IN THE HIGH COURT SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. AR 152/14

In the matter between:

MICHAEL THEMBA HADEBE Appellant

And

THE STATE

JUDGMENT

OLSEN J (VAHED J concurring):

[1] The appellant was tried and convicted before the regional magistrate at Eshowe on a charge that he murdered one Dumisani Mathaba on 27 February 2010. He was warned that the provisions of s 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 were applicable to his case. The learned magistrate found that there were no substantial and compelling circumstances justifying a sentence less than the prescribed one for a first offender, and accordingly sentenced the appellant to imprisonment for fifteen years. With the leave of the learned magistrate the accused appeals against both his conviction and sentence.

[2] On Saturday 27 February 2010 at around or a little after noon a motor collision took place in Princess Magogo Street, Ulundi, near the taxi rank. It involved a BMW and a Colt Gallant. The Colt was being driven by a Mr Shobede. The BMW belonged to the appellant, but it was being driven at the time by the appellant's brother. The appellant was a passenger in the BMW. After the collision the two vehicles came to a standstill some distance apart in Princess Magogo Street, facing in opposite directions. The Colt came to a standstill in the street adjacent to two concrete steps which separate the street

(and the street level) from a slightly elevated platform of land which accommodated a taxi rank set relatively well back from Princess Magogo Street and, between the taxi rank and Princess Magogo Street, an open piece of land where there was a tap (situated hard upon the top of the two steps), and an area where people were accustomed to wash cars.

[3] At the time of the collision the deceased, a Mr S Khoza and a Mr T Zulu were standing in the vicinity of the tap waiting for the car in which they were travelling to be washed.

[4] As one would expect in a town at that time of day, the occurrence of the accident attracted a substantial crowd of onlookers, and what followed no doubt kept their attention. The appellant aside, an account of what followed was given by each of Messrs Khoza, Zulu and Shobede. The accounts of these witnesses unsurprisingly differed in some respects, but not materially.

[5] The appellant got out of his car after it had come to a standstill and went straight to the Colt motor vehicle. Piecing the accounts of the three state witnesses together it seems that the appellant lent into the Colt and took the ignition key, and thereafter pulled Mr Shobede out of the vehicle, apparently intending to take him to the BMW. Mr Zulu says that the crowd advised Mr Shobede not to go with the appellant. The appellant then got into the Colt, trying to start it; whereupon Mr Shobede, knowing that in fact there was no starter motor then installed in the car (which he had been repairing), but being concerned that the appellant's efforts would flatten the battery, opened the bonnet to remove the battery terminals.

[6] The appellant got out of the Colt and moved to the front were a scuffle took place between him and Mr Shobede. The appellant struck Mr Shobede with an open hand, and Mr Shobede attempted to retaliate. At about this time the appellant produced a firearm he was carrying; it was a 9 mm Parabellum

semi-automatic pistol. There is little doubt that emotions were running high, certainly in the case of the appellant.

[7] Mr Shobede backed off, moving in the direction of the tap next to which Messrs Khoza and Zulu stood together with the deceased. From their position it looked as if the appellant wanted to shoot Mr Shobede. The problem was that a firearm pointed at Mr Shobede was at that time also a firearm pointed in the direction of where the three onlookers were standing. Mr Zulu did not immediately appreciate the danger. One gets the impression from what he said in evidence that he really did not think that any shooting would take place.

> "As we were standing there I was standing abreast with the deceased. It was as if it was a dream, the deceased said that person is pointing a firearm to our direction and we laughed."

[8] It appears from Mr Zulu's evidence that the deceased then realised that this was no laughing matter. The deceased was standing next to Mr Zulu. He pulled Mr Zulu down, as if to duck or to take cover together with Mr Zulu. The appellant, who the witnesses described as standing holding the gun in both his hands, then shot in the direction of Mr Shobede. Mr Shobede himself appears to have ducked, seeking refuge by trying to put the Colt between himself and the appellant. The bullet missed Mr Shobede but struck the deceased in the head, and he died subsequently of his injuries.

[9] This version of events is based on the evidence of the state witnesses. The learned magistrate accepted the state version after giving proper attention to the evidence of the state witnesses which, in my view, he correctly classified as consistent with the medical evidence concerning the path of the bullet through the head of the deceased.

[10] The appellant's version of events was rejected by the learned magistrate, correctly in my view. The vital issue was of course the firing of the shot.

According to the appellant he shot into the air in order to frighten off Mr Shobede who he said was the aggressor in the events which followed the motor collision. It is clear from his evidence that what he was talking about was firing a shot up into the sky. He had no idea, he said, how the deceased came to be shot. Almost immediately after the shooting he was taken away in a police van to the police station where he was put in the holding cells, and it was only there, he said, that he learned that someone had been shot at the scene. He did not claim to have made a mistake. He did not claim to have fired a relatively low overhead shot, and to have miscalculated. On his version somebody else had to have shot the deceased. And yet there was no evidence (even from the appellant himself) of any shot having rung out besides the one he fired.

[11] As to why he fired the shot, the appellant's account of the events differs markedly from those of the state witnesses. Although he concedes some initial exchange between him and Mr Shobede (and indeed another occupant of the Colt Galant car), the appellant paints a picture of some level of quiet having settled upon the scene, describing how it was realised that the Colt should be moved out of the way of traffic, and how he joined in with others to push it to one side. The evidence of the other witnesses is at odds with this. Their accounts reveal a relatively seamless transition from the motor collision to the shooting.

[12] According to the appellant after these attempts at moving the car he was set upon by Mr Shobede. He says he saw Mr Shobede put his hand beneath his shirt, and that he (the appellant), fearing that a weapon with which he would be stabbed would emerge, withdrew his firearm, cocked it, and fired it up into the air with a view to scaring Mr Shobede off. None of the other witnesses saw that Mr Shobede placed his hand beneath his shirt. The appellant concedes that nothing was in fact produced by Mr Shobede. Counsel for the state points out correctly that it takes a little time to withdraw a firearm, cock it and aim (at a

person, or the sky, it matters not which) and then fire. The appellant would have had time to observe that he had been mistaken in thinking that Mr Shobede was about to withdraw a knife or any other weapon, before the shot was fired.

[13] The protestations of the appellant that he intended to kill nobody were made against the background of him insisting that he shot upwards into the air. They stand against the evidence of Messrs Zulu and Khoza that the gun was pointed at Mr Shobede who was withdrawing towards them, and at the same time at the two of them and the deceased, who were in the line of fire, but further away from the appellant than was Mr Shobede. Most importantly the version of the appellant confronts the difficulty that the bullet did not go into the air, but flew more or less horizontally striking the deceased in the head. The learned magistrate was correct in rejecting the appellant's version of events. It could not be regarded as reasonably possibly true.

[14] The learned magistrate had to decide the case upon the basis that the appellant attempted to shoot Mr Shobede; and that he missed the mark with the result that the deceased was shot and killed. It was conceded by the appellant in evidence that he was aware of the crowds of people around that scene. There can be no dispute, and indeed there is no dispute, about the proposition that there was a real possibility that a misdirected shot at Mr Shobede would strike an onlooker. Counsel for the appellant argues that the correct verdict in these circumstances was culpable homicide. Counsel for the state argues that the magistrate's decision that this was murder, with *dolus eventualis*, was correct.

[15] Counsel for the appellant has argued, correctly in my view, that a finding that the appellant lied in contending that he had shot into the air does not release the state from its obligation to prove intent in order to secure a conviction of murder. But of course, like so many of life's choices, the appellant's decision not to tell the truth about the shooting had consequences. If there were any

peculiar circumstances present to and attendant upon his mental state at the time when he fired the shot, the presence of which would have diminished or lowered the level of his personal responsibility for the consequences of that shot, his decision not to tell the truth meant that the appellant lost the opportunity of conveying that to the court.

[16] One is left, then, to infer on the available evidence what the appellant's state of mind was with regard to the shooting and its consequence.

[17] Counsel for the appellant has offered no argument against the proposition that given all the prevailing circumstances, as described by the witnesses (including the appellant himself), it is safe to infer that the appellant subjectively foresaw the possibility of the death of a bystander if the bullet directed at Mr Shobede missed its mark. However counsel's approach to the second part of the test for *dolus eventualis* (set out in *S v Humphreys* 2013 (2) SACR 1 (SCA) at 8 a – b) is different, the submission for the appellant being that there is no evidence before the court justifying a finding, beyond a reasonable doubt, that the appellant reconciled himself to the possibility that a bystander might be killed. Counsel goes further and submits that there is no evidence to suggest

(a) that the appellant considered the fact that Mr Shobede may take evasive action as he did; or

(b) that it crossed the appellant's mind that he may miss his target.

(I am not sure that these latter submissions do not in fact go to the first part of the twofold test referred to above, namely the existence of subjective foresight as to the possibility of the death of a bystander.)

[18] However the case must be judged in the light of the proven circumstances. There were people all around. The appellant was angry, wanted

to shoot and did shoot. He could not have believed that Mr Shobede would stand immobile, making an easy target of himself. Mr Shobede was not the only one who took evasive action. The deceased himself had time to realise what was about to happen and that he was at risk. He too took evasive action, albeit unsuccessfully. Counsel for the appellant submitted, correctly in my view, that the best estimate of the range from which the shot was fired is about four metres. One can infer with confidence that, just as Mr Shobede and the deceased (and the other onlookers, for that matter) could see what the appellant was doing, so too could he observe them. They had time to take evasive action. He had time to reconsider the intention he had when he decided to draw his gun from his waist.

[19] The appellant fired at Mr Shobede who was moving. He knew of the presence of a crowd and if he was looking at Mr Shobede then he must have seen others, and in particular the deceased, ducking down in fear of what he (the appellant) was about to do. He had to have subjectively reconciled himself to the possibility that the shot he fired would hit an onlooker, and in particular someone in the position of the deceased who was so in the line of fire that he regarded it as necessary to take evasive action.

[20] In my view there is no merit in the argument that there is no evidence to contradict the proposition that it did not cross the appellants mind that he might miss Mr Shobede. Under cross-examination the appellant was challenged as to whether he did not realise that he was endangering the people crowded around the scene by shooting. His answer was "according to me, my life was in danger". The answer was not that if the appellant had wanted or intended to shoot Mr Shobede he would have been successful because of his familiarity and competence with the weapon he wielded.

[21] Although I disagree with the observation made by the learned magistrate, that it should be brought to account that a bullet passing through Mr Shobede could have struck and killed someone else, as there was no evidence to support such a proposition, I nevertheless agree with his ultimate conclusion that the state established intention to kill in the form of *dolus eventualis.* The appeal against conviction must accordingly fail.

[22] Concerning sentence, counsel for both the appellant and the state are in agreement that the learned magistrate erred in not finding that there were substantial and compelling circumstances justifying the imposition of a sentence less than the prescribed minimum of fifteen years imprisonment which he imposed. The appellant is a fifty-four year old businessman. He runs a motor repair facility and a breakdown service. He is a widower and has six children, two of whom are adults, and four of whom are minors, the youngest being four years old. He is actively involved in community activities. He is a member of the Community Policing Forum at Ulundi, and his tow truck services are used by the police both for their own vehicles and for the recovery of stolen vehicles.

[23] The appellant is a preacher at his local church, and his bishop, Bishop Kenneth Zulu, testified to the effect that the appellant also helps the church financially and with transport. The appellant also made a contribution to the funeral expenses of the deceased, although there was some dispute about precisely how much was made available. The learned magistrate mentioned and took all these factors into account, as well as the facts that

(a) the appellant is not a well man;

(b) it appears that his minor children will be left without support if he is sent to prison.

[24] But against that the learned magistrate quite correctly took into account the consequences of the actions of the appellant, and both the financial and the

emotional loss suffered by the family of the deceased who was a young man of some twenty-three years, already the father of a child. The magistrate was acutely aware of the need to ensure that sentences do not tend to generate a loss of confidence in the administration of justice. The magistrate correctly held that what the accused was guilty of cannot be tolerated. He observed that the accused had demonstrated a lack of self-restraint and that he had indulged himself in unwarranted aggression. These findings were highly relevant in dismissing the argument made before the learned magistrate, that a wholly suspended sentence should be imposed in this case. They go to establish that a custodial sentence is indeed called for in this case. But it is another matter to elevate them to a status which justifies the conclusion that there are no substantial and compelling circumstances in this case despite the fact that the appellant was, prior to these events, a well-respected member of and contributor to the welfare of the community. As the prosecutor pointed out in his address on sentence before the learned magistrate, this case is an example of "road rage"; it was the accident (apparently caused by Mr Shobede) which led to the death of the deceased. That observation is not intended to excuse the conduct of the appellant which was reprehensible. But fifteen years imprisonment is disproportionate bearing in mind all the circumstances referred to above.

[25] Nevertheless, a substantial custodial sentence is called for. The offence was not trivial. I endorse the observation of the learned magistrate that the courts should send a message that consciously giving vent to anger or emotions in circumstances where one endangers the lives of members of the public is not to be tolerated. A licence for a firearm imposes substantial responsibilities on the owner of the weapon. The appellant breached those responsibilities by giving vent to his anger through the barrel of his licenced firearm. Society cannot afford to take too lenient an attitude to such conduct. In my view a sentence of ten years imprisonment would be appropriate.

The following order is made.

1. **The appeal against conviction is dismissed.**
2. **The appeal against sentence is upheld.**
3. **The sentence of fifteen (15) years imprisonment imposed upon the appellant by the learned regional magistrate at Ulundi on 2 October 2013 is set aside and replaced with a sentence of ten (10) years imprisonment back-dated to 2 October 2013.**

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DATE OF HEARING:	20 November 2014
DATE OF JUDGMENT:	15 December 2014
FOR THE APPLICANT:	L Barnard, instructed by A MULLER ATTORNEYS
FOR THE RESPONDENT:	N P De Klerk, THE DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL