

LL

Case No. 285/1985IN THE SUPREME COURT OF SOUTH AFRICAAPPELLATE DIVISION

In the matter between:

SHARFUDEEN FAKHI MALIK

Appellant

and

THE STATE

Respondent

CORAM:RABIE ACJ, VIVIER JA et STEYN AJAHEARD:

19 MARCH 1987

DELIVERED:

31 MARCH 1987

JUDGMENT

/STEYN AJA ...

STEYN AJA:

On April 22 1985 appellant was arraigned before McCreath J and two assessors in the Witwatersrand Local Division on a charge of having murdered Samson Pule Mabote (the deceased) at Krugersdorp on 3 May 1984. He pleaded not guilty but was nevertheless convicted of murder with extenuating circumstances and sentenced to 9 years' imprisonment. Leave was given him by the trial Judge to appeal to this Court against his conviction and sentence.

The facts which were either common cause or undisputed were set out as follows in the judgment of the Court a quo:

"It is common cause that the deceased was in fact shot through the head, the bullet entering the head on the right hand side, and leaving the head from the left hand side. It is also common cause that the accused was the person who was responsible for firing that shot at the deceased and that the shooting was effected by means of a 9mm Parabellum pistol, a firearm which requires a trigger pressure of

/some ...

some 4 kg or 9 lbs tension in order to enable the weapon to be fired.

It is common cause that it is this wound which caused the death of the deceased. It is also not in dispute that the premises where the shooting occurred is a restaurant and, as indicated by the defence in the explanation of the accused's plea, a restaurant owned by the accused and situated on the first floor above certain shop premises. At street level there is a clothing shop, also the property of the accused, the entrance whereof faces onto the street. A few paces therefrom is a stairway, leading down from the restaurant on the first floor to the street. In close vicinity to the clothes shop there is a butchery.

It is also common cause that the entrance to the clothing shop is by means of a door which, according to the accused - and that evidence is unchallenged - is fitted with two locks. The accused, at the time of the shooting, on his own evidence, was sober and it is not disputed that the concentration of alcohol in the blood of the deceased at the time of the shooting was ,22 grammes per 100 millilitres.

The accused's evidence is to the effect that prior to the shooting incident he had attended a course in pistol shooting for a period of approximately a year; that he had been issued with a certificate of competence in consequence of that course, and that the course included learning how to fire a firearm of the nature used in the shooting.

The accused's evidence is also to the effect,

/and ...

and that is likewise unchallenged, that the area in which the restaurant is situated is an area which is somewhat unsafe and that for this reason, and in view of the fact that he had previously had difficulty with persons entering the restaurant and threatening him, he had acquired the pistol in question. He kept it in a cocked position whilst he was not actually in the restaurant itself and in a position in which it could be fired. The pistol was kept in a holster whilst he wore it and it then hung at his left side.

There is the further unchallenged evidence that in the restaurant itself and behind the counter the accused kept a baton to enable him to ward off any persons wishing to assault him or rob him whilst at the restaurant.

That much is common cause, or not in dispute in this case."

It was likewise common cause that appellant shot the deceased in the restaurant between 6 and 7 p m on the day in question and that the deceased had a jacket on back to front. But the circumstances under which the shooting took place were in dispute. I now proceed to deal with them.

Appellant's initial defence as set out by his counsel when indicating the nature of the defence and as

/put ...

put by him to several state witnesses, obviously with appellant's concurrence, was that appellant had acted in legitimate self-defence in warding off an unlawful attack upon him by the deceased. But during the course of his own testimony appellant changed his ground. He then in fact gave to understand that he never intended shooting but pulled the trigger unintentionally whilst evading the deceased. This was, however, no mere afterthought conjured up by him under the pressure of pertinent questioning. On the evening of 3 May 1984, shortly after the occurrence and whilst still in the restaurant appellant made a statement to detective warrant officer Van der Westhuizen of the South African Police in which he inter alia said:

"I then took out my 9 m.m. Parabellum Browning pistol No. 245 PY 18877 to protect myself. The pistol was loaded and by mistake a shot went off and hit the Black male in the forehead."

This was in effect saying the same thing as in his later

/testimony ...

testimony. I will deal with his evidence in greater detail anon. Suffice it now to say that in what he himself repeatedly said appellant effectively disposed of self-defence but also placed the intention to kill pertinently in issue.

The only witnesses to testify about what happened in the restaurant were appellant and his employee Essop who corroborated his version of the events preceding the shooting. Essop did not, however, see the shot being fired as he was then bending down behind the counter looking for the baton. Appellant is consequently the only witness to testify about the occurrence as a whole. Briefly stated, his version thereof is the following.

Between 6.15 and 6.30 p m on the evening in question he removed close on R800 from the till in his shop and put the money in his pocket. He then proceeded to lock the shop's front entrance. Whilst in the process

/of ...

of doing so he was grabbed from behind by the deceased who attempted to push him back into the shop, apparently with the intention of robbing him inside. This attempt failed because one of the door locks had already been secured. Appellant escaped by pushing backwards thereby throwing his assailant off balance. He then fled up the stairs to the restaurant hotly pursued by the deceased. On entering the restaurant appellant made for the counter at the opposite end of the room intending to take refuge behind it. Essop was then also behind the counter. But there were 10 - 12 customers in the restaurant and some blocked appellant's way. He then turned left and ran around a table seeking shelter behind it from the deceased who was still aggressively pursuing him. In an attempt to get at appellant deceased moved in the opposite direction and then pushed the table and reached out to grab him but failed to do so because appellant ducked behind the table. It was during this process of flight

/and ...

and pursuit that the shot was fired after appellant had undone the holster button and drawn the pistol.

During his evidence appellant repeatedly and consistently maintained that he had not meant to shoot. This will be adequately demonstrated by the following extracts from his testimony. During examination-in-chief:

"What did you think what was he trying to do? -- Well he was trying to grab me you see.

Right and what happened when you entered the restaurant -- As I ran up the steps this guy was right behind me, so I ran around the table and he was very close and I pulled the gun out you see to avoid, because I was scared. I didn't know what he was carrying.

But he was still behind you? -- Yes very close to me and I just pulled the gun out and I took it in my hand and I don't know with that tension, or being frightened my hand went on the trigger and the gun went off."

Under cross-examination:

"When did you take your firearm out?--Just when I came to the table, when I ducked behind the table I pulled the gun out."

And:

/"Yes ...

"Yes, but you could have on that stage just taken a step or two backwards, he couldn't have grabbed you, that's what I am trying to get at, is that correct? Do you agree? -- It happened so fast sir, it's difficult for me to say yes or no sir.

Because why I'm putting it to you is that on your own version there was no necessity for you to shoot the deceased. -- I just pulled the gun out, not to shoot him sir, to scare him.

But if you only wanted to scare him why did you pull the trigger? -- With the tension I suppose my finger made a bit still on the trigger and it went off."

When asked in chief where in the restaurant he was when he fired the shot, appellant replied:

"I can't exactly think - at that moment I was so mixed up and frightened. I wasn't even sure where I was."

He added in reply to a further question that after the shooting he found himself "near the pillar". Certain of the photographic exhibits handed in by the prosecution show that this pillar is immediately in front of the counter and width-wise approximately in the centre of the restaurant. To someone standing at the top of the

/stairs ...

stairs and looking into the restaurant the counter is at the far end of the room and the pillar to the right of where the deceased was found lying dead on the floor. From the same position at the head of the stairs the outside wall of the restaurant is to the right, and in that wall is a continuous row of curtained windows overlooking the pavement and street outside the clothing shop. These windows are separated from each other by narrow metal frames. From the entrance to the restaurant at the head of the stairs there is an aisle, apparently not more than 10 metres long, leading straight to the counter. On either side of this aisle there were on the evening in question rows of tables, four to the right and three to the left, each consisting of two tables standing end-on next to each other at rightangles to the aisle. The rows on the right were end-on right up against the aforementioned windows. A photograph of the scene taken by the police that same evening shortly after the shooting

/shows ...

shows the inner of the two tables forming the last row to the left of the aisle (i e the row nearest the counter and the table nearest the aisle) displaced away from its companion in the direction of the counter and its chairs in disarray. The deceased was lying on his stomach between this and the row next to it, amongst the displaced chairs with his head towards the stairs. And the bullet which had killed him was later found to have penetrated a vertical window-frame next to the second last of the right-hand row of tables and approximately opposite its centre line. This bullet hole was 95 cm above the floor.

The entrance wound in the deceased's head was lower than the exit wound and pieces of the deceased's hair and skull bone were mostly found spattered high up against the curtains at the aforesaid windows, none of these ejecta being lower than table-top level. The deceased was not shot at point-blank range because no tatooing or powder burns indicative of such a shot were

/found ...

found at the entrance wound. It must therefore have been a rising bullet that hit him. The distance between where the deceased lay and the bullet-hole in the window-frame was not measured, but judging by the photographs it was clearly not less than two metres. When hit, his head must consequently have been less than 95 cm from the floor, indicating a crouching posture. And appellant's pistol must have been even closer to the floor when the shot was fired. This is not only consistent with appellant pulling the trigger whilst ducking low but in fact strongly indicative thereof. The relative positions of deceased's body, the aforementioned ejecta and the bullet-hole in the window-frame indicate that the shot was most probably

/fired ...

fired almost at rightangles to the centre-line of the aisle. This places appellant within the area of disturbance, on the staircase side of but very close to the displaced table, and consequently also within the area where, according to his testimony, he was when the shot went off.

Whilst the aforementioned facts are clearly corroborative of appellant's evidence as to where and why the shot was fired they are also entirely inconsistent with the shot having been fired by some one standing in an upright position on the far side of the said pillar facing the entrance to the staircase and holding the pistol with a straight arm pointing directly forward at shoulder level in the

/direction ...

direction of the staircase-end of the restaurant. And yet appellant for some reason known only to himself, indicated to the police that he was standing thus when he fired the shot. He was clearly wrong and his tortuous attempts at denying that he did so were rightly disbelieved by the trial Court.

The State also sought to discredit appellant's evidence that the trouble between him and deceased started at the shop by calling as witness a certain Mendonca who was then employed at the adjacent butchery. And a certain Alberts, who had been a policeman on May 3 1984 and had arrived at the restaurant very shortly after the shooting, was called by the defence to discredit Mendonca. Nothing further need however be said of this duel on credibility because the view I take of the matter makes it unnecessary to do so.

The trial Court rejected appellant's evidence, judging him to be an unreliable and untruthful witness and

/finding ...

finding that "there [were] improbabilities in his version which [were] overwhelmingly against him." But in doing so the Court overlooked the strong corroboration of appellant's version to be found in the prosecution's evidence regarding the scene. The trial Court thereby misdirected itself in a most material respect, and that misdirection clearly influenced its adverse findings as to appellant's credibility.

In seeking, however, to find some explanation for the shooting the trial Court came to the following conclusion as set out in the judgment:

"There exists in my view the reasonable possibility that the accused, with something or other happening in that restaurant which angered him, drew the weapon and that it was fired recklessly with the accused knowing the possibility that by firing the weapon, he might cause the death of the deceased. In other words he foresaw the possibility, but that nevertheless, he did fire the weapon."

On the evidence there is no justification for such a finding and in coming to that conclusion the trial Court

/moved ...

moved from the realm of inference to that of conjecture..

Having thus misdirected itself the trial Court wrongly assessed the probabilities which, far from being overwhelmingly against appellant, are decidedly in his favour.

The deceased, dressed as he was and clearly under the influence of liquor, undoubtedly entered the restaurant for some nefarious purpose. Whatever happened (or did not happen) at the entrance to the shop, the probabilities strongly indicate that he was the aggressor inside the restaurant, and there was clearly some or other violent interaction at or near the table between him and appellant at the time of the shot. The fact that the bullet entered deceased's head broadside on as it were is no clear indication of his bodily stance at the moment of the shot. He may, for example, have turned his head only and not also his body at that moment. In my estimation it is at least reasonably possible that appellant

/fired ...

fired the shot by unintentionally pressing the trigger whilst ducking away from deceased. It follows that his evidence on that aspect was wrongly rejected by the trial Court. It may also have been wrongly construed. There is consequently no proof of any intention on appellant's part to murder the deceased.

But appellant nevertheless acted negligently in handling and firing the pistol as he did. Although he had never fired that particular weapon before that evening, he was no stranger to the handling of firearms. A reasonable person in his position would have realised, even in the stressful situation appellant was in, that handling a loaded and cocked firearm in such circumstances was very dangerous and that great care should be taken not to touch the trigger lest the pistol goes off and injures or kills somebody. Appellant did not exercise that degree of care and his failure to do so was culpable. He is consequently beyond reasonable doubt guilty of

/culpable ...

culpable homicide.

But in view of the circumstances under which the shot was fired, his negligence is to my mind not of a very serious nature. This so materially reduces his moral blameworthiness that it does not merit an unpended sentence of imprisonment. In my estimation an appropriate sentence under the circumstances would be a fine of R500 or 12 months' imprisonment and a further 3 years' imprisonment conditionally suspended for five years.

The following orders are therefore made:

1. The appeal succeeds in part.
2. The conviction of murder and the sentence of 9 years' imprisonment are set aside.
3. Substituted therefor are:
 - (a) a conviction of culpable homicide, and
 - (b) a fine of R500 or 12 months' imprisonment, and a further three years' imprisonment wholly suspended for 5 years on condition

/that ...

that the accused be not convicted of an offence involving an assault with a firearm which is committed within the period of suspension, and in respect of which an unsuspended sentence of imprisonment is imposed.



M.T. STEYN AJA

RABIE ACJ

CONCUR

VIVIER JA