157/92

CG CASE NUMBER: 40/90

**IN THE SUPREME COURT OF SOUTH AFRICA**

**(APPELLATE DIVISION)**

In the matter between:

**RUI MANUEL DA SILVA** Appellant

and

**THE STATE** Respondent

CORAM: **E M GROSSKOPF, GOLDSTONE et VAN DEN HEEVER JJA**

HEARD ON: **8 SEPTEMBER 1992**

DELIVERED ON: **18 SEPTEMBER 1992**

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**J U D G M E N T**

**VAN DEN HEEVER JA**

Members of the da Silva family ran a business known as Tex Restaurant and Butchery in Heriotdale, in a building belonging to José Rodrigues Texeira ("the deceased"). On 30 September 1987 appellant shot his landlord inside the premises, immediately went to give himself up to the police, and was in due course charged with and on 24 May 1989 convicted of murder. Extenuating circumstances were found and he was sentenced to 10 years' imprisonment, of which two were conditionally suspended.

The present appeal is against both conviction and sentence, on leave granted by the trial court.

Two very different versions of the same basic events were presented to the court in the course of a lengthy trial.

The State version was that the deceased, accompanied by his minor son Carlos and an assistant, came to the premises in peace and amity on the day in question to collect arrear rental. When it became

evident that he would not receive the full amount owing, the deceased said he intended locking the doors of the business and proceeded towards a door in the rear of the building to do so. Appellant suddenly pulled out a pistol and without any justification shot the deceased, who fell and died on the scene.

The defence version is that the deceased was a hard, violent, lawless man out looking for trouble on that day. He uttered threats, demanded payment in cash, not only prematurely of rental in advance, but also as compensation for a bakkie he accused the da Silvas of having recently stolen, and would accept neither a cheque nor grant the da Silvas any period of grace to enable them to meet his demands. He entered the premises to evict the da Silvas by locking them out and despoil them of their stock, had been drinking and was armed with a knife which he drew and started using; at which, appellant shot him.

From the word go, appellant's version has been

that the deceased had a knife that day. He said so to the deceased's employee, Fernandes, at the scene immediately after the shooting. He reported to constable Young at the charge office that he had fired because deceased had been about to attack da Silva senior with a knife, and repeated this to detective de Kock. De Kock found a knife, exhibit 2, on the waste disposal sink in the kitchen where the shooting had occurred. By the time he arrived many others had been there, including paramedical assistants from the ambulance service who had tried fruitlessly to render first aid to the deceased before removing the body.

The da Silvas' evidence was, without question, flawed; primarily because neither appellant nor his legal adviser took a firm stand as to why appellant was to be held not guilty. The defence vacillated between self defence, defence of appellant's father, and perhaps absence of **mens rea** on the grounds of bona fide error. Add to this inter alia that appellant was linguistically

inept, repetitive and often quite incoherent; that his brother Chico spoke often in the subjunctive, rambled on endlessly, and sought to prove facts from the conclusions to which he jumped; that his other brother Carlos attended a special school which might explain why he did not reply to questions put to him but was unstoppable once launched on a topic; and that the mother of these three was vague, inattentive and constantly sought refuge in "I can't remember".

Nevertheless the State case was also not above criticism; and questions to be addressed on appeal are:

1. Whether appellant had a fair trial; and whether the trial court did not misdirect itself in regard to credibility findings.

2. Whether, if the reply to either of these questions favours the appellant, the conviction can stand.

Facts which are common cause or

uncontradicted, are the following:

1. The da Silvas were in occupation in terms of a verbal lease.

2. In the past, the rental had always been taken to, not collected by, the deceased.

3. A vehicle belonging to the deceased had been driven by the appellant at the request and in the interests of the deceased shortly before, and left in front of deceased's residence from where it was stolen. He suspected the da Silvas of having had a duplicate key made, and reported the theft to the police that morning.

4. He was driven to the da Silva's business by his employee Fernandes after having collected his seventeen-year-old only son Carlos Texeira ("son Carlos") after school to accompany him.

5. The tenant in the adjoining premises, certain Rihm, was not asked for rental. Deceased

visited and drank with him, sending his teenage son next door to summon Carlos da Silva ("brother Carlos"), from whom deceased demanded money.

6. Brother Carlos could produce only R2 000,00 in cash. Deceased sent Fernandes and son Carlos to buy padlocks. He intended closing down the da Silvas' business forthwith, as he had done in the past to other tenants, and did not react to invitations by the da Silvas to discuss payment.

7. After some of the entrances to the business had already been locked on his instructions, and after appellant and da Silva senior had arrived on the premises, the deceased eventually entered and was proceeding to the rear part of the business, accompanied by at least da Silva senior (who has since died), appellant and his brothers. Fernandes was

outside.

8. Near the back door, appellant shot the deceased. Fernandes went to where the deceased had fallen.

9. The son thereafter uttered threats against appellant: the latter says of vengeance, son Carlos has a memory lapse as to the words he spoke.

10 A knife, exhibit 2, was seen on the waste disposal sink shortly after the shooting.

The witnesses produced by the prosecution to testify as to the details of paragraph 8 above were a certain L J Marais, a customer in the shop; Elizabeth Buthelezi, an employee as cleaner and kitchen assistant in the restaurant; and Nhlanhla Mbatha, a counter assistant.

The defence suggested that son Carlos (who as already stated admitted having uttered threats against appellant) had had a hand in building up a false case

against appellant, and denied that he had been, as he said, in the kitchen at the critical time.

Against that background, it was unfortunate that the prosecutor - not, be it said, counsel who appeared before us - withheld two documents from the court until late in the trial.

Documentary proof that blood drawn from the deceased had contained 0.3% alcohol, had been annexed to the post mortem report, but detached from the latter before it went in by consent at the commencement of the trial. The former annexure was not produced during the State case, despite a defence request that the prosecutor do so, and only made available to the defence after the close of the State case. Earlier production may perhaps have affected the testimony of Fernandes, to which I return later. More important, Ms Buthelezi and three other women were listed as State witnesses with working address given as "Tex Restaurant and Butchery", 5 Edison Street, Industria. This is a business now run

business now run by son Carlos after having inherited it from the deceased. Ms Buthelezi emphatically denied that she had worked for the Texeira family at any stage after the shooting. At that stage it became the prosecutor's duty to make available to defence counsel her statement, which he did only after Warrant Officer Baard had testified. Baard had collected her and others at 5 Edison Street to take them to the charge office so that he could take statements from them. He testified that she had told him she had worked for the deceased earlier and for son Carlos after the episode. When she was later recalled at the request of the defence, she persisted in her denial that she had gone to work for son Carlos after the shooting, denied giving the work address reflected in her statement, denied having told Baard that she had also worked for the deceased already before joining the da Silvas, but admitted that her statement, handed in as exhibit J, had been read back to her and translated. The introductory paragraph contains

the sentence:

> "My werkadres is Tex Restaurant and Butchery 5 Edisonstraat Industria"

but the body of the statement goes further:

> "Ek werk tans vir oorledene se familie in Industria by 'n ander kafee. Ek het egter nie hierdie saak met Carlos Texeira of enige ander lid van die Texeira familie bespreek nie en niemand het my gedwing om hierdie verklaring af te lê nie. Carlos Texeira of geen ander persoon het my omgepraat of oorreed om 'n ander verklaring dan die waarheid af te lê nie."

Son Carlos initially could not recall whether Ms Buthelezi worked for him at all, and then said that after "the accident" (his description, applied more than once, of the event of that day) da Silva employees approached him for work and he engaged Buthelezi and "a few others". And Nhlanhla Mbatha's evidence initially reflected her joining the workforce of son Carlos as a fortunate coincidence: she looked for another job and "luckily" found it with son Carlos. Under cross-examination she said she "just thought of the place" and

went to look for work; but immediately conceded that she had actually received an invitation from son Carlos to come and work for him which she had accepted. When she spoke to the police for the first time, she was already in his service.

Against this background, the trial court's assessment of Ms Buthelezi as being a "most satisfactory witness" constitutes a serious misdirection. The court relied on -

(a) the fact that she could not remember that the passage quoted from her statement above, was read back to her. How her failure of memory as to its content can undermine her admission that the statement as such had been read back to and translated for her, after which she signed it, escapes me.

(b) speculation pure and simple, that son Carlos "may have the identity of some of these black women workers mixed up".

(c) a rhetorical question which should have alerted instead of reassuring the court:

> "Why should Elizabeth (Buthelezi) say she did not work there, if she did?"

(d) her failure to corroborate Marais, which "would have been an elementary part of the hypothetical fabrication" had there been one. This overlooks the efficacy of cross-examination as a weapon which is effective for the very reason that no fabrication can envisage all the facets of a story likely to be probed.

On this last aspect, the approach of the trial court was hardly even-handed: discrepant details in the evidence of State witnesses was regarded as showing that they had not been coached, whereas in the da Silvas' evidence it was held to have revealed them as conniving liars.

Appellant's two brothers and his mother gave

evidence for the defence and, as regards detail, were undoubtedly gilding the lily lavishly and unconvincingly. But many aspects of the State case also made collusion among some State witnesses, or animosity towards appellant, possibilities to be considered. I have already referred to son Carlos' admission when it was put to him that he had threatened revenge against appellant. We have the unusual feature that Ms Buthelezi not only denied having entered his employ but denied in her statement what had not yet been alleged: that she had been influenced as to what to say. And in court she painted appellant blacker (or more callous) than she had in that earlier statement, exhibit J. She could not tell the court what the topic of the Texeira-da Silva conversation had been immediately before the shooting because it was conducted in Portuguese. But she says of son Carlos immediately after the shooting,

> "He asked the accused is this the way you do things.
> And then? --- The accused said to him 'fuck off' and the accused grabbed the telephone and

then put it down again and that time the son went to his father.
Yes? --- I have forgotten, the accused said 'fuck off, I am phoning the police'."

Son Carlos himself denies that that happened, nor does anyone else say that it did.

It is unnecessary to analyse the evidence of the State witnesses in detail. What is clear, is that even the supposedly disinterested and reliable witness Marais who was waiting at the counter to buy cigarettes,

(a) is not above criticism. He admits that he originally told warrant officer Baard an untruth: that he had merely heard the shot, seen nothing

(b) corroborates all the da Silvas that Mrs da Silva was at the till up front and not in the kitchen at the time of the shooting or after that at all, and contradicts the two female employees who said that she was there,

moreover in possession of a knife.

The importance of this evidence of Marais escaped the trial court. It undermined the court's theory as to how exhibit 2 got to be on the waste disposal machine. Since son Carlos had told the court that immediately before the shooting he had looked, and there was no knife on the waste disposal machine (nor did he challenge appellant when he then and there alleged that the deceased had been armed with that) this was a matter of considerable importance about which there were many contradictions in the evidence. The trial court appears to have required the defence to nail its flag to the mast of Mrs da Silva's evidence on this issue, in stating that her testimony constituted

> "the defence case that a knife had been picked up from the floor by a policeman in uniform and placed on the waste disposal machine where it was found. This had never been put to any of the police witnesses who testified for the State. I accordingly took steps to call and recall the appropriate witnesses".

He did so then and there, interposing them in the middle

of the defence case. I return to this below. The judgment continues:

> "Up until then the only evidence in that regard was that of the State witness, Paulo Fernandes, to the effect that the accused had told him when he asked where the knife was"

(i.e., when appellant immediately after the shooting spoke of deceased's having been so armed)

> "that it was there on the waste disposal machine, which Fernandes saw, and when he asked him how the knife got from the floor onto the machine, the accused said that a black woman picked it up and put it there. The point about the uniformed policeman had not been put to Paulo Fernandes either when defence counsel informed him that accused would deny having said that a black woman transferred the knife. That was obviously the place to put the real defence to him."

(I underline. It would have been more happily labelled, not "the real defence", but "what Mrs da Silva would say".)

There was of course no obligation on the defence to establish who picked up exhibit 2 from the floor and placed it on the waste disposal machine. All

that was required was to raise a reasonable doubt whether it had not indeed been on the floor before being removed by someone.

The trial court not only ignored material relevant to this issue and placed before it via independent witnesses, but disapproved of the defence conduct in waging what it regarded as a tasteless smear campaign against the dead. Again, it is unnecessary to go into too much detail, but inter alia police evidence and the blood alcohol report revealed that son Carlos and Fernandes were whitewashing the deceased in describing him as an amicable and much loved man, and quite sober on that day. Spoliation was the deceased's method of dealing with rent defaulters. His nature was violent especially when he had been drinking. His fire-arms had been confiscated by the police. He had grabbed at Lt Allers' pistol when the latter was investigating a matter in which a truckload of frozen chickens had been hijacked and allegedly landed up in

possession of the deceased. He had threatened the alleged thief, Sytes, with death for having led the police to him. He looked set to implement the threat by moving towards a knife on a table in his office, which Allers however picked up and put out of reach. Deceased admitted to Allers that Sytes' statement was true that he had used that very knife to gouge out the eye of his employee, certain "Rocky", who had received the stolen goods and since been hastily repatriated to Portugal. There was more of this kind of independent evidence, all of which made appellant's story that deceased had been armed with a knife and ready to use it, and that he brought exhibit 2 with him when coming to close down the da Silvas' business, not nearly as improbable as it might otherwise have been.

The trial court in fact did appreciate that there was a possibility that this had happened, but was triggered into attempting to remove that possibility from the case only by Mrs da Silva's evidence, as set

out earlier. At the request of the court, police were recalled and others called in the middle of the defence case to deny that any of them had removed a knife from the vicinity of the corpse. They all did. Some conceded the possibility that that could nevertheless have been done. The first of the new police witnesses called at the court's insistence, Constable Venter, remembered very little of the events of the relevant evening. The prosecutor who led his evidence was permitted to hand him his statement to refresh his memory, and even to put words in his mouth after the defence had cross-examined him:

> "Sou u dit, dit is tog direk teen u pligte in, niemand mag bewysstukke verwyder nie, u sou mos kan onthou as iemand dit gedoen het? --- Dit is positief."

Defence counsel's objection to the tenor of this "re-examination" was overruled. Detective de Kock testified that he had heard someone say - he could not remember who -"that the ambulance people had picked up the knife

from the floor and put it on the waste machine". The ambulance had arrived on the scene before the police did. The trial judge then caused three of the four "ambulance people" who had been at the scene, to be brought to court. He questioned the first as to whether they had been in uniform, (and received a positive answer), perhaps should it be suggested that Mrs da Silva may have mistaken the wearer for a policeman. All three denied having seen the knife on the floor (or other objects it was common cause had been there) or having picked it up. The trial judge deemed it unnecessary to have the fourth person who came with the ambulance, a nursing sister, called since "Mrs Da Silva did not allege that she saw a woman pick the knife up".

That she was wrong, or lying, that a policeman had done so, still left the possibility open that the knife had been on the foor, and been moved. The trial judge not only did not appreciate this possibility, but theorized that

> "the Da Silva family ... concocted this spurious defence of a knife attack, and in our opinion the brain behind is that of Mrs da Silva. She had given the fire-arm to the accused. When the shot was fired she sized up the situation at once. So she possessed herself of exhibit 2, which was by the toaster, and was seen walking with it in the kitchen. It was hardly possible to place the knife surreptitiously on the floor because deceased's son was there; Elizabeth Buthelezi was there and Paulo Fernandes soon appeared. But it was a simple matter to place it unnoticed on the waste machine where it was pointed out to Fernandes. And then the mother came into this court and falsely alleged that she saw a policeman in uniform pick it up and put it on the waste machine."

Reading the da Silvas' evidence convinces that the court flatters them in inferring them to be possessed of the quickness of wit and telepathetic empathy necessary to make this theory at all tenable.

Finally, and for good measure on this issue, both the prosecutor and the court at the end of the case recognized the existence of that very possibility, despite appellant's conviction of murder. The

prosecutor asked that the firearm, exhibit 1, be forfeited to the State. A knife, exhibit 3, had been produced by the defence as being the one ordinarily used by da Silva senior, to counter the evidence of Ms Buthelezi and Ms Mbatha that exhibit 2 qualified as such. The prosecutor asked that this be returned to the accused. Allers had said that the knife, exhibit 2, found on the waste disposal machine looked identical to the one he had seen in deceased's office, which had allegedly cost Rocky his eye. Allers also said he could not find that knife when he went back to deceased's business after the case had been opened against appellant. The prosecutor asked that exhibit 2 should also be forfeited to the state "as it is not clear on the facts whose knife it was". And the judge a quo ordered just that.

In my view the reply to the first question posed earlier, is that appellant did not have a fair trial; and to the second, that the misdirections as to

credibility were material. Short of a confession of guilt by the appellant his conviction cannot stand nor be replaced by a conviction of some lesser offence. The glaring flaws in the defence evidence cannot discharge the onus which burdened the State, of establishing appellant's guilt beyond reasonable doubt, and R v DIFFORD 1937 AD 370 is still good law. We cannot be sure precisely what occurred in the kitchen and so sufficiently sure of the wrongfulness of appellant's conduct. The truth probably lies somewhere between the two largely fictional accounts which were presented to the court.

The appeal succeeds. The conviction and sentence are set aside.

L VAN DEN HEEVER JA

E M GROSSKOPF JA)
GOLDSTONE JA) CONCUR: