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SIMON SUNDUZA

and

THE STATE

Judgment by:

NESTADT JA

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

SIMON SUNDUZA

APPELLANT

and

THE STATE

RESPONDENT

CORAM: BOTHA, HEFER et NESTADT JJA

HEARD: 3 MARCH 1989

DELIVERED: 17 MARCH 1989

J U D G M E N T

NESTADT, JA:

Appellant was convicted in a regional court of attempted murder. It was found that at about 11:15 am on 10 December 1985 he shot at the occupants of a police vehicle (known as a Casspir) as it patrolled the streets of the KTC squatter camp near Cape Town. A sentence of seven years imprisonment was imposed. He unsuccessfully appealed against his conviction and sentence to the Cape Provincial Division. The matter is now before us by way of a further appeal, with the leave of this Court, against the conviction only.

A number of witnesses, all policemen, testified for the State. The case made out was, in outline, the following. The vehicle in question, being driven by constable Kok, was moving slowly forward. Constable Bezuidenhout was sitting at the back, next to the rear open doors. Suddenly a shot was fired by someone in the street. The bullet narrowly missed

striking Bezuidenhout in the head. He stood up and closed the doors of the vehicle. Each door contained a small, square window. He looked through one of them and noticed a Black man, wearing black trousers, a white shirt and having "een van hierdie gebreide mussies wat rooi in kleur was" on his head, standing about 15 - 20 meters away. This person, whose face he also saw, was holding a firearm. It was aimed at the vehicle. Two further shots went off. Bezuidenhout and constable Slinger, who had been sitting in the front next to the driver, immediately sprang out of the Casspir in order to apprehend the culprit. He was, however, quick to flee. He turned round, ran off and disappeared from view amongst the houses. Bezuidenhout and Slinger pursued him. He intermittently reappeared in small passageways between the houses. Each time Bezuidenhout called on him to stop but the command went unheeded. Eventually

he and Slinger reached a point on the crest of a dune. As they stood there, they again saw this person, "aan die ander kant van die duine af," standing in front of a shack with the firearm in his hand. He was looking directly at them from a distance of some 35 - 40 meters away. As they moved towards him he vanished from sight. They did not see him again until about 7 - 15 minutes later, when, having heard that an arrest had been made, they hastened to the spot near where this had taken place. There they saw appellant. He was the person who had fired the shots and whom they had chased. He was in the custody of warrant-officer Barnard. Whilst on duty in nearby Guguletu, he had received a report over his radio of the incident as well as a description of the clothing of the criminal. (It presumably came from one of the policemen in the Casspir.) He drove to the scene of the shooting and then joined in the search. After

10 - 15 minutes he noticed a Black man who was wearing black trousers, a white shirt and a red hat. This accorded with the description he had been given. This person (ie, as it turned out, appellant), together with another (who was wearing a blue overall):

"(het) koes-koes tussen die huise deurbeweeg en ... tussen twee sinkhokke in verdwyn ... Hulle het gebukkend gehardloop, Edelagbare, dit is duidelik dat hulle, as jy hardloop, normaalweg hardloop jy regop en elke slag as hulle by n huis omhardloop, het hulle eers om the draai gekyk voor hulle verder gehardloop het. Hulle was duidelik op die uitkyk vir iemand."

He followed them for a distance of about 50 meters. Within 2 - 3 minutes he caught up with them where they stood between two sheds and apprehended appellant. This was about one kilometer from where the crime had taken place. Appellant "was besig om om die hokkie te loer in die rigting van waar die ander polisiebeamptes in die pad besig was." No firearm was seen or found in appellant's possession (or at all) but he had had ample opportunity

to get rid of it before being caught. Appellant, and the other person, denied all knowledge of the crime.

Consistent with what he had told the police, appellant's defence was in the nature of an alibi. In support of his denial that he had fired the shots or even been at the scene, he testified that the place where he was arrested was just outside his house. He was innocently standing there, talking to this other person, when he was approached by Barnard and arrested. He had not been pursued. He had not even been running. He had just come out of his house where he had slept the night before.

The issue to be decided is whether the trial court was correct in rejecting appellant's version and in finding, as it did, that the identity of appellant as the person who fired the shots was established. If it was, the verdict of attempted murder

was correct. The attack was clearly unlawful. And an intention to kill is, in the circumstances, the only reasonable inference.

Evidence to prove a person's identity may be direct or circumstantial (Hoffmann and Zeffertt: South African Law of Evidence, 3rd ed, 477-8). The State case in the present matter comprised both. I consider, firstly, the direct evidence. This involves a closer examination of Bezuidenhout's testimony, for it was on it that this part of the State case ultimately rested. He relies on two identificatory features; the offender's clothing and his facial appearance. Appellant, he says, was similarly dressed and looked the same. He was, accordingly, "doodseker" that appellant was the culprit.

The fallibility and resultant unreliability of human observation is well known. This type of evidence of identification is accordingly

approached with caution. It has to be closely scrutinised. And it must be borne in mind, as has so often been said, that the positive assurance with which a witness identifies a person is no guarantee of its correctness. Applying these principles, and although Bezuidenhout's truthfulness was not in question, had his identification of appellant by his face been the only evidence, I do not think it would have been sufficient to sustain a conviction. This part of his evidence (though, as will be seen, not without some weight) suffers from certain inherent weaknesses which detract from its reliability. I proceed to deal with them.

(i) Bezuidenhout described the opportunity he had

for observation as follows:

"(D)it het 'n hele tydjie geduur, dit was omtrent 'n minuut, 'n minuut en 'n half na twee minute se kant toe wat die ... verdagte daar gestaan het, voordat hy nou begin, of voordat hy omgedraai het en begin weghardloop het nie."

This is surely an exaggeration. It is improbable that the period could have been so long. On the contrary, it must have been considerably shorter.

- (ii) On a proper reading of his evidence, it is doubtful whether his identification rests on any particular facial features of the offender.

The evidence in point reads:

"Nou sê vir my, het u gekyk na sy gesig? -- Dit is korrek, ek het genoeg tyd gehad om hom deeglik, want die tydperk wat hy bly staan het, voordat hy die, of terwyl hy die tweede en derde skoot gevuur het, kon ek presies sien hoe lyk hy.

Is daar iets wat u opgemerk het in sy gesig, wat u hom kon laat identifiseer? -- Nee, nie iets spesifiek nie, maar as 'n mens 'n persoon sien, dan sien 'n mens 'n persoon.

Het hy 'n snor gehad? -- Wel, op daardie tydstip het hy 'n snor gehad en, wel, presies soos hy nou lyk het hy op daardie tydstip gelyk. Sy hare was net 'n bietjie korter gewees."

There is a contradiction here. Initially, he

says that he did not notice any particular facial features. Then, immediately thereafter, in answer to a leading question, he refers to a moustache. This is a physical characteristic which, if it was relied on, should have warranted initial mention by the witness. Nor does Bezuidenhout say that he noticed anything in particular about the face of the person who looked directly at him from across the dune. What has been said is not a criticism of Bezuidenhout. Often a witness is able to obtain only a general impression of a person's face. A particular feature is not always sufficiently pronounced so as to attract attention. But the less distinctive a face, the greater the chance of it being mistaken for that of another.

(iii) This is particularly so seeing that Bezuidenhout did not previously know appellant. His identification of him was not at a parade. It took place when and where he came across appellant in the custody of Barnard. There was therefore no opportunity for Bezuidenhout's identification to be tested by him having to make a choice from among a number of people.

This brings me to the circumstantial evidence against appellant. Here the State case was more formidable. It established (to begin with) that (i) the person who shot at the Casspir had on black trousers, a white shirt and a red hat and (ii) after his attack, he ran away and was pursued (by Bezuidenhout and Slinger, though not captured by them). This, as I have indicated, is what Bezuidenhout (and Slinger) deposed to and there is no reason to doubt the veracity of this evidence. As

to (i), whatever the exact duration of the period that existed for Bezuidenhout to see this person, it was obviously sufficient to enable him, contemporaneously with the shooting, to notice how the offender was dressed. Visibility was apparently good. No one else was in the immediate vicinity of where the gunman stood. A distance of only 15 - 20 meters was involved. Bezuidenhout's evidence was that even though the glass of the window of the rear doors of the Casspir was extra thick and had a greenish tint, his view through it was clear and unobstructed. The magistrate's finding, based on an inspection he held of a Casspir which was not proved to have glass of the same kind as that of the Casspir in which Bezuidenhout was, can therefore be left aside as superfluous. And, as to (ii), despite them on occasion losing sight of him, it is clear that the person Bezuidenhout and Slinger chased was the offender. Mr

Potgieter, for appellant, quite rightly did not contest this.

The next link in the circumstantial chain of evidence against appellant is that it was he whom Barnard saw to be fleeing and dodging in the manner described. Although Barnard momentarily lost sight of the two fugitives on one occasion, there can be no reasonable doubt that on his evidence appellant was one of the persons he was following. Barnard went on to describe appellant's condition when he caught up with him as follows:

"Beskuldigde, beide van hulle was baie senuweeagtig en natgesweet... Hulle was baie bewerig en duidelik verskrik toe ek om die draai kom...

U het ook gesê hulle was natgesweet? -- Dit is korrek.

Kan u dit in bietjie meer detail beskryf? -- Dit was natuurlik 'n baie warm dag gewees, maar dit was ook duidelik dat beide van hulle gehardloop het, ek het natuurlik gesien hulle hardloop en dit was duidelik dat hulle beide gehardloop het, hulle asem het ook gejaag."

Of course, appellant denied that he had been fleeing or that he was perspiring or that he was out of breath. But the magistrate, after a careful consideration of all the evidence, rejected this. In my view, there is no basis upon which we can interfere with this credibility finding. On the contrary, the record reveals ample justification for the trial court's assessment of appellant as untruthful.

A crucial issue is what clothes appellant was wearing. Unless they matched those of the offender, the case against appellant collapses. It was not suggested that by the time he was apprehended he had changed his clothes. On the contrary, the State case was that they were the same as those which he wore when he committed the crime. I indicated earlier that appellant was wearing i.a. a white shirt. This is an over-simplification of the evidence. At the instance of

the magistrate, his shirt was produced as an exhibit. It was, in fact, light cream or off-white (and had a thin, light-brown or cream stripe). This, argued Mr Potgieter, was different from the "white" shirt which the witnesses said the culprit wore. Well, I suppose it is. But I think counsel is putting too fine a point on the witnesses' description of the culprit's shirt as "white". When it comes to the description of the colour of an object, one is, to some extent, dealing with an individual's subjective perception of such colour. Such description will not always take account of the many gradations of colour and shade that exist; it may merely be a general one which was not intended to be precise. Judged in this light, a cream or off-white object could fairly be described as white. Indeed, one of the definitions of "white" given in the Shorter Oxford English Dictionary is "of a light or pale colour;

applied to things of various indefinite hues approaching white, esp. dull or pale shades of yellow". Barnard himself, until appellant's shirt was shown to him in Court, said that it was white. So he described it in the same way as Bezuidenhout. Moreover, it is not as if Bezuidenhout said that the shirt worn by the offender was "snow-white" ("spierwit"). Had this been the case, there may have been a discrepancy sufficient to found a serious doubt as to appellant being the culprit or indeed sufficient to show that he was not. A fortiori, had appellant's shirt been a distinctly different colour. It is a question of degree. In casu the difference was insignificant. I therefore do not think that the point under consideration detracts from the reliability of Bezuidenhout's description of the offender or his identification of appellant as that person.

I must briefly also refer to the hat.

As I have said, Bezuidenhout's evidence was that this person wore "een van hierdie gebreide mussies wat rooi in kleur was". A "mussie" is, strictly speaking, a type of (small) hat without a brim (see HAT sv "mus"). The hat that appellant was found to be wearing (it was also produced as an exhibit), whilst having the appearance of being made of knitted material, was not a "mus". It was (in the words of Barnard) "n 'floppie' hoedjie, soos wat hulle gebruik as hulle krieket speel of visvang". Further it was, as the magistrate found, "maroon-kleurig". So, here too, there were differences between Bezuidenhout's description of what the culprit was wearing and what appellant was found to be wearing. But, as in the case of the shirt, I do not think these are material. Maroon is very much akin to red and could be described as such. As regards the type of hat, Bezuidenhout, on his recall, albeit in answer to a

leading question, explained that "(d)ie kante was so op, soos 'n mussie". The magistrate described what the witness had indicated as follows: "Die getuie het die kante opgerol langs die kant, dan gee dit 'n mus-voorkoms." Unfortunately, Barnard does not deal with how exactly appellant was wearing his hat when he was followed and apprehended but obviously Bezuidenhout's evidence in this regard was, despite appellant's assertion that he wore the hat in the ordinary way, accepted. It follows that as regards the hat as well there was, broadly speaking, correspondence between what the offender and appellant were respectively wearing.

The position thus is that it was proved that within some 12 - 20 minutes after the shooting and about one kilometer away, appellant was found to be wearing items of clothing corresponding to what the criminal had worn. This, in itself, was, so I

would have thought, a relatively singular coincidence. But the matter does not rest there. As I have said, a second feature identifying the culprit is that he ran away. So, too, did appellant. Whether the respective pursuits by Bezuidenhout and Barnard were in the same direction and where in relation to each other they took place, does not appear from the record. Nor does one know what the interval was between them. It would have been helpful had there been evidence on these points and, even more so, had there been a plan depicting the area and the routes taken. But, even without this information, the probative value of the evidence under discussion remained. It was strongly inculpatory. An inference that it gave rise to was that the person pursued by Bezuidenhout (the offender) was the same person as Barnard followed and caught up with (appellant).

Two questions remain to be dealt with. The one is whether the facts referred to exclude every reasonable inference save that appellant is the culprit. The other is whether the inference is consistent with all the proved facts (R v Blom 1939 AD 188 at 202-3). I consider the latter first. It has already been indicated that such proved facts are i.a. that appellant, when followed by Barnard, (i) was in the company of another and (ii) had no firearm. This is to be contrasted with the offender. It will be remembered that when pursued by Bezuidenhout and up to the time Bezuidenhout lost sight of him he (i) was alone and (ii) had a firearm. The critical issue is whether these differences are reconcilable. They are peculiar. On the State case there is no explanation for them. Obviously Barnard's pursuit was subsequent to that of Bezuidenhout. One wonders why, on the supposition that

it was the same person who was being successively followed, such person would have retained his firearm during the first part of the chase but discard it thereafter. And how and under what circumstances he was joined by his fellow fugitive is a mystery. On the other hand, the fact that these features were not, on the State case, explained, does not per se mean that they are necessarily inconsistent with appellant's guilt. After anxious consideration, I have come to the conclusion that they are not. It may be that it was only after shaking off Bezuidenhout, that an appropriate opportunity arose (at a point in time before Barnard began to follow him) for appellant to discard his firearm. There would have been good reason for him to want to do that. Barnard specifically states that appellant had such opportunity. The person that Barnard saw appellant running with could well have been a confederate of his who, for some reason,

had remained in the background and only joined up with appellant at a late stage. This, of course, is speculation but I indulge in it in an attempt to show, without the use of too fertile an imagination, that the factors under consideration do not detract from appellant's guilt being consistent with all the proved facts.

The last stage of the enquiry is whether the inference of guilt is the only reasonable one; in other words has the identity of appellant been established (beyond reasonable doubt)? I have already evaluated the cumulative effect of the evidence against appellant. Clearly, it was such that an explanation by him was called for. But he did not give one. Instead, he untruthfully denied that he ran away (in the manner described by Barnard). Now, an accused's untruthfulness must not be allowed to loom too large in

considering whether the State proved its case (R vs du Plessis 1944 AD 314 at 323). What weight it has depends on the circumstances of each case (S vs Mtsweni 1985(1) S A 590(A) at 593 I - 594 E). Here appellant lied on a material point. Why did he do so? And from what was he running away? It would not seem to have been an innocent flight. Had it been so, he presumably would have said so. It could, of course, have been for an illegitimate purpose unconnected with the crime. It could even be that he was, for some reason, at the scene of the incident (though not as a perpetrator). But this is conjecture. Appellant deliberately took the risk of giving false evidence. He therefore forfeited the benefit of these explanations (R vs Mlambo 1957(4) S A 727(A) at 738 C - D). He obviously had something to hide. I think the magistrate was right in holding, as he in effect did, that this was a suitable case for

regarding appellant's untruthfulness as corroborative of the State case. This is particularly so if regard is had to the following. When Barnard caught up with appellant (and the other person), he demanded the firearm "waarmee hulle op die polisiemanne geskiet het". Appellant thereupon (so the magistrate found) showed Barnard "n stukkie pyp ... wat eenkant teen n huis gelê het en gesê dat dit is wat hy in sy hand gehad het". This statement of appellant was false. It was clear to Barnard that the pipe "was duidelik n ding wat al lankal daar gelê het en nie iets wat net daar neergegooi is nie". This is significant. Appellant admits that just before he was confronted by Barnard he had something in his hands. But on Barnard's evidence appellant's assertion that it was a pipe was not true. This strengthens the State case that (at an earlier stage) he had a firearm.

I must return to Bezuidenhout's

purported recognition of appellant by his face. Despite the defects referred to, it is not without weight. His honesty having been accepted, it at least follows that appellant and the offender facially resembled each other. This being so, the following statement (with which I agree) in Hoffmann and Zefferth, op cit, at 465, is in point:

"The cogency of circumstantial evidence usually arises from the number of independent circumstances which all point to the same conclusion. Each fact may be in itself perfectly consistent with innocence, but the court is not obliged to consider them in isolation. The question is whether the evidence as a whole furnishes sufficient proof of guilt. Nor is the court restricted to a consideration of those facts which are in themselves proved beyond reasonable doubt. For example, an item of circumstantial evidence may be the testimony of a witness who says that he saw the accused near the scene of the crime. If this were the only fact in issue, the court might not be able to say that the witness's identification was sufficiently trustworthy to prove beyond reasonable doubt that the accused was the person whom he saw. But this does not mean that the witness's evidence must be

ignored. The fact that someone who at any rate resembled the accused was seen in the area, when taken with other facts, may still be a significant item of evidence."

In my opinion (though formed not without hesitation), and on a conspectus of the evidence, the only reasonable inference was that appellant was the culprit. Not more than about 20 minutes after the shooting he was found in relatively close proximity to where it had taken place. He was similarly dressed to the offender. They resembled each other. Like him, he had been running away (in a furtive manner). He untruthfully denied this. I think he was correctly convicted.

One final observation. As I have already indicated, the record discloses a number of examples of the prosecutor putting, and being allowed to put, leading questions of an important nature and involving obviously controversial aspects to the State

witnesses. This is unfortunate, particularly because appellant was unrepresented. It cannot, however, affect the result of this particular matter.

The appeal fails and is dismissed.

NESTADT, JA

BOTHA, JA)
) CONCUR
HEFER, JA)