

IN THE HIGH COURT OF SOUTH AFRICA (NORTHERN CAPE PROVINCIAL DIVISION)

KIMBERLEY

CASE NO.:CA&R35/01

DATE: 11/05/2001

In the matter between:

ANDREW ITUMELENG BABEILE

APPELLANT

VS

THE STATE

RESPONDENT

CORAM: Steenkamp J.P et Majiedt J

J U D G M E N T

MAJIEDT J:

1. One of the laudable objectives in enacting our present Constitution (Act 108 of 1996) is set forth in the preamble thereof as follows:-

“to heal the divisions of the past . . . “

This matter before us vividly illustrates the necessity for that healing process.

It has at its backdrop the turmoil and turbulence which has earned the Vryburg High School nationwide notoriety over the past two years or so. Racial tensions lie at the heart of this unfortunate event which has left one of the protagonists herein with a possibly permanent physical scar on his neck, the consequence of a stab wound inflicted with the use of a pair of scissors by the other protagonist. The emotional sequelae of this sad occurrence on both these protagonists are inestimable.

2. The Appellant was convicted of attempted murder in the Vryburg Regional Court and was sentenced to 5 years imprisonment of which 2 years were conditionally suspended for a period of 5 years. Having been refused leave to appeal by the Trial Court, the Appellant successfully petitioned this Court for leave to appeal in terms of section 309C of the Criminal Procedure Act, 51 of 1977.

Leave to appeal was granted against conviction only and was limited to the question of whether the State had proved an intention to murder as opposed to an intention to commit grievous bodily harm.

3. Bearing in mind the aforementioned narrow ambit of the appeal, it is not necessary to summarize the evidence in any great detail. Suffice to say that the following was common cause at the trial:

- 3.1 on 17 February 1999 there was a racial altercation between a number of white schoolboys and their black counterparts at the Vryburg High School;
 - 3.2 as a consequence thereof, the Appellant stabbed the complainant, Christof Erasmus, with a pair of scissors in his neck;
 - 3.3 this wound was located in an area of the neck close to vital organs and it had a 50% potential of being fatal.
4. The State witnesses' evidence painted a picture (with certain deviations it must be said) in which the complainant was part of the group of white schoolboys who had been engaged in a verbal confrontation with their black counterparts on the day in question. It appears from the evidence that one Corné de Bruyn was the leading figure on the side of the white scholars. The Appellant was seen to lash out at the complainant with what subsequently turned out to be a pair of scissors, inflicting the penetrating 2cm. long wound on the complainant's neck.

The Appellant thereafter took flight from the scene, but was rugby tackled by another scholar and taken to the

headmaster's office, whereafter he was arrested by the police.

The pair of scissors was retrieved at the scene and was eventually handed in as an exhibit at the trial.

- 5. The Appellant testified and proffered a thoroughly unconvincing version of how he was encircled by the white schoolboys (which came to be referred to as the “*de Bruyn group*” at the trial) pursuant to the verbal altercation aforementioned. He was shoved to and fro in the circle after reference had been made to the demeaning racial slur “*kaffir*” (though, on his evidence it has not been established that these words were directed to him in particular).**

He had taken out the pair of scissors from the pocket of his trousers, where it had been lodged earlier with a view to replacing it in his school bag once the interval was over (these events occurred during interval). His objective in removing the pair of scissors was to scare away these boys, but it did not have the desired effect.

The Appellant averred that, in the course of being shoved to and fro in the circle, the complainant had slapped him in the face (this was denied by all the eyewitnesses who had earlier testified for the State).

What is common cause, however, is that the complainant then smacked his fist into the palm of his other hand, emitting a loud noise. The stabbing then followed immediately thereafter with the Appellant claiming that he accidentally stabbed the complainant with the scissors, after being shoved forward again. There is no

consensus among the State's eyewitnesses as to whether the Appellant had been in front, slightly behind or directly ahead of the complainant immediately prior to having stabbed the complainant with the scissors.

Mr. Hulley, who appeared before us for the Appellant as he had done at the trial, placed much emphasis on this discrepancy: more about that in due course.

6. The Magistrate rejected the Appellant's version as not reasonably possibly true, correctly so in my view. The Appellant was a woefully inept witness and his evidence left this reader with the distinct impression that he was evasive, untruthful and readily prepared to embroider as he moved along in the face of sustained effective cross-examination by Mr. Nekosie who appeared for the State at the trial as he did at this appeal.
7. In any event, the narrow ambit of this appeal is premised on the acceptance of the State case and the rejection of the Appellant's version – this much was understood by Counsel at the hearing of the appeal.

The effect thereof is that the issue before us requires to be adjudicated on the proved facts of:

- a) a verbal altercation, with no physical manhandling involved, preceding:-
- b) an intentional stabbing by the Appellant in the neck of the complainant.

8. Mr. Hulley faced an arduous task in persuading us that the Magistrate's decision was wrong – he acquitted himself commendably well in attempting to do so. His argument can be paraphrased as follows:- that the Magistrate had erred in finding, on the proved facts, that the State had proved beyond reasonable doubt an intent (in the form of *dolus eventualis*) to murder by in effect blurring the distinction between subjective foresight and objective foresight. In developing his argument, Mr. Hulley placed much reliance on:-

- a) the difference in build between the complainant (a hefty rugby player) and the Appellant (diminutive and frail in build);
- b) the fact that the complainant had punched his fist into the palm of his other hand, immediately prior to the stabbing;
- c) the positions of the parties prior to the stabbing and the differences in the State case in this regard; and
- d) the fact that the complainant had ducked shortly prior to being stabbed.

9. I do not propose dealing with each and every one of these propositions – suffice to say that I am not persuaded that the Magistrate had erred in his assessment of these aspects before arriving at his finding. He correctly in my view found that:

9.1 it is not uncommon for smaller persons to attack bigger ones, particularly where the former are armed and the latter not;

9.2 where there is a moving scene such as this one where the school bell had announced the resumption of classes and scholars were making their way to their respective classrooms, it is to be expected that eyewitnesses would differ on the respective positions of the protagonists;

9.3 even accepting the complainant's provocative conduct in smashing his fist into the palm of his hand, it did not justify the stabbing itself; and

9.4 last but not least – a pair of scissors can be as lethal as a sharp knife in stabbing someone.

10. The medical evidence of Dr. Smit, which remained uncontroverted, is of particular significance in deciding the issue before us. The doctor testified that:-

10.1 the stab wound was a 2cm penetrating laceration, located close to vital organs;

10.2 there was a 50% likelihood of this wound being fatal;

10.3 a reasonably severe amount of force was applied to cause the wound, since it had penetrated to the complainant's jaw; and

10.4 in his opinion, a person inflicting such a wound in the neck region should anticipate that the wound can have fatal consequences.

11. One of the main obstacles which confronted Mr. Hulley in the course of his argument was the dilemma which his client's rejected testimony had caused. I can do no better than to quote, in this regard, the following dictum by Malan JA in his minority judgment in *R v Mlambo* 1957(4) SA 727(AD) at 738:-

“Moreover if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable

with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity, to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so.”

It is precisely for this very reason that Mr. Hulley was driven to disavow during argument his reliance on what can conveniently be paraphrased as putative self-defence in his Heads of Argument. There is simply no basis on the proved facts for such a defence; in fact the Appellant himself did not rely thereon in his testimony, nor did Mr. Hulley advance that as being the Appellant’s case in the course of his cross-examination of the State witnesses.

To borrow again from Malan JA in *R v Mlambo* (supra) at 738B-C:

“An accused’s claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case” (emphasis added).

See also: *S v Phallo & others* 1999(2) SACR 558 (SCA) at 562g-563b.

12. The nub of the enquiry is therefore the subjective foresight of the Appellant in stabbing the complainant. In the absence of an explanation by him, the answer to the enquiry must of necessity be sought by inferential reasoning. In doing so, one needs to remain mindful of what the test is and guard against blurring the distinction between subjective foresight and objective foresight:

“To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so”,

per Holmes JA in *S v Sighwahla* 1967(4) SA 566 (AD) at 570E.

See also: *S v Lungile & another* 1999(2) SACR 597 (SCA) at 602h-i.

13. In applying this deductive reasoning with the requisite caution, and conscious of its pitfalls (see *S v Lungile*,

supra at 603a-b), I am of the view that the only reasonable inference to be drawn on the proved facts herein is that the Appellant had subjectively foreseen the possibility of his act of stabbing the complainant having fatal consequences, but had proceeded reckless of such result. The Appellant had held the pair of scissors in his hand prior to the attack. Having regard to the force of the attack, the location of the wound and the prevailing circumstances at that time on the accepted version of the State, I do not believe that there is any reasonable possibility that it had never occurred to the Appellant that his action may have fatal consequences.

Compare the facts in:-*S v Sigwahla (supra)* at 570 G-H.

14. In the premises, I am satisfied that the Magistrate had correctly convicted the Appellant of attempted murder.

In my view, the appeal should be dismissed.

S.A MAJIEDT
JUDGE

I agree. The appeal is dismissed and the conviction and sentence is confirmed.

M.D.J. STEENKAMP

JUDGE PRESIDENT

DATE OF APPEAL: 07-05-2001
DATE OF JUDGMENT: 11-05-2001
COUNSEL FOR APPELLANT: Mr. Hulley
COUNSEL FOR RESPONDENT: Mr. Nekosie