

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT
(NORTH GAUTENG, PRETORIA)

11/4/2013

CASE NR: A 856/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
(4)	
11/4/2013	<i>EINA Louw</i>
DATE	SIGNATURE

In the matter between:

MPHELA BILLY MAPULANE

APPELLANT

AND

THE STATE

RESPONDENT

JUDGEMENT

JANSE VAN NIEUWENHUIZEN, AJ

- [1] The appellant was found guilty of two counts of attempted murder on 2 February 2011 in the Regional Court for the Regional Division of Mpumalanga, held at Standerton. The court *a quo* imposed a sentence of 10 years imprisonment.

[2] The first count relates to the first complainant and the second count to the second complainant.

[3] The appellant launched an application for leave to appeal against the conviction and sentence in the court *a quo*. The application was dismissed on 10 June 2011.

[4] The appeal is presently before Court by leave of the Court.

Point in limine

[5] At the inception of the hearing of the appeal, the State requested that the appeal be struck from the roll due to non-compliance with the provisions of section 309B(3)(a) of the Criminal Procedure Act, No 51 of 1977.

[6] The relevant section reads as follows:

" Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires to appeal."

[7] The underlying rationale for the requirements contained in section 309B(3)(a) is well established and with reference to rule 67 of the Magistrates' Court Rules, was explained by Mahomed J (as he then was) in *S v Maritz* 1994 (1) SACR 456 T at 458 e, as follows:

"Rule 67 of the Magistrates' Court Rules undoubtedly provides that the notice of appeal shall set out clearly and specifically the grounds, whether of fact or

law or both fact and law, on which the appeal is based. What is the object of this provision? It seems to me that the ultimate object must be to ensure that the real issues arising on any appeal are properly ventilated, with full opportunity of all interested parties to properly apply their minds to these issues and to make an informed contribution to the resolution thereof. The notice of appeal must therefore be such as to-

- (1) enable the Court to ascertain the grounds of fact and law on which the appeal is based;*
- (2) to give the representative for the State a fair opportunity to prepare for and to anticipate the grounds on which the appellant seeks to attack the judgment of the court a quo; and*
- (3) to enable the magistrate to properly react to such grounds and to furnish to the Court the benefit of such reaction."*

[8] Mr Maritz, appearing on behalf of the appellant, submitted that the appeal is before this court in terms of the provisions of section 309C and consequently, once leave to appeal has been granted by this court, it is not necessary to file a further notice of appeal. Mr Maritz contended that the grounds for the appeal are succinctly set out in the petition.

[9] Section 309C deals with the procedure to be followed in a petition to this court and sub-section (3) provides that the petition must be served on the clerk of the lower court.

[10] Section 309C(4) provides that the court *a quo* must furnish reasons for the refusal of the application for leave to appeal in the lower court.

[11] In this instance, the appellant's petition was served on the clerk of the court *a quo* on 1 October 2012.

[12] In an undated notice, the presiding Magistrate, indicated that he had nothing further to add to the reasons contained in his *ex tempore* judgment.

[13] In the premises and having regard to the principles contained in the *Maritz* judgment *supra*, this court was satisfied that justice will not be impeded if the hearing of the appeal proceeded and gave an order to that effect.

Facts:

[14] The following facts are common cause between the parties:

14.1 Two rival groups attended a club in Meyerville, Standerton. During the course of the evening a brawl erupted between the two groups, which resulted in a physical fight outside the club.

14.2 The appellant was not present and/or involved in this skirmish between the two groups.

14.3 The appellant transported certain people to their homes and upon his return, found his friends, Xolani, Magwegwe (second complainant) and Phumlani fighting. He requested them to leave with him, which they did. The appellant was driving a Golf motor vehicle at the time.

14.4 The appellant proceeded to an Engen Filling Station across the road from the club.

14.5 Whilst at the Filling Station a second fight erupted and the appellant fired a single shot, which shot hit the second complainant in his lower stomach. The injury was serious and the second complainant spend two months in hospital.

States witnesses

[15] Although six witnesses testified on behalf of the State, I will only refer to the evidence of the witnesses relevant to charges on which the appellant was convicted.

Mthkoza Shabalala (first complainant)

[16] The first complainant testified that he was present during the first fight at the club. He decided to run away from the fight and ended up at the Engen Filling Station across the street from the club, where he hid in the petrol attendant's rest room.

[17] A Golf motor vehicle stopped at the Filling Station and the occupants of the vehicle rushed to the rest room and dragged him outside. He was thereupon assaulted by the occupants of the Golf.

[18] During the assault Sifiso Welcome Vilakazi (the second complainant) endeavoured to stop the assault on him. The first complainant was at that stage lying on the ground and the second complainant was standing in front of him.

[19] According to the evidence of the first complainant, a person with a fire arm walked towards them and fired a shot at him. The shot, however, missed him and hit the second complainant.

[20] Already during evidence in chief, the first complainant testified that he did not see the person who fired the shot.

[21] During cross examination, the first complainant made the following admission:

"Verstaan ek u reg dat u dan getuig in plaas dat hy u raak geskiet het, toe skiet hierdie ander persoon Magwegwe (second complainant) in sy maag? -- Ja.

Nou was dit 'n direkte skoot volgens u vanaf daardie ander persoon wat Magwegwe in sy maag getref het? -- Meneer kan nie sê of dit was op my gerig of aan Magwegwe gerig, ek weet nie." (court's emphasis)

Mkhulu-Amos Shabalala

[22] Mr Shabalala worked at a kiosk on the premises of the Filling Station on the night of the incident.

[23] He testified that he could observe the events taking place from the kiosk.

[24] According to his evidence, the first complainant came running towards the Filling Station and disappeared from his view. The next moment a Golf arrived

at the Filling Station and the passengers alighted from the vehicle. It was clear to him that they were chasing the first complainant.

[25] He saw the group fighting with the first complainant and further more saw that the appellant had alighted from the Golf with a firearm in his hand.

[26] The appellant approached the first and second complainants and although the appellant wanted to shoot the first complainant, the shot missed and hit the second complainant.

[27] He testified that the appellant pointed the firearm downwards and therefore accepted that the appellant wanted to shoot the first complainant who was still lying on the ground.

[28] When being confronted with the appellant's version, he reacted as follows:

"As die Beskuldige nou byvoorbeeld vir die Hof sal sê hy het net 'n waarskuwings skoot afgevuur, hy wou nie vir TK (first complainant) skiet nie, wat sou u kommentaar wees daarop? -- Ek sal niks kan sê daaroor nie."

and

"Toe die Staat vir u gevra het, as die Beskuldigde vir die Hof sou kom sê hy het 'n waarskuwings skoot geskiet, toe het u vir die Hof gesê u sal nie, u kan nie daaroor u opinie uitspreek nie, u kan nie sê nie, dit is met ander woorde moontlik.--Al wat ek sê Edelaagbare is ek het nie die

woorde, die spraak wat hy gesê as hy geskiet het; hy het geskiet as waarskuwing geskiet, skoot, of wat hy gedoen het Edelagbare - ek kon nie hoor nie ek het net die aksie gesien."

En Beskuldigde gaan vir die Hof kom sê hy het die grond, hy het 'n skoot in die grond geskiet of in die plaveisel. Hy het glad nie 'n vuurwapen op 'n persoon gerig nie. --Soos hy sê hy het op die grond geskiet. Nou hy het iemand geskiet.

U het nie gesien waarna het hy geskiet nie, het u? -- Ek het gesien wat hy die vuurwapen so hou en skiet en toe val Magwegwe op die grond."

Sifiso Welcome Vilakazi (second complainant)

[29] The second complainant was with the appellant in the Golf. He testified that they chased the rival group to the Engen Filling Station where the first complainant was pulled from a double cab bakkie.

[30] The first complainant was thrown on the ground. Whilst lying on the ground, the appellant with a firearm in his hand walked towards the first complainant and uttered the following words "*ek maak hierdie hond dood*".

[31] Immediately thereafter the appellant fired a shot, which shot hit him because he was standing in front of the first complainant.

[32] Throughout his testimony he insisted that the appellant wanted to shoot the first complainant.

The Appellant's version

- [33] The appellant was not an impressive witness. It is clear from his evidence that he endeavoured to justify his conduct on the evening of the incident.
- [34] The appellant, a police officer, testified that, in an attempt to stop the second fight at the Filling Station he fired a warning shot into the ground.
- [35] He testified that the bullet must have ricocheted in order to hit the second complainant in the stomach.
- [36] When confronted with the fact that the firing of a shot in a built up area is extremely dangerous and should only be resorted to if one's life is in danger, he insisted that his actions at the time of the incident, giving the specific circumstances, were justified.

Intention to murder

- [37] The State has the *onus* to prove that the appellant intended to murder both the first and second complainant's. Intention can manifest in three forms to wit: *dolus directus* (direct intention), *dolus indirectus* (indirect intention) and *dolus eventualis* (foreseeing the result).
- [38] The State readily conceded that there was no evidence to prove that the appellant intended to murder the second complainant.
- [39] The only remaining question is therefore, whether the appellant intended to murder the first complainant.

- [40] The second complainant is the only State witness who testified to the fact that the appellant intended to murder the first complainant.
- [41] I agree with Mr Maritz that the version of the first and second complainants is mutually destructive to such an extent that their evidence should be rejected out of hand.
- [42] But even if the court has regard to the evidence of the second complainant, his evidence as to the events that unfolded on the night in question, is so improbable that it should in any event be rejected.
- [43] Why would the appellant, who at no stage during the evening participated in the fighting, suddenly want to murder the first complainant? The first complainant was lying on the ground, was being assaulted and posed no risk to the appellant whatsoever!
- [44] I am satisfied that the State did not proof beyond a reasonable doubt that the appellant had the necessary intention, in any of its forms, to murder the first complainant.
- [45] The finding *supra* is, however, not the end of the matter. The appellant was also charged with contravening the provisions of section 120(3)(a) of the Firearms Control Act, No 60 of 2000, to wit, to cause bodily injury to a person by negligently using a firearm.
- [46] The question then arises whether the appellant was negligent in firing a shot on the evening of the incident.

Negligence

[47] In order to determine whether the appellant was negligent, the Court needs to apply the following test:

"A person's conduct is negligent if

1. *the reasonable person in the same circumstances would have foreseen the possibility*
 - (a) *that the particular circumstance might exist; or*
 - (b) *that his conduct might bring about the particular result;*
2. *the reasonable person would have taken steps to guard against such a possibility; and*
3. *the conduct of the person whose negligence has to be determined differed from the conduct expected of the reasonable person."* (See: *Criminal Law*, Snyman, fifth edition at p. 210)

[48] Being a police officer in possession of a firearm, the appellant should have been particularly cautious in the handling of the firearm. Due to his training and vocation the appellant is naturally aware of the inherent risk in firing a firearm in close proximity of people in a built up area.

[49] The appellant did not act in self defence or in defence of the life of another person. His intention to stop the fight is admirable, but there were various less drastic ways in which he could have obtained the same result.

[50] The appellant should have foreseen the possibility that a warning shot fired into the pavement could ricochet and injure persons in the vicinity.

[51] I am satisfied that a reasonable police officer, if confronted with the same scenario as the appellant, would not have fired a shot.

[52] In view of the finding of negligence, the court *a quo*'s conviction on two counts of attempted murder should be set aside and be replaced with a finding that the appellant contravened the provisions of section 120(3)(a) of the Firearms Control Act.

Sentence

[53] In terms of section 121 read with Schedule 4 of the Act, any person convicted of a failure to comply with the provisions of section 120(3)(a) may be sentenced to a fine or to a term of imprisonment not exceeding 5 years.

[54] Having regard to the appellant's personal circumstances, the fact that society expects police officers to protect rather than injure citizens and the serious injury sustained by the second complainant, I am of the view that a term of imprisonment of 5 years is justified.

[55] The appellant is for present purposes a first offender and I deem it fair that three years of the sentence be suspended for a period of five years on condition that the appellant does not contravene the provisions of section 120(3)(a) of the Act during the time of suspension.

Magistrate's conduct during the trial

- [56] In the final instance, Mr Maritz urged this court to comment on the conduct of the presiding Magistrate, Mr Hallet, during the trial.
- [57] I must from the outset, express my absolute dismay at the treatment not only the appellant, but also his legal representative was subjected to by Mr Hallet during the trial.
- [58] Mr Maritz has referred to various incidents where Mr Hallet interrupted the attorney acting on behalf of the appellant during cross-examination. On one occasion the Magistrate ordered the appellant's attorney to finish his cross-examination, because it was the end of the court day and he will not allow the witness to testify when the case resumes on another day.
- [59] The tone and manner in which Mr Hallet addressed the appellant's attorney is indicative of a total lack of basic courtesy and impartiality.
- [60] During the appellant's evidence Mr Hallet was irritable and treated the appellant with absolute disdain.
- [61] The judgment is fraught with personal remarks that were totally irrelevant to a judicial finding.
- [62] Mr Maritz referred to the following extract in *S v Mlimo* 2008 (2) SACR 48 SCA at 51 i:

"Undue impatience and irritability on the part of a judicial officer is inappropriate and undesirable. A trial Judge or Magistrate must ensure that 'justice is done'. He or she should so conduct the trial that his/her open-mindedness, impartiality and fairness are manifest to all those concerned in the trial and its outcome, especially the accused."

[63] Mr Mallet's conduct in the court *a quo* dismally failed to meet the standards set out *supra*.

[64] In order to prevent similar conduct in future, I am of the view that the contents of this judgment should be brought to the attention of the Magistrate.

Order

I propose that the following order should be made:

1. The appeal against the conviction on two counts of attempted murder and the sentence of 10 years imprisonment is upheld.
2. The court *a quo*'s order is replaced with the following order:

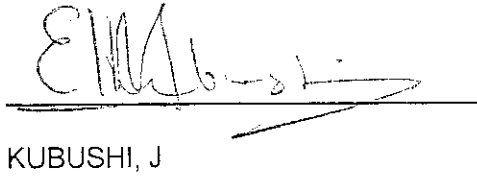
"The accused is found guilty of contravening the provisions of section 120(3)(a) of the Firearms Control Act, No 60 of 2000 and is sentenced to a term of imprisonment of 5 years of which three years is suspended on condition that the accused is not found guilty of contravening the provisions of section 120(3)(a) of the Act during the period of suspension."

3. The sentence is to run from 2 February 2011.
4. It is ordered that the judgment be brought to the attention of the Presiding Magistrate in the court a quo, Mr Hallet.



JANSE VAN NIEUWENHUIZEN, AJ

I agree



KUBUSHI, J