Case No 56/94 IN THE SUPREME

COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between:

JOSIAS MASHIMBYE Appellant

and

THE STATE Respondent

CORAM: NESTADT, EKSTEEN et NIENABER JJA

Date heard: 2 March 1995

Date delivered: 14 March 1995

J U D G M E N T

NESTADT, JA:

On the night of 22 February 1992 a party was taking place at a house in Giyani township within the area of Gazankulu.

Amongst the numerous people there present were Patrick Maboko ("the complainant"), his mother, a certain Ronny and Mbekeni Xivambu. At about midnight the appellant arrived there. He was apparently uninvited. He (and others) were asked to leave. Events turned nasty. In the result and with a 9 mm pistol, which he had in his possession, he shot the complainant in the left upper chest in the vicinity of the shoulder. The shooting took place outside the house near the gate of the yard.

This occurrence gave rise to the prosecution in the Giyani Regional Court of the appellant on a charge of attempted murder. An alternative charge alleged that he had acted in contravention of sec 39(1)(1) of the Arms and Ammunition Act 75 of 1969 in that he had discharged an arm and had thereby negligently

injured the complainant. His denial of guilt notwithstanding, he was convicted on the main count and sentenced to five years imprisonment of which two were conditionally suspended. In terms of sec 12 of the Act the consequence of this, and the regional magistrate so noted, was that the appellant was deemed to be declared unfit to possess a firearm (which was ordered to be returned to the appellant's employer, namely the Department of Interior of Gazankulu). The appellant appealed against his conviction and sentence to the Transvaal Provincial Division. The appeal was unsuccessful. This is a further appeal. It is brought with the leave of the court a quo.

The gist of the appellant's version of what happened was that he was attacked by the crowd at the party; his life was in

danger; acting in self-defence he fired a shot into the air; but he was still being pursued; as he was fleeing he accidentally fired a second shot (which struck the complainant).

The trial court rejected this evidence. Mr Jordaan who appeared before us for the appellant quite correctly did not quarrel with this finding. It is clear that the appellant was a poor witness, indeed a lying one, and that his version could not possibly be true. The matter therefore falls to be determined on the State version. It was in the main deposed to by the complainant, his mother and Xivambu. It was to the following effect. The appellant stood next to the gate. The complainant's mother approached him. She stood some one and a half metres from him. He was angry. He said "I will shoot all of you". He was pointing his firearm in her direction.

He then fired a shot over her shoulder. It was in this way that the complainant was struck. He had been in the house. Having, however, heard a commotion outside, he went out to investigate. He saw his mother and the appellant. He walked towards them (from behind his mother). It was whilst doing so that he was shot. After the shooting the appellant said that "he did not shoot at any person". He then ran away.

It admits of no doubt that the appellant deliberately fired the shot that struck the complainant. The question is: did he do so with the necessary mens rea, ie with the intention (whether by way of dolus directus or dolus eventual is) to kill the complainant? This obviously depends on whether his intention was that the bullet should strike the complainant. If it was, the only reasonable inference

would be that he intended to kill him. Both the trial court and the court a quo, of course, found that the State had proved that in firing the shot that hit the complainant the appellant had the necessary intent. It would seem, however, that they did so on somewhat different bases. The magistrate (somewhat baldly I may say) concluded that "looking at the evidence subjectively...the accused deliberately pulled the trigger and from that the Court can only draw one inference, that is that the accused had done so with the intent to kill Patric Maboko". It is not clear whether this amounted to a finding of dolus directus or dolus eventualis. But it would seem to involve an acceptance of the proposition that the appellant knowing of the presence of the complainant, fired in his direction. The Transvaal Provincial Division on the other hand found that the

appellant must have foreseen that the shot "may hit somebody,...who was present in the yard or in the house" and that he was guilty on the basis of dolus eventualis.

I am afraid that I cannot agree with either the trial court or the court a quo. In my opinion the State failed, whether on the basis of dolus directus or dolus eventualis, to prove that the appellant in firing the shot (albeit deliberately) had the requisite intent to kill the complainant. The distinction between dolus eventualis and mere negligence (as to which see S vs Sigwahla 1967(4) SA 566(A) at 570 D) must in this regard be kept firmly in mind. I refer naturally to the difference between what the appellant must have subjectively foreseen (ie did foresee) on the one hand and what he objectively ought to have foreseen on the other. To sustain a conviction it was

necessary for the State to show that the appellant foresaw the possibility that in Bring as he did, the complainant or someone else would be struck. Whilst it is probable that he did, I do not think that this is the only reasonable inference from the evidence. The main reason for saying this is that such evidence (and I am of course referring to that of the State) does not paint a very clear picture of the scene and of what happened. As will appear we are in many respects left to speculate.

I commence with the evidence concerning the fore-seeability or otherwise of the complainant being struck. The problem here is that there is a dearth of evidence as to whether the appellant was ever aware of the complainant's presence behind his mother. I leave aside the appellant's denial that he saw the complainant. The

problem stems from the fact that it is unclear where exactly the complainant was when the appellant fired. The complainant's evidence that he was "close" (to his mother) and Xivambu's that the complainant was "behind" her are too vague and imprecise to be of any real assistance in determining the issue of whether the appellant saw the complainant. This is compounded by the absence of any meaningful description of what the visibility was like. The only evidence on this point was that of the complainant that where he was standing "there was some light". It was not part of the State case that the complainant and the appellant spoke to each other before the shooting. The complainant conceded that he could not hear what his mother and the appellant were saying to each other. He never saw that the appellant had a firearm. These are further indications that

the appellant might not have been aware of the complainant's presence. Bear in mind also that no motive on the part of the appellant to harm the complainant was shown. On the contrary the complainant testified that they had not quarrelled. It is true that the complainant saw the appellant. But it does not follow that the appellant saw the complainant. And the fact (testified to by the mother) that the appellant, when he fired, was pointing the firearm in

her direction (and therefore I will assume in the complainant's

direction) takes the matter no further.

This brings me to the issue of whether the approach of

the court a quo was justified, ie that in shooting as he did the

appellant must have known that somebody might be hit and killed.

Here too there are difficulties in the way of the State. The

appellant's threat made just before he shot, to "shoot all of you" may well have been mere bravado; or perhaps the desire to make his presence felt or to frighten those at the party. Immediately after he shot, the appellant said that he did not shoot at any one. Clearly the appellant did not intend to shoot the mother. Had he so intended, he could not have missed her. The evidence does however establish that there were a number of other people in the vicinity at the time. They were the guests at the party. But there is no clarity as to where they were when the appellant shot and in particular whether, to his knowledge, they were in his line of fire. They were not in the immediate proximity to the complainant or his mother. According to the complainant the other guests were in the yard. There was however no evidence that the appellant shot in that direction. But let

us assume (there was some evidence to this effect) that the guests were in the house, or running towards it or round it. Even so the guilt of the appellant on the main charge was not proved. This is because it was not shown that this is where the appellant aimed at. One does not know what distance the house is from the gate (where the appellant was) or where it is situate in relation to the direction in which he pointed the firearm. The State should have produced a plan depicting the scene. Without it there are material gaps in the State case. Ronny was not called. It would seem that he was an important witness. Nor does the evidence (given by a policeman who arrived at the scene after the shooting) that a "certain hole" which it was "presumed was caused by a bullet" was found in the house and that "the window pane" was shattered. There is no

indication which part of the house is being referred to. In any event this is hardly sufficient to prove that the damage referred to was caused by the appellant's shot. It may have pre-existed the incident. As I have said, the appellant was an untruthful witness; his version was a false one. This feature cannot, however, in the light of the defects in the State case to which I have alluded, avail the State (cf S vs Mtsweni 1985(1) SA 590(A)). They are such that the appellant should have been acquitted on the main charge of attempted murder. He should, in my judgment, have instead been found guilty on the alternative charge. Plainly he acted negligently. The shot he fired was not in the air. It must have had a horizontal trajectory. He ought as a reasonable man to have foreseen that someone might be injured.

It remains to deal with sentence. The one imposed must be set aside. The appellant must be sentenced afresh for the contravention of sec 39(1)(1). In terms of sec 39(2)(d) a fine of R4 000 or imprisonment not exceeding one year or both are competent. At the time of the trial the appellant was 42 years old. He had no previous conviction. He voluntarily reported the matter to the police on the following day. He is a family man. He was entitled to possess the firearm. In these circumstances I do not think a sentence of imprisonment is called for. A fine will suffice. At the same time it must be a substantial one. The degree of negligence was high. The complainant was quite badly injured. The improper use of firearms is rife. Unfortunately there is nothing on record as to what the appellant earns. It appears however that he

is a senior officer in the employ of the Department of the Interior in Gazankulu. In these circumstances there is reason to believe that he will be able to pay the fine I intend to exact.

The appeal succeeds. The appellant's conviction of attempted murder is set aside. So, too, is his sentence. There is substituted a conviction on the alternative to count one, namely a contravention of sec 39(1)(1) of the Arms and Ammunition Act 75 of 1969. In respect of this offence he is sentenced to pay a fine of R2 500 or eight months imprisonment. The order directing the return of the firearm to the Department of the Interior remains.

H H Nestadt Judge
of Appeal

Eksteen, JA )
) Concur
Nienaber, JA )