50/80/TMS

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

ANTONIO TEIXEIRA — Appellant

and

THE STATE — Respondent

CORAM: Wessels, Joubert, JJ.A. et Galgut, A.J.A.

HEARD: 6 May 1980

DELIVERED: 16 May 1980

J U D G M E N T

WESSELS, J.A.:

In this matter the Court a quo (VERMOOTEN, J., and assessors, sitting in the Springs Circuit Local Division) convicted the appellant of murder without extenuating circumstances. The presiding Judge imposed the mandatory sentence of death. Appellant's application for leave to appeal to this Court against his conviction

was.../2

was refused by the presiding Judge, who, however, granted him leave to appeal against the sentence. Thereafter, appellant successfully petitioned the Chief Justice for leave to appeal against the conviction as well.

It is common cause that during Saturday evening, 7 July 1979, appellant fired a shot from his pistol and fatally wounded the deceased, an adult Black male. At the time, appellant was co-owner of a cafe business (known as Sideway Restaurant) in Schoeman Street, Heidelberg, Transvaal. On the opposite side of the street there was a similar business known as Tony's Eating House. The deceased was standing on, or in the vicinity of, the stoep in front of the last-mentioned cafe when he was shot. It was after sunset and the electric lights of the cafe's had been switched on. There were also street lights. There was a bus stop some short distance beyond, and on the same side of the street as Tony's Eating House. The street light in the vicinity of the bus stop was out.

It..../3

It was for that reason that persons who were waiting for a bus formed a queue on the pavement in front of Tony's Eating House. It is clear from the evidence that there were pedestrians who were crossing the street in both directions. It was, as I have already indicated, a Saturday evening, and the evidence indicates that a number of persons were drinking intoxicating liquor. It is probable that some of them were intoxicated. The evidence, including medical evidence, established that deceased must have been strongly under the influence of liquor at the time. It appears from the evidence that the persons standing in the queue and crossing the street were all Black people.

The State case rested on the evidence of a single witness, the eighteen year old Sarah Nhlapo, who was employed as a cook at the local police station. According to her evidence she intended returning to her home by bus, and joined the queue in front of Tony's Eating House at approximately 20h00. In her evidence-in-chief she referred to

certain.../4

certain incidents which took place during a period of about 30 minutes while she stood in the queue waiting for the bus to arrive. As to the first incident, she testified that she saw appellant emerge from the front door of Sideway Restaurant holding a Black man by his arm. Appellant dragged or pushed this man towards the street. The latter fell down, and appellant returned to his cafe. The Black man thereafter got up and walked towards the spot where Sarah was standing. He took up a position near the door of Tony's Eating House. While he was standing there, a man (whom she described as his companion) walked across to Sideway Restaurant. As to this, her evidence (which was interpreted into Afrikaans) reads as follows:

> "En terwyl die oorledene daar staan die ander man wie saam met hom gewees het het toe oorgestap na beskuldigde se kafee toe".

I should explain that she referred to the "oorledene" because on her version, the Black man who was concerned in the first incident, was the man who was eventually shot by appellant.

As.../5

As to the second incident seen by Sarah, she testified that she saw appellant chasing deceased's companion out of the cafe. Appellant was wielding a baton. She saw that deceased's companion had a bottle in his hand. In appearance, this bottle was similar to a bottle which was handed in as an exhibit at the trial - an empty White Label whiskey bottle.

As to the third and fourth incidents, she testified as follows in her evidence-in-chief:

> "Lateraan toe kom daardie persoon weer terug na die beskuldigde se kafee toe met daardie bottel. Die beskuldigde het toe vir hierdie persoon weer gejaag. Die persoon hardloop toe na ons kant daar waar ons gewees het.
>
> Ja? --- 'n Rukkie lateraan toe het die beskuldigde van sy kafee uitgekom. Hy kom na ons kant toe, dit is na daardie kafee toe. Terwyl hy na ons toe gestap het het hy albei sy hande agter so gehou. En toe hy in die middel van die straat was toe wag hy vir 'n sekere kar om eers verby hom te ry. Na hierdie kar by hom verby gery het toe hardloop die beskuldigde nou na ons toe. En net toe hy naby die oorledene was en daar het hy hom toe geskiet.
>
> Nou gaan jy 'n bietjie vinnig. Sê net vir die Hof, toe die beskuldigde naby julle kom het hy iets gemaak, iets gesê, wat het gebeur? --- Hy het niks gesê nie.

Het..../6

Het jy enigiets in die beskuldigde se hande gesien? --- Ek het net gesien hy skiet. DEUR DIE HOF: Het hy 'n wapen in sy hande gehad? --- Toe hy skiet toe sien ek die vuurwapen."

Sarah said that when appellant fired with his pistol he was approximately 1 metre from the deceased. The deceased fell down. Immediately thereafter, the appellant pursued deceased's companion for some distance without, however, overtaking him. Appellant gave up the chase, and returned to his cafe. She said that the deceased appeared to be under the influence of liquor, but was still able to walk without staggering. The appellant, she said, appeared to be sober. She stated that she was about 3 metres away from the deceased when he was shot. She did not see any weapon in his possession. All she saw was that he had a plastic bag containing tobacco in his hands. In concluding her evidence-in-chief, Sarah testified as follows:

"MNR. HANEKOM: En as die oorledene 'n groot voorwerp in sy hande gehad het soos byvoorbeeld 'n leë bottel, sou jy dit gesien het? --- Ja,

ek..../7

ek sou dit gesien het maar hy het niks by hom gehad nie.

Was daar op enige stadium in jou teenwoordigheid 'n rusie tussen die beskuldigde en die oorledene? --- Ek het geen moeilikheid tussen hulle twee daar gesien nie.

Wat het die oorledene gedoen net voordat hy geskiet is? --- Hy het maar net daar gestaan en hy was besig om sy sigaret daar op te maak, 'n sigaret op te maak.

Het hy 'n sigaret gerol? --- Ja."

Sarah was subjected to a lengthy cross-examination by appellant's counsel. She stated that she knew neither the deceased nor his companion. In so far as the identification of the deceased was concerned, she stated that she was certain that the person who was involved in the first incident was the deceased, because she observed that the person who was dragged from the appellant's cafe wore a blue overall, that he walked to where she was standing in the queue and remained standing about 3 metres away from her until he was shot some 30 minutes later. The person who was shot wore a blue overall. After the conclusion of the first incident, she thought that there would be no further incidents involving appellant and the deceased.

As..../8

As to the number of incidents witnessed by her Sarah gave evidence under cross-examination which appears to contradict that given by her in her evidence-in-chief. I refer to the following passage in her evidence under cross-examination:

> "Die eerste insident was volgens haar soos ek haar getuienis verstaan het, toe die beskuldigde met die oorledene uit sy kafee uit tevoorskyn kom? —— Ja.
> En nou sê u daar was 'n tweede insident toe die beskuldigde vir die tweedemaal uit die kafee uit tevoorskyn kom, toe jaag hy die oorledene met 'n knuppel, nie die oorledene nie, die oorledene se vriend, met 'n knuppel? —— Ja.
> En die derde keer wat hy tevoorskyn kom is toe hy vir u groepie nader? —— Ja."

In her evidence-in-chief Sarah stated that immediately before the shooting incident she saw deceased rolling a cigarette. Under cross-examination she stated that while appellant was running across the street she saw deceased smoking a cigarette - indeed, she actually smelt that he was smoking. Sarah must be endowed with a very keen sense of small, because she also said that his breath smelt of liquor. It appears from her evidence

that..../9

that the deceased was standing some 1½ paces from her. They were never standing face to face.

She reiterated under cross-examination that accused, after pausing in the middle of the street to allow a motorcar to pass, ran across the street, passed through the queue and, without at any time saying anything, shot the deceased where he was standing, i.e., some three metres behind the queue. She was asked to estimate how many people were standing in the immediate vicinity of the deceased when he was shot. Her reply was:

> "Ek kan nie sê nie, ek het nie getel nie, maar ons was baie."

As to when she last looked in the direction of the deceased before he was shot, she testified as follows:

> "Kan ek weer vir u vra Sarah, om te verduidelik of u inderdaad omgekyk het terwyl die beskuldigde nader na u toe beweeg het? Want ek wil dit vir u stel ek vind dit hoogs onwaarskynlik? --- Ek het na die beskuldigde gekyk terwyl hy so aankom totdat hy vir daardie kar daar gewag het, en terwyl

hy..../10

hy daar vir die kar wag om verby te ry toe kyk ek om en toe sien ek die oorledene is besig om daar te rook.

En daarna het u toe weer vir die beskuldigde gekyk? --- Vandaar af toe kyk ek maar weer aan hom want ek het hom nie vas gekyk nie, want ek het nie vir hom kop toe gevat omdat ek nie geweet het hy kom skiet nie.

Goed, nou verstaan ek u nou reg, laat ons dit net duidelik kry. Van die oomblik wat die beskuldigde gewag het vir die kar om verby te gaan en hy toe nou weer begin naderkom het van toe af het u nie weer omgekyk nie, u aandag was toe gevestig voor u op die pad. U het toe klaar vir die oorledene gekyk? --- Nadat daardie kar daar verby gery het het ek toe nie meer agtertoe gekyk nie, ek kyk nou na hom want hier hardloop hy nou na ons toe.

Goed, van daardie oomblik wat hy van die middel van die straat af nadergkom het, totdat hy by u verby is, het u nie weer handbewegings aan die kant van die oorledene gesien nie? U het net sy gesig gesien kort voordat die skoot geklap het? --- Ek het toe nie meer na sy hande toe gekyk nie, ek het net in sy gesig gekyk maar as daar iets in sy hande gewees het dan sou ek dit gesien het.

Maar waarom sê u so? Hoe kan u dit sê as u nie gekyk het na sy handie nie? --- Maar sy oë is mos daar net naby sy hande, ek kon dit gesien het."

As to the movements of deceased's companion immediately prior to the shooting incident, Sarah

testified..../11

testified as follows under cross-examination:

"Toe u oor u linkerskouer kyk en u sien die oorledene en die beskuldigde, dit wil sê net voordat die skoot geval het, het u toe ook die persoon met die bottel in sy hand gesien daar naby die oorledene? --- Ek het hom nie gesien nie, hy was in die winkel, in die kafee.

Wel, dan verstaan ek nie u getuienis nie, as u sê hulle was omtrent drie meter van mekaar af toe die skoot geval het? --- (Hof kom tussenbei).

DEUR DIE HOF: Nee, dit is waar hy uitgekom het. Stel u vraag korrek.

MNR. DU PLESSIS: U sê die oorledene het ongeveer drie meter van die deur af gestaan waar die man met die bottel uit tevoorskyn gekom het, is dit u getuienis? --- Ja.

Het hierdie kafee glasvensters voor? --- Ja.

En u het nie deur die glas gesien waar die man met die bottel hom toe bevind nie? --- Ek het hom mos nie gesien nie, ek het nie na hom gekyk nie. Ek kyk na die man wat beseer is.

Het u gesien toe hy daar aankom, dit wil nou sê die man met die bottel? Het u gesien toe hy naby julle groepie mense kom, nog voordat die voorval plaasgevind het? --- Ja, ek het hom gesien.

Het u gesien of hy gepraat het met die oorledene? --- Hy het nie met die oorledene gepraat nie.

Was hy nie naby die oorledene nie? ---

Nee..../12

> Nee, want daardie man met die bottel het maar net van die beskuldigde se kafee af gekom oorkant die straat.
>
> En hy het toe by die ander kafee ingegaan? --- Ja.
>
> En dit is waar hy was toe die insident plaasgevind het? --- Ja, U Edele."

Appellant, a 47 years old Portuguese-speaking South African citizen, testified in his own defence through an interpreter. He said that he originally came from Madeira and settled in South Africa in 1962. On 12 May 1979 he and Manuel Encarnacao became joint owners of the Sideway Cafe. Since appellant had no capital he borrowed money to finance the business. He said that by the beginning of July 1979 he "was losing quite a lot of money" and that the business "was really going down". He mentioned that "on a few occasions" customers had stolen goods in the shop.

As to the events which took place during the evening in question, appellant testified as follows in his evidence-in-chief:

"Right..../13

"Right, now turning to the day on which the incident of which you are charged occurred, can you firstly tell the Court whether it is correct that you manhandled a Black man and threw him out in the street in the early part of that evening? --- That is correct.

Why did this take place, what was the reason for this? He was stealing out of my shop.

And this man now, where did you leave him? --- I left this particular man outside my shop on the pavement.

Now at a later stage that evening there was a shooting incident? --- That is correct.

Did these two incidents have anything to do with each other? --- No, nothing whatsoever.

Can you give an estimate to the Court approximately how long after the first incident did the second - did the actual shooting incident take place? --- Approximately 15 to 20 minutes.

Right, now when you threw out this person out of your shop, this is now the first incident, did you use a baton or a stick outside in the street? --- During the first incident when I pushed this African gentleman out of the shop I had no weapon whatsoever in my hand."

This passage in his evidence creates the impression that only one person was involved in this incident. From evidence given under cross-examination, however, it appears that two people were involved.

The..../14

The evidence to which I refer, is the following:

> "Can you tell us more about this first incident, what was this incident? --- Two African men arrived in my shop. They approached my counter, in other words they went behind my counter. My partner then grabbed at these two African gentlemen. I saw my partner struggling with these two Black African men. I assisted him by grabbing the other African gentleman.
> BY THE COURT: The other - you mean the second one? --- Yes.
> MR. HANEKOM: What did you do then? --- I then went behind my counter, I was behind my counter. I then grabbed the knobkierie, I hit the African gentleman once, I then grabbed him and threw him out of the shop."

If regard is had to the form of the questions put to appellant during his examination-in-chief, it is clear why he did not at that stage mention the second person. He also explained in answer to questions put by the presiding Judge that the two persons had in fact not stolen any chocolates, but were attempting to do so. If regard is had to the fact that appellant contented himself with merely pushing the one person out of the cafe and leaving him outside on the pavement,

it..../15

it is, in my opinion, probable that nothing had been stolen.

As to what led up to the shooting of the deceased, appellant testified as follows in his evidence-in-chief:

> "Right, now we will deal with the second incident, the actual shooting. Is it correct that at approximately 20h30, that is 8/30 that particular day, that is the 7th of July, you were serving customers in your shop? --- That is correct.
>
> Now tell the Court where exactly there in the shop were you busy, and what exactly were you doing at that point in time? --- I was behind the - I was serving fish and chips with my back towards the door of the shop.
>
> Yes, proceed, what did you then observe? -- As I turned around with the packet of fish and chips I saw deceased put his hand over the counter and he took chocolates from the counter. I then shouted at my partner if he could catch the deceased as I was busy serving customers.
>
> Right, before we proceed now, can you tell the Court what was your reaction when you saw this man stealing chocolates from your shop? -- (Explains to interpreter).
>
> Were you happy about it or not? --- I was already very upset at the first incident. I then shouted at my partner to assist me ... (intervention).
>
> What was your reaction at the second incident, that is the question, Mr. Teixeira? -- I was terribly annoyed.

Now... /16

Now when you shouted at your partner what was the reaction of the deceased? --- He looked at me, he turned around and ran out of the shop.

Now at that point in time when you saw him running out, what did you then decide to do? --- I ran after the deceased. I kept on shouting at the deceased stop, just stop.

Alright, now before we proceed, I think we should make it quite clear at this point in time, can you tell the Court whether you lost sight of the deceased at any stage until the actual shooting? --- I was looking at the deceased all the time and I followed him all along.

Now what was the object in pursuing him? What did you want to accomplish thereby? -- I wanted to bring the deceased back into my shop and phone the police.

Were you interested in recovering the property that you thought that he had stolen or not? --- Yes, I was very much interested and I wanted to have the deceased arrested.

Right, now can you as a fact state that the deceased when he ran out of the shop, still had the chocolates on him on the one hand, or whether he dropped it back to its place? Can you say that that as a fact, or not? --- I am a hundred per cent convinced that the deceased had the chocolates in his hand.

Did you at any stage in the shop see the chocolates in his hand? --- When I saw his hand over the counter he still had the chocolates in his hand.

Now..../17

Now can you tell the Court what you saw when you reached the outside, in other words when you emerged from your shop? --- I saw the deceased in the middle of the street with a bottle in his hand.

Can you tell the Court what his attitude was, was it jovial or was he aggressive? --- I am under the impression that he was aggressive.

Was that the first time that you saw him handling a bottle? --- That was the first time.

Can you now proceed to tell the Court what happened from that point in time onwards? --- The deceased was in the middle of the road with this bottle in his hand. I again spoke to the deceased and asked him please to come back into my shop.

Right, did he obey your command? --- He did not obey my command.

What did he in fact do? --- As I was talking to him and as I was trying to convince him to come back into the shop, he had this bottle as if he wanted to strike me.

Right, as a result of that what did you do? --- I got a friend (fright?), I put my hand in my back pocket and I took out my revolver.

That is the pistol, an exhibit in front of the Court. EXHIBIT 3? --- That is correct.

Now can we just pause here for the moment. Ths pistol before Court, do you keep it in the shop in store, or do you carry it on your person? --- I did not keep this in my shop, I always had this revolver in my back pocket.

Right.../18

Right, now what did the deceased do when he saw the pistol in your hand? --- He ran across the road, in other words onto the other side of the road.

Alright, now did you see anybody else in that vicinity to which he had run? --- The deceased ran to a crowd, there was a crowd of Black African men on the other side of the road.

Right, now did you then turn back or did you follow him? --- I followed the deceased.

Once the deceased had reached the group of which you have told the Court, what happened to him, did he continue running or did he stop? --- He stayed with his friends and apparently these African gentlemen had made a circle and the deceased was standing in the middle of this particular circle.

What was the distance between you and the deceased approximately at that stage? --- Approximately one and a half metres.

BY THE COURT: From where to where, Mr. Du Plessis?

MR. DU PLESSIS: Approximately one and a half metres the witness says, and that is the distance between him and the deceased at that stage when he was encircled by a number of Black men.

BY THE COURT: Between the accused and the deceased?

MR. DU PLESSIS: That is correct, My Lord. What did the deceased then do? --- I kept on saying to the deceased please come

back..../19

back into my shop, and I spoke in English to him. At this stage he lifted the bottle and he aimed the bottle at me as if he wanted to hit me on the head.

Right, now can you tell the Court what was your impression as to the attitude of this group, and more particularly the deceased? Were they a docile group, or were they an aggressive group? --- (Explains to the interpreter).

Will you just answer the question. What was your impression as to the attitude of this group? --- I was under the impression and I can say that they were very aggressive.

Now the accused, did he remain stationary, did he retreat or did he advance, did he come closer, or did he remain stationary with the bottle? --- The deceased advanced towards me.

Alright, now I want you to tell the Court what your state of mind then was, what did you feel when you saw the group and more particularly the accused advancing upon you? --- I felt that my life was in danger.

Right, and did you have the firearm still with you at that stage? -- Yes, I did.

Can you now tell the Court in your own words what did you then intend to do? --- The moment I saw the deceased with this bottle again approaching me I was under the impression that the deceased wanted to injure me, and that my life was in danger. I took out my revolver to frighten the group off ... (intervention).

Now..../20

Now can you just pause there, did you still have the revolver with you or did you have to take it out? --- I already had the revolver in my hand.

Right, yes? --- I did not want to shoot at the deceased directly, I wanted to scare the group and I wanted to scare the deceased off. I did not point directly at the deceased.

Now can you do it by way of elimination. Firstly, can you tell His Lordship whether it was your intention to kill the deceased? --- This was not my intention.

Was it your intention to hit him with a bullet, or to hit any person in the vicinity? --- This was not my intention at all.

Now what did you intend or what did you think at the time, how would you be able to frighten off the group and more particularly the accused? The deceased, I beg your pardon? --- The only way was to use my revolver and scare them off with my revolver.

What did you think would their reaction be if they hear a shot? --- I am sure they would have fled.

Now did you observe any action on the part of the deceased after the shot had rung? --- (Court intervenes).

BY THE COURT: After the shot had ..?

MR. DU PLESSIS: After the shot had rung?

BY THE COURT: After the shot had gone off?

MR. DU PLESSIS: Had gone off, yes? What happened after you had fired? -- (Court intervenes).

BY THE COURT: But he has not told us that he fired a shot yet.

MR. DU PLESSIS: As the Court pleases. What

happened.../21

happemed then, did a shot go off then? That is common cause, My Lord.
BY THE COURT: Then he must say whether he fired the shot or not. -- As I have already explained I was under the impression that the deceased wanted to hurt me or harm me I should say or kill me, and I then had my revolver in my hand, I put my finger on the trigger and I pointed in a general direction.
BY THE COURT: What do you mean with general direction? -- I had no intention of pointing this particular revolver at nobody at all. I just wanted to frighten them off and I had my finger on the trigger, but I did not point this revolver at anybody in particular.

Well, at what did you point it then? -- At nobody, I did not - I do not know if it was because I was very highly strung, I was very nervous, but I did not want to point my revolver directly at anybody.
MR. DU PLESSIS: Alright, now can we just get this from you, did a shot go off or not? -- A shot was fired.
BY THE COURT: By whom? --- I used my revolver and I shot, I do not know at who.

Why don't you just say a shot went off, I fired a shot? -- I fired a shot My Lord.
MR. DU PLESSIS: Now after you fired the shot what did you see, what happened to the deceased? --- I saw the deceased fall slowly to the ground.

At this point in time did you see another man with a bottle near the scene? -- There

was..../22

was another African gentleman next to the deceased with a bottle in his hand.

And what happened between you and this man after the shooting? --- I was under the impression that this other African gentleman with the bottle in his hand would also come at me.

Yes well, what happened then? --- I followed this African gentleman.

Until where? -- I followed him until around the corner of the shop and then I gave up."

Appellant returned to the cafe and unsuccessfully attempted to telephone the police. Eventually he drove to the police station in his motor-car and reported the matter to the police. The next day he made a statement to Capt. Klee, which was handed in at the trial as an exhibit.

Appellant was extensively cross-examined as to the circumstances in which he came to fire the fatal shot. I do not propose to traverse it in any great detail. In considering the effect of the evidence given under cross-examination it must, in my opinion, be borne in mind that the shooting incident was comprised of two stages. During the first stage

appellant..../23

appellant was pursuing the deceased in an effort to arrest him and bring him back to the cafe so that he could be handed over to the police. He was also interested, so he said, in retrieving the stolen chocolates. This led him to confront the deceased where he was standing on the stoep in front of Tony's Eating House. The second stage commenced when deceased advanced towards appellant and threatened to assault him with a bottle. On appellant's version, the distance between them was about ½ metre. It was at that stage that appellant fired the fatal shot. It is abundently clear from the evidence given by appellant that this stage lasted for no more than a few seconds. He was closely cross-examined as to his various thought processes during these few seconds, e.g., as to why he did not retreat rather than shoot the deceased and why he did not call for help.

Appellant was asked to demonstrate in the witness-box how he came to fire. As to this, the record reads as follows:

"MR. HANEKOM: My Lord, I want the witness to demonstrate how he had the pistol in his hand just before the shot was fired. --- I had the pistol as I am holding it now.
BY THE COURT: I cannot see. He shows that it was pointed downwards at an angle. --- Downwards at an angle, and as the deceased approached me with the bottle in his hand coming towards my head I then moved back and I lifted my arm in the air, my left arm, - My Lord, as I backed backwards and as I lifted my arm into the air I must have lifted my hand at the same time and pulled the trigger.
MR. DU PLESSIS: My Lord, may I ask that a description of the actions on the part of the witness be read into the record.
BY THE COURT: In answer to this question the witness demonstrates as follows: That he stepped back because the deceased was threatening him with a bottle which he held aloft, the accused then lifted his left arm more or less above his head in a protective gesture and because he moved back and his body also went slant - went backwards at an angle, therefore the right arm, the hand in which he held the pistol, also must have lifted up and it was at that stage that he fired the shot.
MR. DU PLESSIS: That is correct, My Lord. May I also ask my observation was clear the accused moved back in a jerky movement, he jerked back, that was as he indicated."

The demonstration by appellant, as recorded in the above-quoted passage, has a greater importance than was accorded it by the Court a quo. Appellant was cross-examined at length as to the direction in which the pistol

was..../25

was pointing and in regard to his evidence that he was not deliberately aiming at anybody. It appears from the demonstration that up to about a second or two before the short was fired, the pistol was pointed downwards at an angle, i.e., it was not being aimed at any person. If appellant's evidence in this regard may reasonably possibly be true, it would appear that the lifting of the pistol was not a deliberate act of aiming at the deceased's chest, but may virtually have been an involuntary movement resulting from his lifting his left arm to ward off the threatened blow with the bottle.

The Court a quo accepted the evidence of Sarah and rejected that of appellant as false beyond any reasonable doubt. It is stated in the judgment of the Court a quo that:

> ".... we realise that Sarah was a single witness, and I cautioned myself and my assessors that we must approach her evidence with caution, and only if her evidence is satisfactory in every material respect can we accept her evidence, contradicted as it is by the defence version".

It was held that Sarah made an "excellent impression",

was completely independent and gave her evidence in "a relaxed and dispassionate manner". Notwithstanding a number of contradictions, which the Court a quo regarded as trivial, her evidence was found to be satisfactory in every material respect. As to appellant, it is stated in the judgment of the Court a quo:

> "Even making allowance for the fact that he is on trial for his life, the accused by his demeanour did not impress us favourably".

It was held that on the crucial question as to why he shot the deceased, the appellant gave different versions in his evidence. The Court a quo criticised appellant's evidence that he did not look for a bottle or chocolates after the deceased had been shot. As to this, the judgment of the Court a quo reads as follows:

> "And the accused found no bottle at the scene where the deceased fell down after being shot, nor any chocolates. It is true he says he did not look because he was in such a state but we cannot accept it. If his life was really in danger from a bottle then he would have found that bottle and taken it for the police as evidence to sustain his story of self-defence. And his precious chocolates, for which he was

prepared..../27

> prepared to risk his life, he also did not pick up and take back. The answer is because they were not there, as the bottle was not there."

It was also held that appellant's "protestations of nervousness" when he was confronting the deceased were unconvincing and mere "play-acting".

A further criticism directed to the evidence of appellant was the following:

> "Another criticism we have of the accused is that the Court had great difficulty in hearing from him whether he had fired the shot. We heard expressions like these, 'so a shot rang', and we heard 'a shot went off', and we also heard 'a shot was fired', but for some or other reason he was reluctant to say 'I fired the shot'. Now there is not much in that point but we expect a man when relying on self-defence to say of course I shot the man, but I was entitled to do so."

It may well be asked why the "point" is taken into account at all if there is "not much" in it? In fact, in my opinion, there is nothing in the point. It was never in issue that appellant fired the fatal shot. In the course of his evidence-in-chief, appellant described

as..../28

as best as he could what he had in mind immediately prior to shooting the deceased. If regard is had to the passages in the evidence where the expressions referred to in the judgment appear, it is clear, in my opinion, that appellant used them not because he was reluctant to say that he fired the shot but because he was answering his counsel's questions, as appears from the following passages in his evidence-in-chief:

> "Now did you observe any action on the part of the deceased after the shot had rung? --- (Court intervenes).
> BY THE COURT: After the shot had ...?
> MR. DU PLESSIS: After the shot had rung?
> BY THE COURT: After the shot had gone off?
> MR. DU PLESSIS: Had gone off, yes? What happened after you had fired? --- (Court intervenes)
> BY THE COURT: But he has not told us that he fired a shot yet.
> MR. DU PLESSIS: As the Court pleases. What happened then, did a shot go off then? That is common cause, My Lord.
> BY THE COURT: Then he must say whether he fired the shot or not."
> .....
> .....
> "MR. DU PLESSIS: Alright, now can we just get this from you, did a shot go off or not? --- A shot was fired.
> BY THE COURT: By whom? --- I used my revolver and I shot, I do not know at who.

Why..../29

Why don't you just say a shot went off, I fired a shot? — I fired a shot, My Lord."

It appears that counsel's questions were framed on the basis that it was common cause that appellant had fired the shot.

In so far as the finding regarding demeanour is concerned, it is, of course, so that the Court a quo had the advantage of observing the appellant while he was testifying. On the other hand, he was testifying through an interpreter. In my opinion, it is ordinarily a matter of great difficulty to assess a witness's demeanour where he testifies through an interpreter.

A further criticism of the appellant's evidence referred to in the judgment of the Court a quo was that he gave different versions as to why he shot the deceased. There is some substance in this criticism. However, a careful perusal of his evidence satisfies me that up to the time the deceased threatened to assault appellant, it was his intention to arrest the deceased.

However..../30

However, a different situation arose when, on appellant's version, the deceased, who was no doubt comforted by the presence of other Blacks, threatened to assault appellant with a bottle. As I have already pointed out, only a few seconds elapsed between the show of an aggresive intention on the part of the deceased and the firing of the shot by appellant. Although the appellant's evidence as to why he fired the shot was not wholly consistent, a fair reading thereof satisfies me that what he was attempting to convey was that whilst arrest was uppermost in his mind when he was pursuing the deceased, he was in fear of his life when he fired the shot. Furthermore, some of the versions referred to in the judgment of the Court a quo, indicate to me that it was not always borne in mind that the shooting incident was comprised of two stages, the second of which commenced when, on appellant's version, he had to react to a threatened assault.

Yet..../31

Yet another criticism of appellant's version was that after the shooting incident he did not think of retrieving the bottle handled by the deceased and the stolen chocolates. This criticism is, in my opinion, wholly unjustified. After the deceased had been shot, appellant pursued his companion and then returned to the cafe to telephone the police. In the circumstances in which he found himself, it would, in my opinion, have been a matter for surprise if the appellant were to have acted in the manner suggested in the judgment of the Court a quo. The inference which the Court a quo drew from the appellant's failure to search for the bottle and the chocolates, namely, that he did not look for them because "they were not there", is, in my opinion, unjustified.

Appellant was cross-examined with reference to the contents of the statement he made to Capt. Klee the following morning. He did not have

the..../32

the assistance of an interpreter. In the statement he said, inter alia: "I was certain that he was going to assault me with the bottle and I fired one shot towards him". It was put to him in cross-examination that this was inconsistent with his evidence that he did not "point directly at the deceased". In the statement the appellant did not deal in detail with the circumstances in which the shot was fired. He then knew that the deceased had been hit, and that the pistol must then have been pointing at the deceased. In his evidence, particularly that given in connection with his demonstration as to how he came to fire the shot, he was at pains to explain that he did not consciously aim at the deceased (or anybody else, for that matter). He was asked:

> "Were you aware of the fact that when you fired the shot you pointed the firearm at the deceased's chest? Towards the deceased's chest?"

His reply was:

> "I was not aware of this".

If..../33

If regard is had to the demonstration he gave in the witness-box, it is, in my opinion, reasonably possibly true that at the moment he pulled the trigger, he did not consciously aim at the deceased's chest. In my opinion, far too much weight was given to the suggested contradiction in the evaluation of appellant's credibility. It is worthy of note that in the main the version appearing in the statement is consistent with the version given in his evidence before the Court a quo.

After the conclusion of appellant's evidence, his counsel (Mr. Du Plessis) informed the Court that his mandate had been terminated. The hearing was postponed to enable appellant to obtain the services of another advocate. At the resumed hearing Mr. Bruwer appeared for appellant. He called appellant's partner (Manuel Jose Encarnacao) to testify on behalf of the defence. The Court a quo found him to be an unsatisfactory witness, and appellant's counsel did not seek to rely on his evidence. I do not propose, therefore, to deal with his evidence.

I have already referred to the fact that the prosecution rested its case on the evidence of a single witness notwithstanding the fact, as appears from the record, that there were further witnesses who were, so it would seem, in a position to elucidate the circumstances in which the deceased was shot.

As appears from the judgment of the Court a quo, it was aware of the need to approach the evidence of a single witness with caution and that the evidence of Sarah could only be accepted as decisive of the issues requiring determination if it were found to be clear and satisfactory in every material respect. With respect to the Court a quo, I am of the opinion that it failed to approach Sarah's evidence with the degree of caution which the circumstances so clearly called for. I think I am stating the obvious in saying that in evaluating the evidence of a single witness, a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities.

In..../35

In my opinion, for the reasons to be stated hereunder, the version testified to by Sarah is so clearly improbable that it borders on the incredible.

On Sarah's version, she witnessed four separate incidents that evening. According to her, the deceased was concerned in the first and fourth of those incidents. The fourth incident (when appellant shot the deceased) occurred approximately 30 minutes after the first incident, which terminated when the deceased was pushed out of Sideway Cafe by appellant and left on the pavement. Appellant entered the cafe; the deceased walked across to Tony's Eating House and stood on or near the stoep in front of the cafe and behind the persons standing in the queue. It is clear on Sarah's version that appellant did no more than push the deceased out of the cafe and, so it would seem, lost interest in him when the deceased fell down on the pavement. Appellant quite clearly did not have the deceased's arrest in mind, which renders it probable that he was truthful when he testified that the person who

was pushed out of the shop had only attempted to steal chocolates. It will be recalled that on appellant's version he did push a customer out of the cafe, but that that person was not the deceased. On Sarah's version she herself thought that the first incident came to an end when the appellant re-entered the cafe. On Sarah's version, the deceased's companion (identified as Boet John Tshabalala) was concerned in the second and third incidents. According to her Tshabalala had a bottle in his hand. After the third incident, so Sarah testified, Tshabalala walked across the street, entered Tony's Eating House and only re-appeared on the scene after the deceased had been shot. The lapse of time between the end of the third incident and the commencement of the fourth incident cannot be accurately determined on Sarah's version. On her version, appellant re-entered Sideway Cafe. Shortly thereafter, so she said, he came out once more, proceeded to the middle of the street, where he paused to allow a motorcar to pass, and then

ran..../37

ran across the street at a fast pace, with both hands behind his back, up to the point where the deceased was standing in front of the cafe. Without being provoked or threatened by the deceased, and without saying anything to him, appellant deliberately aimed at and shot him in the chest at virtually point blank range. On Sarah's version, therefore, the appellant must have had a strong feeling of resentment when he pushed the deceased out of his cafe (although he did no more than that at the time), so much so that after the lapse of about 30 minutes, when he saw the deceased standing in front of Tony's Eating House behind the queue, he crossed over the street (in the manner already indicated) intending to shoot the deceased. On Sarah's version, appellant must then have seen deceased from where he was in the cafe, because she says that he did not have to look for the deceased; he ran through a gap in the queue straight up to where the deceased was standing. The only evidence that it was possible for appellant to have seen the deceased from where he was standing inside

the cafe, was that of Sarah. It must also be borne in mind that after the first incident, appellant was also concerned in the two Tshabalala incidents, but did nothing more than to pursue him for some short distance.

It is a matter for surprise that the Court a quo did not address its mind to the improbability inherent in Sarah's version. The Court a quo made a final evaluation of her evidence purely on demeanour and the fact that the contradictions in her evidence were not sufficiently serious to cause it to doubt the truthfulness of her evidence.

It appears from the judgment of the Court a quo that in argument, appellant's counsel submitted that Sarah's evidence that 30 minutes elapsed between the first and fourth incidents was improbable and should not be accepted. This argument is dealt with as follows in the judgment:

> "Mr. Bruwer further argued that her evidence that a half an hour had

> emerged between the throwing out of the deceased and the killing of him, sounds improbable, and that the Court should not accept that. Well, I have already said that she was tested in regard to her estimate of time and found to be accurate. Naturally, we have also considered this matter of a half an hour very, very carefully, and I shall return to the half an hour lapse again at a later stage, but except for these, Mr. Bruwer was unable to contend that there are any grounds for finding her evidence unreliable."

Later on in the judgment, there is a further reference to counsel's argument in regard to the improbability of the time lag of 30 minutes. I refer to the following passage:

> "And again Mr. Bruwer stressed the improbability of the half hour time lag between the throwing out of the deceased and the killing.
>
> I said that I would return to this point. It is significant to us that the accused virtually corroborates Sarah. He says the shooting occurred about 15 to 20 minutes after he had manhandled a Black man and thrown him into the street. It is true, the accused professes that this incident had nothing to do with the shooting. But Sarah says that this man whom the accused manhandled, and threw into the street, was the deceased in the blue overall whom the accused shot to death about half an

hour..../40

> hour later. It is significant also that the accused corroborates Sarah in regard to the chasing after Boet with this bottle after the shooting.
>
> Mr. Bruwer asked us to bear in mind that the accused went into the street and fired the fatal shot in the presence of a number of bystanders. Well, that is so, but people do strange things and we are unable to say that because he fired in the presence of a number of bystanders, that therefore he could not have had the intention to kill."

It is not clear from the judgment precisely what point appellant's counsel made in regard to the time lag of 30 minutes. However, judging by the manner in which the Court a quo dealt with counsel's argument, it would appear that it may have been contended that Sarah's evidence that 30 minutes elapsed between the first and fourth incidents was improbable and should, on that account, be rejected. As to this the Court a quo correctly pointed to the fact that appellant's own estimate was some 15 to 20 minutes. However, there is nothing in the judgment of the Court a quo to indicate that it gave any consideration whatsoever

to..../41

to the inherent improbability in Sarah's version to which I have already referred. In failing to do so, the Court a quo misdirected itself in concluding that Sarah's evidence was satisfactory in every material respect, and that it was safe to convict the appellant on her uncorroborated evidence.

In my opinion, although appellant cannot be described as a completely satisfactory witness, he was not shown to have told deliberate falsehoods, nor did he contradict himself in any serious respect. Whatever his shortcomings as a witness, his version at least has the merit of being consistent with the probabilities.

During the course of cross-examination, the following was put to appellant:

> "Prior to this incident did you know a black male by the name of Morgan Sithole? --- By the particular persons's name, no.

But..../42

> But do you know a person - that person by another name then? --- I do not know the name of the person, I do not know the name of the customers that come into my shop. I do not even speak their language.
>
> Well, I put it to you that prior to this incident on the same evening this Morgan Sithole and the deceased were in your cafe in the kitchen where they were eating and drinking? --- That is not correct."

Morgan Sithole's name is included in the list of witnesses furnished by the attorney-general to the appellant in terms of the provisions of section 144(3)(a) of Act No. 51 of 1977. It is not clear from what was put to the appellant in cross-examination what evidence Sithole would have given if he had been called as a witness, nor what the relevance was of the fact that "prior to" the first incident Sithole and the deceased were in the kitchen of Sideway Restaurant, "where they were eating and drinking".

Another name appearing in the list of witnesses is that of deceased's companion, Boet John Tshabalala. The record reveals that he was available to be called as a witness. From Sarah's

evidence..../43

evidence it appears that Tshabalala was clearly in a position to corroborate her as to what occurred during the second and third incidents and also as to where he was during the fourth incident. It must be borne in mind that on appellant's version there were only two incidents, the first being when he pushed a Black person out of the cafe and the second when he pursued the deceased after the latter had (on appellant's version) stolen chocolates. Tshabalala's evidence would have been most material in resolving the conflict between Sarah and appellant as to the number of incidents.

In the judgment of the Court a quo there is no reference whatsoever to the State's failure to call either Sithole or Tshabalala to testify on behalf of the State, nor to the question whether an inference adverse to the State was justified. The burden of proof rested on the State to prove its case. Counsel for the State must have realised how unsafe it is to rely on the evidence of a single witness. I will disre-

gard.../44

gard the fact that he failed to call Sithole. In the case of Tshabalala, however, counsel for the State must surely have realised that if Sarah's version is to be accepted as truthful, Tshabalala's evidence could have corroborated her evidence in regard to a matter very much in issue - namely the number of incidents. It was clear from Sarah's cross-examination that appellant intended disputing her evidence as to the number of incidents.

It was submitted by counsel on behalf of the State that an inference adverse to appellant could equally be drawn from the fact that Tshabalala was not called to testify on behalf of the defence. In this regard, counsel for the State contended on appeal before this Court that during the trial counsel for appellant indicated that Tshabalala might be called to testify on behalf of the defence and had been furnished with Tshabalala's statement made to the police. This was an ex parte statement made by counsel acting for the State on appeal. I propose to ignore it, because

counsel who acted for the appellant at the time did not appear before this Court, and no reference is made thereto in the record of the proceedings. In my opinion, the failure by the State to call Tshabalala to testify as a witness, justifies the inference that in counsel's opinion his evidence might possibly give rise to contradictions which could reflect adversely on Sarah's credibility and reliability as a witness.

In my opinion, therefore, the Court a quo erred in concluding that the evidence of the single witness, Sarah, was satisfactory in every material respect, and that it was safe to convict appellant of murder on the strength of her uncorroborated evidence, notwithstanding the improbability inherent in her version. This conclusion is, however, not the end of the matter because on appellant's version he fired the shot which fatally wounded the deceased. His plea, one of self-defence, constitutes a denial of the allegation that he acted unlawfully.

In..../46

In the judgment of the Court a quo the following statement appears:

> "Now it is common cause in this case that the accused fired the fatal shot, and indeed in the course of argument by Mr. Bruwer who now appears for the accused, it also was conceded that the accused's purported defence of self-defence had not been established. And the only issue before the Court is whether the accused had the intention to kill the deceased."

It is by no means clear what the Court meant by saying that it had been conceded by appellant's counsel that the "purported defence of self-defence had not been established" (my underlining). If the Court a quo intended to say that appellant had not discharged the onus of proving his defence, and that that was the concession made by his counsel, then counsel was in error in making the concession and the Court a quo misdirected itself. The onus was quite clearly on the State to prove beyong any reasonable doubt that appellant acted unlawfully, i.e., that in the circumstances appellant's action in killing the deceased was not justified.

However, /47

However, I shall assume for the purpose of this judgment that despite the somewhat inept phraseology, the Court a quo did not overlook the incidence of the burden of proof. It is, in my opinion, clear from the record that appellant's counsel did not by his concession made during argument intend to make an admission of fact binding on appellant. It was an indication to the Court a quo that on his view of the evidence he could not argue that the State had not proved that appellant acted unlawfully. With respect to counsel, he erred in making the concession, as will appear from what follows.

Although it is stated in the judgment of the Court a quo that the only issue which required determination was whether appellant had the requisite intention to kill the deceased, the question of self-defence is, nevertheless, dealt with therein, albeit without examining the evidence in any degree of detail. The fact that counsel for appellant made the concession in question did not, in my opinion, relieve the Court a quo of its duty to determine

whether..../48

whether or not appellant had acted unlawfully. It is stated in the judgment of the Court a quo that appellant's counsel had conceded "that the accused placed himself in a dilemma in which he should not have placed himself, and that he had enough time and place to get himself out of the dilemma...". The conduct of appellant in pursuing the deceased was, in all the circumstances, no doubt foolhardy; but it was not unlawful, because he had seen the deceased stealing chocolates and was in law entitled to pursue and, if possible, arrest him. The only conduct really relevant to the issue of self-defence, is that relating to appellant's reaction to the deceased's threat to assault him with the bottle. It was suggested to appellant that he could have called for help. I do not appreciate how a call for help could possibly have availed appellant when (on appellant's version) the deceased advanced towards him evincing a clear intention of striking him with the bottle. It was suggested that appellant "had enough time and place to get himself out of the dilemma". In my opinion, the circumstances indicate

the..../49

the contrary. Even on an armchair approach, it appears that, with the deceased being less than a metre away from him, it would have been an act of folly on appellant's behalf to have attempted to seek safety in flight. In my opinion, the State failed to prove beyond any reasonable doubt that appellant's conduct in killing the deceased was not justified, i.e., that he had acted unlawfully.

In the result, the appeal succeeds and the conviction and sentence are set aside.

P. J. WESSELS

Joubert, J.A.
Galgut, A.J.A. } Concur