172/1959

G.P.-S.1568732—1956-7—9,000. S. U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE DIVISION).
AFDELING).

ORIG. P.E. Record

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

JAN DIRKSEN - LABUSCHAGNE
Appellant.

versus/teen

THE QUEEN
Respondent.

Appellant's Attorney _____ *Respondent's Attorney* _____
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate T. M. Mullins *Respondent's Advocate* J. E. Nöthling
Advokaat van Appellant *Advokaat van Respondent*

leave - ECD

Set down for hearing on: Monday, 7th December, 1959.
Op die rol geplaas vir verhoor op:

B

9.45 a.m. : 12-55 p.m.

C.A.V. P. Rousseau
Reg.

Postea: Thursday 10th December 1959

Appeal allowed and the Conviction and sentence are set aside.
Schreiner J.A.
de Beer J.A.
Malan J.A.

P. Rousseau
Reg.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

JAN DIRKSE LABUSCHAGNE Appellant

and

R E G I N A Respondent

Coram: Schreiner, de Beer et Malan, JJ.A.

Heard: 7th December, 1959. Delivered: 10 - 12 - 1959

J U D G M E N T

SCHREINER J.A. :- The appellant, a twenty-three year old constable in the South African Police, was convicted of culpable homicide by a court consisting of JENNETT J. and assessors, sitting in the East London Circuit Local Division. He was fined £25 with the alternative of one month's imprisonment. JENNETT J. granted leave to appeal to this Court.

The deceased, a youbg coloured man nineteen years of age, had on the morning of the 7th October 1958 been sentenced in the magistrate's court, East London, to a fine of £5, with the alternative of 20 days imprisonment, for being in possession of dagga. The fine not having been paid, he, with other prisoners, was in process of being removed from the court cells to a police van in order to be transported to gaol, when he

slipped/.....

slipped through the police cordon at the exit from the cells and ran along the pavement. The exit from the cells opens into Caxton street which lies along the south side of the court block. On the north side of the block lies Terminus street. These two streets at their eastern ends meet Station street which runs north and south between the court block on the west and the railway station on the east. The distance between the exit from the cells to the corner of Caxton and Station streets is about forty yards and the deceased ran to this corner along the northern pavement of Caxton street. A native constable, Jameson Jevu, ran after him but was soon passed by the appellant who was the only armed guard in charge of the prisoners. Both Jevu and the appellant called upon the deceased to stop and the appellant fired a warning shot from his revolver over the deceased's head. The deceased did not stop but turned round the corner into Station street which he crossed diagonally towards the railway station. The appellant followed him and fired two shots, with an interval of several seconds. Both struck the deceased and, according to the medical evidence, either could by itself have caused his death. He expired almost immediately after receiving the second wound.

The appellant's defence rested, as it had to rest, on section 37(1) of Act 56 of 1955, which reads -

"Whenever/.....

"Whenever any person authorised under this Act to arrest or assist in ~~the~~ arresting any person who has committed or is on reasonable grounds suspected of having committed any offence mentioned in the First Schedule, attempts to arrest any such person and such person flees or resists and cannot be arrested and prevented from escaping by other means than by killing the person so fleeing or resisting, such killing shall be deemed in law justifiable ~~homicide~~."

The appellant was authorised by section 38 of Act 56 of 1955 to arrest the deceased and the deceased certainly fled. By attempting to escape he contravened section 27 of Act 13 of 1911 (the Prisons and Reformatories Act) the maximum penalty for which was 2 years imprisonment and strokes, so that his offence ~~thus~~ fell within the First Schedule, which includes offences having a maximum penalty exceeding 6 months, without option. And the appellant attempted to arrest the deceased. All the other conditions for protection under section 37(1) were thus present and the killing would be justifiable homicide provided that the deceased "could not be arrested and prevented from escaping by other means than by killing" him. The appellant had to prove by a balance of probabilities that all the conditions of justifi~~xxx~~-cation were present (Rex v. Britz, 1949(3)S.A.293). It was there said, at page 303, in relation to section 44(1), the predecessor of section 37 (1), "If the circumstances specified in the section are present the conditions for protection are com-

pletely/.....

-pletely fulfilled and, however unreasonable the arrestor may have been, the killing is deemed to be justifiable."

It should be observed, however, that although, if the conditions required by section 37(1) are present, there will be justification despite unreasonableness, this does not mean that reason is to be disregarded in deciding whether it was possible to arrest the deceased and prevent him from escaping without killing him. What could have been done means what could in reason have been done, having regard to the facts which the killer knew or ought to have known.

There appear to be three antecedently possible ways in which the appellant might have prevented the deceased from escaping, without killing him. The first way was to catch him himself. The second, if a firearm was to be used, was to wound him only, the natural way being to shoot him in the leg. The third was to obtain the assistance of one or more other persons to capture him.

The appellant met the first point by stating in evidence, which was not challenged, that his health at that time was bad and that as he ran he was not gaining on the deceased. He said that from the 21st August to the 27th September he had been off duty for 2/4 days, having had his tonsils removed and thereafter having had other ailments which had left him in a

weak/.....

weak condition, from which he had not recovered by the 7th ~~December~~ October. The trial court accepted this evidence and concluded accordingly that as he was tiring he could not himself have caught the deceased and re-arrested him.

The second possibility, that of successfully avoiding a lethal wounding by shooting the deceased in his lower limbs, would have been a very real one if the distance separating the appellant and the deceased at the crucial stage had been substantially less than the distance accepted by the trial court. This question involves reference to the evidence of a Crown witness, van Ryneveld, who crossed Station street from Terminus street to the main entrance of the railway station shortly before the fatal shots were fired. It was his intention to visit the booking office in the station building. He first heard a shot - the warning shot fired by the appellant in Caxton street - and then he heard a shout or shouting. He was then aware of the two men running northwards in Station street. According to the appellant the pursuit was along the eastern pavement of Station street, but van Ryneveld's impression was that it was in the eastern part of the roadway. He had already crossed the pavement in front of the entrance of the station and turned round to look at the men. The impression that van Ryneveld

gained/.....

gained was that the appellant was ten paces or at the most twelve paces behind the deceased when he fired the first of the two fatal shots, the second following in two or three seconds when the distance between the men had not materially changed. At least before he fired the second shot the appellant appeared to van Ryneveld to half-stop, apparently to steady himself for shooting. Had that evidence been accepted as an accurate picture of what happened it would be difficult to avoid the conclusion that the appellant, who had been trained in the use of a revolver, could at least have made certain of hitting the deceased in the leg or foot, even if he could not have summoned enough strength to spurt forward for the final short distance and catch him. But the appellant testified that he was about 30 paces from the deceased when each of the shots was fired and the trial court, while expressing surprise that at such a distance the appellant should have succeeded in hitting the deceased both times, assumed the correctness of his version. This was a crucial finding. At a distance of 30 paces it would clearly be much more difficult for a running man to be sure of hitting another running man in a part of the body that would not be likely to cause death. The appellant gave evidence that the service revolver which he used was liable to kick and throw the bullet above the line of sight. For this reason,

he said, he aimed at the deceased's ankles, the kick unfortunately carrying the bullet higher than he had expected. No expert evidence was called and the trial court did not find that the appellant could, while stopping the escape by hitting the deceased, in reason, have avoided killing him. In the circumstances this Court cannot make such a finding itself.

In association with the appellant's failure to wound only, regard should be had to the very important fact that not one shot alone but two were fired by the appellant at the deceased. The evidence of the acting district surgeon, who held the post mortem examination on the deceased, shows that it is probable that the first of the two wounds was the lower one, which entered the buttock and perforated the small intestine in twelve places. What must have been the second wound entered the shoulder blade and traversed the lungs, lacerating the large blood vessels at the base of the heart. The assistant district surgeon was asked which of the two wounds would have been the first, assuming that the deceased ran nearly fifty yards after receiving the one and fell almost immediately after receiving the other. On those facts he naturally had no difficulty in saying that the lower wound would have been the first. But he was not asked how long the lower wound would have taken by itself to cause death nor was he asked whether that wound would have affected the

deceased's/.....

deceased's running powers so as to slow him down noticeably. The appellant testified that the first of the two shots made no apparent difference to the way in which the deceased ran and he said that he was not aware that the first shot had hit the deceased. He was not cross-examined on these statements. Had the appellant realised that he had hit the deceased in the body with the first shot, it would have been very difficult for him to justify firing the second. A question might then have arisen whether, even though the first wound was one that could have caused death by itself, the appellant would not have been guilty of culpable homicide by unlawfully shortening the deceased's life still further, by firing the second shot. But on the record as it stands it is impossible to say that the first wound must have caused the deceased to change his movements or slow up, so as to bring home to the appellant that he had hit the deceased. It can therefore not be said that the appellant lost the protection of the section because he could have avoided causing the death of the deceased by shooting more accurately at the deceased's legs or by refraining from firing the second shot.

This brings me to the third antecedently possible way in which the appellant might have prevented the deceased from escaping, without killing him. That would be by

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enlisting the help of others in capturing the deceased. It was the appellant's failure, as the trial court found, to show that the deceased could not have been arrested and prevented from escaping by summoning others to help in securing him that led the court to convict the appellant. The question what can be expected from the co-operation of the public in the arrest of fleeing criminals is a difficult one and depends on the circumstances. Section 34 of Act 56 of 1955 requires every male between 16 and 60 to assist any policeman who calls upon him to assist in making any arrest which the policeman is authorised to make of a person charged with or suspected of the commission of an offence. If, without sufficient excuse, such male fails to assist he is guilty of an offence. But obviously proof of the commission of such an offence may be a difficult matter and the existence of this provision has little bearing on the question whether in fact a policeman's call for help is likely to bring forth adequate and timous assistance. Policemen are furnished with shrill whistles which may attract the attention of persons in the neighbourhood and lead to their coming to the aid of a policeman pursuing a criminal. Although calls for help or whistle blasts will not guarantee that help will be forthcoming even in a populous area, they are potentially valuable aids to police action which should certainly be used whenever possible before firearms are resorted to. But

whether/.....

whether in any particular case such possibilities of help could in reason be expected to materialise in action and whether in fact they would have prevented the escape of the prisoner must depend upon the circumstances. And a most important circumstances will obviously be the presence, so far as the policeman is aware, of members of the public to whom his appeals for help might be addressed.

In the present case there was some evidence of the presence of people at five places near the route of the fleeing deceased. The first small group of persons was at the corner of Caxton street and Station street. They were apparently non-Europeans who may have been frightened by the appellant's warning shot, which though aimed high was generally in their direction. The native constable Jevu, called for the Crown, stated that he shouted at these people in Xosa and English to stop the deceased but, instead, they made way for him. Possibly they feared that he was armed and might injure anyone who tried to bar his way. The next place where there was evidence of the presence of people was at a baggage entrance to the station, some forty yards south of the main entrance. Jevu said that he saw people coming out of the opening. The appellant said that he saw no one there and suggested that Jevu, who was coming on relatively slowly behind him, might have seen people emerging after the appellant had passed.

This seems possible. At the main entrance of the station was van Ryneveld, whose presence there was the principal factual ground for the conviction and to whose evidence I shall return. Also in the neighbourhood of the main entrance, according to a defence witness, Sergeant Scheepers, there were two cars off-loading passengers and their luggage. He himself had apparently been a member of the cordon at the exit from the cells, and when the deceased broke away and ran eastwards he ran westwards and went clockwise round the block, coming into Station street via Terminus street. JENNETT J. said that the court did not propose to weigh Sergeant Scheepers' evidence in the balance. Because he said that he did not see van Ryneveld ,"his observation may well have been at fault in regard to the taxis too. " It does not, with respect, follow that because a witness fails to see a person - for any reason - he is unreliable when he says that he did see two cars with luggage being unloaded. But no-one else speaks of these cars and although Sergeant Scheepers thought that they were there before the shooting, it seems possible that they arrived just afterwards. As, however, the trial court ignored Sergeant Scheepers' evidence on the point this Court could not attach importance to it. The fifth place where people were seen was a stopping place for non-European buses some 200 yards north of the scene of the shooting.

The/.....

The appellant said that he saw a bus standing there and people getting in and out of it. He was asked whether he did not think that the people there would help him to arrest the deceased and he said that he did not think that they would. It should be observed that some distance short of the bus-stop was another opening into the railway station premises through which, by crossing the rails, a person could make his way ~~to the~~ into the bushy country from which he could reasonably hope to make good his escape.

There remains the fact, which was not in dispute, that van Ryneveld, a young man, whom the appellant knew by sight, was at the main entrance to the railway station at the time of the shooting. The trial court was satisfied that the appellant did not see van Ryneveld but held that this was because he was concentrating on the fleeing man. The court also referred in general to other members of the public who might have been in a position to hear and respond to a call for help. I do not think that on the evidence it should be assumed that there may have been other persons about who might have helped to arrest the deceased. Van Ryneveld said that he saw none and although there may have been such persons, hidden perhaps by parked cars, of which there were a few in the street, it would not be fair to the appellant to act upon the view that such persons were or may have been

in fact at hand. The trial court's judgment stresses the fact that a police whistle was not used, but it does not express a finding upon the appellant's evidence that he was continuously shouting to the deceased to halt - right up to the time that he ~~first~~ fired the shots. He said that his shouting was louder than a whistle would have been. This evidence may well have been untrustworthy. Van Ryneveld heard a shout or shouting but apparently only in the distance, soon after the first warning shot. But the trial court did not state any finding as to whether or not the appellant went on shouting loudly as he says he did. If he was in fact shouting loudly and was running down the street brandishing a revolver , this would seem to constitute nearly as clear an invitation to passers-by to join in capturing the deceased as a direct appeal to them.

Van Ryneveld was not clear where exactly he was when the appellant came down the street following the deceased. It was put to him that he might actually already have passed through the covered entrance into the building. He said that he did not think that he had actually crossed the threshold but it seems to be not impossible that he was either inside or so nearly inside the building that the appellant could not be blamed for not seeing him. And if that is so, it could not be said that because the appellant did not call upon him for assis-

-tance it was not proved that an available means of preventing the deceased's escape was not neglected. P.D.S. 11.3.60

The case is not an easy one and it is well to remind oneself of what has been said in the past about the extremely, indeed dangerously, wide protection afforded by the section. In Rex v. Hartzer (1933 A.D.306) WESSELS C.J. said at page 309, "In any case a policeman cannot shoot at a person arrested merely because he runs away. He must first use other means to recapture him, and he can only resort to a firearm if he can use no other means whatever to recapture the arrested person. "

In Mazeka v. Minister of Justice (1956 (1) S.A. 312 at page 316), Van den HEEVER J.A. pointed out that "the legislature could not possibly have intended that recourse to shooting should be had lightheartedly."

The learned judge went on to say :

"There can be no doubt that the legislature intended section 44(1) to be strictly interpreted, "

and, after quoting the above cited passage from Britz's case (supra) concluded,

"All the more reason, therefore, that the circumstances should be closely scrutinised to see whether the conditions for the protection are completely fulfilled. "

These remarks are very important and warrant repetition whenever the application of the section arises. I have certainly not lost sight of them in considering the facts

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~~of~~ in the present case, but have come to the conclusion that, having regard to the trial court's findings of fact, it should have acquitted the appellant. In my view he succeeded in proving that there was, in reason, no way in which he could have prevented the escape of the deceased save by killing him. It is indeed a tragedy that a young man's life should have been thus suddenly brought to an end. There is no reason to suppose that in his case the community would have suffered had he made good his escape. But the appellant established the facts necessary to secure him the protection of the section.

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

De Beer, J.A.
Malan, J.A.

J.W. Schreiner
9.12.59

And what age are you?—— I'll be twenty-three in this year.

You know that one of the last witnesses was Sergeant Scheepers, who said that in the entrance he noticed two taxis, being off-loaded, but he only noticed one person actually off-loading, did you see any of those?—— No.

Thank you.

(THAT CONCLUDES THE EVIDENCE).

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(Mr. Dahl addresses the Court).

(Mr. Mullins addresses the Court).

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J U D G M E N T.

JENNETT, J:

As we have reached the conclusion, after very anxious deliberation, I shall try and give our reasons at once so that we may avoid any further suspense for the accused.

On the 7th of October last year, the accused, twenty-three years old, who has been in the Police Force four years, was on what has been called 'cell' duty at the Magistrate's Court, East London.

At about 12.50 p.m. that day, the persons who had come before the various courts at East London that morning, were to be moved to the gaol or other place of

custody/.....

custody from the cells of the magistrate's court. A police van, which was to transport them, was drawn up in Caxton Street, opposite the door to the cells. Among the prisoners was one whom I shall refer to hereafter as the deceased. He was a nineteen-year old coloured male, who had been sentenced that morning to pay a fine of £5 with an alternative of twenty days imprisonment with compulsory labour for possession of dagga.

Members of the Police Force formed a sort of avenue through which the prisoners would pass from the door of the cells to the police van. On each side, that is east and west of the avenue, were three or four members of the Force. Only the accused was armed. The deceased managed to slip through the line made by the policemen on the eastern side, and made off in an easterly direction along Caxton Street. A native constable, Jevu, immediately gave chase. He says he called upon the deceased to stop, he also shouted to some non-Europeans on the corner of Caxton Street and Station Street, to stop the fleeing man. The deceased gave no heed to Jevu's order and the persons referred to gave way, so that he, the deceased, was able to continue in his flight.

That corner is about 60 or 80 ft. from where the break-away occurred.

The accused also gave chase and soon, not surprisingly in view of the difference in age and weight, overtook and passed Jevu. Deceased proceeded into and across Station Street, and onto the eastern side of that street, where the East London railway station is sited.

Jevu says that he proceeded on and shouted out

that the deceased should be stopped. He says he called out about eight times in Xhoza and three times in English. According to Jevu and the accused, the deceased crossed the eastern pavement of Station Street and proceeded along in a northerly direction. In the course of his flight he passed the baggage entrance and the main entrance of the railway premises. Thereafter the accused,who was pursuing him, fired two shots at the deceased. The first bullet entered his left buttock, and lodged in the abdominal area, while the second hit him in the left back and lodged in the right chest area.

According to the medical evidence both caused fatal injuries, but the second caused almost immediate death. When the deceased received the second shot he slowed up, turned round, staggered a foot or two and collapsed. In these circumstances the accused now faces a charge of Culpable Homicide.

At the time of the shooting a witness, Clive van Ryneveldt, was on his way to the railway station through the main entrance. He says he saw the deceased pass behind him, that is in the street, as he, the witness, mounted the eastern pavement, in Station Street. He says further that the accused stopped, steadied himself for each shot, and that the shots were fired in fairly quick succession at a distance of about ten paces and not more than twelve paces. The accused, on the other hand, maintains that the deceased was fleeing alongthe eastern pavement, from about the baggage entrance, until he was shot. He also maintains that the shots were fired while he was moving or running, and that the distance between himself and the deceased was,

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in respect of both shots, about thirty paces or ninety feet.

Itis clear that the witness van Ryneveldt was taken by surprise at the event and fairly describes what he calls his impressions. He is certain, however, that the deceased passed behind him, and that the accused steadied himself to shoot.

The Court finds itself unable to reach any firm conclusion as to the distance that separated the accused from the deceased at the time the shots were fired, and assumes,therefore, in that regard that the accused may be correct. We may be pardoned for being surprised that the deceased and accused were about 30 paces apart. having regard to the accuracy of the shots, of the shooting. It is quite impossible to say accurately whether the accused was increasing his lead - whether the deceased was increasing his lead on the accused, or whether the accused was gaining on the deceased. According to the spots appearing on the plan, as having been pointed out by the accused, it seems more likely that the distance between them remained fairly constant.

It is clear that no police whistles were blown and the accused did not call upon van Ryneveldt or anyone else to assist in the recapture of the deceased.

Van Ryneveldt is quite clear that he witnessed the shooting and was in full view of the accused and the Court accepts that evidence. The accused's claim that there was no one in the street cannot be correct, he must have failed to see van Ryneveldt or any others who were there because he was concentrating on the fleeing

man/.....

man or because he deliberately denies seeing him or them.

Now, the Defence relies upon the provisions of sec. 37 of the Criminal Code. That section reads:

" Whenever any person authorised under this
" Act to arrest or assist in arresting any
" person who has committed or is on reasonable
" grounds suspected of having committed any
" offence mentioned in the First Schedule, attempts
" to arrest any such person, and such person
" flees or resists, and cannot be arrested and
" prevented from escaping by other means than
" by killing the person so fleeing or resist-
" ing, such killing shall be deemed in law justi-
" fiable homicide".

The first question that arises is whether that section applies to a case like this. The deceased was escaping from custody and was therefore committing an offence which is covered by the First Schedule. Is the offence for whichhe was convicted and sentenced in the morning in any way relevant? I think not. In the first place, the terms of the section seem to me to support that view. It is clear that a prison warder can claim protection for shooting an escaping convict in terms of sec.29 of Act 13 of 1911. He might well not know the offence the escaping man had committed, which resulted in his imprisonment. It might be a minor offence. That section does not refer to any particular offences and it is obvious therefore that the legislature regarded escaping as a serious offence.

In this case, too, the accused was unaware of the offence for which the deceased had been sentenced

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that very morning.

In applying sec37, the Court is not concerned with any question of reasonableness for the shooting. The fact that it was unreasonable to shoot an escaping prisoner, because his offence was a minor one, and his sentence for escaping might also be small, is irrelevant in the present enquiry, and Mr.Justice Shreiner pointed out in the case of Rex vs. Britz, 1940-1949(3) S.A.L.R., page 293 -

> " The section covers the case of the shooting
> " of a man who escapes after committing only a
> " minor fraud".

On the question whether the section applies whatever the offence was for which the deceased had been sentenced in this case earlier, I hold that it does in the present case.

The deceased committed an offence referred to in the First Schedule and the accused was entitled in terms of sec.38 of the Code to arrest him.

Now, because the section so greatly widens the powers of the police and others, beyond the powers they would have at Common Law, it has been held that it must be carefully applied. The onus is on the accused - see the case I have referred to - the King against Britz - and he must show on a balance of probabilities that the essentials referred to in the section, justify the killing, were all fully present. He must show on the balance of probabilities that there was the escaping prisoner and that there were no other means, other than killing, by which his apprehension could be effected.

As illustration of how strict the section is, I refer to the words of Curlewis,Judge of Appeal, in Rex vs.Hartzer, 1933, A.P.D., page 306, at page 308,where he says:

" He must first use other means to recapture
" and can only resort to a fire-arm if he can
" use no other means whatsoever to recapture
" the arrested person".

Again in the case of Mazeka against the Minister of Justice, 1956,(1),S.A.L.R., 312, at page 316, Justice van den Heever says, after refrrring to the section -

" All the more reason therefore that the circum-
" stances should be closely scrutinized to see
" whether the conditions for protection are com-
" pletely fulfilled. In considering the case
" the Court must not adopt an armchair-critic
" outlook, but must try and place itself in the
" position in which the accused found himself."

The Court must now therefore consider whether it has been shewn that there was an escape by the deceased and whether or not he could be arrested or prevented from escaping by means other than killing him.

As to the first question, the answer is plainly in the accused's favour. The next question is the difficult one. The accused must show that the escape could not have been prevented otherwise than by shooting of the deceased. How could the successful escape of the deceased have been prevented except by shooting? By the accused overtaking the deceased and catching him. The evidence shows that the accused had been off duty because of illness for

twenty-four days during the five or six weeks prior to the 7th of October. The illnesses included tonsillitis, nose-bleeding and influenza, and he stated that he had been weakened, and was out of condition as a result, and that is acceptable. His claim that he was becoming spent when he fired the fatal shot is therefore quite reasonable, and he has shewn that the deceased's escape could not have been prevented by the accused himself overtaking and apprehending him.

Other members of the Force present at the initial break-away by the deceased could not have overtaken and caught him. That leaves us the only other means of preventing the success of the escape, that is the pursuit and apprehension of the deceased by members of the public.

In this we include a pursuer being assisted by other members of the public cutting off the deceased's flight. In dealing with this means of preventing the escape, the first question is whether or not there were members of the public available to assist in the pursuit of the deceased.

The accused says, as I remarked earlier, that he saw no one, and that there were none in the street where the pursuit was taking place at the time of the shooting. As stated earlier, the witness van Ryneveldt says he was outside the main entrance to the railway station and in such a position that he could and did observe the accused firing the shot. I said earlier too that this witness referred to the deceased passing behind him a few paces away. Though the Court has already indicated that it feels it cannot make

firm findings as to distances between the spots at which the accused and deceased were when the shots were fired, it is satisfied that this witness can be relied upon when he says he saw the shooting and could have been seen plainly by the accused.

Then there is the evidence of Sergeant Scheepers that he saw two taxis close to the main entrance and atleast one person removing luggage from them. This evidence we do not propose to weigh in the balance. The witness, I think, said he did not see van Ryneveldt, and his observation may well have been at fault in regard to the taxis too.

At the baggage entrance Jevu observed persons, about 30 or 40 paces from the main entrance, possibly more, and in the direction in which the deceased was running there is a European entrance to the station, where persons might have been expected. There is no evidence that there were not persons just inside the main entrance itself.

It is clear that the accused did not call upon van Ryneveldt or anyone else to assist in the chase. Van Ryneveldt says he would have assisted had he been called upon to do so. The Court has no doubt that he would have done so. He considers that he would have been able to overtake the deceased, but he naturally adds the qualification that it would depend on how quickly he reacted and grasped the situation. Even if he could not himself overtake the deceased; he might well have been able to keep him in view and called for, and obtained, the assistance of others in the deceased's path, who could have cut

off/.....

off the deceased's flight.

We think that the accused failed to observe van Ryneveldt and other members of the public, and that he did fail to do so because of his concentration on the fleeing man.

As already stated, the accused did not call upon van Ryneveldt and others to assist in the pursuit. He did not blow his police whistle at any time. He considered that to do so would not have availed because of train whistles which are blown at intervals in that area. This does not appeal to us as an excuse. A police whistle blown in the street in the circumstances might well have had results. He considered too that calling on members of the public would not have helped, they would probably not have assisted him even if called upon to do so. He bases that view to some extent upon the fact that the non-Europeans at the corner of Caxton and Station Streets did not assist when called upon by Jevu. They must have been about 60 or 80 feet from the place where the break-away occurred and the deceased must have reached them, or atleast been very near to them, before the nature of the call for their help would have been appreciated by them, and even if they had been unwilling to obey the call, that is not a good reason for assuming that others would have taken up a similar attitude. There is no reason to think that responsible Europeans would not have readily responded to a police call for assistance. It cannot be assumed that they would have committed the offence of refusing to help the police when the necessary call had been made upon them to do so.

There is evidence, that of Jevu, that the public do render ready assistance when called upon. Then there is a feature that has to be considered, that Jevu called out for help. I said earlier that in his evidence he claimed that he had called out about eight times in Xhoza and three times in English. Whether he had time to make all those calls for help and to call upon the accused to stop at the same time, may be doubtful. The Court required him to repeat in Court the call he made in English and it is not surprised that no one understood and grasped what he said.

At all events Europeans might well be expected to respond more readily if the accused had called upon them to assist rather than Jevu. Jevu had fallen behind in the pursuit, the accused was the deceased's immediate pursuer, he was in charge of the pursuit, and he was the one who made the decision that the shooting had become necessary.

In the circumstances the Court finds that the accused has not shewn that if he had called for help from the public, he would not have received it, and that if he had received it, the deceased's escape could not have been prevented. In short, he has not shewn that the escape could not have been prevented by assistance from the public, that is by means other than the shooting of the deceased. No doubt in the excitement and feeling his responsibility for the prevention of the success of the escape, the accused acted more hastily than he would otherwise have done. The fact remains that in view of the wide power the

section/.....

section in question gives, the essentials it prescribes must be shewn to be present when its protection is relied upon, and in this respect, as I have indicated, the Defence has failed in this case. The accused must in result be convicted.

(MR. DAHL DOES NOT WISH TO ADDRESS THE COURT).

MR. MULLINS: (in mitigation):

The accused in this case is, as Your Lordship knows, twenty-three years of age, his salary is in the neighbourhood of £28.0.0. per month, of which he is paying his own board and lodging at the police barracks. I understand from the accused that in so far as the question of a possible fine is concerned, he has no assets.

HIS LORDSHIP:

There is no question that we're going to fine him - we are at another stage now where we have to consider the verdict, but I don't think that in the circumstances, although we have held that there is a failure by the Defence to discharge the onus that we take a very serious view, unfortunate though it may be for the deceased. This section gives the wide powers, we're not considering reasonable as everything else, and the fact that he shot a man who was only convicted of a minor offence doesn't enter into the picture at all, and I don't think that there's any question but that the Court proposes/.....

proposes to fine him. Now you are going to address me on that and you were saying that if a fine is proposed?

MR. MULLINS:

Yes, M'Lord, that is what I was addressing Your Lordship on. If a fine is imposed, M'Lord, he has no immediate cash at all, that is the point I was trying to make.

HIS LORDSHIP:

He wants time to pay?

MR. MULLINS:

He earns £28 per month, and he is paying £7.10.0. per month for his board and lodging at the police barracks. I have no details of his other expenditure, M'Lord,but it is of a very minor nature. May I just refer Your Lordship to the nature - Your Lordship has no doubt noticed it - of the fine which was given in Britz' case, I think it was.

HIS LORDSHIP:

Yes, in one of the cases there was a fine of £20.

MR. MULLINS:

That is so, M'Lord, there was a fine of £20. With respect, M'Lord, in my submission, this is a case in which Your Lordship might find even a fine might well be suspended as a possible form of punishment. That is merely a suggestion. which I put forward with respect, but this is a case in which a very, very nominal fine would meet the case. I think in other regards I must leave it

entirely/.....

entirely in Your Lordship's hands. If Your Lordship does impose a fine, for example, similar to that in Britz' case, I would ask Your Lordship to allow the fine to be paid in instalments.

HIS LORDSHIP:

Oh, yes, we shall certainly do that.

JUDGE'S REMARKS IN PASSING SENTENCE:

JENNETT, J:

You have heard that the Court has convicted you of Culpable Homicide and you have heard the circumstances in which the Court considers you committed that offence.

Now, in dealing with the sentence, I want to say at once that we have all been favourably impressed with your demeanour generally. Because of the state of the law, we are not entitled to say that you acted unreasonably and we should punish you accordingly because you shot a man who all he escaped might only be a month or two's imprisonment, nor do we consider at all, it does not enter into the picture, that he had only been fined £5 or twenty days earlier that day for possession of dagga. Because of that and various other reasons, we think that the proper thing to do in your case is to fine you. We cannot quite accede to your Counsel's suggestion that the fine should be no greater, in fact should be less, than the fine imposed in an earlier case you have heard us refer to, in Britz' case. There the schoolmaster was