Case No: 668/91
N v H

ANTONIO SOUSA DE OLIVEIRA — Appellant

and

THE STATE — Respondent

SMALBERGER, JA -

REPORTABLE

Case No: 668/91
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

ANTONIO SOUSA DE OLIVEIRA Appellant

and

THE STATE Respondent

CORAM: SMALBERGER, NIENABER, JJA,
et HARMS, AJA

HEARD: 4 MAY 1993

DELIVERED: 18 MAY 1993

J U D G M E N T

SMALBERGER, JA:

The appellant was convicted in the Witwatersrand Local Division by STEGMANN, J, and two assessors of murder (count 1) and attempted murder (counts 2 and 3). The convictions followed upon a shooting incident which occurred at the appellant's

residence in Rewlatch, Johannesburg, on 25 September 1988. The appellant was sentenced to 12 years' imprisonment on the murder count, and to 8 years' imprisonment on each of the other counts. The sentences were ordered to run concurrently, resulting in an effective sentence of 12 years' imprisonment. The appellant's subsequent appeal to the Full Bench of the Transvaal Provincial Division was dismissed. With the requisite leave he now appeals to this Court against his convictions and sentences on all three counts.

From the evidence the following picture emerges. The appellant was born in Madeira in 1956 of Portuguese-speaking parents. His family emigrated to South Africa in 1969. The appellant is illiterate. His home language is Portuguese and he speaks only a limited amount of English. From about 1974 the appellant and a certain Mrs Cordeiro lived together as husband and wife, initially in Boksburg and later in

Rewlatch. At the time of the shooting incident the appellant was in partnership with three of his brothers. Between them they owned and ran a number of small shops or businesses. The appellant assisted in the operation of the partnership business at Langlaagte.

The complainant on count 2 was Mr Vusi Nyandeni ("Vusi"). He commenced employment with the appellant in Boksburg in 1981. He was then still a teenager. When later that same year the appellant and Mrs Cordeiro moved to Rewlatch, Vusi accompanied them and took up residence in the servant's quarters at the back of the house. He continued to live there, and to be employed by the appellant, until the shooting incident. In March 1988 one Tandi Adams moved in with Vusi and lived with him in his quarters for the duration of his stay there. Although the relationship between the appellant and Vusi was essentially that of employer and employee, it had developed in the course of time

into a deeper, more friendly and trusting relationship, a state of affairs that persisted until the shooting incident.

The house occupied by the appellant at the time was situated in an area described by various witnesses, including certain policemen, as a dangerous one. There had been a number of prior incidents of robbery, housebreaking and theft committed against inhabitants and properties in the neighbourhood. The house stood on a corner plot and was bounded on its western side by Impala Road and on its southern side by Southern Klipriviersberg Road. In a fence adjoining the latter road, at the eastern corner of the property, there was a gate. This gate opened onto a cement driveway which sloped gently downwards towards the garage. The driveway was four to five metres wide and lay between the house and a pre-cast concrete fence which formed the eastern boundary. The area in

question was a relatively confined one. There was a wall which connected the far (north-eastern) corner of the house with the garage. In the wall was a steel door which gave access to the back yard where Vusi's room was located. The route normally taken by Vusi to his room would have been via the driveway and the steel door. On the eastern side of the house there were two windows overlooking the driveway. The first of these (when proceeding down the driveway towards the garage) was that of the spare bedroom; the second was that of the bedroom shared by the appellant and Mrs Cordeiro. The window of this room opened towards the left (i.e. towards the garage). Both windows were burglar-proofed (as indeed was the rest of the house).

I come now to the events of Sunday 25 September 1988. On that morning the appellant, Mrs Cordeiro and Vusi, as they were accustomed to do, left for the shop at Langlaagte at about 05:00. They

carried on business until closing time at 13:00. Before leaving the shop the appellant sent for a bottle of whisky at a nearby shebeen. He and Vusi then proceeded to partake of some drinks. Thereafter the three of them left in the appellant's vehicle. They took the day's takings with them. At Vusi's request he was dropped in Hillbrow. The appellant and Mrs Cordeiro proceeded to their home. There they had a meal, and eventually both went to lie down and sleep. Meanwhile Vusi had made his way to Alexandra to the house of his brother, Mr Paul Peter Nyandeni ("the deceased"). There they were joined by Mr Isaac Nzimande ("Isaac") and Mr Jochonia Modisaitsele ("Jochonia" - the complainant on count 3). The four of them went to Daveyton in Isaac's car to visit a brother of Vusi and the deceased. On their way back to Alexandra, Vusi asked Isaac to take him to the appellant's house. En route they stopped at a cafe where Vusi purchased

cigarettes and a large bottle of Coca-Cola. On arrival at the appellant's house Vusi invited his companions to his room to share the Coca-Cola he had bought. They entered the premises through the gate and proceeded along the driveway to the steel door. This was just after 17:00.

What has been set out thus far is either common cause or reflects factual findings made by the trial Court which are not in dispute for the purposes of the present appeal. With regard to the events that followed, particularly those surrounding the actual shooting, there was considerable divergence between the State and defence versions.

According to the State witnesses (Vusi, Isaac and Jochonia) they walked down the driveway quite openly, past the two bedroom windows, to the steel door. It was locked. Vusi knocked on the door in the hope that Tandi Adams might be there to open it. His

knock elicited no response from anyone. He then proceeded to the front of the house where he rang the door bell. There was no response there either. He walked back towards the steel door. While he was doing so Mrs Cordeiro appeared at her bedroom window. She asked Vusi what he wanted. He requested that the steel door be opened. The appellant then appeared at the same window. He too enquired of Vusi what he wanted. Vusi explained that he was trying to gain entrance to his room. The appellant, noting Vusi's companions, told Vusi that he had previously warned him not to bring strangers onto the premises and that if it happened again he would shoot him. The appellant then left the window. He reappeared shortly thereafter armed with a pistol, and without uttering a word he commenced firing at Vusi and his companions.

The defence did not dispute that on the afternoon in question the appellant fired at least six

shots through his bedroom window. It is common cause that the deceased died of a gunshot wound of the chest when one of the bullets fired by the appellant struck him in the back and penetrated his chest cavity. Another bullet struck Vusi on the top of his head penetrating his scalp. A third bullet narrowly missed Jochonia, tearing a sleeve of the shirt he was wearing. It was disputed, however, that the shots were fired in the circumstances deposed to by the State witnesses. The appellant did not testify at the trial. The defence version of the events rests upon the evidence of Mrs Cordeiro and a statement made by the appellant to the police relating to the shooting which was proved as part of the State's case.

Mrs Cordeiro's evidence was to the following effect. She was awoken from her sleep sometime after 17:00 by the barking of their two dogs. She went to the window of her bedroom and peeped out but did not see

anything or anybody. She then proceeded to the adjoining spare bedroom. On nearing the window of that room she observed through the net curtain three or four black men outside close to the window. They were in the driveway. She did not recognise any of them. She took fright at seeing them and ran back to her bedroom where she shouted to the appellant: "Antonio, Antonio, Antonio, there are unknown black men outside". At the same time she heard glass break. She described herself at that stage as being "highly excited and nervous". The appellant woke up (what she termed "an abrupt awakening"). He sat on the edge of the bed and said to her: "Be calm, be calm, I will see what is going on and I will sort this out". His pistol was lying on his bedside table. The appellant then got up and approached the window. She herself went to the adjoining bedroom, but before she reached the window she heard shots being fired. She then started screaming.

(On her evidence there would have been no opportunity for any discourse between the appellant and Vusi before the shooting started.)

The statement subsequently made by the appellant to the police reads as follows:

> "On Sunday 1988/09/25 at about half past three I went to sleep. At about twenty past five my wife called me and said there were about four or five blacks in the driveway. My wife started to scream. I told my wife not to worry. I would sort it out. I then took my pistol from the table next to my bed and I fired six or seven shots and these blacks ran away. I saw afterward that two black males were lying on the ground. I was not thinking about anything at the time as I was half asleep when I shot these shots. I was not under the influence of liquor at the time I fired these shots."

I do not propose to deal with the events that followed on the shooting as they are not relevant to the question of the appellant's guilt or innocence. Suffice it to say that after the shooting the deceased's body was lying at the south-eastern corner of

the house; Vusi was lying in the middle of the driveway where he had fallen after being shot. It is also worthy of mention that when the appellant realised that Vusi had been shot he immediately proceeded to render assistance to him.

After carefully analysing the evidence the trial Court concluded that the evidence of Mrs Cordeiro could reasonably possibly be true, and that it could not accept as the truth the evidence of Vusi, Isaac and Jochonia that the appellant had recognised Vusi and had spoken to him before firing directly at him and the others. It is not necessary to traverse the trial Court's reasons for arriving at its conclusions. Suffice it to say that they are eminently sound and persuasive. Apart from anything else, it is extremely unlikely, given the nature of their relationship, that the appellant would have fired at Vusi knowing that it was him.

It follows that the correctness of the appellant's convictions must be judged in the light of Mrs Cordeiro's evidence and his own statement. The main issue revolves around the appellant's state of mind at the time of the shooting. It is therefore also pertinent to consider what was put on his behalf under cross-examination, and the effect of his failure to give evidence.

The impression gained from the appellant's plea explanation at the commencement of the trial, and what was initially put to certain of the State witnesses under cross-examination, was that that he sought to justify his conduct on the basis that he had acted in defence of his life and/or property i.e. private defence (or as it is still commonly, but less accurately, referred to, self-defence) . (See as to the use of the term "private defence", and the need to do so, Burchell and Hunt: South African Criminal Law and Procedure :

Vol I : p 322; Lawsa: Vol 6 : p 36; Snyman: Criminal Law : 2nd Ed : p 97.) It subsequently transpired that the defence was rather one of putative private defence ("putatiewe noodweer"). From a juristic point of view the difference between these two defences is significant. A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective - would a reasonable man in the position of the accused have acted in the same way (S v Ntuli 1975(1) SA 429 (A) at 436 E). In putative private defence it is not lawfulness that is in issue but culpability ("skuld"). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful.

His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude dolus in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide.

On appeal the unlawfulness of the appellant's conduct was not in issue. Accordingly the only issue was whether the State had proved beyond all reasonable doubt that the appellant subjectively had the necessary intent to commit the crimes of which he was convicted, in other words, that he did not entertain an honest belief that he was entitled to act in private defence. Any argument based on the reasonableness of the appellant's belief and conduct was not persisted in, and rightly so.

The appellant did not testify as to his state of mind at the time of the shooting. Whether or not he

held an honest belief that he was entitled to act as he did must therefore be determined with regard to such other evidence as reflects upon his state of mind, and inferential reasoning.

One can commence with the premise that no reasonable man in the circumstances in which the appellant found himself would have believed that his life or property was in imminent danger. As appears from Mrs Cordeiro's evidence (and the appellant's statement), all that she told the appellant was that there were a number of black men outside in the driveway. According to Mrs Cordeiro, when she reported this to the appellant she heard glass break. The appellant makes no mention of glass breaking in his statement. The only glass that broke on the premises that evening was the Coca-Cola bottle, presumably when it was dropped. At what precise stage this occurred is not clear bearing in mind that material aspects of

Vusi's version of the events were not accepted. What is significant is that any noise that may have came from breaking glass came from outside. It was not suggested, and could not have been thought, that the noise of breaking glass came from either of the bedroom windows (or any other window of the house for that matter). In other words, there was nothing to suggest that attempts were being made at a forcible entry. At the trial it was put to Vusi and his companions that they had preceded along the driveway not openly, but stealthily, so as to disguise their presence on the property, a suggestion they denied. There was no evidence to prove that they did so. Even if they had, it would not be relevant as the appellant (and accordingly the reasonable man in his position) was not aware of the manner in which they approached.

The reasonable man in the appellant's position would therefore only have known that there were

strangers on the premises. He would also have been aware of the fact that the area in question was a dangerous one where robberies and housebreaking were not uncommon. There was, however, no indication that any attack on the house or its occupants had commenced or was imminent. The appellant was in a situation of comparative safety in his bedroom, in a secure and burglar-proofed house and armed with a pistol. In those circumstances it is inconceivable that a reasonable man could have believed that he was entitled to fire at or in the direction of the persons outside in defence of his life or property (and that without even a warning shot).

One would normally impute to a person in the position of the appellant (in the absence of any evidence by such person as to his state of mind at the relevant time) a state of mind akin to that of a reasonable man. In a given case, however, proved facts

or circumstances may exist which would justify a different conclusion. In the present instance there are none. This is so even if it is permissible to have regard, when dealing with the convictions, to the evidence led on the appellant's behalf in mitigation of sentence (a matter on which I refrain from expressing any view), which led the learned trial Judge to hold that the appellant has "a marked dullness of intellect" and "has not been blessed with more than a comparatively low level of intelligence". Even from someone with the appellant's limited intellectual capacity one would prima facie not expect a reaction different from that of the reasonable man, having regard to the particular circumstances of the present matter.

In the circumstances there was prima facie proof that the appellant could not have entertained an honest belief that he was entitled to act in private defence. The appellant failed to testify as to his

state of mind and to refute this prima facie proof. His silence must weigh heavily against him. As was said by Schreiner J in R v Mohr 1944 T P D 105 at 108:

> " [I]t is not easy for a Court to come to a conclusion favourable to the accused as to his state of mind unless he has himself given evidence on the subject."

(See too R v Deetlefs 1953(1) SA 418 (A) at 422 G; S v Kola 1966(4) SA 322 (A) at 327 F; S v Theron 1968(4) SA 61 (T) at 63 D - H.) The appellant's failure to testify therefore resulted in the prima facie proof that he did not entertain an honest belief that he was entitled to act in private defence becoming conclusive proof of that fact. The appellant's defence of putative private defence was therefore correctly rejected by the trial Court.

In his statement the appellant said, inter alia, "I was not thinking of anything at the time as I

was half asleep when I shot these shots". The appellant's counsel sought to rely on this excerpt to establish a defence. The nature of such defence is not clear. The defence of putative private defence implies rational but mistaken thought. It is inconsistent with a lack of awareness of what you are doing. The excerpt is therefore not relevant to that defence. Nor do the words per se establish an absence of intent. At best they might point to a lack of criminal capacity or responsibility ("toerekeningsvatbaarheid") but the appellant's counsel, correctly in my view, specifically disavowed any reliance on such defence.

The excerpt must in any event be seen in its proper context. It appears in a statement which formed part of the evidential material before the trial Court. It cannot be elevated to a proved fact. Its cogency must be determined in the light of all the relevant

evidence as well as in the context of the statement as a whole. If regard is had to Mrs Cordeiro's evidence and the rest of the appellant's statement it is quite clear that he was aware of what he was doing despite an "abrupt awakening". Mrs Cordeiro testified (as previously mentioned) that the appellant said to her: "Be calm, be calm, I will see what is going on and I will sort this out", and his own statement records that he told her "not to worry" and that he "would sort it out". These utterances reflect presence of mind on his part. His further acts in picking up his pistol, moving to the window and opening it before shooting also show an awareness of what he was about. His conduct was not that of a person whose mind was befuddled with sleep. That he was at all times aware of what he was doing is also confirmed by what was put on his behalf under cross-examination to certain witnesses, the precise details of which need not detain us.

The evidence establishes that the appellant fired at least six shots in rapid succession into a confined area (the driveway) while aware of the presence of people there. Two of them were struck and one was narrowly missed. Even if one accepts in the appellant's favour that he had not previously seen the people he fired at, he knew they were in the driveway. He fired in the direction in which they would have had to go if they had wanted to leave the driveway, which is the direction they could have been expected to take. He did not fire into the air. The injuries to the deceased and Vusi, the result of direct hits, bear testimony to the fact that at least some of the shots had a trajectory likely to strike a person. In any event there was a substantial danger of bullets ricocheting off the walls adjacent to the driveway and striking the persons on it. The only reasonable inference to be drawn from the evidence, as well as the

appellant's failure to testify, is that he must have foreseen, and by necessary inference did foresee, the possibility of death ensuing to the persons outside, but reconciled himself to that event occuring. In the circumstances he was correctly held to have had the necessary intention to kill in the form of dolus eventualis. His appeal against his convictions must accordingly fail.

In passing sentence the learned trial Judge took into account the objects of punishment and such other considerations as are generally acknowledged to be relevant to the determination of an appropriate sentence. It is not contended that he misdirected himself in any material respect. What is claimed is that on a proper conspectus of all relevant factors, the sentences imposed induce a sense of shock.

As I have mentioned, the appellant is a person of sub-normal intelligence. The trial Judge accepted

that he was not an aggressive person by nature, and that there was no reason to fear that he would act in the same way again. The evidence shows that he was abruptly awakened by a nervous and excitable woman (Mrs Cordeiro) who clearly overreacted to the presence of what she perceived to be total strangers in the driveway. The appellant did not allow himself much time for reflection before embarking upon the course he followed. What actually caused him to fire in the irresponsible manner in which he did is largely a matter for conjecture. However, Mr Dorfling, for the State, fairly conceded that the appellant probably believed that there was some danger looming. (This is not the same as saying that he honestly believed that he was in danger, which I have already found not to have been the case.) Unfortunately, instead of contenting himself with, at most, firing a warning shot, he grossly overreacted to a situation which was not life-

threatening in any way.

The appellant's conduct must be viewed in a serious light. His precipitate action and undisciplined and unlawful use of a firearm resulted in the death of the deceased and serious injury to Vusi. It is purely fortuitous that Jochonia was not also seriously injured. There was no need for the appellant to have fired a single shot, let alone six or more. At the same time there was an unfortunate combination of circumstances which contributed to the appellant acting as he did - a situation unlikely to repeat itself. As the trial Judge correctly remarked, "heavy punishment is not necessary to prevent you from committing such crimes again". One thing is abundantly clear - there is no evidence to suggest that the appellant's conduct had any racial overtones.

I am mindful of the fact that the question of punishment is pre-eminently a matter for the discretion

of the trial Judge, and that this Court will not lightly interfere with the exercise of that discretion or arrive at a different assessment of what constitutes an appropriate sentence. Having said that, it seems to me, on a proper conspectus of all relevant considerations, that this is not a case which merits punishment to the extent of that imposed. I am of the view that a sentence of 9 years' imprisonment on the murder count and 5 years' imprisonment on each of the attempted murder counts would have been appropriate. The difference between such sentences and those imposed is sufficiently material or striking to compel interference by this Court.

The following order is made:

1) The appellant's appeal against his convictions is dismissed.

2) The appeal against the sentences is allowed, and the sentences are altered to

read as follows:

(i) Count 1 (Murder): 9 year's imprisonment;

(ii) Counts 2 and 3 (Attempted murder): 5 year's imprisonment on each count.

(iii) It is ordered that the sentences on all three counts are to run concurrently.

3. The Registrar is directed to transmit a copy of this judgment to the Department of Correctional Services.

J W SMALBERGER
JUDGE OF APPEAL

NIENABER, JA )
HARMS, AJA ) concur