

NOT REPORTABLE
CASE NO. 343/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MINISTER OF LAW AND ORDER

APPELLANT

and

PAULINA MONAMODI

RESPONDENT

CORAM:

JOUBERT, HEFER, NIENABER, HOWIE, JJA et
OLIVIER, AJA

DATE OF HEARING: 7 MARCH 1995

DATE OF JUDGMENT: 30 MARCH 1995

JUDGMENT

OLIVIER, AJA:

The respondent instituted action in the Witwatersrand Local Division against the appellant for the recovery of damages in respect of a serious shotgun injury suffered by her minor son, David Monamodi ("David"), on 16 September 1989. It was alleged that the injury was sustained when

members of the S.A. Police opened fire on a crowd of approximately 500 people. David was part of that crowd, a funeral procession which was moving down Bulani Road, Soweto.

At the trial two conflicting and mutually destructive versions emerged. According to the respondent's version the injury was caused by a shot fired at the crowd by the police. According to the appellant's version the injury was more likely caused by a shot fired at the police by a gunman in the crowd.

The parties agreed that the question of liability and that of quantum should be separated. It was so ordered in terms of rule 33(4) and judgment *was given on the merits only*.

The trial judge (MacArthur J) found that he was not able to make an adverse finding concerning the credibility of the witnesses on either side; and that there were no inherent improbabilities in either version. He accordingly concluded that the respondent had not discharged the onus resting upon her and granted absolution from the instance with costs.

However, on appeal, the Full Bench of the Transvaal Provincial Division

concluded that there was sufficient probability to create proof on a balance of probabilities that David's injury had been caused by a pellet from a cartridge fired by the police.

Special leave to appeal against the last-mentioned judgment was subsequently granted by this Court.

A number of facts are not in dispute.

1. David, who at the time of shooting was a little over 12 years of age, joined a funeral procession consisting of about 500 marchers. The procession, which clearly had political overtones, proceeded from west to east in Bulani Road, Soweto.
2. In the vicinity of the scene in question Babi Naphuti Street joins Bulani Road from the southern side.
3. Slightly to the east of the T-junction formed by Babi Naphuti Street and Bulani Road, but on the northern side of Bulani Road, there is a coal-yard.
4. The SSG pellet which struck David was fired from a 12-bore shotgun.

5. The police did fire on the crowd with SSG pellets on the day in question.
6. The medical evidence shows that the pellet that struck David was on a trajectory, in relation to David's body, from left to right. It entered his body in the centre of the left scapula, passed through the spinal cord and proceeded into the upper lobe of the right lung. In the spinal cord, it injured the nerve tract, causing a paralysis of the right leg and a drop-foot deformity of the right foot. The pellet was travelling on a more or less horizontal plane through David's body.
7. It is unlikely that the pellet had ricocheted before it entered David's body.
8. SSG cartridges, which are fired from a 12-bore shotgun and not by a handgun, are commonly used and freely available.

This brings me to the two conflicting versions.

David, who was 16 years old when he testified, told the court that the crowd, of which he was a part, was proceeding along Bulani Road from west

to east when two yellow police vans arrived at the scene and blocked the road. The police contingency was, therefore, in front of and to the east of the crowd, as it moved towards the police. The coal-yard would have been on the left (northern) side of the crowd. According to David he then moved to the vicinity of the coal-yard where he remained standing for about two minutes. A tear-gas shot went off and he ran into the coal-yard where he took shelter in one of the inhabited rooms. He remained in the room for quite some time and then, because the firing had ceased, he went outside. Near a "stop nonsense" fence (a brick wall with a fence on the outside) he saw a policeman holding a fire-arm, which he was waving around in David's general direction. David describes the fire-arm as a small one, about 18cm to 21cm long. He looked at the policeman, not expecting to be shot at, and he then "... turned around to go towards Zola, that is my home, and he [the policeman] was still by that corner."

David testified that he then collapsed. He heard people exclaiming that he had been shot. He lost consciousness, which he later regained in the

Baragwanath hospital.

David's version is that the police vans had stopped well to the east of Babi Naphuti Street and slightly to the east and south of the coal-yard. He indicated on a diagram the position of the policeman with the handgun as next to and just north of the police vans. On the same diagram he identified the place in the coal-yard where he had been standing when he was injured. The police vans and the policeman with the handgun were, therefore, also east of the position where he had been when he was injured.

He illustrated on the diagram that the brick wall was between the coal-yard and that part of Bulani Street where the police had taken up position. He also sketched three shops on the northern side of Bulani Road. According to his indications the shops were directly between the policemen and his position when he was injured. He placed the crowd approximately opposite the junction of Babi Naphuti Street and Bulani Road.

According to David's version, the police must have fired at him in a north-westerly direction, i.e. not down or parallel to Bulani Road where the

crowd was supposed to be. David places the policeman with the handgun about 40 metres away from the position occupied by himself in the coal-yard.

On David's version, there is this problem: the SSG pellet which caused his injuries could not have been fired by the policeman with the handgun. Professor van der Spuy, an acknowledged expert in the field of gunshot wounds, testified that he was not aware of any handgun that fires 12-bore shotgun cartridges. SSG pellets can only emanate from such a cartridge.

Thus, the only possibility supportive of David's evidence is that the shot that injured him must have been fired by another policeman in the vicinity of the police vans, indicated by him to be just to the south of the policeman with the handgun. This would, however, increase the angle between the east-west direction of Bulani Road, i.e. between the police and the crowd, and the supposed line of fire.

The appellant's version was given by the policemen on the scene, viz. Captain du Preez, Constable Reynecke, Sergeant Tredoux and Warrant-Officer Botha.

The picture sketched by Du Preez, Reynecke and Botha is as follows.

Having been summoned to the scene in Bulani Road, du Preez, accompanied by Botha, was driving a blue Ford Sierra police motor car. They approached the crowd from an easterly direction and stopped the vehicle somewhat to the west of the Babi Naphuti Street junction. This would place the coal-yard approximately 50-70 yards behind them, (i.e. to their east) as they were facing the crowd. They got out of their car.

A man in the front rank of the crowd, and to the left side of the police, immediately started firing at them with what clearly appeared to them to be a long shotgun. Du Preez and Botha started firing at the crowd with 9mm pistols and shotguns, using inter alia SSG cartridges. Reynecke and one Roodtman (the latter now deceased) arrived in a patrolvan, with Tredoux in the back. Reynecke and Roodtman also fired at the assailant and at the crowd, which was attacking the police and throwing stones at them. Du Preez estimates that the firing from the crowd lasted about six seconds. The crowd kept on advancing, while throwing stones at the police. Some of the

policemen were struck by stones, and they continued firing at the crowd in Bulani Road, directly from east to west. Du Preez fired two shots with his shotgun, using SSG cartridges. Reynecke also used a shotgun. The crowd then turned tail and fled. The police ceased firing. There was never any danger to the police from the area of the coal-yard behind their backs and no shots were fired from or in that direction. Directly after that, when the crowd had dispersed, a Casspir with about 20 policemen arrived and the order was given to search Bulani Road and the adjacent open veldt for possible casualties. None were found. Du Preez was standing at the police vehicles, when, approximately one minute after all firing had ceased, he heard a shout from the coal-yard, 50 yards behind him. He saw an adult beckoning him. He went to the coal-yard where he was told that a child had been wounded. He did not see the child and was told that it had already been removed to a hospital. No teargas was fired that day.

Du Preez further testified that, at the time of the alleged incident, the shops to the north of Bulani Road were already in existence. It would have

been impossible to wound someone in the coal-yard from the position where David had alleged the police vehicles were parked. The police witnesses deny that they had parked their vehicles at the point as alleged by David. They denied ever having fired shots in the direction of the coal-yard, which, in their version, would have been behind them.

According to both Du Preez and Reynecke the situation when they were attacked by the crowd was life-threatening. They testified that the gunman in the crowd was firing a shotgun that could have used SSG cartridges, which are commonly used and readily available.

Tredoux never really got out of the back of the patrol van in which he arrived on the scene, because he feared for his life. According to his evidence, the patrol van stopped and immediately afterwards he heard shots being fired. When the firing stopped, he started getting out of the back of the patrol van, but he was struck by a stone on the back and retreated into his former position of safety. He is adamant that after he got back into the vehicle, no further shots were fired. He stated that although the crowd was

already in the process of fleeing, some of them turned around and threw stones at the police, but no further shots were fired. His evidence was corroborated by the other police witnesses.

The conflict between the two versions is evident. According to the police, they had taken up position well to the west of the coal-yard in Bulani Road and were firing at the crowd down Bulani Road in a westerly direction. If David was wounded in the coal-yard, as he alleges, he would have been behind them. There was no reason to fire in that direction. According to the police version, he was probably wounded by a shot fired by the gunman in the crowd, who was firing at the police. David would have been more or less in his line of fire. According to David's version, the police took up position much further to the east, just to the south-east of the coal-yard. They fired on the fleeing crowd and he was hit when he came out of the room in the coal-yard.

The appellant's reply to this version is that, according to David's own evidence, it is both impossible and improbable - impossible because of the shops and the brick wall between the position of the police, as indicated by

David, and his own position; improbable because, according to David's own version, there was no reason for the police to fire another shot after the firing had ceased and after David had already come out of hiding. In any event, there was no reason for them to fire a wayward shot into the coal-yard. On a balance of probabilities, it was submitted, David was wounded by the gunman in the crowd in the cross-fire between himself and the police. David was in the line of fire of the gunman. That also explains why he stated that whilst he was running into the coal-yard, shots were being fired. Also, it was argued, the probabilities are that the pellet which injured David emanated from a shot fired at a range of approximately 70 metres. At the shorter distance, where he places the police, the pellets would not have spread to such an extent that only one peripheral pellet would have entered his body.

It is evident that a crucial aspect is the point from which the police had been firing their shots. There is a direct conflict of evidence on this matter.

The trial court considered the credibility of the various witnesses and, as already mentioned, came to the conclusion that no adverse finding could

be made against any of them. The case had to be decided on the probabilities. The trial judge expressed several difficulties with David's version, and expressed doubt whether the facts supported the conclusion that David must have been shot by the police. In his view of the case, there were no inherent improbabilities on either side. The fact that David was injured by an SSG pellet does not necessarily mean that the police fired that shot - it could have emanated from the assailant in the crowd. Consequently, he held that the respondent had not discharged the onus of proof and ordered absolution from the instance with costs.

The Full Bench of the Transvaal Provincial Division reversed the trial judge's decision, Van der Walt J delivering the judgment of that court (Zulman and Mahomed JJ concurring). The gist of the judgment is to be found in the following words:

"There is no evidence, as I said, of the police firing towards the north. But then we have the evidence of Tredoux and that gives a glimmering of a contradiction and, if on Tredoux's evidence a rain of stones was directed towards the police after the shots had ceased, it is possible and we think it is probable that at that stage shots may have been fired

at people off the road and if that is so, a stray pellet might have (hit) David where he was. Looking at the facts again, we have David struck by an SSG pellet. We have police firing cartridges containing SSG pellets. That is a fact. We have speculation of a lone gunman firing a shotgun, possibly with cartridges containing SSG pellets because that is a fairly common round. We have evidence on the police side that his firing had ceased and he had vanished prior to David being shot. Somebody fired the shot that struck David. On these facts what is the more probable? That it was fired by police with shotguns, issued with SSG cartridges ... But we have police and any number of them on the scene. They are armed. Against that we have a lone gunman who has shot his bolt, as it were, and has vanished and for the police version to be accepted as equally probable, one would have to postulate that this lone gunman fired further shots from another direction at the police subsequent to the cessation of fire which cessation was put beyond any doubt by Captain du Preez." (My emphasis)

There are in my view serious difficulties in the reasoning of the Court

a quo.

Apart from the unsupported "probable possibility" that the police fired into the coal-yard, the major flaw in the argument is that, by implication, it rejects the police evidence regarding the position where they had stopped and from where and in which direction they had fired at the crowd. The whole argument proceeds on the basis of acceptance of David's evidence concerning

the position where the police had stopped. The argument, with respect, does not do justice to the finding of the court a quo with regard to the credibility of the police witnesses.

The next difficulty is the argument that David was wounded after the cross-fire had ceased and after the lone gunman had vanished; ergo it must have been the police who shot him. There is no factual support for this theory. There is no evidence as to when David was wounded - his evidence was that he came out of the room at the coal-yard when the firing had stopped, and it was then that he was struck. But he did not even hear the shot which wounded him, and he fainted immediately. He cannot, and did not, say that the shot which wounded him was a single, lone shot nor that it was the last shot fired. On his evidence it cannot be concluded that he was not wounded in the process of a continuing volley of shots.

I have a similar problem with the line of reasoning of the court a quo that when David was wounded, the lone gunman had "shot his bolt" and had vanished. There simply is no evidence to substantiate that finding: neither

David nor the police were able to connect the moment of David's wounding with the time of the "disappearance" of the gunman.

The next problem is connected to the previous one: if David was struck by a shot after the cross-fire had stopped, why assume that a further shot was fired by the police? Why not by the gunman in the crowd? To argue that it could not be him because he had vanished lacks evidential support, as I have said.

In this Court counsel for the respondent, in support of the judgment of the court a quo, endeavoured to rely on the evidence of Tredoux. He had remained in the back of the patrol van during the gunfire. When he thought everything was quiet he emerged. However, he was struck on his back by a stone. It was submitted that in such circumstances, and notwithstanding the denials by the appellant's witnesses, it is quite probable that a policeman armed with a shotgun fired a further shot in the direction of the stone throwers. It was argued that at that stage the procession had been broken up and had dispersed in all directions. It also was argued that it was quite probable that

there were persons who were frustrated by the halting of the procession and angered by the police action, and who had dispersed into the open areas to the sides of the road, including the northern side; that stones were thrown from that direction; that a further shot was fired towards that side and that it was a stray pellet from such a shot which struck David as he stood in the coal-yard.

While this argument seems attractive in a superficial way, it is still flawed. There is no evidence to support it; it contains all the defects of the judgment of the court a quo and it ignores a basic part of Tredoux's evidence, viz that although he was struck by a stone, there was no further firing. In the light of the credibility findings of the trial judge, one cannot accept parts of Tredoux's evidence and reject other parts simply to fit a theory.

A further possibility was also mooted in argument: that David was shot by the police when he was still part of the crowd, and only later collapsed and fainted. This theory also founders due to a lack of substantiating evidence. It was never even alleged that after David had been wounded, he would still

have been able to walk or run. In fact, when his mother found him at Baragwanath Hospital, he was unable to stand or walk and had to be carried away. Another problem with this theory is: how probable is it that David, after having been wounded as a member of the crowd, would have run towards the position of the police (according to his version of the point of firing) or around the police (according to their version of the point of firing)? The probabilities are that he would have run away from the point where the police were firing from, i.e. according to either version, away from the coal-yard.

It is a pity that David's case was handled in such a way as to leave basic evidential questions unanswered. For example, he was never asked at the trial to describe in which direction he was facing when he was struck. This would immediately have given an indication of the trajectory and therefore of the origin of the shot which wounded him. Furthermore, the police allegation that it would have been impossible for them to have wounded David according to his own version because of the position (as alleged by him) of the brick wall and the shops, was never countered by asking the court for an inspection in

loco, or the submission of photographs depicting the scene, etc.

In balancing probabilities, one must select a conclusion which seems *to be the most natural, or plausible, of several conceivable ones, even though* that conclusion may not be the only reasonable one (per Selke J in Govan v Skidmore 1952(1) SA 732 (N) at 734 C-D approved by Viljoen JA in AA Onderlinge Assuransie-Assosiasie Bpk v De Beer 1982(2) SA 603 (A) at 614 H and by Holmes JA in Ocean Accident and Guarantee Corporation Ltd v Koch 1963(4) SA 147 (A) at 159 C-D.) A conclusion can, however, only be reasonable if it is based on objective facts emerging from accepted or acceptable evidence. It is perhaps necessary to repeat the classic words of Miller R in S v Naik 1969(2) SA 231 (N) at 234 C-E:

"If the court, on the evidence before it, were to come to that conclusion, it would be making an assumption rather than drawing an inference, for the facts necessary for the drawing of an inference are lacking. As Lord WRIGHT observed in Caswell v Powell Duffryn Associated Collieries Ltd., (1939) 3 All E.R. 722 at p. 733: 'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish ... But if there are no positive proved facts from which the inference can be made, the method of

inference fails and what is left is mere speculation or conjecture.' "

In the present case, there are simply not sufficient proven facts to say that the inference that David was shot by the police is a reasonable one, let alone the most plausible one.

In my view, the trial judge correctly ordered absolution from the instance with costs.

The appeal succeeds with costs. The order of the court a quo is set aside and the following order is substituted therefor: "The appeal is dismissed with costs."

P J J OLIVIER
ACTING JUDGE OF APPEAL

JOUBERT, JA)

HEFER, JA))CONCUR

NIENABER, JA)