CG CASE NUMBER: 126/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BENJAMIN NGCOBO Appellant

and

THE STATE Respondent

CORAM: E M GROSSKOPF, VAN DEN HEEVER et HARMS JJA

HEARD ON: 14 MARCH 1994

DELIVERED ON: 25 MARCH 1994

J U D G M E N T

VAN DEN HEEVER JA

2 On Sunday, 10 August 1986, appellant broke into the house of a Mr Luus at 33 Stumke street, Witpoortjie, in the district of Krugersdorp. He stole a number of items including a Rossi .38 special revolver, a video recorder, some cash, and a brown bag into which he put other smaller items.

Later that night he and two companions walked past a stationary car in Kagiso, and aroused the suspicions of the driver. That was Detective Sergeant Mathe. He and a colleague, in plain clothes and an unmarked car, were on patrol in Kagiso and had stopped in Hintsa street to drop off two passengers. One of appellant's companions was carrying the stolen video recorder, the other the brown bag. Mathe instructed his colleague, constable Moeketsi, to follow the three on foot. He himself would circle with his vehicle and head them off where they were crossing open ground littered with rubbish, with the result that it could not be traversed by car.

In executing this manoeuvre, Mathe briefly lost sight of the four on foot, then saw three fleeing and Moeketsi lying on the ground screaming. He had been shot through the neck. Mathe ran to him. Moeketsi's firearm was in its holster at his side. Mathe put him in the car, took him to the Leratong hospital, returned to the scene off Hintsa road and found the video recorder and bag which had been abandoned within metres of where Moeketsi had been felled.

The following day, 11 August, Leratong hospital telephoned Mathe and asked him to fetch Moeketsi and take him to the Milpark Clinic. He did so.

Sixteen months later Moeketsi who had not been able to resume police duty since the day he was injured, died.

Arising out of appellant's actions that night he was charged in the Witwatersrand Local Division with

housebreaking with intent to steal and theft, murder, and possession of an unlicensed firearm and ammunition for it. The last two counts were withdrawn at the beginning of the trial. The reason became clear after appellant had been convicted on the others.

Moeketsi to whom I refer in what follows as the deceased, was not the only policeman appellant wounded that night. After losing his booty other than the firearm and a little cash, appellant woke a friend, Nkwane, and took him drinking. He told Nkwane of what he had done earlier that night: burgled a house in Witpoortjie, and shot a man he thought wanted to rob him of his booty, which he had abandoned. When appellant and Nkwane left the shebeen, appellant shot and wounded another constable, who survived. The two went from there to a bar in Dobsonville where appellant sold the revolver.

He was arrested, long after, for this second shooting, and convicted of attempted murder and the

illegal possession of the firearm. He pointed out Nkwane as having been with him at the time, Nkwane came out with what appellant had told him of the earlier events of the same night, and the present charges followed. It was because he had already been convicted in respect of possession of the firearm that night at an earlier trial, in May 1989, that the relevant charges were dropped when he stood trial, in February of 1992, in respect of the death of the deceased and the burglary at Luus' house.

He was convicted on both those charges, and sentenced to four years for housebreaking and theft, and 15 years on the murder charge, the sentences to run concurrently.

His appeal is brought by leave of this court against his conviction of murder.

The attack against that was two - pronged. It was argued that the prosecution had not proved beyond reasonable doubt that appellant's shooting of the

deceased was unlawful; or that that shooting had caused the death of the deceased.

The evidence against appellant on the merits consisted of that of Mathe; what he himself had said to Nkwane; and a statement he made to a magistrate three days after his arrest, exhibit C.

I start with the latter. After telling of the burglary, appellant continued -

> "Ek het die goedere gevat en saamgebring na Kagiso toe, (n) et toe ek oor die straat loop toe ry 'n kar by my naby (verby?). Dit draai weer terug in my rigting. Terwyl ek nog die kar kyk het iemand van agter gekom. Hy het 'n vuurwapen in sy hand gehad. Hy vra toe wat se goed het ek by my. Terwyl hy so praat het, het hy die vuurwapen op my gerig. Ek het ook die vuurwapen by my gehad, maar ek het dit nie op horn gerig nie. Ek het gedink die persoon wil die goedere by my vat, want ek het die geld en 'n videomasjien by my gehad. Ek het toe weggehardloop. Ek is na my vriend se huis toe. Ek het daar geklop. Hy maak oop. Ek het toe vir hom gesê dat waar ek gegaan het om geld te soek het ek toe geld gekry. Ek sê toe vir hom dat ek iemand met 'n vuurwapen geskiet het. Ek is toe saam met hom na 'n smokkelkroeg."

Nkwane's evidence has already been summarized

above. His ipsissima verba (in so far as one can use that description of a version given through an interpreter) in evidence in chief were -

> "Whilst we were walking he told me that he had a video and some money and that those items were in a bag. And he told me that he had shot a person and he told me that that person wanted to rob him.
>
> He told me that there was a vehicle, the vehicle came, it had been driven and that one person alighted from the vehicle and that that person who was alighting from the vehicle had a firearm with him . . . and that that person stopped them when they were three and that he was having a firearm, the one who alighted. He told me that they uplifted their hands and he told me that he fired a shot.
> Who fired a shot? ---(Appellant) and he told me that they then ran away. This is now all three of them and that they left all the items that they had in their possession at that scene."

Cross-examination elicited no greater detail on this part of the story:

> "So, the accused . . . told you that he shot a person and that that person wanted to rob him, is that correct? --- He said to me it appeared, as though."

Appellant at the trial put the date of the

burglary and shooting in June but was clearly wrong on this score. His evidence about why he had fired at the deceased was that the deceased came after him, asked "where are you from and where are you going to?", then produced a firearm and pointed it

> "at us ... He instructed us to uplift our hands ... It came to my mind, I wondered why does he say these words, whilst pointing a firearm at me". The deceased cocked the gun, and then "I lost my mind and I thought this person was going to shoot at me. There was also a vehicle approaching us from behind at a high speed. I then decided to fire a shot and ran (run?) away. I did fire a shot. I was with some other people and they had some articles in their possession ... and they dropped these articles on the ground and we ran away".

He had not known that deceased was a policeman.

Under cross-examination he said i.a. that he saw the deceased fall, "and when he had fallen down he was still having his firearm in his hand". It was put to him that he knew that it would spell trouble if he were found in possession of a stolen firearm while in the company of two others carrying stolen goods. He

conceded that.

> "(Y)ou appreciated that that man might want to arrest you and so you shot him so that you could get away from him and so avoid arrest? -- I shot because I thought that this person was going to take my money and I thought the person was going to rob me. ... The money I had stolen where I had broken into.
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> When I shot at him, he fell down. I did not think of running away immediately. I thought of picking up those items. I thought I should pick up these items and whilst 1 thought of taking them along, the person who had fallen down was screaming with the firearm in his hand and I saw a vehicle coming. It was quite close to me. ... I thought that this car can knock me or the people inside the car might shoot me. I left those items there and ran away.
>
> I shot him so that I could run away but I do not believe it was in August."

The court recalled Mathe. He repeated that the deceased's firearm was in its holster when Mathe came to him where he was lying screaming. This was not challenged. He conceded that had the deceased drawn it and returned it to its holster again, he, Mathe would not necessarily have seen that.

In rejecting appellant's version that he had faced a cocked firearm, the trial court found appellant to have lied about the month in which the burglary and shooting had taken place. This was however hardly a matter of any importance. Luus had suffered only one burglary. Appellant agreed that the burglary and the shooting occurred during the same night. The court also relied on the improbability that appellant would have drawn a gun and fired in the face of a service revolver already aiming at him; and of the deceased's being able to return his revolver to its holster after receiving the serious neck wound, as appellant's counsel suggested could have happened. The truth of Mathe's evidence that when he came to where his colleague lay, the latter's weapon was in its holster, was not in issue.

Those are not the only improbabilities in that part of appellant's version of events. A more serious criticism is the gross improbability that the deceased

should have wanted to return his revolver to its holster at all after falling with it still in his hand, instead of firing at his attackers. On his own evidence appellant was in the immediate vicinity of the stricken man, and still looking to pick up the stolen goods.

More important, the finding that appellant "deliberately fired at the deceased at close range ... He probably wanted ... to avoid losing his loot" is in accordance with appellant's own evidence, as the quotations from that make clear. From the beginning that was the reason he gave for having fired at the deceased. The story that he thought the deceased was going to shoot him, was a late and passing embellishment. He did not stay with it but under cross-examination by the prosecutor came back to the version he gave hot off the press, as it were, to his good friend Nkwane. He had no fear of the deceased. It was not from him that he fled. He did so only when Mathe's car came too close for comfort. Appellant did not

 purport to have shot deceased in defence of life and limb. I have difficulty with the notion that a burglar could escape criminal liability for violence used in protecting his unlawful possession from a competitor in crime. The reason given for regarding the use of violence as being justifiable in private defence, is "dat reg nie voor onreg hoef te wyk nie". (DE WET & SWANEPOEL, STRAFREG 4th ed p 75; SNYMAN, STRAFREG 3rd ed p 111.) When violence is used in defence of an indisputable legal interest, that violence must be proportionate to the harm to be averted; and the test is an objective one. Cf Ex parte DIE MINISTER VAN JUSTISIE: In re S v VAN WYK 1967 (1) SA 488 (A) 497H-498C, 503H-504B. This burglar could by no stretch of the imagination be regarded as having been justified in using a firearm which he knew was functional (having checked on that earlier that evening) against someone wanting to deprive him of what he had stolen from Luus. I come then to the issue of causation.

The deceased was removed to Milpark so that he could be attended to by a cardio-thoracic surgeon, Dr Nicolaou. He told the court that when the deceased was admitted to Milpark hospital he had a raging temperature. A bronchoscopy revealed that he had an extensively lacerated oesophagus and a small tear in his trachea. Infection had set in. There was an abscess where the bullet had emerged above the right shoulder blade. Pus was extending along the track of the wound, leaking from the tear in the oesophagus, and starting to extend down to the mediastinum. Once there, sepsis is difficult to stop and may suppurate into the adjacent spaces such as lungs, stomach, pericardium.

A series of operations followed. Initially, the pus was drained from his swollen neck, a tube inserted into his small intestine so that he could be fed otherwise than orally, and antibiotics administered.

Despite these measures his condition

worsened.

To eliminate on-going soiling of the mediastinum by oral secretions, which invariably carry germs even when one is not eating at all, the oesophagus was diverted and given an external orifice.

After some time, in a third operation he was given a new oesophagus by pulling up the stomach and anastomosing it to the base of the pharynx. The anastomosis was unusually high which created additional problems but this was dictated by the level of the wound.

Although the series of operations solved the acute phase of the problem by putting a stop to soilage by oral secretions via the oesophagus, the deceased's troubles were not over. The original injury had transected a nerve, resulting in partial paralysis of the vocal cords and an inability to control the swallowing mechanism. When he ate, food spilled into the trachea. This in turn led to chronic lung

infections. He "was discharged from hospital in October because his life was not in immediate danger any longer. He was re-admitted periodically with pulmonary infections and remained an outpatient in the intervals between. Dr Nicolaou saw him regularly. The infection was controlled in a measure by on-going treatment with antibiotics but it never cleared completely. The chronic sepsis led to emaciation and weakness. By July of 1987 he was certified permanently unfit to return to normal duties.

Dr Nicolaou himself could do no more for this patient, but the advice of ear nose and throat specialists was sought to see if his damaged vocal cords and so his ability to speak could be improved, but nothing came of this. The suggestion was made that the larynx be removed completely and the trachea given an external opening. That would stop the problem of food spillage into the airways but leave the deceased, who could still speak, though poorly, mute. He was averse

6 to undergoing such a procedure.

Dr Nicolaou saw the deceased for the last time towards the end of November, 1987. He had never at any stage fully recovered from the results of the injuries caused by the bullet wound. Dr Nicolaou went on leave in December. When he returned in January he heard that the deceased had died.

The brother of the deceased, Petrus Moeketsi, testified that after the deceased had been discharged from Milpark Hospital he went to live at Kagiso with his grandfather but returned to hospital periodically. During December of 1987 the brothers visited their parents at Koffiekraal. There the deceased complained that he was ill. He started vomiting blood. He was taken to Paul Kruger Hospital in Rustenburg on New Year's Day. Petrus heard that he had been transferred from there to Johannesburg. He died on 3 January 1988 in the Park Lane Clinic.

From the time that the deceased was discharged

7 from Milpark Hospital until this New Year's Day, the deceased according to Petrus sustained no further injuries.

Dr Kemp performed a post-mortem examination on the deceased on 8 January 1988. He was very emaciated, weighing only 47 kilograms. Dr Kemp found an unhealed tracheostomy opening in the front of his neck, old surgical sutures in the tissues of the neck, and deformities of the vocal cords on the right side. The cause of death given in his report was "purulent pericarditis following old trauma". There was about 100 millilitres of pus in the sac around the heart. He recorded in his contemporaneous notes that the other organs, including the lungs and oesophagus, were normal. He had no independent recollection of this particular post mortem examination, but assumed that he had had the medical records relating to the deceased available to him and that it was from those that he learned of the "old trauma".

Miss Bate who appeared for appellant was critical of the evidence of Dr Kemp. According to Dr Nicolaou's evidence, the deceased suffered from chronic pulmonary infection, and describing his lungs as "normal", for example, raised doubts about the accuracy of Dr Kemp's observations. There was, she said, a lacuna in the medical evidence. One did not know what had happened to the deceased from the time Dr Nicolaou last saw him until he died, so that the chain of causation was incomplete.

Dr Kemp, who had been present in court while Dr Nicolaou testified, explained how it could come about that damage to lungs caused by sepsis could have been missed in a corpse with a heart such as he found and described. The lungs would have been congested with blood, which would be normal for someone with a heart in this condition and mask the presence of small pleural abscesses. No abnormality of the oesophagus would have been noticeable because the part of deceased's stomach

that had been brought up, "when you cut it open it appears the same as an oesophagus would". One may safely assume that once he saw the deceased's heart, his interest would have focussed on that. The pus in the pericardium would have filled three-quarters of a tumbler and was unquestionably the cause of death. "There is no way that a patient with a purulent pericarditis can live", he said. "It is a fatal defect." And "a healthy 28-year-old person does not get pericarditis ... there must have been some causative - well, let us say injury before that".

Under cross-examination Dr Nicolaou had said that he had not foreseen that the lung infection would pass to the pericardium. That means no more than that he had not anticipated that the heart of the deceased would succumb to sepsis before his lungs did, bearing in mind his evidence that although the acute problem of sepsis reaching the mediastinum, which would probably have resulted in death, had been averted by the initial

operations, the chronic problem of sepsis was never solved. The condition of the deceased was virtually incurable, and his life was at risk throughout.

> "... we know that bacterial pericarditis in a fit male is a very unlikely disease to present itself .. . (and) ... the patient did have a mediastinitis which is a chronic infection down into the mediastinum".

He regarded the pericarditis to have been caused by the chronic sepsis in the lungs which in turn had been caused by the bullet wound; and was not aware of any other factor which could explain its having occurred.

In the light of that evidence and that of deceased's brother that nothing further untoward had happened to the deceased, the fact that no doctor gave evidence about what was done for and to deceased during the two days that he was in the Park Lane Clinic, is irrelevant. After receiving the gunshot wound he was a sick man whose health deteriorated inexorably until he died, and there is no suggestion that any procedure attempted or omitted at Park Lane Clinic either caused

or could have averted his death.

In the alternative Miss Bate urged that the infliction of the wound, even as a sine qua non of the deceased's death, was too remote from its result to attract criminal liability. The appellant's refusal to undergo the operation to remove his larynx and give his trachea an external exit and so avoid aspiration of food particles, was the immediate cause of his death. She relied on S v MOKGETHI EN ANDERE 1990 (1) SA 32 (A) Van Heerden JA said at p 46I-47B:

> "In die reël is 'n dader se handeling wat 'n conditio sine qua non van die slagoffer se dood is, te ver verwyderd van die gevolg om tot strafregtelike aanspreeklikheid daarvoor te lei indien (i) 'n versuim van die slagoffer om mediese of soortgelyke advies in te win, behandeling te ondergaan of instruksies na te kom die onmiddellike oorsaak van sy dood was; (ii) die verwonding nie in sigself lewensgevaarlik was nie of dit nie meer op die tersaaklike tydstip was nie, en (iii) die versuim relatief onredelik was, d.w.s. onredelik ook met inagneming van eienskappe, oortuigings ens van die slagoffer. Daarmee gee ek nie te kenne dat indien een of meer van die vereistes nie bevredig is, die kousale ketting nie verbreek kan wees nie."

According to the evidence the deceased was discharged from Milpark after the last of the series of operations Dr Nicolaou described, during October of 1986. Although he did not require to be detained in hospital, as already stated, he had not fully recovered and indeed never did so. There was no stage after the initial injury at which it ceased affecting appellant adversely and seriously. The record does not tell us when the suggestion was made that the deceased undergo a further operation; nor that he was told that it was a life-or-death choice. There is no indication that it was. There was merely the possibility that it could have saved his life at the certain cost of his voice, but would have caused its own problems. Dr Nicolaou did not elaborate on what those might be. There is no suggestion that he was urged to submit to it, or told that it would or might be dangerous or unreasonable not to do so. Indeed the effect of Dr Nicolaou's evidence was that it would have been unreasonable to expect this

man who had already suffered so much, to assent to the procedure.

The facts in this case fall short of all the criteria postulated in the quotation from MOKGETHI'S case quoted above. No policy considerations require the court to look for some stage in the chain of causation, earlier than the death resulting from the bullet wound, at which to snip that chain in order to limit appellant's legal responsibility for the consequences of his conduct.

The appeal is dismissed.

L VAN DEN HEEVER JA

CONCUR:

E M GROSSKOPF JA)
HARMS JA)