LESOTHO

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU **C OF A CRI/5/2022**

In the matter between:

REX **APPLICANT**

AND

TSELISO NTHANE **RESPONDENT**

CORAM: DAMASEB AJA
MUSONDA AJA
CHINHENGO AJA

HEARD: OCTOBER 2024

DELIVERED: 1 NOVEMBER 2024

SUMMARY

Criminal procedure: discharge of accused at end of prosecution's case – Crown bears the onus to establish a prima facie case in a ricochet case that accused should have reasonably foreseen that bullet will ricochet and injure another. Crown failed to do so – Appeal dismissed.

JUDGMENT

P T DAMASEB AJA

Introduction

[1] The present appeal concerns two inter-related decisions by a trial judge in a criminal prosecution for the statutory offence of murder: (a) The refusal by the trial judge to allow the Crown to put questions to its own witness during examination-in-chief about an out of court witness statement, and (b) The discharge of the accused at the close of the prosecution's case in terms of section 175(1) and (2) of the Criminal Procedure and Evidence Act 9 of 1981 (CPE).

[2] The indictment reads:

> *"IS GUILTY OF CONTRAVENING SECTION 40 (1) OF THE PENAL CODE ACT NO. 6 OF 2010 READ WITH SECTION 40 (2) THEREOF.*
>
> *In that upon or about the 10th day of January 2019 and or at near 'Moteng in the district of Botha-Bothe, the said accused did perform an unlawful act or omission with the intention of causing the death of* ***KOPANO MOHAPI,*** *the said accused commit the offence of murder of the deceased,* ***KOPANO MOHAPI****, such death resulting from his act or omission the said accused did thereby contravene the provisions of the code as aforesaid."*

[3] The accused pleaded not guilty to the charge and the Crown led only two witnesses. The accused had admitted that the deceased died as a result of a bullet wound fired from his pistol.

[4] It was common cause that the bullet extracted from the deceased during the post-mortem, was deformed. During cross-examination of the two Crown witnesses the version put by the accused is summed up by the trial judge in the following terms:

> *"Accused explanation put to the witnesses is that he obliquely fired a warning shot to ward away a foreseeable threat towards him by those people gathered there who were uttering threats and picking up stones. Accidentally the fired hit the hard surface and reverted to deceased, hitting and entering his chest cavity".*

[5] The evidence of the Crown's two witnesses is summarized by the trail judge as follows:

> *"The first witness, Motiki Mokatse (PW1), testified that in January 2019, he was employed by Nthane Brothers. On January 9, 2019, he was tasked with escorting a truck that was carrying machinery from Moteng to Mokhotlong. During the journey, the truck encountered difficulties on a slope, preventing it from climbing further. Mokatse attempted to seek help by contacting his boss, Pinare Nthane, who was in Mokhotlong. He continued to communicate with Nthane as they waited for assistance, and he also received a phone call from the accused regarding the situation.*

Late in the evening, around 9:00 PM, a large truck from a nearby mine arrived to assist by towing the loaded truck. However, while being towed, the truck capsized, causing a roadblock and forcing everyone to spend the night at the location. The following morning, the accused arrived at the scene with his driver, Moeketsi Motsamai (PW2). The accused began speaking with the truck driver, the deceased, who explained the events leading to the truck's capsizing. However, the accused appeared dissatisfied with the explanation. Mokatse left the accused and deceased to discuss the matter and moved some distance away, approximately 15-20 meters. He observed that there were many people gathered on both sides of the road, some of whom were grumbling about the situation. Although the accused was visibly upset, Mokatse noted that he was not as furious as he had seen him in other instances. People near the fire also moved closer to the accused and the deceased during their discussion.

While Mokatse was some distance away, he suddenly heard the sound of a gunshot. Uncertain of where the sound came from, he took cover inside the truck's cabin and later hid behind guardrails after a brief period of silence. He then heard someone calling him and approached the voice. When he arrived, he saw the accused and Moeketsi carrying the deceased to a vehicle, and he assisted them in placing the deceased inside. At the scene, one of the bystanders pointed out a bullet shell on the ground, which Mokatse picked up. As the vehicle was already moving with the accused driving, Mokatse threw the shell into the vehicle, where

Moeketsi received it. Mokatse remained at the scene while Pinare Nthane later arrived with a towing machine.

During cross-examination, Mokatse revealed that the crowd present at the scene continued to grumble even after the shooting, and some people moved closer to the accused in what appeared to be a hostile manner. He could not confirm whether the crowd was picking up stones, but based on their actions, he speculated that if he had been in the accused's position, he might have believed that he was in danger and would have fired a warning shot. Mokatse also stated that he could not deny the possibility that the accused fired a bullet in a diagonal direction, which might have ricocheted off a rock and hit the deceased. When shown a damaged bullet removed from the deceased's body, Mokatse expressed doubt that a human body could deform a bullet to such an extent. He emphasized that he had not witnessed the actual shooting and did not tell the police that the shooting was accidental, suggesting that someone else must have made that statement.

The second witness, Moeketsi Motsamai (PW2), testified that in 2019, he was working as the accused's driver. On January 10, 2019, he drove the accused from Bloemfontein to 'Moteng to address the truck's issues. Upon their arrival, the truck, which had a machine loaded on it, had tilted. The deceased, who was the truck driver, was at the scene, and the accused approached him for an explanation. The deceased explained the circumstances, but the accused placed blame on those who had been

escorting the truck, accusing them of seeking shelter in their vehicles when it began to rain.

Moeketsi parked the accused's vehicle in a safe location and got out. He observed people warming themselves by a fire, and several trucks were parked along the road leading to Mokhotlong. While standing there, he overheard one of the people by the hilltop saying that they were many and could attack the deceased if they wanted to. Fearing that he might become a victim of such an attack, Moeketsi moved away from the group and approached the deceased to greet him. Before the deceased could respond, Moeketsi heard a loud sound, which he initially thought was a tire burst. However, he soon noticed the deceased clutching his left chest and collapsing. Moeketsi immediately held the deceased, and the accused rushed over to assist him. The accused instructed Moeketsi to bring the vehicle so they could take the deceased to the hospital. During the drive, the accused kept glancing at the deceased, almost causing the vehicle to capsize. Moeketsi urged the accused to let him drive, which he did, and they proceeded to Botha-Bothe hospital, where medical personnel confirmed the deceased's death. Moeketsi waited outside the hospital while the accused went in, and when the accused returned, he was crying. Moeketsi inquired why he was crying, but the accused did not respond. A nurse later informed Moeketsi that the deceased had passed away. At the accused's request, Moeketsi then drove him to the Botha-Bothe Police Station, where the accused reported the incident. Moeketsi accompanied the accused to the police station on another

occasion, where his own statement was read back to him, although he did not fully agree with its content.

Under cross-examination, Moeketsi testified that some people at the scene were speaking in a threatening tone towards the accused, prompting him to distance himself from them. He also saw them picking up stones. However, he did not witness the accused drawing his gun or firing it, as the accused was behind him at the time.

Additional evidence was presented in the form of an identification statement from the deceased's brother, Mohapi Mohapi, who confirmed that he had identified the deceased's body and that a gunshot wound was present on the left side of his chest. The post-mortem was conducted with his consent.

A .45 Glock pistol with the serial number BMB627 and a fired bullet were submitted for ballistic examination. The examination confirmed that the bullet found at the crime scene had been fired from the accused's pistol. The post-mortem report, which was compiled by Dr. C.T. Moorosi, determined that the cause of death was multiple organ injuries and significant blood loss resulting from a gunshot wound. The report further detailed that the bullet entered the chest cavity, causing severe damage to the spleen, pancreas, and stomach, and that approximately one litre of blood was found in the peritoneal cavity. The investigating officer had informed Dr. Moorosi that the deceased was allegedly shot accidentally

on January 10, 2019, at 'Moteng and was declared dead upon arrival at Botha-Bothe hospital."

[6] At the end of PW2's evidence-in-chief, prosecution counsel began a line of questions that showed that the witness had, during his evidence-in-chief, given a version of events which was inconsistent with an out-of- court statement he had made to the police. Counsel for the accused objected and the trial judge sustained the objection. The result is that the Crown was not allowed to elicit evidence from the witness concerning his previous inconsistent statement.

[7] The Crown then closed its case and the accused applied for a discharge in terms of section 175(3) of CPEA. The section states:

> *"If at the close of the case for the prosecution, the court considers that there is no evidence that the accused committed the offence charged, or any other offences which he might be convicted thereon, the court may relief a verdict of not guilty".*

The High Court's approach

[8] The court *a quo* defined the primary issue it had to decide to be whether the Crown had established a *prima facie* case that the

accused intentionally or negligently caused the death of the deceased. The court *a quo* found that the Crown's evidence was insufficient and failed to prove the necessary elements of the charge.

[9] The court noted that while two witnesses testified, neither provided direct evidence that the accused shot the deceased. And that, furthermore, the accused voluntarily surrendered to the police after the incident and offered an explanation, stating that he had fired a warning shot to ward off a threatening crowd. He claimed that the bullet accidentally hit a rock surface, ricocheted, and struck the deceased. This explanation was not challenged by the Crown's witnesses. One witness admitted that he could not deny the possibility that the bullet had ricocheted, and the other witness confirmed that the crowd was hostile and were picking up stones, though neither saw the accused shoot at the deceased.

[10] A key issue was the lack of a crime scene sketch, particularly one that would show the rock surface that the accused claimed the bullet hit. This, according to the court, was crucial in understanding the circumstances of the shooting. Additionally, the post-mortem examination revealed that a deformed bullet was

removed from the deceased's body, which was consistent with the accused's explanation that the bullet had ricocheted off a hard surface. No forensic evidence was presented by the Crown to disprove this explanation, and the ballistic evidence did not clarify the situation, as it only noted that a bullet was found at the scene without confirming its condition or trajectory.

[11] The Crown conceded that the fatal bullet came from the accused's gun, but there was no evidence to show that the accused had fired with the intent to kill or that he was negligent in not foreseeing the possibility that the bullet could ricochet and strike the deceased. The court emphasized that the lack of a sketch and detailed forensic evidence weakened the Crown's case.

[12] The court also underscored the constitutional rights of the accused, particularly the right to a fair trial and the presumption of innocence. It noted that an accused cannot be compelled to incriminate themselves, and if the Crown fails to present a prima facie case, compelling the accused to defend themselves would be a violation of their rights. The court stressed that its role is to administer justice based on facts and evidence, not to assist the prosecution in building its case.

[13] The court expressed concern that the case had been initiated without sufficient evidence to support a conviction and that a person should not be prosecuted without reasonable and probable cause. The long duration of the case, with a murder charge hanging over the accused since 2019, was seen as an injustice to both the accused and the family of the deceased, who had been given false hope that justice would be served.

[14] Finally, the court criticized the poor drafting of the charge, noting that it failed to specify the act or omission by the accused that caused the death. This lack of clarity was seen as a violation of the accused's right to know the precise charges against him, hindering his ability to prepare a defence.

[15] After having oral evidence, the learned judge discharged the appellant, holding that:

> *"[19] This is one of the unfortunate cases indicated with no iota of evidence against the accused …a person should not be prosecuted in the absence of minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself". There should be reasonable and probable cause to believe that the accused is guilty of an offence before the prosecution is initiated."*

Grounds of Appeal

[16] The Crown relies on three grounds of appeal. First, that the learned Judge erred and misdirected herself in her ruling in denying the prosecutor an opportunity to lead the Crown Witness in relation to the contents of the witness' Police Statement.

[17] Second, the learned Judge erred and misdirected herself in the application for a discharge in deciding that there was no other offence of which the respondent (accused person) might be convicted on in the light of the undisputed evidence that the deceased died as a result of the conduct of the respondent.

[18] Third, the learned judge erred and misdirected herself in ignoring the possibility of a definable degree of negligence on the part of the respondent when shooting a warning shot as sufficient evidence that might sustain a competent verdict of guilty on the charge of culpable homicide.

Discussion

[19] The prosecution persists that it should have been allowed to put questions to PW2 about the inconsistencies between what he

testified in court and his out-of-court statement made to the police. It is rather confusing to me just what it is counsel for the Crown wished to achieve.

[20] One thing is clear: counsel for the Crown made no suggestion to the court that he wished to have the witness declared hostile. On the contrary, what he stated time and again is that he wished to elicit answers from the witness that will show that he had previously made a statement that could be inconsistent with what he testified in Court, ostensibly to prepare him for the prospect of being impeached by the defence on his credibility.

[21] Adv. Rafoneke during the course of argument made no pretense that what he was trying to do was to cross-examine his own witness. He sought to justify that posture by submitting that it was an attempt to set the stage to declare the witness hostile.

[22] I disagree. Nowhere in the exchange between him, the defence and the court did he give any hint that he was laying the factual foundation to declare the witness hostile. Without applying to court to declare the witness hostile, it was not open to the

prosecution to put questions to its own witness intended to impeach his credibility.

[23] In similar circumstances, in *R v Saqwashula* 1930 AD 437 counsel for the persecution was allowed, without declaring the witness hostile, to put questions to a state witness suggesting that she made a previous inconsistent to the police, which would show that the accused had confessed his guilt to her. The resultant conviction was set aside on appeal.

[24] The principle is clear: an unfavorable witness must first be declared hostile before the party calling him can challenge him with a previous inconsistent statement.

[25] As the learned authors of the South African Law of Evidence[1] wrote:

> *"Unfavorable and hostile witnesses*
>
> *Sometimes a witness will give evidence which is unfavorable to the contentions of the party who has called him. In such an event he can be contradicted with other evidence on matters relevant to the issue. He may also be asked whether he has made a previous statement which is*

[1] DT Zeffertt & AP Paizez, *The South African Law of Evidence* 3rd ed, p 1023.

> *inconsistent with his testimony, and if he denies it, the statement may be proved against him. Beyond this, however, a party is not ordinarily entitled to impeach the credit of his own witness. If the judge is of the opinion that the witness is hostile the judge may allow him to be cross-examined by the party who called him, but in no circumstances, other than when the witness has been declared hostile, may the cross-examination or other evidence be directed to showing that the witness is generally unworthy of credit on account of his bad character or previous convictions."* (My underlining for emphasis).

[26] The Crown's attempt to impeach the credit of its own witness without first having him declared hostile was properly disallowed by the trial judge. The first ground of appeal therefore fails.

Ground two

[27] I will assume the second ground of appeal relates to the murder count – in other words if the Crown led *prima facie evidence* on which the respondent should have been placed on his defence. During oral argument, Adv Rafoneke on behalf of the Crown conceded that there was no *prima facie* evidence to support the murder count and that the appellant was properly discharged thereon. The concession is properly made and nothing further needs to be said in relation to the count.

Ground three

[28] The Crown posits that it had led sufficient evidence of negligence on the part of the appellant in the manner he discharged the firearm, to have been placed on his defence on a charge of culpable homicide.

[29] The prosecution bore the onus to prove all the constituent elements of a possible competent verdict of culpable homicide. What evidence does the Crown rely on to support a prima facie case of negligence?

[30] It was common cause between the Crown and the defence that the bullet extracted from the deceased during the post-mortem was deformed. The only reasonable conclusion (to be inferred in favour of the accused) is that it must have hit a hard surface such as a rock, ricocheted and then entered the body of the deceased. As Teele KC submitted on behalf of the accused, that evidence raises the issue of foreseeability which the Crown bore the onus to prove. Absent that, counsel submitted, the Crown had not laid the evidential foundation for negligence on the part of the accused in respect of the competent verdict of culpable homicide.

[31] As Teele KC submitted, the Crown bore the onus to show that the accused should have reasonably foreseen that the bullet would ricochet and cause injury to a bystander.

[32] As was laid down in *Kruger v Coetzee* (1966 (2) SA 428 (A)430 E-F in respect of culpable homicide:

> *"For the purpose of liability culpa arises if –*
>
> *(a) a diligent paterfamilias in the position of the defendant–*
>
> *(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
>
> *(ii) would take reasonable steps to guard against such occurrence; and*
>
> *(b) The defendant failed to take such steps."*

[33] That *dictum* was quoted with approval by this Court (in a ricochet situation) in *Ratsebe v Rex* C of A (CRI) NO.9 of 2003 at p 6.

[34] On the facts before us, it was common cause that at the time that the accused discharged the firearm, he apprehended harm to himself from a group of people who were advancing towards him.

He put it to the Crown's witness in cross-examination that he fired in the air to ward off the persons charging at him.

[35] That the bullet struck a rock is obvious because the bullet found inside the body of the deceased was deformed. The suggestion by the accused that he discharged the firearm to protect himself from harm raises the inference that he had a perfectly lawful excuse to act in the manner that he did.

[36] The Crown bore the *onus* to prove that the accused should have foreseen that the bullet would ricochet and likely injure others and take steps to guard against that occurrence.

[37] On behalf of the defence it was submitted that:

> *"The Crown ought to have brought evidence to show whether given the land scape of portion of the parties the respondent ought to have foreseen that the deceased would be injured. There is no presumption of negligence."*

[38] I agree. The Crown had failed to establish a *prima facie* case of culpable homicide and the accused was properly discharged in respect thereof.

[39] In the result:

The appeal is dismissed.

PT DAMASEB

ACTING JUSTICE OF APPEAL

I agree:

P. MUSONDA

ACTING JUSTICE OF APPEAL

I agree:

M.H CHINHENGO

ACTING JUSTICE OF APPEAL

FOR THE APPELLANT: ADV M. RAFONEKE

FOR THE RESPONDENT: ADV. M.E TEELE KC with
ADV M. PHAMOTSE