellant and other members of the Lesotho Mounted Police Service (the police) during student protests on 22 October 2009 near the entrance gate to the Roma campus of the National University of Lesotho (the NUL).

[4] The crown called 17 witnesses. These included policemen on the scene and students, including three students who had been wounded. The appellant testified in his own defence and he called constable Thoola, who was one of the policemen on the scene.

[5] The accounts of the various eyewitnesses of the events that unfolded on the day differ in some of the detail. The broad outline of the events of the day was, however, common cause. The police were deployed in an area near a commercial centre outside the main gate to the NUL campus where the students were protesting. Some of the policemen were armed with Mossberg 12 gauge slide action shotguns (referred to in evidence as pump action shotguns). The evidence is not clear but would it seem that there were about 6 shotguns amongst nine or ten policemen on the scene. The appellant and two of his

colleagues arrived on the scene around about lunch time. They joined seven of their colleagues who had been sent there earlier. The police on the scene were under the command of Sgt Mojakisane, who testified that he instructed his men to disperse the students by firing their weapons into the air on three occasions during the course of the day. First his men dispersed a group of students who had gathered at the commercial complex outside the gate to the campus. Some of the students then regrouped further down the road in the direction of Maseru. There they set fire to debris and on Mojakisane's instruction four policemen went to disperse this group. It was after these students had been dispersed that the appellant and two colleagues arrived on the scene. The students had by this time regrouped and a number of them moved along the road towards the gate to the campus. On Mojakisane's instructions three or four policemen (again the evidence is not clear as to the number) armed with shotguns formed a line across the road near the main gate to the NUL campus. The appellant was one of the armed policemen who took up position in the line. Mojakisane testified that the students in front of the approaching group raised their

hands while those at the back of the group threw stones at the police.

[6] As the group of students approached the police drawn up in the line across the road, Mojakisane gave the order to disperse the students by firing into the air. The appellant and his colleagues fired a number of shots. When the first shots rang out, the students ran away. As they dispersed, four of the fleeing students were struck by shotgun pellets. One student, Matseliso Thulo received fatal wounds to her upper body and three others were wounded. An analysis of two shotgun pellets that were recovered from the body of the deceased, show that she was struck by AAA calibre pellets.

[7] Dr Tlhabi Moorosi (PW16) who conducted a post mortem examination on the body of the deceased student, found that she had been struck by seven pellets on the back of her upper body. One pellet passed through her right arm and the other pellets entered her posterior chest wall and penetrated her heart, left lung and liver. The wounds to her heart and left lung resulted in extensive bleeding and the collapse of her left lung, leading to her

death. Two AAA pellets were recovered from the body of the deceased.

[8] Ms Papali Chabana (PW6) was wounded in her leg (it is not clear from the evidence whether it was her right or left leg). Ms Retselisitsoe Hoala (PW7), who was with Papali Chabana received a scalp laceration in her left parietal area. Ms Refiloe Mohono (PW9) was struck in the upper part of her right arm, the right side of her neck and the back of her right hand.

[9] The case against the appellant is that instead of following Mojakisane's instruction to fire into the air, he was the only policemen who fired in the direction of the fleeing students, thereby wounding the three students and causing the death of the deceased.

[10] The appellant denied that he had fired in the direction of the students and testified that he followed the instructions and fired into the air twice. He testified that when he fired his weapon, the students were facing him and were about seven to ten metres away from him. He said that he knew that if a person were to be hit by a shot

fired from a shotgun at that range, the '*injuries would be very serious*'. According to the appellant, his colleagues in the line also fired into the air and they stopped firing immediately when the students dispersed.

[11] The case against the appellant that he fired at the students instead of into the air, is based first of all on the evidence of three eyewitnesses and secondly, circumstantially, on the fact that the students were struck by pellets (showing that someone had fired in their direction) and that their wounds were consistent with them being shot from behind, that is when they were running away from the line of policemen.

[12] The three eyewitnesses were two students, Ms Mekhoa Mathe (PW2) and Ms Lipuo Ramarothole (PW3) and Ms Majonase Rahlehleile (PW5), a street vendor who sold fruit and vegetables from her stall next to the road close to the main gate to the NUL campus.

[13] Mekhoa Mathe was a student who lived off campus. She was seated in a sprinter taxi near the entrance gate to the NUL campus when she saw the students approaching

the line of policemen standing across the road. When the firing began, she ducked down and did not see the direction in which the police fired. She did, however, see that one of policeman in the line was pointing his weapon at the students before she heard the guns go off. Some days later, she saw the policeman who she believed had fired at the students. She asked the person who was with her at the time who the policemen was and she was told that his name was Paamo, the name of the appellant. She testified that she had seen the appellant before the incident passing near the place where she lived. She pointed the appellant out in court as the policeman who had pointed his weapon at the students immediately before she ducked down when the first shots rang out.

[14] Lipuo Ramarothole was also a student who lived off campus. She also sat in a taxi at the taxi rank near the gate to the NUL campus. She saw the group of students approaching the line of police in the road. According to her the police started shooting into the air. One of the policemen, however, pointed his weapon at the students. She had not seen this policeman before. The policeman was facing away from her but she saw that he was of a dark

complexion with a hefty build. He was also taller than the other policemen. Three days later, she again saw the policeman. She asked Mekhoa Mathe (the other eyewitness mentioned earlier) who was with her at the time, who he was and she was then told by Mathe that his name was Paamo who lives at Mangopeng. It is to be noted that Mathe's evidence was that she had asked a friend (whom she did not name) some days after the incident who the policeman was and that she was told his name is Paamo. Lipuo Ramarothole testified that she was not the friend who was asked by Mathe what the name of the policeman was, but that she had asked Mathe who the policeman was and that she was told by Mathe that his name is Paamo.

[15] Majonase Rahlehleile was the third eyewitness who identified the appellant as the policeman who had pointed a weapon in the direction of the students. She had been carrying on her street vending business from a stall about four paces away from the gate to the NUL campus since 2005. She saw the group of students approaching the gate. According to her there were three policemen in a line across the road. She had a clear view of the scene about 25 paces from her stall. According to her, when the police

cocked their guns the students ran away. Her evidence continues as follows:

“When the students ran away, the policemen started to shoot. The guns of the two policemen were pointed upwards while one of them shot pointing at the direction where the students were running to.”

The witness identified the appellant as the policeman who had fired in the direction of the fleeing students. She stated that she knew the appellant's name from before the incident. She had seen him in the company of other policemen and women. He wore an old and faded navy blue police uniform and cap. She asked his name and was told by his colleagues that his name was Paamo. She had seen him often since 2005 and knew that he lived between Mafikeng and Liphakoeng, at a place also known as Mangopeng. The appellant in evidence confirmed that he lived in the direction described by Majonase Rahlehleile and that she could indeed have seen him before as he often passed the place where her stall was.

[16] The appellant was confronted in cross examination with the evidence of the eyewitnesses, in particular that of

Majonase Rahlehleile, that, unlike the other policemen who had fired into the air, he had fired in the direction of the fleeing students. The appellant maintained that he and the other policemen with him had all fired into the air.

[17] Two issues arise in this appeal. First, whether the pellets that hit the four students had been fired from the shotgun used by the appellant and, if so, whether he had fired the shotgun in the direction of the fleeing students with the intent to kill them.

[18] The court a quo accepted the evidence of Mathe, who had seen the appellant before the incident and Majonase Rahlehleile, who had often seen him and had known the appellant's name from before the incident. The evidence of Lipuo Ramarothole, who corroborated the evidence of the other two, was also accepted by the court a quo, which found that the appellant had been identified as the only policeman who had fired his weapon in the direction of the fleeing students. I can find no fault with this conclusion.

[19] On the second issue, namely whether the appellant had the intention to kill the deceased (and presumably,

also the three students who were wounded), the court *a quo* found that the appellant had the intention to kill in the form of *dolus eventualis*. The appellant was, so the court reasoned, a policeman of 20 years' service and well trained in the use of firearms. He knew that pellets fired into the air could not have caused any injuries when falling back to earth. The appellant was subjectively aware of the possibility of death but was reckless whether it ensued or not.

[20] Mr Nthontho, who appeared on behalf of the appellant submitted that the eyewitnesses were not reliable and that their identification of the appellant as the policeman who had fired in the direction of the fleeing students, should not have been accepted by the court. He pointed out that it was a continually changing scene with groups of people moving around. He pointed to the fact that the evidence of the witnesses on the scene differed substantially in regard to the distance between the policemen and the students immediately before the shooting started. If the appellant had shot at the students when they were as close to the police as some eyewitnesses would have it, the pellets would not yet have spread out and the wounds of those

who were hit would have been of an entirely different nature. The first witness, an ex- student who was policeman when he testified, said that a security guard had earlier fired a shot with a 9 mm pistol at the guardhouse near the gate. Majonase Rahlehleile, the stall holder near the gate, was unaware of this shot.

[21] In my view the points raised by counsel do not detract in any material respect from the reliability of the evidence. The evidence of the three eyewitnesses, and in particular of Majonase Rahlehleile, that it was the appellant who had fired in the direction of the fleeing students, must be accepted. The evidence of Majonase Rahlehleile is convincing. She had a clear view from close by. She had often seen the appellant before the incident since 2005, when he passed her stall close to the entrance to the NUL. She identified him as the policeman who wore the old faded uniform. She already knew his name before the incident when she enquired about and was told his name by his colleagues. She knew the area where he lived and the appellant conceded that she could often have seen him pass her stall on his way home. The discrepancy between her evidence and her statement to the police was denied by her and was not properly proven by the crown. In any

event, if it did exist, the discrepancy was of no consequence and does not affect the reliability of her evidence.

[22] The appellant's version that all the policemen in the line fired into the air does not account for the fact that the four students were hit by shotgun pellets. His evidence cannot, on all the evidence, reasonably possibly be true. The court a quo did not misdirect itself in the evaluation of the evidence. There is no basis upon which this court should interfere with the court's finding in regard to the identification of the appellant as the person who fired in the direction of the fleeing students.

[23] I differ, however, from the conclusion of the court a quo on the second issue, namely that the appellant had the subjective intention to kill the students. As was recently again emphasised in S v Humphreys (424/12) [2013] ZASCA 20 (22 March 2013) by the South African Supreme Court of Appeal, intention in the form of dolus eventualis is a two fold subjective test: did the accused subjectively foresee the possibility of the death of a person, and did he reconcile himself with that possibility?

[24] The witness Majonase Rahlehleile did not say, as the court *a quo* stated, that the appellant fired directly at the fleeing students. The evidence of Majonase Rahlehleile, who had the clearest view of what had occurred, was that the appellant fired with *his gun pointing in the direction where the students were running to*. Two points need to be made. There is no reliable evidence of how far the students were from the appellant when he fired the shot(s) which hit them. The appellant's concession that he knew that at a range of 7 to 10 metres, the injuries would be very serious does not apply to the situation where the students were fleeing. The expert evidence of Senior Inspector Martin Phuthi (PW11) was that the size of shot used in this case (AAA) had a range of 40 to 60 metres and that the the wad containing the 35 pellets would drop off at 25 to 35 metres whereafter the pellets would spread out and travel further. On the available evidence it would appear that the students must have been between 25 and 60 metres away when they were struck by the pellets. There is no evidence that the appellant knew what size shot was being used in the shotguns which had been issued to them on the day of the incident. There is no evidence that the AAA pellet is the shot that is usually used by the police for crowd control.

The evidence is that smaller pellets lose velocity more rapidly with a corresponding reduction in range and reduced penetration of a target.

[25] In my view the crown has failed to establish beyond reasonable doubt that the appellant subjectively foresaw that a student may be killed by the shot fired from his weapon at the distance the students were away from him when he fired in their direction, and that even if he did foresee the possibility of death ensuing, that he accepted and reconciled himself with death as a consequence of his conduct, and nevertheless shot in their direction. This conclusion means that the appellant is not guilty of the murder of the deceased because he lacked the required intention to kill her.

[26] I am, however, satisfied that a reasonable man in the position of the appellant would have foreseen the possibility that the fleeing students may be killed and would consequently have refrained from shooting in the direction of their flight. In my view the appellant should have been convicted of culpable homicide on count one.

[27] The appellant's conviction of attempted murder on the other three counts can for the same reason, namely, the absence of the subjective intention to kill, not stand. The crown has not shown that the appellant acted with the necessary intention to kill the students that were wounded. In my view, the appellant did foresee that firing a shotgun in the direction of the fleeing student may cause them serious injuries if they should be hit by the pellets while fleeing. In my view he accepted this possibility and nevertheless fired in their direction. On this finding, the appellant is guilty of assault with the intent to cause grievous bodily harm in respect of the remaining three counts.

[28] I turn to the appeal against sentence. The fact that the appellant has on appeal been found guilty of the lesser crimes of culpable homicide and assault with the intent to cause grievous bodily harm, means that it is open to this court to reconsider the sentences imposed. The appellant was a policeman of 20 years' service. He was a first offender. Having regard to the seriousness of the crimes of which the appellant has been convicted and the fact that an innocent life has been lost, I am of the view that six

years' imprisonment would be an appropriate sentence on count 1, culpable homicide, and that 18 months' imprisonment would be an appropriate sentence on each of counts 2 to 4, the assault with the intent to cause grievous bodily harm, with the sentences all running concurrently.

[29] In the result, the following orders are made:

1. The appeal against conviction and sentence is upheld.
- 2 The orders made by the court a quo are set aside and the following orders are made in their stead:
 1. On count one the appellant is found guilty of culpable homicide.
 2. On counts 2, 3 and 4 the appellant is found guilty of assault with the intent to cause grievous bodily harm.
 - 3 On count one the appellant is sentenced to 6 years' imprisonment

- 4 On counts 2, 3 and 4 the appellant is sentenced to 18 months' imprisonment on each count;
- 5 It is ordered that the sentences on counts 2, 3 and 4 shall run concurrently with the sentence on count 1.

W.J. LOUW
ACTING JUSTICE OF APPEAL

I agree:

W.G. THRING
JUSTICE OF APPEAL

I agree:

R.B. CLEAVER
ACTING JUSTICE OF APPEAL

For the appellant : K.J. Nthontho

For the respondents : A M Lenono