

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

KEITH MARSHALL Appellant

AND

THE STATE Respondent

CORAM : **SMALBERGER, MARAIS JJA et**

ZULMAN AJA

HEARD : **8 MARCH 1996**

DELIVERED : **29 MARCH 1996**

JUDGMENT

ZULMAN AJA:

The appellant, as accused number 1, was convicted in the Regional Court, Klerksdorp, on three counts, namely murder, attempted murder and pointing a firearm. His co-accused, accused number 2, was found guilty of two counts of assault. The appellant was sentenced to an effective period of eight years imprisonment whilst accused number 2 received a suspended sentence. The appellant appealed to the Transvaal Provincial Division of the Supreme Court of South Africa against both his convictions and sentence. He also applied to lead certain further evidence of one Swartz. The application to lead further evidence was dismissed as also the appeal. Leave to appeal to this Court was granted upon the basis of a possible different view of certain medical evidence which had been led by the State as also in regard to the refusal of the application to lead further

evidence.

The events giving rise to the charges against the appellant took place on 2 April 1993, in a street in the suburb of Alabama in Klerksdorp. It would seem that the appellant and his brother-in-law, accused number 2, became involved in a confrontation with the deceased and his cousin, one Booysen, the complainant in the attempted murder count.

During the course of a scuffle between the appellant and Booysen, a .357 Magnum revolver which had been tucked in the appellant's waist, in front of his belly, fell to the ground. It was picked up by the deceased who then fired at least two shots into the air. At this stage the appellant was on his back in the road and Booysen was sitting on his chest. A third shot, to which I will return, was also fired by the deceased. There is a dispute on the evidence as

to whether the appellant succeeded in throwing Booyesen off him or whether Booyesen released the appellant who then stood up on his own.

The appellant then removed a 9 mm pistol which he had with him from its holster and fired six shots at the deceased all of which struck the deceased. One shot was also fired at Booyesen which struck him in the leg as a result of which he took no further part in the fight.

The deceased died as a result of injuries sustained by him in the incident, the most significant of which was a bullet wound in the heart. The deceased died on the scene within minutes of being shot.

The State relied upon the evidence of Booyesen and one Moses who was an eye-witness as also a certain Loots who arrived at the scene shortly after the shooting had ceased.

Booyesen described events which occurred earlier in the day preceding the confrontation in the street. It was common cause that

there was bad blood between the deceased and the appellant but it does not seem that this had any direct bearing on the shooting itself.

According to Booysen he was attacked, for no apparent reason, by the appellant, who kicked him. Booysen retaliated by throwing the

appellant to the ground, jumping upon him as he fell and wrestling

with him on the ground. During the skirmish, the .357 revolver

which the appellant had with him fell to the ground, the deceased

picked it up and fired two shots into the air. Thereafter, according to

Booyesen, the deceased threw the revolver towards the appellant's car

which was standing parked fairly close to the scene of the fight. The

deceased then turned towards the bystanders who were gathered and

indicated to them that they should stand back, seemingly in order to

allow the witness and the appellant enough space in which to continue

their fist-fight. Booysen and the appellant separated and the appellant

stood up, removing the 9 mm pistol from its holster as he did so.

He fired a shot at the deceased which struck the deceased in the back.

The deceased turned around and started walking towards the appellant, the deceased being unarmed. He asked the appellant why he had shot him. The appellant thereupon fired two further shots at the deceased's chest whereupon the deceased sank to his knees. The appellant then turned towards Booysen and fired a shot at Booysen which struck him on his right leg. Booysen managed to crawl away from the scene. However, he saw the appellant turn back towards the deceased, go down on his knees and fire three further shots at the deceased from that position. The deceased who was still in a kneeling position, then fell forward onto his stomach. According to Booysen he then saw both the appellant and accused number 2 kick the deceased as he lay on the ground. Accused number 2 also stabbed

the deceased with a sharp metal instrument which looked to him like a screw driver. Accused number 2 then went over to Booysen and stabbed at his face with the instrument, causing an abrasion. He also stabbed him on his left buttock.

Much of the evidence of Booysen was corroborated by Moses.

It was common cause between the witnesses that shortly before the incident commenced a motor vehicle driven by the deceased in which both Booysen and Moses were passengers had almost collided with a Kombi-taxi driven by one Venda. The taxi came to a halt in the garden in front of Venda's house. Moses and Venda were acquaintances. Venda assisted the deceased and his companion in pushing the deceased's car back towards the street, whereafter Venda and Moses went in to Venda's house in order to agree upon the cost of repairs to the deceased's vehicle. Whilst Moses was inside the

house with Venda they heard two shots being fired. Moses ran out to see what was going on. When he emerged from the house he saw the deceased being shot. The bullet entered the deceased's back as the deceased was facing Moses when the shot was fired. The appellant was standing behind him. Moses confirms that at that stage the deceased was unarmed. According to Moses further shots were fired and there was a further attack upon the deceased and upon Booysen.

Although Loots was not a witness to the actual shooting he remained at the scene until the deceased's body was removed. He stated that he heard shots being fired and he immediately ran over to the scene. He saw the appellant standing with a firearm in his hand and the deceased lying on the ground. He saw the deceased walk over to a revolver which was lying on the ground and hand it to one

De Bruyn, apparently a relative of the appellant who, together with accused number 2 subsequently left the scene in the appellant's motorcar. The revolver was later handed in at the police station.

The appellant's version of the events differs in material respects from that of the State witnesses. The appellant relied upon the defence of self-defence. According to him the deceased and Booysen were the aggressors. The deceased struck out at the appellant who jumped backwards in order to avoid the blow. In the process, the revolver which he had with him, fell to the ground. As he tried to retrieve the revolver he was tackled about the legs by Booysen. He fell on his back with Booysen on top of him. Whilst he was wrestling with Booysen on the ground, the deceased picked up the revolver and told Booysen to move away so that he could shoot the appellant. The appellant heard two shots being fired which he

believed were being fired in his direction. He managed to escape from Booysen by butting him with his head and kicking him in the groin. As he jumped up he removed the pistol from its holster. He saw that the deceased had at that stage grabbed accused number 2 and was holding him in a grip with his left arm around his head and pointing the revolver at the appellant. The appellant was in fear of his life. It was at this juncture that the deceased fired the third shot mentioned earlier. He immediately fired at the deceased. He fired several shots as the deceased seemed to be unaffected by the bullets which penetrated his body and continued coming towards the appellant. Eventually the deceased fell over and landed on his stomach with the revolver still grasped in his righthand. The appellant claims that he then heard a warning shout by accused number 2. He turned and saw Booysen advancing upon him with a

sharpened iron weapon in his hand. He fired a shot which struck Booyesen in the leg and Booyesen fell. The iron weapon was subsequently found by the police on the scene.

The version of the appellant was largely corroborated by the evidence of accused number 2 and an eye-witness, one Nagel.

The magistrate conducted a thorough and detailed examination of the evidence of the appellant and the witnesses called on his behalf and pointed to various contradictions in their evidence. Although he found that the appellant's version was largely corroborated by the defence witnesses he was of the view that there was a conspiracy between these witnesses to assist the appellant and that their evidence could therefore not be accepted. He accordingly rejected the defence version.

In finding that the evidence of the State witnesses was

acceptable and convincing, he did not subject that evidence to as searching an enquiry as that conducted by him in regard to the evidence of the appellant and his witnesses.

It was argued on behalf of the appellant that the magistrate had decided the matter by applying the civil standard of a balance of probabilities. The judgment is sprinkled with words such as "waarskynlikhede" and the like. This notwithstanding, it seems clear from a consideration of the judgment as a whole that this argument is not sound. The magistrate accepted the evidence of the State as being true beyond all reasonable doubt and rejected that of the appellant and his witnesses as false. (c/f S v Van Tellinghen 1992 (2) SACR 104 (C))

Whilst it is correct that a court of appeal will not lightly interfere with a finding of credibility of a lower court (see for example

R v Dhlumayo and Another 1948 (2) SA 677 (A) and S v Robinson and Others 1968 (1) SA 666 (A) at 675 G-H)), it will interfere where there has been a material misdirection of fact or where the Court a quo has failed to take account "of particular circumstances or probabilities, material to an estimate of the evidence, or has given credence to testimony perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact" (per Innes CJ in Parkes v Parkes 1921 AD 69 at page 77).

In his judgment the magistrate relied heavily upon the independent evidence of a district surgeon, Dr Wentzel, who gave evidence for the State, more particularly Dr Wentzel's evidence concerning a bullet wound which he observed on the deceased's back. The magistrate found that the wound was an entry wound and could

not be explained upon the appellant's version. As previously mentioned, this version was to the effect that at the relevant time the deceased had already fired three shots and was approaching the appellant to attack him, when the appellant, in the emergency of the moment, fired at the deceased. If this was so, one would not then have found an entry wound but rather an exit wound. A closer examination of the evidence of Dr Wentzel read with the post-mortem report which was prepared contemporaneously, was, putting it at best for the State, equivocal. In this regard the following evidence in chief of Dr Wentzel as compared with evidence given by him in cross-examination and thereafter in re-examination is of significance. In his evidence in chief, Dr Wentzel said:

"Is daar enige ingangswonde op die agterkant van die liggaam daar aangedui, die rug met ander woorde? Daar is, die een dit is juis een van dié wat ons nie kon spesifiek identifiseer as 'n ingangswond nie, maar wat wel ooreengestem het met 'n

projektiel wat ons onder die vel gekry het aan die voorkant, punt nege hier. Dit sê dit is 'n skietwond rug plus minus in die midlyn, maar hier moet u ook onthou dit is veelvuldige skietwonde. So jy het nie 'n teiken wat stilstaan nie. So dit is moeilik om daar definitief, oor die rigtings as sulks 'n uitspraak te gee."

The reference to "punt nege" is a reference to the post-mortem report which was completed under the direction of Dr Wentzel. Of significance, in my view, is that of the ten wounds and injuries described in the report, all of them, other than the injury with which we are here concerned, state whether the wound was an entry-wound or an exit-wound. It is perhaps arguable that it is implicit in the description of the relevant wound that it was indeed an entry-wound.

However I believe that this is a matter of speculation. In cross-examination by the appellant's attorney, Dr Wentzel said the following about the wound:

"Dan die negende aantekening hier punt nege sê u die skietwond

rug, midlyn koeëlpunt wat links voor op die bors onder vel vassit plus- minus sewe sentimeter van die midlyn, nege sentimeter onderkant die linkertepel. Sou u met volkome sekerheid kan sê dat dit 'n ingangswond is in die rug? Dit kan inpas nog steeds by die beweging van die pasiënt self as hy sou roteer, hetsy om weg te kom, hetsy net deur rotering vanweë pyn kon daardie kolom wel getref het en dan bly vassleek onder die vel self.

Weereens kan 'n mens sê soos wat jy lees dat ek dit, die werklike lyn van die wond kan nie vassgestel word nie..... (tussenbei)..... Nee kyk dit is omdat jy veelvuldig het. Jy kan nie, jy kan nie noodwendig A moet by B uitkom, C moet by D uitkom nie, want jy het veelvuldige moontlikhede wat tractusse betref. Veral as jy 'n deurskiet wond het, veelvuldige deurskietwonde, dan is dit moeilik om te sê watter in pas by watter uit. Jy weet wel daar is 'n in en'n uit, maar jy kan nie noodwendig hulle bymekaar pas nie."

In re-examination and in response to a plainly leading question from the prosecutor, Dr Wentzel was more certain of the matter when he said the following:

"Ek wil net terugkom na 'n vorige vraag wat gevra is. U is gevra na hierdie ingangswond soos u dit beskryf het op die rug en dan is daar vir u gevra is dit inderdaad 'n ingangswond. Die antwoord het nou meer gegaan na die trajek van die wond toe,

maar u het dit inderdaad daar beskryf as 'n ingangswond

Watter een is dit?

Ek dink dit is punt sewe se kant, die wat op die rug toegedien is. Ek dink dit is u beskrywing daar by punt sewe.

HOF: U verwys na die een waar die koeëlpunt voor by die vel is. O dit is amper plus-minus op die midlyn ja.

AANKLAER: Maar die ingangswond is u seker was op die rug Ja."

In these circumstances it seems to me that there was at least a reasonable doubt as to this aspect of the matter. The appellant was entitled to the benefit of that doubt and it was not correct to have used Dr Wentzel's evidence as a justification for rejecting the appellant's version as being false. Whilst the evidence of Dr Wentzel was not necessarily inconsistent with the evidence of the State witnesses, to my mind, it takes it too far to say that it provided reliable positive corroboration of their evidence and that the State, upon whom the onus of proof undoubtedly rested, had therefore succeeded in proving beyond reasonable doubt that the whole version of the appellant was

false. This plainly constituted a material misdirection of fact.

Furthermore, the fact that there may have been an entry wound present on the deceased's back was not necessarily inconsistent with the appellant's version. It could well be that in the process of the confrontation the deceased wheeled around and was struck by a shot admittedly fired by the appellant.

There are certain aspects of the appellant's version and that of the defence witnesses which might be regarded as unsatisfactory, for example their inability to explain the presence of stabwounds on the deceased's body. However, it is reasonably possible that these injuries might have been inflicted after the appellant and the witnesses had left the scene by others who felt incensed by the conduct of the deceased and Booysen. On the version of the appellant and accused no 2, the deceased and Booysen had assaulted Venda as a consequence

of the near collision. It has also to be borne in mind that the location of the stabwounds on the deceased's body were not consistent with the State witnesses account of how they were inflicted.

A disturbing feature in the evidence of the witnesses for the State was the failure of each and every one of them to make any mention whatsoever of the third shot which was fired by the deceased shortly prior to the firing by the appellant of what might well have been the fatal shot. That such a shot was fired is incontestable : the police found three spent cartridge cases in the chamber of the revolver. It is a purely co-incidental failure of memory in this respect occurring in the case of all the eye-witnesses called by the State is in the highest degree unlikely therefore entirely conceivable that the witnesses for the State were trying to minimize the role of the deceased who was a large and strong man and seeking to gild the lily, as it were, by

painting the appellant as the aggressor, from whom the deceased was trying to escape. Another unsatisfactory aspect of the State case, to which adequate attention seems not to have been given in the judgment of the magistrate, was the failure of the State to have presented any independent testimony from various persons who in all probability must have seen what took place at the scene. These persons were in the Kombi-taxi in the immediate vicinity of the incident at the relevant time. In addition, and of some importance, in my view, was the failure of the State to have called the witness Venda who was present at least during part of the events. Venda was subpoenaed by the State to give evidence and was at Court during the trial. He was made available by the State to the defence but refused to consult with the appellant's attorneys. Under these circumstances it is not surprising that he was not called by the defence. Again, the

onus being upon the State, any adverse inference which is to be drawn from a failure to have called the witness, must operate against the State.

A further unsatisfactory aspect of the evidence for the State concerns the evidence given to the effect that the deceased had thrown the firearm which he had in his hand under a car. No explanation was given or suggested as to why, in the circumstances, he would have wanted to do this. Nor why he found it necessary to commence firing with the revolver at all.

It is true that if the evidence given by the police who attended the scene shortly after the shooting of the deceased and Booysen as to what was said by the appellant can safely be accepted as an accurate and comprehensive account, it tells against the appellant, for no mention was made of the appellant having been fired at by the

deceased or indeed that the deceased had fired at all. However, there is reason to doubt whether it can be so accepted. They were not policemen who were charged with the investigation of the case. They had to cope with the removal of the deceased and the injured Booysen in pouring rain and the conversational exchanges with the appellant were essentially en passant. They were testifying purely from memory many months later and their evidence is not entirely harmonious. For example, Constable Schlebusch makes no reference to the possession or use of a firearm by the deceased but says that something of that sort may have been said by the appellant to one of his colleagues. Captain van der Westhuizen said that the appellant had mentioned that the deceased had come into possession of a second firearm which he (the appellant) had had with him but he could not remember if the appellant had said that the deceased had fired any

shots with it. Given that the deceased did in fact come into possession of one of the appellant's firearms and that he fired three shots with it before the appellant fired any shots, it would be surprising if the appellant had mentioned none of this to the police and had confined himself to the threat posed by the piece of iron which was in the possession of Booysen. In the circumstances, this factor can be assigned little weight. It could be said that the appellant's version fails to explain why the appellant chose to arrive on the scene with the revolver in his waist-band as well as a pistol. However he was not questioned in this regard and again I do not believe that this failure of itself provides a sound reason for rejecting the appellant's version in its totality.

Care should also be taken when examining the appellant's version not to view the events as an "armchair critic", wise after the

event, and weighing the matter "in the secluded security of the court-room" (See for example Burchell and Hunt - South African Criminal Law and Procedure - Volume 1 page 279; R v Zikalala 1953 (2) SA 568 (A) at 572 F to 573 C and R v Patel 1959 (3) SA 121 (A) at 123 D to 124 A).

To sum up, there were two diametrically opposed versions before the trial Court as to what took place; the version deposed to by the State witnesses who were neither independent nor entirely satisfactory witnesses and who contradicted one another in certain material respects, and the version deposed to by the appellant and his witnesses who also contradicted themselves in certain material respects.

The trial Court regarded the medical evidence as strong corroboration of the essential thrust of the evidence of the State

witnesses and that assessment of the medical evidence played a major role in its decision to reject the defence version and accept the State's version of what had occurred. It erred in so doing. The misdirection was material and the consequence is that this Court is obliged to consider the matter afresh. That it must do notwithstanding all the disadvantages under which it labours when it has not seen and heard the witnesses itself. It is trite that in such circumstances the conviction can only be sustained if the Court is satisfied that a court which had not misdirected itself would inevitably have convicted the accused. To put the matter another way, it would have to be satisfied that a consideration of the recorded evidence, despite all the attendant dangers and handicaps inherent in such a process, leads inexorably to the conclusion that the accused's guilt was indeed proved beyond reasonable doubt.

Applying these criteria, I do not believe that it can be safely said that the accused's explanation for his admitted killing of the deceased is not reasonably possibly true. The suspiciousness of the circumstances and the reservations one has about the credibility of the defence version are just not sufficiently potent to justify an outright rejection of the defence version purely on the strength of a perusal of the recorded evidence. It follows that the appeal has to succeed. In these circumstances it becomes unnecessary to consider the rejection of the application to lead further evidence.

The appeal is allowed and the convictions and sentences are set
aside.

R H ZULMAN AJA

SMALBERGER, JA)

concur

MARAIS, JA)