Case No 389/95 /mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

DAVID MICHAEL CRITCHELL APPELLANT

and

THE STATE RESPONDENT

CORAM: HEFER, NIENABER et SCOTT JJA HEARD: 4 MARCH 1996 DELIVERED: 25 MARCH 1996

J U D G M E N T

SCOTTJA/..

SCOTT JA:

The appellant was charged in the regional court with two counts of culpable homicide and one count of attempted murder. The charges arose out of a shooting incident which occurred in the early evening of 19 August 1988 in the parking area on the roof of the Sandton City complex where the appellant, a 54 year old married man, was employed as a security manager. The appellant pleaded not guilty but was convicted on all three counts. On the first count of culpable homicide (which related to the death of Mr Neville Lalla) he was sentenced to eight years imprisonment of which three years were conditionally suspended for five years. On the second count of culpable homicide (which related to the death of Mr Kopeng Motimele) he was sentenced to two years imprisonment, and on the count of attempted murder he was sentenced to two years imprisonment of which one year was conditionally suspended for

five years. The sentences imposed in respect of the counts of culpable homicide were ordered to run concurrently so that the effective period of imprisonment imposed amounted to six years.

The appellant appealed to the Witwatersrand Local Division against all three convictions and the sentences imposed. The appeal against the convictions was unsuccessful but the appeal against the sentences succeeded to the extent that the total period of effective imprisonment was reduced from six to two years. With the necessary leave of the court a quo the appellant now appeals to this Court against both the convictions and the sentences as altered.

It was common cause that on the evening in question Lalla (the deceased in the first count of culpable homicide) and Mr Joel Ramushu (the complainant in the attempted murder charge) drove in a white Mazda motor car ("the Mazda") to the roof parking area of the Sandton City complex

where Lalla proposed stealing a motor car radio and tape deck. The Mazda belonged to Lalla but was driven by Ramushu. The latter stopped the vehicle in what was described as a travelling lane in the parking area at right angles to a row of parked vehicles and in the vicinity of entrance 17 to the complex. He left the engine idling while Lalla got out and proceeded to gain entry to one of the parked vehicles ("the Jetta") by using a screwdriver to remove the triangular window of the left rear door. In the meantime, the manner in which the Mazda had been driven in the parking area had aroused the suspicion of one of the security guards. His radio report to his immediate superior was overheard by the appellant who was then having his evening meal in his flat on the premises. The appellant was in charge of all the security guards employed on the premises. Using his two-way radio the appellant advised the guards on duty that he would investigate the matter and instructed them to keep away from the area. The

reason for this instruction, he explained in his evidence, was that he was the only one who was armed and if there was to be any shooting he did not want to have his own security guards in the way. The appellant approached the Mazda armed with a pistol capable of firing 16 rounds. Ramushu was sitting behind the steering wheel of the Mazda with the engine running. The Jetta was parked immediately to the left of and at right angles to the Mazda. According to the appellant Lalla was sitting in the front passenger seat of the Jetta. Ramushu denied in his evidence that Lalla had ever climbed into the Jetta but little turns on this dispute of fact. Ramushu was in any event found by the magistrate to be an unsatisfactory witness.

It is common cause that in the next few minutes the appellant fired off a number of shots, almost emptying the magazine of his pistol. He fired two shots into the Mazda, one of which struck Ramushu on the left elbow. He fired several shots - he thought about twelve - at Lalla of

which no fewer than seven entered the latter's body. He also fired a shot which struck one of his security guards in the chest fatally wounding him (Motimele).

The explanation offered by the appellant for the shooting, in a nutshell, was the following. As to count 3, ie the attempted murder charge, he said that he had fired two warning shots through the window of the left rear door of the Mazda when it started to move forward. He denied having had any intention to shoot Ramushu. As far as count 1 was concerned, ie the charge of culpable homicide in relation to the death of Lalla, the appellant contended that he had acted in self defence. With regard to count 2, ie the charge of culpable homicide in relation to the death of the security guard, it was contended that the appellant had reasonably but mistakenly believed that he was about to be attacked and that in shooting Motimele he had not acted negligently.

The circumstances in which the shots came to be fired were the subject of much dispute at the trial, particularly in relation to count 1. The State relied essentially on the evidence of two witnesses, Mrs Aletha Carswell and her brother, Mr Dietlof Maré. Mrs Carswell, who was then a Miss Mare, was to adjudicate at a beauty competition which it was common cause was being held at the complex that night. She was driven to the complex by her brother. The other passengers in the vehicle were her future husband who was sitting in the front passenger seat, her grandmother and one other woman both of whom sat with her in the back. While heading in the direction of entrance 17 in the parking area both witnesses observed a person (the appellant) standing next to a stationary Mazda in the travelling lane. Both testified that the appellant suddenly fired two shots with a handgun into the left rear door of the Mazda. Mare immediately stopped. According to Carswell the appellant was then about

35 metres away. Maré estimated the distance at 20 metres. Although the area was generally poorly lit the headlights of their car illuminated the scene ahead. Carswell did not observe a person sitting behind the steering wheel of the Mazda; Mare did. He also saw this person (Ramushu) flee from the vehicle shortly after the initial shots had been fired. That Ramushu did so was not in dispute. He was apprehended shortly thereafter in a nearby street. Both Maré and Carswell testified that after the initial two shots had been fired they observed another man rise up from between the Jetta and a motor car parked next to it. Both were adamant that this man (Lalla) had his hands raised with his palms facing the appellant in a typical attitude of surrender. They said that the appellant swung round to face this person and without hesitating began shooting at him. After the first shot or two the man collapsed but the appellant continued shooting at him. Both witnesses then observed a security guard approaching the

appellant from behind. The appellant by then had moved to a point approximately in front of the Mazda. The guard hesitated and at one stage even retreated a few paces. According to Carswell, he appeared to be waiting for the shooting to stop. Finally he walked up to the appellant from behind and touched him on the shoulder. Both witnesses observed the security guard to be wearing his peaked cap. The appellant then swung round and fired at point blank range. Both witnesses thought that two shots were fired in quick succession. The security guard, they said, collapsed immediately.

At this point Maré put his vehicle into reverse and beat a hasty retreat. He drove round to entrance 17 by another route and dropped off Carswell who by then was late. While she was walking to the entrance she saw the appellant fire a further shot in the direction of where Lalla had collapsed. This was also observed by Mare.

The appellant's version of what had happened differed in a number of material respects. He acknowledged that he had fired two shots through the window of the rear door of the Mazda but said he had only done so after the car had begun to move slowly forward. Once the shots had been fired the vehicle stopped. He said that he then directed his attention to the Jetta. The other person (Lalla) was still sitting in the front passenger seat. The appellant testified that he fired two warning shots through the left rear window of the Jetta. He explained that he did not first announce his intention to arrest Lalla or call on him to surrender as he thought that the latter was probably armed with some weapon or other and he did not want to expose himself to the risk of injury. He said Lalla's immediate reaction was to open the door of the Jetta and advance menacingly towards him in a crouching position with his arms down but with a screwdriver held in a horizontal position. According to the

appellant he shouted at Lalla to stop and then began firing at him "hoping to hit a fatal area". Lalla nonetheless continued advancing until he was almost touching the appellant. At this stage the appellant heard the footsteps of someone approaching him from behind. He explained that he instinctively swung round and fired a single shot at this person believing him to be the driver of the Mazda. As he did so he realised to his horror that it was one of his security guards. He denied that the guard was wearing his cap at the time. He testified further that after rendering assistance to the security guard he suddenly observed Lalla who was lying on the ground a few metres away making an attempt to reach for the screwdriver which was nearby. He, the appellant, then fired a further shot at Lalla.

The magistrate in a lengthy and closely reasoned judgment rejected the version of the appellant and accepted that of Carswell and

Maré He described these two state witnesses as "fair, objective and impartial" and found them to be "excellent" witnesses. The appellant on the other hand, he categorized as "singularly unimpressive". In this Court Mr Knopp who appeared for the appellant sought to challenge this finding, particularly in relation to the circumstances in which Lalla came to be shot. The only imperfections in the evidence of Carswell and Mar6 to which he was able to point, however, were of a trivial nature and in my view of no consequence.

The appellant's version on the other hand was wholly unconvincing. It is difficult to imagine for instance why he should have fired warning shots at the Jetta. He had already directed two shots at the Mazda. Both persons involved in the attempted theft would by then have appreciated that the appellant was armed and prepared to use his firearm. It would also seem most improbable that Lalla, armed only with a

screwdriver, would continue to advance upon the appellant after being struck by numerous bullets. In the initial fusillade he was hit no fewer than six times. What is also of significance is that the description of the attack given in the course of the proceedings in terms of s 115 of the Criminal Procedure Act 51 of 1977 ("the Act") differed from the appellant's evidence in a material respect. At the plea stage Lalla was said to have advanced towards the appellant with the screwdriver "in a raised position". This is not what the appellant subsequently said in evidence. Finally it is necessary to observe that the difference between the appellant's version and that of Carswell and Mare is such that it can not be explained on the basis of a mere error on the part of the two state witnesses. There was clearly no reason for either of them to have fabricated their description of the shooting of Lalla. Indeed, Carswell testified that she was incensed by the manner in which Lalla had been gunned down and it was for this reason that she

had gone to the trouble of getting involved and ultimately giving evidence.

The magistrate accordingly found that the appellant had deliberately fired a number of shots at Lalla when the latter was attempting to surrender and rejected the appellant's version that he had acted in self defence. I can find no reason for interfering with this finding.

In the course of his evidence the appellant pointed out that theft was a crime mentioned in the first Schedule to the Criminal Procedure Act. The consequence of this is that he would have been entitled to arrest Lalla and in terms of s 49 of the Act use such force as may have been reasonably necessary to overcome any resistance to the arrest or to prevent him from escaping. On the basis of the facts found by the magistrate, however, there can be no question of the appellant being afforded any protection in terms of the section, nor can there be a reasonable possibility of the appellant ever having believed that he was entitled to shoot a man

who was surrendering. Not only was there no resistance but on the appellant's own version he fired some 12 shots at Lalla of which no fewer than 7 struck him. When the final shot was fired Lalla had, of course, already been hit six times. The final shot could hardly have been necessary to overcome any resistance or prevent the wounded man from fleeing.

The magistrate correctly observed that the State had proved that the appellant was guilty of murder. Relying on the decision of this Court in S v Nsubane 1985 (3) SA 677 (A) he nonetheless convicted the appellant of culpable homicide as charged. It was not contended that he was precluded from doing so by reason of his findings of fact. It follows that the appeal with regard to count 1 must fail.

I turn to count 2. An issue which was much debated in cross-examination was whether Motimele was wearing his cap at the time he was shot. Whether he was or not seems to me to be of little significance. The

sole question in issue was whether the appellant was reasonably entitled to assume that the person behind him was the driver of the Mazda and about to attack him. In this Court Mr Knopp argued that the appellant's assumption was reasonable as he had ordered his guards not to come near. I cannot agree. The appellant knew that he was in a parking area to which the public had access. The fact that he had told his guards to stay away did not exclude the very real and foreseeable possibility of innocent persons coming to find out what was happening or even attempting to stop him from shooting. In the circumstances the appellant was clearly negligent in firing without first establishing who it was who was behind him. I can find no fault with the conviction on this count.

With regard to count 3, the question in issue was whether the appellant had the necessary mens rea to sustain a conviction of attempted murder. The magistrate found that he had in the form of dolus eventualis.

As I have said, the appellant's version was that he had fired two shots at the Mazda after it had begun to move slowly forward. He said the shots were fired through the window of the left rear door but directed towards the front of the vehicle and to the left of the driver. In cross-examination he conceded that he had appreciated at the time that the bullets could be deflected by the glass or some other part of the vehicle and kill the driver.

Mr Knopp argued that the magistrate had placed too much reliance on the appellant's concession and that in any event the appellant was protected by the provisions of s 49 of the Act.

It is common cause that the appellant at no stage prior to firing at the Mazda called upon the driver to stop or in any other way indicated that he was attempting to arrest him. There can be no question therefore of the appellant being afforded protection under s 49(1) of the Act. See Macu v Du Toit en 'n Ander 1983 (4) SA 629 (A) at 633 G - H. Nor did

he ever suggest that he honestly believed that he was entitled to shoot deliberately at the driver of the Mazda or to aim so close to him as to expose him to the risk of being hit. On the contrary, he maintained throughout that the shots fired at the Mazda were intended to be no more than warning shots. He explained his failure to fire these warning shots into the air on the basis that there was always a possibility of someone being hit when the bullets finally came down again and that he accordingly wished to "contain" the rounds in the motor car. But it is clear from the photographs of the Mazda showing the bullet holes and from the appellant's own description of the shooting that he fired into the vehicle at such an angle that even if he did not hit the driver the bullets would not have missed him by much. There was no reason to do so. He could have aimed at some other part of the vehicle. On his own evidence he appreciated that by aiming where he did there was a risk of the driver being hit.

Given the

circumstances in which the shots were fired this concession was not at all unreasonable and the magistrate was entitled to place reliance upon it. Notwithstanding this appreciation on the appellant's part he proceeded to shoot in the direction of the driver regardless of the possible consequences. I am unpersuaded that the magistrate erred in convicting him on count 3.

I come finally to the appeal against sentence. The court a quo found that the trial court had misdirected itself in two respects. The first was that in the case of count 1 the magistrate had failed to give due weight to the fact that the appellant had been convicted of culpable homicide and not murder. The second was that the magistrate had failed to give sufficient weight to the rather special circumstances in which the crimes were committed and the stress and strain to which the appellant had been subjected in fulfilling his duties as security manager. The court a quo accordingly in the case of count 1 substituted a sentence of 5 years

imprisonment of which 3 years were conditionally suspended for 5 years, and in the case of counts 2 and 3 directed that the sentences imposed were to run concurrently with the sentence imposed in respect of count 1. In the result the effective period of imprisonment was reduced from 6 to 2 years.

In this Court Mr Knopp submitted that effective imprisonment of two years remained excessive and induced a sense of shock and that the court a guo had failed to attach sufficient weight to the appellant's personal circumstances. In my view there is no substance in either of these submissions. I can see no reason for interfering with the sentences as altered by the court a quo.

The appeal is accordingly dismissed.

D G SCOTT

HEFER JA

-Concur

NIENABER JA