

B.J. DE SALDANHA

and

THE STATE

JANSEN JA.

Case no. 42/83
M C

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:-

BERNARD JOHN DE SALDANHA Appellant

- and -

THE STATE Respondent

Coram: JANSSEN, VILJOEN JJA et
VIVIER AJA.

Heard: 18 September 1984.

Delivered: 30 November 1984.

J U D G M E N T

The appellant was convicted of murder in the Witwatersrand Local Division (per VERMOOTEN J). The court found extenuating circumstances and sentenced him to 10 years imprisonment. He appeals against conviction and sentence by leave of this Court.

It is common cause that on 12 April 1982 the appellant fired a .45 semi-automatic pistol approximately 5 times at one Valentine Lategan, hitting him twice. Both shots were fatal. The shooting occurred in Caledon Street, Coronationville, Johannesburg, in or near the T-junction between Caledon Street and Dordrecht Street, and in the vicinity of a café, from which the deceased had just emerged with a litre bottle of Coca-Cola which he had bought. He was accompanied by his girlfriend,

Alison /

Alison le Roux. As to what had gone before there is serious conflict between the version of the witnesses for the State and that of the appellant, but it is at least common to both versions that the deceased had earlier on assaulted the appellant and that the appellant had at some stage fallen to the ground.

According to Alison le Roux the appellant met the deceased at the door of the café as the latter came out. Her evidence-in-chief continues :-

"MR SWANEPOEL: Did the accused have his gun in his hand at that stage or didn't you see the gun? --- No, it wasn't in his hand.

Did the deceased have anything in his hand when he came out? --- A litre bottle of Coke.

.....
What happened when these two met there?

--- The accused said to the deceased. He showed him his arm, he said: Can you see what you did to me?

COURT /.....

COURT: It's the left arm? --- Well, I don't know which arm it was.

MR SWANEPOEL: Was there anything wrong with the arm? --- It was bruised, yes.

COURT: Did you say it was bruised? --- Yes.

MR SWANEPOEL: Did the deceased reply? --- The deceased said: So what? Go and make a case against me if you want to.

What happened then? --- The accused then answered and said: Just because you tripped me I must go and make case against you?

Yes, and then? ---Then the deceased asked him now why is he crying then, you know.

Was he crying? --- Not really crying, but I mean he means now ...

COURT: Why is he complaining? --- Yes.

Who said that? --- The deceased said to the accused.

You complain like a baby, that's crying? --- Yes?

MR SWANEPOEL: Yes, what happened then? --- Then the deceased said to him: Man, just get lost. He took my hand and he said: Come, we go home.

COURT: Are you walking home? You're now walking home? --- Yes.

MR SWANEPOEL: That is in the direction of this church building? --- Yes.

What happened then? --- Well, when the deceased said to him: Just get lost; and he took my hand and /.....

and he said let's go home, the accused asked him: What did you say? He asked again, he then asked again: Do you want take me on?

COURT: Is that now the deceased? The accused now? --- The accused replied to him, yes.

What did you say? Do you want to take me on?--- Yes.

.....

MR SWANEPOEL: Yes, and then? --- Then I turned around and I said to the accused: Man, can't you leave him alone? Can't you see he doesn't want to fight with you? I turned around and we walked home and he shot."

This evidence of Alison le Roux is corroborated in

essential respects by the evidence of the witnesses

Leslie Challends and Andrew Steeneveld. They in addition

mention the deceased throwing the bottle of Coca-Cola at

the appellant after the first shot or shots had been fired

and the bottle falling to the ground and breaking, without

hitting the appellant. Alison le Roux says that she did

not /

not see this as she was then facing the other way, but

that she did hear a bottle break.

The appellant says that after the earlier unpleasantness and after the deceased had left the scene he stood talking to one Buglich (Buggarage) near the café. His evidence-in-chief continues :-

"Did you then see the deceased again on that day? --- Yes, m'lord.

What happened? Under which circumstances did you see him? --- While I was talking to Buglich, the deceased, I just heard him shouting and using bad language towards me, m'lord.

Did Buggarage then leave you? --- Buglich ..., I looked at the deceased and looked back at Buglich, m'lord, and I'd seen Buglich had started walking away.

Did he walk away across the street? --- He walked away across the street.

Did the deceased then go into the cafe? --- He started swearing as he was approaching the cafe, m'lord.

What kind of words did he use? --- Waar ek

jou /.....

jou kry jy vrek.

Did he go into the cafe?

.....

COURT: The last question was, did he go into the cafe? --- He did go into the cafe.

Yes?

MR JOUBERT: Did he eventually come out of the cafe? --- He came out of the cafe and started swearing at me.

Did you at any stage say anything back? --- Not at that stage. He then repeated words like, waar ek jou kry jy vrek. Jou ma en pa sal rou vir jou.

Did you then say anything? --- I waved my hand in a motion and said, fuck you.

What happened then? --- He came at me with a full litre Coke bottle held by the neck.

Yes? --- His girlfriend tried

COURT: Just slowly.

MR JOUBERT: Sorry, m'lord.

COURT: With the Coke held by the neck? Yes?--- His girlfriend tried to pull him away.

Pardon? --- His girlfriend tried to pull him away.

Yes? --- He pulled away from her and advanced towards me and flung this Coke bottle at me.

MR JOUBERT: Can you give the Court an indication of how far he was from you when he flung this

Coke ./.....

Coke bottle at you? --- At that stage about five metres.

Did he hit you with the Coke bottle? ---
No, m'lord, I moved one step back and ducked.

Did the Coke bottle then miss you? ---
The Coke bottle missed me and broke.

What did the deceased then do? --- The
deceased still came at me. He dropped his
hand and it was so fast I saw a knife coming
into his hand.

What did you then do?

COURT: Wait a bit now. Yes?

MR JOUBERT: What did you then do? --- I drew my
gun, cocked it and fired at his chest.

COURT: How far was he from you then? --- Two
to three metres away from me.

Yes, Mr Joubert?

MR JOUBERT: Now, after you had fired the shots,
did the deceased then

COURT: How many shots? --- Five.

MR JOUBERT: I'll ask him that.

COURT: I fired five shots?--- I fired a number
of shots.

MR JOUBERT: Do you know exactly how many shots?
--- No, m'lord.

Did the deceased then collapse?---- He was
still standing and went forward and then fell."

The /

The assessment by the court a quo of the witnesses appears from the following :-

"Now, Leslie was not a good witness. His demeanour was not very convincing. He spoke so softly that I had to reprimand him on more than one occasion. He also contradicted himself here and there. In my opinion it is safer not to rely on his evidence, save where it is corroborated by other credible evidence. Andrew made a good impression. In my opinion he was an honest and reliable witness. It is true that he was a friend of the deceased. It is also true that in certain respects he differs from the evidence of Miss le Roux, but in this regard it must be remembered that the three eye-witnesses called by the State observed the quickly changing events from different vantage points. For example, when (as is common cause) the deceased emerged from the cafe with the bottle of Coke, Andrew testified that he saw accused speak to the deceased there, Miss le Roux being there, too, but he could not hear what was being said, because he was some distance away. Miss le Roux impressed me

favourably /.....

favourably. I would estimate her age at twenty years. She is a young lady of refinement. She would not concede that the deceased pushed the accused at the first incident and merely conceded the possibility that he tripped the accused at the second incident. [These 'incidents' relate to what happened before the deceased went to the café.] But such an attitude, although not pardonable, is understandable. On all the main incidents on this moving kaleidoscope of events her evidence agrees with that of Andrew and Leslie. But for the reservation I mentioned she appeared to be frank and sincere in her evidence. I feel that I can safely accept the evidence of Andrew and Miss le Roux.

On the other hand the accused gives a version which is completely improbable."

In the result the court a quo accepted the evidence of the State witnesses and rejected that of the appellant.

Mr Joubert has presented a full and able argument directed at showing that the court a quo erred in its

assessment /

assessment of the witnesses for the State. Inter alia

he has pointed out a large number of discrepancies and unsatisfactory features, particularly in respect of the events preceding the final incident at the café.

However, on a careful reading of the evidence and upon full consideration of the matters raised, I am unpersuaded that the court erred in this regard. The differing vantage points of the witnesses and the nature of the events observed are adequate to justify the view of the court a quo.

As to the appellant, counsel has emphasized that the court a quo considered the main defect in his evidence to be that it was "completely improbable", and he argues that, in arriving at this conclusion, the court has in

many /

many instances based its reasoning on a faulty premiss.

It may be assumed in favour of the appellant that this criticism is not without foundation, (e.g. in respect of the court's acceptance that the deceased was not an aggressive man). There is, however, some inherent improbability in the appellant's evidence that the deceased would have sworn at the appellant, without any further provocation, at the time he went to the café for the Coca-Cola. But of greater importance is the appellant's denial that there was any discussion between him and the deceased at the entrance to the café and his denial that he showed a bruise on his arm to the deceased, as testified to by Alison le Roux. The appellant concedes that he did at the time have a bruise on his arm and that

he /

he had sustained it earlier on at the hands of the deceased. He cannot explain how, on his own version, Alison le Roux could be aware of this bruise. The court a quo attached considerable importance to this aspect and it does seem to be crucial. It cannot but lend credence to Alison le Roux's evidence and discount that of the appellant. If to this is added the fact that it was adumbrated in cross-examination by counsel for the appellant that inter alios a witness would be called to say that a knife had been taken from the body of the deceased, and that this witness was in fact not called and that no explanation was given for this omission, then it becomes impossible to find that the court a quo erred in believing the State witnesses and disbelieving the appellant.

Counsel sought some support for the appellant's version of the actual shooting in the medical evidence and relied on the presence of a mark surrounding the one entrance hole in the deceased's shirt - said by the pathologist to be either gunpowder or grease. However, on analysis, the inferences to be drawn from the position of the wounds do not really carry the matter any further, nor does the mark on the shirt. Without knowing its true nature and without ballistic evidence no inference can be drawn in respect of the distance at which the shot was fired. Counsel has suggested that the court itself should have investigated this question, but this would have amounted to an uncalled for descent into the arena. It has also been suggested that the court itself should have called those

witnesses /.....

witnesses the defence did not call (despite having put in cross-examination that they would be called). Here also it was not at all incumbent upon the court in the circumstances to do so.

In my view it has not been shown that the court a quo erred in accepting the evidence for the State and rejecting that of the appellant.

It is contended that even on the State's version it has not been established that the appellant intended to kill the deceased. The appellant, so the argument runs, was so provoked and enraged that he lost control to such a degree that he did not advert to the fatal consequences of his acts. However, in the particular circumstances of this case, this amounts to

mere /.....

mere speculation. The appellant has not said that he was enraged and the other evidence does not point to the appellant having been disabled by emotion from foreseeing the possibility of death ensuing.

The appeal against the conviction must fail.

In regard to sentence the extenuating circumstances found by the court are material, viz. "the events of that afternoon, including the assaults on you by the deceased, the humiliations which you had to suffer and the degradations, and the absence overall of premeditation". In dealing with the appellant's personal circumstances the court said:-

"Now, I take into account in your favour the mitigating factors which have come out in the /.....

the evidence. You've been married for twelve years and have two children of twelve and nine to support and a wife of course. The evidence is that you are a good husband and father. You are not aggressive by nature. At the moment you have work. You told me yourself in evidence that you are earning R550 per month. Your wife testifies that she also works as a computer operator at R850 per month. Mrs Blindeman has testified that she knows you since birth and I take that into account. You're not an aggressive person. You're not a trouble maker. She knows you well, because you lived next door to her. She says you're religious and you're a good father and provider.

I take into account the circumstances under which this crime was committed. There was a long series of provocations offered to you. I don't think you yourself were blameless in the course of the happenings which preceded the firing, but undoubtedly there were these series of provocations. As I said in the judgment it is quite clear that the final insult in regard to the bruise on your arm was the thing that caused you to fire and, therefore, it is common cause, and the State concedes, that you were subject to this provocation.

I take /.....

I take into account also that you went to the police and handed over your gun and handed over yourself."

The appellant has no previous convictions except one for drunken driving. He is 34 years of age. However, the "interests of society" weighed heavily with the court :-

"Coming now to the interests of society, I must bear in mind, as Mr Swanepoel correctly states, that fire-arms are used far too often in the jurisdiction of this Court and hardly any day does one open a newspaper but one reads that somebody has shot somebody else again. Frequently that somebody else is dead. And fire-arms are used in armed robberies. The whole thing is an issue very serious and the Courts cannot neglect their duty to protect society from these very lethal weapons which seem to be used indiscriminately by people."

Obviously the use of a fire arm was considered in a very

serious /.....

serious light.

In my view, however, the court appears to have attached undue weight to this aspect in the particular circumstances of the case. The appellant was licensed to possess the pistol; he did not carry it habitually, but that day intended to go target shooting. Purely fortuitously he became embroiled with the deceased, a person unknown to him. Visiting friends in the neighbourhood he had noticed one "Pompies" scrawling obscene remarks on a wall and he forced him to wash it off. A quarrel with Pompies ensued and the appellant threw a cartridge across the street at Pompies as a "souvenir". The deceased happened to pass on a bicycle at that instant and the cartridge either struck him or closely missed him.

The /

The deceased jumped off the bicycle and confronted the appellant and assaulted him, before leaving to go to the nearby home of Alison le Roux. The appellant ultimately used the pistol merely because it was to hand. In these circumstances the instant case cannot be equated to the type of case the court a quo had in mind. In my view the court a quo misdirected itself and the question of sentence must be considered afresh.

In all the circumstances a sentence of 5 years would appear to be appropriate.

The appeal against the conviction is dismissed; and the sentence is altered to one of 5 years imprisonment.

E.L. JANSEN JA.

VILJOEN JA)
VIVIER AJA) Concur.