

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

ZACHARIA KATU

ACCUSED

JUDGMENT

Coram: Nomngcongo J

Date of hearing: 19th October 2010

Date of Judgment: 30th September, 2013

- [1] The accused is charged with the crime of murder in that upon or about the 30th March 1994 and at or near Frasers shop at Ha Qaba in the district of Mafeteng he unlawfully and intentionally shot and killed Maponts'o Francina Motseki (deceased)
- [2] Evidence has established that on the fateful night, the deceased, was on her way home from attending an athletics meeting with her students. She decided to call upon the manageress of Frasers at Ha Qaba. She called on one of her male colleagues to accompany her to the compound in Frasers yard where the manageress and other staff were housed. The dwellings comprise a large house with several rooms and it is surrounded by a security fence. The pair stood at the fence and tried to call the attention of the

manageress. When they got no response, the male teacher left and the deceased apparently remained. It was raining heavily.

- [3] It is while she was at the fence that the accused had occasion to go out of the house for some purpose or other. He saw the deceased. He apparently hurried back to his room and collected his service rifle and went back out. There he shouted “who are you?” There was no response and he repeated the question with the same results. He decided then that he was under attack. He fired a shot in the air. There appears quite strangely, to have been no reaction to all this fracas. I would venture to suggest that it might have been because of the heavy rain that was falling that night together with the fact that deceased was covering herself with a blanket.
- [4] After that first warning shot the accused decided to aim directly at the figure standing at the fence. To use his own Sesotho words. “ka se supa ho eena”.
- [5] The reason advanced by the accused for fearing that he was under attack is that there had prior to this been an attack at one of Fraser’s shops at Motsekuoa where a security guard like him had been over-powered and forced to go to the manager who was then robbed of money. He feared that this might happen to him. This was put to the PW3 ‘Matanki Makhanya in cross-examination. She replied that although she knew that there had previously been attacks on Frasers’ shops, she was not aware of the particular one at Motsekuoa.
- [6] The accused goes on to mention that not only had there been an attack at Motsekuoa but also another at the very shop where he was employed. Gun men who had pretended to have had a break down the previous night actually over powered him in the morning and subsequently robbed the shop. I must hasten to observe that this was not put to anyone in cross-examination. Mr MOKOKO is a very careful cross-examiner. He could not have missed something that happened personally to the accused and remember one that happened in Motsekuoa which is a considerable distance away from Qaba. I conclude that this was an embellishment on the part of the accused.

- [7] After shooting at the deceased the accused retreated into the house and there reported to the manageress that he had shot at thieves. He was according to PW3 in considerable distress, even crying. I think he was aware that he had struck his target. Nothing was done until in the morning when the body of the deceased was found lying next to the fence a few metres away from the gate. The spot was pointed out to the court when it went for an inspection in loco.
- [8] The post-mortem report reveals a number of injuries; a gunshot wound on the distal end of the sternum about 2cm in diameter, a rugged wound on the right hand about 5cm in diameter penetrating the hand with fractures of the carpal bones and radio carpal dislocation, bruise gunshot wound on the sternum extending for about 2cm around the wound, multiple lacerations on the right scapular each about 2cm long. There were also lacerations on the right ventricle and the right auricle. There was evidence of haemopericardium as well as haemothorax of the right lung. The left lobe of the liver had been ruptured. Death had been caused by post-traumatic cardiac arrest.
- [9] When the accused shot he says himself that after the warning shot he pointed the gun at the person standing by the fence. He was a man trained in the use of firearms. He fired from a short distance pointing to the chest and abdominal area of the deceased. The shot or more probably shots found their target with lethal effect. His only excuse is that for reasons stated above he thought he was under attack and was defending himself and his colleagues.
- [10] To succeed with this defence the accused must show that there was an unlawful attack upon a legal interest which had commenced or was imminent (see General Principles of Criminal Law – J.M. Burchell. 3rd Ed. p 73).
- [11] In casu, the lone figure standing at the fence did not exhibit any signs of aggression. The accused saw this figure and was able to go back into the house and there to arm himself and all the while it did nothing. The accused on the other hand had time even to confront this person and the person seemed passive to his activities. Instead of investigating further this strange

behavior or taking other avoiding action accused decided to shoot directly at the person. It has to be remembered that not only did the figure not show any signs of aggression but also there was a physical barrier of the security fence between the deceased and the accused. When this was pointed out to him all the accused could say was that perhaps the person might have cut a hole in the fence to gain access. This is obviously a spurious after thought that was not even mentioned in his evidence in chief.

[12] The action of the deceased here who seemed determined to see the manageress in spite of the darkness and heavy rain may have been suspicious coupled with the alleged spate of attacks. It might require a reasonable man to be on his guard but it certainly does not justify throwing reason to the winds, As Holmes said in **S.v Burger 1975 (4) SA 877 at 879 – E** one does not expect a reasonable man to act *inter alia* with “headlong haste” nor as **Holmes J.A in Herschel V. Muepe 1954 (3) SA 464 at 490 – F**, with a “*timorous faint heart always in trepidation lest he or others suffer some injury*”.

[13] In this case whatever exercised his mind on seeing the deceased, there was certainly no sudden attack that justified the extreme action taken by the accused. No reasonable person could have in the circumstances have feared any attack upon him. His killing was not deceased was not justified

The accused is therefore guilty of culpable homicide.

The Lady assessor agree.

**T. Nomngongo
Judge**

For Crown: Ms Ranthithi

For Accused Mr Mokoko

IN THE HIGH COURT OF LESOTHO

In the matter between:

REX

v

ZACHARIA KATU

ACCUSED

SENTENCE

Coram: Nomngcongo J

Date of Sentence : 1st October, 2013

[1] The accused was charged with murder but was ultimately convicted of culpable homicide. In mitigation of sentence Mr Mokoko seized upon this as a mitigating factor in itself in that it showed accused never intended the death of the deceased. This is one of those difficult cases on the borderline between culpable homicide and murder proper. I say so because the negligence of the accused was in the assessment of the situation he found himself in rather than in the execution of the act that brought about the death of the deceased. The latter was deliberate. The accused pointed his firearm at

the deceased and fired at least twice. As a trained security he must have known that death would ensue.

[2] All too often people who carry arms in their line of duty seem too ready to unleash them at the slightest provocation. The punishments of the courts must disabuse them of this tendency. The accused in this case on seeing a person who posed no danger to him ran for his gun and it was no long before he had shot dead a defenceless woman.

[3] It has been forcefully argued on behalf of the accused that the trial has been hanging over his head over the past nineteen years and that it was through no fault on his part that it has dragged on for so long. In the meantime the accused had to carry on in life. He is married and has two children born during the period and is now working as a driver in a government department. Custodial punishment it is argued will only serve to disrupt accused's life that has been shaped in a particular way during the period , but serve none of the purpose of punishment because the event has faded in the distant past and the accused will not feel that it bears any relationship to it.

[4] I agree that the long wait until the finalization of the case through no fault on the part of the accused must have taken its toll on the accused emotionally or psychologically. But I do not agree with the conclusion that a custodial

punishment will not serve any of the purposes of punishment, viz deterrence, prevention, reformation and retribution. People who carry guns need to be reminded that they carry the lives of others literally in their hands and that it is not a responsibility to be carried lightly. Society must be reassured that those who do cannot be treated lightly.

[5] The accused is a first offender who has a family that consists of a wife and two young children. A custodial sentence will deprive the children and wife of a father and breadwinner. Such a deprivation may be temporary and perhaps not totally unexpected. I weigh that against the unexpected and sudden loss of a mother and also bread winner in the Motseki family. Their loss is permanent.

[6] In the circumstances I consider the appropriate sentence to be three years imprisonment. I suspend one year of such imprisonment for three years on condition that the accused does not commit an offence involving violence to the person committed during the period of suspension.

T. Nomngcongo
Judge

For Crown: Ms Ranthithi

For Accused Mr Mokoko

