THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: A439/2013

In the matter between:

SHUMSHEER SINGH GHUMMAN Appellant

and

THE STATE Respondent

JUDGMENT: 26 JUNE 2013

VELDHUIZEN J:

[1] On 29 February 2012 the appellant was convicted in the regional court sitting in Cape Town on the following charges: fraud (count 1), a contravention of s 18(2)(b) of the Riotous Assemblies Act, 17 of 1956 (count 2), attempted murder (count 3) and malicious injury to property (count 4). The magistrate

took all the counts together for the purpose of sentence and sentenced the appellant to nine years imprisonment.

[2] The appellant's application for leave to appeal against his convictions on counts 1, 2 and 3 and the sentence was refused by the magistrate but granted on petition in terms of section 309C of the Criminal Procedure Act, 51 of 1977.

THE CHARGES AND PREAMBLE

[3] The three charges which are the subject of this appeal are set out in the charge sheet and reads as follows:

'COUNT ONE: FRAUD

IN THAT on or about or during the period 29 October 2010 to 12 January 2011 and at or near Cape Town and/or Athlone and/or Philippi, in the Regional Division of the Western Cape, the accused unlawfully and with the intention to defraud, gave out and pretended to Joseph, and/or Kretzman, and/or Phaliso and/or Yalezo, to their prejudice or potential prejudice, that the accused–

1. Was Michael Kirkham;
2. Was a freelance photojournalist;
3. Was interested in doing a piece on violent crime in Cape Town;
4. Required for this purpose to find a "fixer" who could introduce him to gangsters to talk to for the purpose of his photojournalist project;

5. Would honour an agreement to pay a fee for the introduction to and/or interview with the gangster or gangsters; and/or

6. The purpose of meeting the gangster or gangsters was merely related to his supposed lawful photojournalist project;

WHEREAS IN TRUTH AND IN FACT the accused, when he made the representations as aforesaid, well knew that the representations were false

IN THAT the accused-

1. Was not Michael Kirkham, but in fact Shumsheer Singh Ghumman;

2. Was not a freelance photojournalist, but in fact a fund manager;

3. Was not interested in doing a piece on violent crime in Cape Town;

4. He did not seek to be introduced to gangsters for, or merely for the purposes of his photojournalist project, but rather for the purpose of inciting him or them to harm Rhind and/or Hannah Rhind and/or members of the Rhind family and/or otherwise to intimidate them and/or to murder Rhind or otherwise to get rid of Rhind or to sort the Rhind family out permanently, as described further in the Preamble; and/or

5. Did not intend to honour an agreement to pay a fee for the introduction to and/or interview with the gangster or gangsters, and did not in fact do so.

AND IN THAT the accused did thereby commit the crime of Fraud, as described further in the Preamble.

COUNT TWO: CONTRAVENING SECTION 18(2)(b) FO THE RIOTOUS ASSEMBLIES ACT, NO 17 OF 1956 – INCITING ANOTHER TO COMMIT MURDER

IN THAT on or about or during the period 12 to 13 January 2011 and at or near Cape Town and/or Camps Bay and/or Clifton, in the Regional Division of the Western Cape, the accused, unlawfully and intentionally incited, instigated, commanded and/or procured Yalezo to commit an offence, to wit: that he should unlawfully and intentionally kill Rhind, a male person, as described in the Preamble.

COUNT THREE: ATTEMPTED MURDER

IN THAT on or about 14 January 2011 and at 195 Kloof Road, Clifton, in the Regional Division of the Western Cape, the accused unlawfully and intentionally attempted to kill Rhind and/or Ms Rhind by throwing and/or placing and/or igniting home-made bomb devices at the residence of the Rhinds while they were asleep inside, as described in the Preamble

ALTERNATIVELY TO COUNT THREE: ARSON

IN THAT on or about 14 January 2011 and at 195 Kloof Road, Clifton, in the Regional Division of the Western Cape, the accused unlawfully and with intent to injure Rhind in his property, set fire to and thereby damage or attempt to destroy the Rhind residence at 195 Kloof Road, Clifton, being an immovable structure, and the property of or in the lawful possession of Rhind IN THAT the accused threw and/or placed and/or ignited home-made bomb devices at the said Rhind residence, as further described in the Preamble.'

[4] Much of the history and facts set out in the preamble are either common cause or not seriously disputed. In the preamble to the charges it is alleged that the trouble in which the appellant found himself had its origin in London.

There he befriended a lady Ms Hannah Rhind, a company executive. After the two had met a few times and exchanged messages Ms Rhind ended the relationship. The appellant thereafter sent sarcastic messages to her on her cell phone. Ms Rhind complained to her father. Her father spoke to the appellant on the telephone and eventually laid a complaint of harassment with the Metropolitan Police, London against the appellant. As a consequence the police warned the appellant to refrain from contacting the Rhind family.

[5] Mr Rhind also made a complaint to the appellant's employer. As a result of this complaint the appellant again sent an e-mail to Mr Rhind. He was thereafter formally warned by the London police.

[6] The appellant failed to heed the warning and sent further derogatory e-mails to Mr Rhind. As a result he was charged and convicted of harassment by a court consisting of three lay magistrates. He was sentenced and an order restraining him from contacting the Rhind family was also issued. The appellant appealed his conviction and sentence to the Crown Court. This is apparently not an appeal in the strict sense of the word but rather a re-trial. His appeal was set down for 27 January 2011. On 6 January 2011 the barrister representing the appellant informed the Crown Prosecution Service that the evidence given by Ms Rhind and her father before the magistrates would be admitted. They were, therefore, not required to testify again.

[7] It is alleged that the appellant had already, in London, hatched his plan to injure the Rhind family. It is common cause that he contacted a journalist Raymond Joseph in Cape Town under the false name of Michael Attwood and pretended that he was a photojournalist. He conveyed to Raymond that he wished to interview gangsters in Cape Town for a story he was doing about violent crime in the city. To qualify for his project the

gangsters should be older than 25 years, currently involved in crime and be comfortable with the idea of perpetuating violence. Joseph put the appellant in contact with one Kretzman and he corresponded with Kretzman via e-mail using the name Kirkham. Eventually Kretzman agreed to introduce the appellant to gangsters for a fee of R1 600.

[8] On 28 November 2010 the appellant downloaded pictures of Rhind and his daughter from the internet as well as pictures of the Rhind residence at 195 Kloof Road, Clifton.

[9] The appellant arrived in South Africa on 9 January 2011. He had incendiary matches and tape in his luggage. The tape had an address in London and the words '4 Hannah' printed on it.

[10] The appellant met Kretzman and was introduced to one Phaliso who eventually introduced him to Mr TS Yalezo ('Yalezo') at Brown's Farm in Philippi. After some discussion the appellant returned to Kretzman and paid him R500 promising to pay him the balance ie R1 100 the next day.

[11] It is alleged that Joseph, and/or Kretzman, and/or Phaliso and/or Yalezo were to their prejudice deceived by the appellant and unwittingly became involved in his plan to murder or injure the Rhind family.

[12] The appellant and Yalezo met again on 12 January 2011 and went to a pub. There the appellant told Yalezo that he '*had a problem with a white male who resides in England and sometimes in South Africa*' and that he wanted Yalezo to '*sort this man out because he is causing him problems.*'

[13] The appellant and Yalezo met again in the late afternoon of 13 January 2011. The appellant drove Yalezo to the Rhind house in Clifton. During their trip the appellant gave Yalezo the photos that he had downloaded from the internet. It is alleged that he asked Yalezo if he would kill Rhind for him and offered to pay him R10 000. Yalezo refused.

[14] Having failed in his effort to engage Yalezo in his plot to kill Rhind the appellant decided to execute his plan without any assistance.

DISCUSSION

[15] The evidence of the appellant's actions in the early hours of 14 January 2011 is largely common cause.

[16] The appellant proceeded to Mr Rhind's residence in Clifton. Rhind and his wife were asleep inside the house. The appellant had three home-made petrol bombs with him. He had manufactured these using wine bottles, incendiary matches and the printed tape. He, after spending some time at the house, lit the bombs. He threw two of them at

the house and they landed on the balcony of the residence where they exploded. The ensuing fire caused considerable damage to the walls and floor as well as the furniture on the balcony. I should mention that the third bomb tailed to explode and was later found in a bush on the side of the house.

[17] The appellant also slashed two front tyres and a rear tyre of Rhind's motor vehicle which was parked in the driveway.

[18] At his trial the appellant pleaded guilty to the charge of malicious injury to property but not guilty to the first three charges.

[19] It is clear from the first three charges and its preamble that the evidence of Yalezo was of pivotal importance to the state's case. He was the only state witness who could give evidence of what had transpired between him and the appellant. In support of these charges the state presented the hearsay evidence of Rhind, Mr Bernard Schaeffer ('Schaeffer'), constable Singqi and constable Hare regarding what Yalezo had conveyed to them. The prosecutor informed the magistrate that Yalezo would himself testify. The hearsay evidence of these witnesses was thereafter provisionally admitted by the magistrate in terms of s 3(3) read with s 3(1)(b) of the Law of Evidence Amendment Act, No 45 of 1988 ('the Act').

[20] Rhind testified that Yalezo approached him on 26 January 2011. According to Rhind, Yalezo informed him that there was someone who

wanted to do bad things to him. According to Yalezo this man wanted him to do an urgent 'hit and that he had come to warn him. He further conveyed to Rhind that this man was an Asian looking Australian. From what he conveyed to Rhind it was clear that he knew that Rhind works for a refinery and has a daughter in the UK. At that stage Schaeffer arrived and took over the questioning of Yalezo.

[21] According to Schaeffer's testimony Yalezo gave him a more detailed version namely that 'I have been sent to sort him out'. On further questioning by Schaeffer as to what it meant, he explained that he had to do a 'hit' meaning he had to kill Rhind. After questioning him Schaeffer handed him over to the police.

[22] Captain Ntongana testified that he had instructed the late constable Nucoba to take a statement from Yalezo. Constable Singqi had apparently overheard Yalezo's statement to Nucoba. Singqi testified that Yalezo had told Nucoba that he was hired to sort someone out in Camps Bay. On inquiring what he meant he said he was hired to kill this person. The person who hired him pretended to be a journalist and he showed Nucoba a photograph and stated it depicted the place where the hit was to be carried out. He, Singqi, made no mention of Yalezo being offered any money. He had made a statement on 14 July 2011 which read as follows:

> 'On 26 January 2011 I was on duty and sitting at detective office at Camps Bay SAPS. I remember when Constable Majola brought an unknown black male into our offices. I was sitting with the late

Constable Nucoba. The late Constable Nucoba interviewed the person and when I listened to him, he was hired by an unknown person to kill the other one, but he was not interested to kill anybody. This person introduced himself as Siyabulela Yaliso staying in Philippi.'

[23] When his testimony is compared to his statement his memory had clearly undergone an improvement – a most unlikely occurrence if one considers that nearly six months had elapsed from the time he overheard the statement to Nucoba and his putting pen to paper. It is also necessary to mention that the statement to Nucoba had disappeared.

[24] Yalezo was then called to testify. He did not confirm the hearsay evidence. The prosecutor questioned him regarding the statements he had made and concluded his examination in chief by stating that 'the witness may have diverted from his statement and I prefer to leave any further procedures to re-examination. Despite the defence's objection the magistrate allowed the prosecutor to put portions of two statements that had been taken from the witness. The witness denied that he had said what was put to him. The magistrate then, again overruling the defence's objection, allowed the witness's two statements to be handed in as exhibits J and K.

[25] On application of the prosecutor the magistrate ruled:

'The witness made certain remarks in his statement which he denies in court today. On the basis of that this witness evidence is discredited and struck off the record.'

The prosecutor then stated that he had requested the police to 'give him the necessary attention'. This clearly meant he intended to have Yalezo prosecuted for giving false evidence or making conflicting affidavits.

[26] The trial court later heard the evidence of constable Hare. He testified that he had taken down exhibit J on 26 January 2011. It was typed and attested to by Yalezo on 27 January 2011. The defence objected to this evidence but it was received by the magistrate. In cross-examination Hare conceded that he had back dated the statement and had falsified certain details pertaining to the commissioning thereof.

[27] Hare also testified regarding the second statement, exhibit K. He testified that Yalezo: '. . . said that the day when I came there he was tired. He gave me a lot of stories and the next time when I took his statement it was much clearer because he had taken notes.' He further explained: 'There were other few changes, Mr Yalezo came and said he did not say it this way he said it this way and we rectified it.' According to him Yalezo had written the changes on a piece of paper which was no longer available because he had given it to his typist. This second statement now also made mention of Yalezo having been offered R10 000 to do the hit.

[28] The state thereafter applied to have the hearsay evidence of Schaeffer and Singqi as well as the two statements that were taken by Hare admitted in evidence in terms of s 3(1)(c) of the Act. The defence opposed the application. The magistrate ruled:

'After considering everything that was said this morning I have decided to allow the evidence at this stage. It is relevant in the sense that it can help me to get to the bottom of this case. There's a big difference between relevancy and the value of the evidence. The value I cannot ascertain at this stage. It is not a finding that the hearsay is credible or reliable but it is relevant and in that sense I will allow it at this stage. Full reasons for the decision will be given when I give judgment in this matter.'

[29] The magistrate made no mention that he, at that stage and before admitting the hearsay evidence, had regard to the safeguards and requirements contained in s 3(1)(c)(i) to (vi) of the Act. In his main judgment, read with his judgment on the application for leave to appeal, the magistrate changed his original ruling and allowed only the hearsay evidence given by Schaeffer.

[30] I have two concerns with the way in which the hearsay evidence as well as the evidence of Yalezo was treated. The manner in which the state approached this matter leaves much to be desired. In my opinion the record of what had transpired during the trial leads to the irresistible inference that the prosecutor all along knew or, at the very least, had no reason to think that Yalezo would confirm the hearsay statements. It was in the circumstances wrong of him to inform the court that Yalezo would testify and by implication confirm the hearsay statements. As a consequence of the assurance that he gave to the court the defence, as it was entitled to do, curtailed the cross-

examination of the witnesses giving the hearsay evidence and reserving a thorough cross-examination for Yalezo. The fact that it may be difficult to imagine what more the defence could have done if they had been alerted to the fact that Yalezo would not confirm the hearsay statements, does not detract from the force of this criticism. Unless it is patently and unquestionably clear that counsel would in any case have done no more or nothing different from what he had done, this court should not second-guess the manner in which counsel would have conducted the defence of his client had he known that Yalezo would not confirm the hearsay testimony of the witnesses. In my opinion it was wrong and impacted on the appellant's fair trial right for the prosecutor (whether by design or oversight) to have the trial court admit the evidence of the witnesses, in terms of s 3(3) of the Act, in this manner only to argue later that it should be admitted in terms of s 3(1)(c) of the Act.

[31] Section 3 of the Act provides:

'**3 Hearsay evidence**

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) *(b)* if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph *(a)* of subsection (1) or is admitted by the court in terms of paragraph *(c)* of that subsection.'

It is important to note that s 3(1) of the Act re-affirms that hearsay evidence is generally inadmissible. Hearsay evidence should therefore only be admitted after a court has considered the safeguards set out in s 3(1)(c) of the Act. This was recognised by Cameron JA in *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) at 335 D – 336 B:

'The statute does not license the wholesale admission of hearsay. Long before the Constitution came into effect the common law was alert to the dangers such an approach would have entailed. Not only is hearsay evidence - that is, evidence of a statement by a person other than a witness which is relied on to prove what the statement asserts - not subject to the reliability checks applied to first-hand testimony (which diminishes its substantive value), but its reception exposes the party opposing its proof to the procedural unfairness of not being able to counter effectively inferences that may be drawn from it. For these very reasons, this Court emphasised more than four decades ago that "hearsay, unless it is brought within one of the recognised exceptions, is not evidence, ie legal evidence, at all".

[14] The 1988 Act does not change that starting point. Subject to the framework it creates, its provisions are exclusionary. Hearsay not admitted in accordance with its provisions is not evidence at all.'

The learned judge continued on p 337 C - D:

> 'This Court alluded in *S v Ramavhale*[1] to an intuitive reluctance to permit untested evidence to be used against an accused in a criminal case, observing that an accused 'usually has enough to contend with without expecting him also to engage in mortal combat with the absent witness'. It concluded that "a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so".
> [17] Aside from the importance of these cautionary words, a trial court, in applying the hearsay provisions of the 1988 Act, must be scrupulous to ensure respect for the accused's fundamental right to a fair trial.'

In my opinion the magistrate failed to give due consideration to each of the important provisions of s 3(1)(c) of the Act before admitting the evidence.

[32] Although the magistrate strongly criticised Singqi and Hare he did not explicitly reject their evidence. However in his judgment on the application for leave to appeal he stated:

> *'The defence is simply wrong, I cannot, I must revisit the issue. And in fact I did revisit the issue and changed my original decision by disallowing the evidence of the police regarding the hearsay matter. I only at the end of the day allowed Schaeffer's evidence.'*

I must say that this is not how I read the magistrate's judgment. The following passage demonstrates why I doubt the correctness of the above statement. When dealing with the hearsay evidence in the main judgment the magistrate said:

> *'There is a golden thread in all the hearsay evidence and that is that, the Phillip Rhind problem should permanently be solved. I agree with the submissions by the prosecution that the hearsay evidence completes the more probable mosaic of evidence. I also agree that it*

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[1] 1996 (1) SACR 639 (A)

would offend the interests of justice to exclude the hearsay evidence of at least Schaeffer. The accused version of the crime that he incited Yalezo to commit is inherently improbable and it does not accord with the rest of the evidence, when viewed as a whole. The State's version that the accused asked Yalezo to take out Phillip Rhind is far more probable. This factor counts in favour of admitting the evidence. The evidence has probative value as it completes the whole puzzle. It is re-enforced by objectively proven facts.'

And later again:

'The statements were intentionally given in the ordinary course of the interviews. The statements form part of a generally contemporaneous series of records.'

In conclusion under the heading 'FINDINGS' the magistrate again criticised the police witnesses and stated that 'The sloppy and unsatisfactory evidence by these SAP witnesses minimize the reliability of their evidence. I can however find no reason to reject the evidence of Shaeffer, including the hearsay reports to him by Yaleso.

If the magistrate had re-visited his original ruling and excluded the hearsay evidence given by the police witnesses then there can be no reason to weigh the reliability of their evidence. In fact the magistrate explicitly found 'The statements (as opposed to statement) form part of a generally contemporaneous series of records.'

I am not satisfied that the magistrate, in convicting the appellant, did not also have regard to the hearsay evidence given by the police witnesses. I do,

however, agree that their evidence was blemished to such an extent that it should have been rejected.

[33] If the magistrate changed his ruling on the admissibility of the hearsay statements then, in my view, there is another reason for us to revisit the procedure followed by him. At the conclusion of the state's case accused persons are entitled to know what case they have to meet ie what evidence they have to adduce and what evidence they have to challenge. This includes any hearsay evidence that was admitted. (See s 35(3)(h) and (i) of the Constitution of the Republic of South Africa, 108 of 1996). It is cold comfort for an accused to learn, in the main judgment, that the magistrate has decided to exclude hearsay evidence which was previously admitted. In the matter under consideration no new evidence was tendered during the defence case which could have influenced the magistrate to revisit his ruling on the admissibility of the hearsay evidence (if that is in fact what he did).

[33] I now treat each of the conditions contained in s 3(1)(c) of the Act. Inasmuch as the magistrate found no fault with the hearsay evidence of Schaeffer I will restrict myself to his evidence.

(i) The nature of the proceedings

I need hardly state that a criminal trial requires that a court be especially alive to the prejudice that may result in the admission of hearsay evidence. The remarks by Schutz JA in *Ramovha, supra* at p 647 I to 648 A are apposite:

> '. . . but I agree with Van Schalkwyk J's remark in *Metadad v National Employers' General Insurance Co Ltd* 1992 (1) SA 494 (W) about, 'the Court's intuitive reluctance to permit untested evidence to be used against an accused in a criminal case' (at 499H). Without engaging in a debate about everything that was said in those cases I further agree with the expression of the same concern in *Hewan v Kourie NO and*

Another 1993 (3) SA 233 (T) at 239E-F and *S v Cekiso and Another* 1990 (4) SA 20 (E). An accused person usually has enough to contend with without expecting him also to engage in mortal combat with the absent witness.'

(ii) The nature of the evidence

Schaeffer interviewed Yalezo on 26 January 2011. That is 12 days after the incident at the Rhind's home in Clifton on 14 January 2011. This left ample time for Yalezo to tailor his version to suit himself. Schaeffer questioned Yalezo but he did not take a statement from him and this only further serves to militate against the reliability of the hearsay evidence. These were certainly not spontaneous statements (as the magistrate found them to be) by Yalezo to Schaeffer.

(iii) The purpose for which the evidence is tendered

The evidence was clearly tendered to prove not only that the crimes were planned some time in advance but also that the appellant had at an early stage formed the intention to murder Rhind.

(iv) The probative value of the evidence

Although Schaeffer may have been a credible witness the reliability of the hearsay statement is certainly not above question.

(v) The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends

I have already mentioned that Yalezo denied that he had made the statements and reneged on his written statements. Suffice to say that the prosecutor had no faith in the witness and the magistrate also did not believe him. How then, I ask myself, can one be satisfied that a witness of this calibre made reliable statements to Schaeffer and the police.

(vi) Any prejudice to a party which the admission of such evidence might entail

In the light of the dangers attached to reliance upon hearsay statements emanating from this particular witness, the prejudice to the appellant is, in my view, obvious.

Having regard to these consideration I conclude that the magistrate erred in admitting Schaeffer's hearsay evidence.

[34] I should also mention that the procedure followed in the striking of Yalezo's evidence from the record was fatally flawed. In this regard I need only refer to *S v Govender and Others* 2006 (1) SACR 322 (E) at 327B - F where Nepgen J referred with approval to the procedure which had been employed when witnesses had been cross-examined on their statements. I do not, however, find it necessary to analyse the manner in which the witness was discredited in this instance. Suffice it to say that the procedure followed by the magistrate was irregular.

[35] It was also belatedly argued that the mere fact that the appellant gave a false name to Joseph, Kretzman, Phaliso and Yalezo is sufficient to found a conviction. I do not share this view. The mere making of a false statement is not sufficient to constitute the crime of fraud. The false statement must be made with the intention to defraud and must result in, at least, potential prejudice. In my view this was not proved.

[36] Without the evidence of what had transpired between the appellant and Yalezo the appellant's convictions on counts 1 and 2 cannot stand.

[37] I turn to count 3. The magistrate found that the appellant had the direct intention to kill Rhind. This finding is based on the facts surrounding the appellant's conduct before leaving the UK for Cape Town and his conduct subsequent to his arrival in Cape Town. The magistrate concluded that the evidence conclusively showed that the appellant had planned the attack on Rhind with the intention to kill him. I do not agree. Although the evidence tend to indicate that the appellant intended to attack Rhind it does not, without the hearsay evidence, justify the inference that the appellant intended to kill him. This finding does not result in the conviction for murder being set aside.

[38] The appellant threw two petrol bombs at the Rhind residence. This act of the appellant is fraught with danger. One need not be endowed with a live imagination or high intelligence to realise that such conduct is pregnant with the possibility of the loss of life. The appellant must have and, in my view, the only reasonable inference is that he did foresee the possibility that his actions could cause the loss of life. In my judgment it was proved that he acted with *mens rea* in the form of *dolus eventualis* and not *dolus directus*. It follows that his conviction on the charge of attempted murder must stand.

SENTENCE

[39] Our conclusion necessitates that the sentence imposed by the magistrate should be reconsidered. I need not elaborate on the crimes committed by the appellant. The attempted murder is a particularly

serious one and the malicious injury to property charge to which he pleaded guilty is also one of the more serious examples of this crime.

[40] I consider this to be a case where the personal circumstances of the appellant must yield to the interests of society and the seriousness of his crimes. The appellant spent sixteen months in prison awaiting trial. This fact must be given due weight when an appropriate sentence is considered. In this regard I disagree with the magistrate and our judgment on sentence will take account of the appellant's pre-trial incarceration. Having weighed all the relevant facts and circumstances a sentence of imprisonment is inevitable. Inasmuch as the two crimes involved one course of conduct this is an appropriate case for treating counts 3 and 4 as one for the purpose of sentence.

CONCLUSION

[41] In the result the appellant's appeal on counts 1 and 2 is upheld and the convictions and sentence are set aside. Counts 3 and 4 are taken together for purpose of sentence and the appellant is sentenced to four (4) year's imprisonment. In terms of section 282 of the Criminal Procedure Act 51 of 1977 the sentence is antedated to 31 May 2012

A.H. VELDHUIZEN, J
JUDGE OF THE HIGH COURT

I agree.

M.L. DOLAMO, J
JUDGE OF THE HIGH COURT