

135/88
/mbIN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

M M SIBISI APPELLANT

vs

THE STATE RESPONDENTCORAM: BOTHA, KUMLEBEN et F H GROSSKOPF JJAHEARD: 22 MAY 1989DELIVERED: 1 JUNE 1989

J U D G M E N TKUMLEBEN JA/....

KUMLEBEN JA:

On the night of 6 November 1985 the appellant, a Township Manager of Ngwelezane in Kwa-Zulu, shot the complainant with a .38 special revolver. The bullet entered the left side of his neck and emerged from the other side. The shot did not prove fatal but resulted in permanent paralysis of the left side of his body.

The incident led to the appellant being charged in a regional court with attempted murder. He pleaded not guilty. The complainant and Mr "Bheki" Khumalo, who was present when the shooting took place, were the two witnesses for the State. The appellant testified controverting their evidence. The magistrate was impressed with the demeanour of the two State witnesses and found their evidence satisfactory. By

contrast, he was highly critical of the appellant as a witness and held his evidence to be improbable. In the result, on an acceptance of the State case, the appellant was found guilty as charged. He was sentenced to four years' imprisonment, half of which period was conditionally suspended for three years.

The appellant appealed to the Natal Provincial Division of the Supreme Court against his conviction and sentence. The court (Friedman J and Gordon AJ) took the view that there were material discrepancies in the evidence of the two State witnesses and that the trial court therefore erred in accepting the evidence of the complainant. In the result, the court decided that where the evidence of the appellant differed from that of the complainant, the former was to be relied upon. On this basis (and apparently without having regard to the

evidence of Khumalo) it decided that the appellant on his own account of what took place was correctly convicted. The appeal against sentence also failed. With leave of the court a quo both these issues are before us on appeal.

At the start of the trial, in the disclosure of the nature of appellant's defence in terms of sec 115 of the Criminal Procedure Act, No 51 of 1977, it was stated that the appellant, whilst seated in his van, had been confronted and threatened by the complainant, causing him to fire the shot which injured the complainant. He added that he did not aim it at the complainant. This statement clearly implies that he shot in order to frighten and deter him, but not to kill. His evidence was to the same effect. At no stage, one notes, did he rely explicitly on self-defence by alleging that his life

was in imminent danger and that, had the shot been fired deliberately at the complainant, such action would have been justified and therefore lawful. However, the magistrate in his judgment (presumably as a result of a submission along such lines) held that the appellant "at no stage acted in self-defence" and that "his unlawful act was done with the required intention to kill the complainant." In the notice of appeal initially lodged, the magistrate's rejection of the defence of justification was challenged ("The Learned Magistrate erred to reject (sic) the defence version that Appellant was acting in self-defence"). It was only in the amended grounds of appeal that the defence of mistake (accidental killing) was obliquely raised ("The learned Magistrate erred in finding that Appellant had the intention to kill the Complainant").

In the appeal in the court a quo, and before us, a further defence was raised. Counsel submitted that, even if the appellant had acted unlawfully in that he exceeded the bounds of self-defence, it was reasonably possible that he believed such action on his part was justified, in which event he lacked the mens rea (dolus) to sustain a conviction of attempted murder. (See S v Ntuli 1975 (1) S.A. 429 (AD) 436 H and 437A and S v Ntanzi 1981 (4) S.A. 477 (NPD) 481 C - F: in the former decision at page 436 F it was pointed out that: "Dolus consists of an intention to do an unlawful act".)

It would appear that in the court a quo, and at times during the debate in this court, these defences - mistake (accidental injury), justification (self-defence) and lack of "wederregtelikhedsbewussyn"- were merged or not viewed in correct perspective. The issue, first and

foremost, is whether the appellant was proved to have intended killing the complainant in casu by aiming the shot at him (dolus directus) or because, as it was put in S v Sigwahla 1967(4) S.A. 566 (AD) 570 B - C, he "subjectively foresaw the possibility of his act causing death and was reckless of such result" (dolus eventualis). If such intention was not proved, cedit quaestio. If proved, then and then only, need the other two questions be considered.

The appellant and the complainant met each other for the first time that night in a road outside a shebeen, referred to as "Mary's place". The appellant was driving a small Isuzu van and was accompanied by three other men and a girl. He gave the complainant some money and asked him to buy beer at Mary's place. The appellant was not persona grata there apparently because

he had still to pay for past purchases. The evidence of the appellant differs from that of the complainant on the question whether the latter returned with any beer and on the stage at which they went to another shebeen, "Terry's house". Nothing turns on this. It is common cause that later that evening they, with their male companions, were in Mary's shebeen. There they sat drinking, having left the girl in charge of the van parked outside the shebeen. At a certain stage the appellant was told that she was no longer at the vehicle. He left the shebeen to check that his knife and revolver were still in the cubby-hole and to lock the van. Subsequently, after events which I shall in due course relate, they departed in the van without the complainant. They next met him in a street a block away from the road in which Mary's shebeen was situated. It was there that the complainant came to be injured.

That evening the complainant on his own admission had drunk seven quarts and two pints of beer over a comparatively short period of time. There is some evidence that he was given spirituous liquor to drink as well. Notwithstanding his own assessment of his condition ("I was just happy. I was not drunk"), which is ex hypothesi seldom an accurate one, the chances are that he was appreciably under the influence of liquor. No doubt with some regard to this fact, and in the light of the unsatisfactory evidence given by the appellant, Mr Paver, who appeared on behalf of the respondent, agreed that no reliance could be placed on the complainant's evidence where it differed from that of the appellant.

Notwithstanding this concession, which was correctly made, I consider it appropriate, and to a limited extent relevant, to examine appellant's account

of events at the time he went to his van, having heard that it was unattended.

According to his evidence, on arrival at his vehicle, he opened its left hand door and felt in the cubby-hole to find out whether his revolver and his knife were still there. As he was doing so and had hold of the fire-arm, he felt a hand grab hold of the hand in which he had the revolver. For some reason the grip on his hand was shortly afterwards released. He noticed the complainant standing in front of the van near its bonnet but no other person in the vicinity. At that stage, to quote from his evidence-in-chief:

"The knife came out of the cubby-hole. I cannot say whether it was taken out by that hand which held my arm, or it just dropped out of the cubby-hole, I cannot say, but it came out."

He spoke to the complainant saying: "You are the only

person here, but there was someone holding me from behind here." The complainant explained, so the appellant said, that he (the complainant) had heard the appellant screaming at the van, that he had run from the shebeen to see what was happening and that he had noticed a boy running away from the van. The appellant did not believe him. The two of them searched in vain for the knife on the ground at the van. They returned to the shebeen to join their drinking companions. They told the appellant that it was "this friend of yours", referring to the complainant, who had taken the knife. They then left the shebeen without the complainant. However, as the van reversed out of the shebeen yard, the complainant called out to the appellant who stopped the van and alighted from it. The complainant said to him: "Are you really looking for your knife? The knife which is lost?" When he affirmed that he was, the complainant said that for R5

he would fetch the knife from the boy whom he had seen running away with it. The appellant in fact gave him two R2 notes and a R10 note - fourteen rand in all - in order to get the knife back. The complainant thereupon climbed into the van and directed them to a certain house in the same road as Mary's shebeen. He claimed that the boy, whom he knew, was staying there. He entered this house but returned without the boy or the knife, saying that he had been told that the boy was staying at a place at or near the main road. They drove there and stopped in it but the complainant was unable to identify this other house. The appellant felt that he was being led a dance. He remonstrated with the complainant saying: "Because you took my money, I am driving this car straight to the police station". With that the complainant jumped off the back of the van, saying that he would make further enquiries and meet them at the house to which he had

first taken them. They drove off without him. They next came upon him in the street where the shooting incident took place.

This story about the loss of the knife is, I must say, in many respects one of surpassing weirdness. Not surprisingly, it did not stand up to cross-examination and does not bear scrutiny.

The appellant said that when he felt the hand grab him from behind, he wrenched his hand free and, as one would expect, turned round to see who was there. But before he looked back he saw the complainant standing in front of the van. ("And as I turned, even before looking at the back, I then saw complainant in front of the vehicle".) This sequence of events, i.e., seeing the complainant before he looked back, was confirmed by him

more than once in his evidence. He was emphatic that at that time there was no one else near the van. He was at a loss to explain how the complainant could have released him and reached the position in front of the bonnet without his having seen this movement. It seems in any event strange that, if the complainant was the person who laid hold of him, he (the complainant) would have gone to the front of the vehicle and stood there. At one stage the appellant contradicted himself by saying that he never looked back after seeing the complainant in front of the van. ("There was then no necessity to look back, because I saw this person in front of me, and I then questioned him".) He confronted the complainant because he suspected that he was the person who had thus held his hand. He did not believe the complainant's explanation that he had seen a young boy running from the van. When he discovered that the knife was missing he

suspected that the complainant had taken it and told him so. ("I said, 'I suspect that it is you'"). Yet, instead of insisting on searching him before he had any opportunity of concealing the knife or of disposing of it, the two of them looked for the knife on the ground. When pressed to explain why he did not search him, the appellant said that he was not in possession of a search warrant and that in any event - for reasons not revealed and difficult to imagine - he was no longer suspicious of the complainant and accepted his assertion that he had not taken the knife. He did not believe the story that the complainant had seen a young boy run from the van. He was nevertheless prepared to pay the complainant more than he had asked in order to retrieve the knife and trace the boy. Finally, at a stage when the appellant had run out of patience and had threatened to take complainant to the police station, the appellant permits

him to alight from the van with a view to meeting him at the house where the search for this elusive boy had started.

The evidence of the appellant on this aspect of the case is plainly unconvincing: in fact so untrustworthy that it cannot be accepted as true. One must add, though, that the complainant confirms that the appellant said that he had lost his knife, that they at a certain stage all searched for it and that he did accuse the complainant of having taken it. The complainant, however, denies that he ever left the group at the shebeen during the time that the appellant was at his van.

Returning to the scene where the shooting took place, and having discounted the evidence of the

complainant, the relevant evidence of Khumalo and the appellant dealing with this chapter of the narrative is to be examined.

I start with the evidence of the appellant. He said that as they approached a Kombi from behind, he saw the complainant and another person standing at the back of it. One of his passengers in the van said that he should stop. (Apparently this was not the appellant's intention.) Having stopped, this same person said: "Don't go near that kombi. Those people are hatching some crooked plan" and added that he had noticed earlier in the evening a knife in the sock of the complainant similar to the one the appellant had lost. The appellant switched off the engine of his van. When he restarted it, the complainant ran and stood in front of it. This caused him to stop the van again. The complainant came

to the open window at the driver's seat. He put his hand through the window space and tried to remove the ignition key saying: "Take out the money, you dog. If you don't, I'm going to kill you today". At this stage the hand of the complainant was holding the right wrist of the appellant against the door frame. Because, as they struggled, the complainant was unable to pull the appellant's arm out through the open window, he (the complainant) put his head into the cabin and tried to butt the appellant's head with his. The appellant managed to pull the complainant's arm inside with a view to pinning it by turning up the window. His left hand, however, could not reach the window handle. Initially appellant's companions seated next to him did not assist him in any way. The appellant feared that the other person, whom he had seen at the Kombi, would come to the assistance of the complainant. He asked the man seated

next to him to unbutton the holster of his revolver which was on his left hip. This having been done, he drew the revolver from the holster with his left hand. He held the revolver in front of the complainant and said: "You see, you'll get injured". As he thrust the fire-arm forward, the complainant withdrew his head. At that stage, so the appellant said, the complainant did not believe it was a real fire-arm. Apparently to convince him of this and in order to frighten him, he fired a shot. In his own words he described what happened thus:

"As he jerked his head backwards, I then wanted to frighten him so that he would see that this thing was a firearm, and it was then that there was a little space after his head pulled backwards. He then let go of the grip on my arm, and at that stage I think I pulled the trigger ... (intervention)

COURT I'm sorry - at this stage you thought you pulled the trigger of the firearm? -- Yes, I pulled the trigger with the intention of shooting through that space which was after his head moved backwards

- there was a space there to shoot to the air.

MR ROBERTS Through the window - the open window? --
Yes. But in that movement I saw his head moving forwards and backwards again."

He repeated that the complainant had drawn back and released his hold on his arm before he fired the shot through the window into what he described as an "open space." He fired the shot in order to frighten the complainant whom he thought was about to take a knife from his sock. He did not see that the bullet had struck the complainant. He believed that he had run away. At this point one of the passengers said: "Drive away, they are starting the Kombi there, we are going to die, drive away." He did so.

Under cross-examination the appellant said that after they parted company and before meeting again at the Kombi, the complainant was in no way aggressive towards

him. In fact it was he (the appellant) who was annoyed with the complainant. His explanation for the bullet striking the complainant when the revolver was not aimed at him, was therefore that, although the complainant had drawn back and released his hold of him he came forward again at the critical moment when the shot was fired. ("I think when I tried to frighten him, jerking backwards, and when he let go of the grip on me, I think he went forward.")

The evidence of the appellant, to which I have just referred, bristles with improbabilities of which the following are examples. Why should his passengers tell him to stop the van and then immediately tell him to proceed because "these people are hatching some crooked plan"? One wonders where this third adult appeared from, bearing in mind that Khumalo was conveying school girls

in his van and there is no suggestion that Khumalo alighted from the Kombi. Why should the passenger tell the appellant that some nefarious plan was being worked out when the complainant, who had shown no signs of aggression, was seen talking to another person at the back of a Kombi, assuming the presence of this other person? For what reason did the appellant, suspecting that these two persons were up to no good, decide to turn off the engine of his van? What, one may also ask, made him restart without any further action on anyone's part? Finally, it seems passing strange that the appellant was unable to trace any of his passengers to support his story when he was faced with a very serious criminal charge.

The evidence of Khumalo covers some, but not all, of the same ground. He said that he was driving his Kombi car in a street in the township that evening. The

passengers in his vehicle were all school girls. He was hailed by the complainant, who was his friend. He stopped his vehicle. The complainant came to its left side and started speaking with him. At this stage the Isuzu van arrived. It stopped on the left hand side of the Kombi facing in the same direction, more or less in the middle of the street and about in line with the Kombi. Although it was dark, the street was well lit. Khumalo was able to see that the driver of the van wore spectacles. With the engine of the van still running, its driver (the appellant), quite politely, called the complainant saying that he wished to speak to him. The complainant went over to the open window at the driver's seat. He leant against the door "and placed his arms on the window sill". He was leaning forward with his head just outside the cabin of the van. They were conversing but he could not hear what was being said. After a short

while he saw the head of the complainant go into the cabin of the van. His impression was that it had been pulled inside. He then heard the shot ring out. He ducked down thinking that he might be in danger. When he looked up again he saw the van driving off. He noticed the complainant lying injured in the road and went to his aid.

The fact that Khumalo's evidence is contradicted in many respects by the complainant cannot, of course, in the circumstances detract from its quality. It reads to my mind convincingly. Counsel for the appellant could not point to any inherent improbabilities in it. The only criticism proffered was that it was somewhat unlikely that from where Khumalo sat in his Kombi he could have seen what he claimed to have observed. But he said that the street was well lit and

that he looked through the open side door of his Kombi, which must have been more or less in line with the van and only a short distance from it. Cross-examination did not indicate that Khumalo was not a reliable witness. (Incidentally he was not asked about the alleged presence of another person standing near the Kombi.) He did infer that the complainant's head appeared to have been "pulled" into the van but conceded that he could be mistaken in this regard. What he actually said was: "I noticed that he went inside as if someone was pulling from inside" and "I think that someone might have pulled him in the manner he went in". He also said more than once that as the head of the complainant went inside the van, the shot went off.

Thus, if one weighs up the evidence of these two witnesses, there are to my mind sound reasons for accepting Khumalo's where their evidence differs. The appellant, who has been shown to be an untruthful witness on a collateral issue in this case, gives, as I have indicated, a most improbable account of the events about which Khumalo also testified. The evidence of the latter, on the other hand, appears to me to be satisfactory and in my view no cogent reasons for its rejection exist.

Thus, on an acceptance of the evidence of Khumalo, read with that of the appellant which stands alone, the following picture emerges.

The complainant was standing at the Kombi talking to Khumalo when the van arrived. There was no other adult present and it must have been apparent that the passengers in the Kombi were school children. The appellant called the complainant over to the van. The complainant, on arrival, tried to grab hold of the ignition key and said: "Take out the money, you dog. If you don't, I'm going to kill you today." At that stage the complainant had hold of the appellant's wrist and was forcing his arm against the window frame. Thereupon, as has already been stated, the complainant thrust his head forward in an attempt to butt the appellant. The latter unsuccessfully tried to close the window and in due course managed to take a hold of the revolver in his left hand. The complainant drew back, apparently on seeing the revolver. This action created a space at the window into which the appellant

decided to shoot in order to frighten the complainant. However, as the shot went off, the complainant moved forward again into its line of fire. Apart from the inferences to be drawn from this evidence, the appellant stated as a matter of fact that he had no intention of killing the complainant.

The critical question is whether the evidence of the appellant on events immediately preceding, and at the time of, the firing of the shot can be rejected as false. In deciding this question the following considerations are important:

- (a) Khumalo said that the appellant called the complainant across to speak to him in a polite and respectful manner. Though the appellant said that at that stage he was annoyed with the complainant, the manner in which he summoned him does not point to anger on appellant's part or to an intention to kill him on his arrival at the van.

- (b) If that were his intention, it is unlikely that it would have been preceded by the scuffle and some conversation, which Khumalo confirms took place.
- (c) It may be said that it is improbable that the complainant, having drawn back when the fire-arm was produced, would have again thrust his head forward and position it at or inside the window. Soberly viewed this is so. But unexpected and irrational action is often the hallmark of inebriety.
- (d) My conclusion, despite the assertions of the appellant implying the contrary, is that at the time the appellant fired the shot he did not think that his life was in imminent danger, nor was it. He was involved in a scuffle with a young intoxicated person (the appellant referred to him as a "boy"), who was grappling with him bare-handed. He had not produced a weapon or made any move to do so. The appellant was sober. (He only had two pints of beer to drink that evening.) In such circumstances it is likely that he would have fired a warning shot rather than decide to kill the "boy".
- (e) One must guard against attaching undue weight to the false evidence given by the appellant even in relation to what took place when the two of them met in the presence of Khumalo "because experience shows that a weak but innocent man will sometimes, when appearances

are against him, take refuge in an invented story, because he does not think that the truth alone will be sufficient to carry conviction." (Quoted from footnote 61 on page 326 of an article by Mr Justice Nicholas contributed to "Fiat Justitia : Essays in Memory of Oliver Deneys Schreiner".) See too, in reference to untruthful evidence of an accused person, S v Mtsweni 1985 (1) S.A. 590 (AA) 593 I - 594 D. If the appellant was unaware of the fact that accidental or negligent conduct causing injury - in this case severe injury - does not attract criminal liability, the possibility of embellishment is increased.

The crucial consideration is thus whether the statement by the appellant that he did not intend to kill the complainant, supported by his evidence ——— pertinently relating to this issue, is so far-fetched that it cannot reasonably possibly be true. (Cf. S v Sephuti 1985 (1) S.A. 9(AA) 12 F - H, the facts of which in certain respects closely resemble those in this case.) Despite grave misgiving about the honesty of the appellant generally (which this judgment, I

suspect, adequately reflects) I am, for the reasons enumerated above, unable to conclude beyond reasonable doubt that the shot was fired with the direct intention of killing the complainant.

As to dolus eventualis, if one assumes - as one must - that the settled intention was not to shoot the appellant, it cannot be said with the necessary degree of certainty that in the heat of the moment the thought that the complainant might be accidentally shot entered appellant's mind and that he reconciled himself to this possible consequence.

In the circumstances it is unnecessary to consider whether the appellant acted in self-defence, or bona fide thought that his conduct was lawful. With reference to sec 258 read with sec 256 of the Criminal

Procedure Act No 51 of 1977, it also follows from this conclusion that no lesser competent verdict ought to be substituted.

The appeal is allowed and the conviction and sentence are set aside.

M E KUMLEBEN
JUDGE OF APPEAL

BOTHA JA) - Agree
F H GROSSKOPF JA)