IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A40/2006

DATE: 29 FEBRUARY 2008

In the matter between:

LINGELETHU BAKUMENI Appellant

and

THE STATE Respondent

JUDGMENT

DUMINY, AJ:

[1] The appellant was tried in the Cape Town Regional Court on one charge of common assault, one of assault with the intent to do grievous bodily harm to one Henry Martin and four counts of attempted murder. The details of those charges are set out in the record.

[2] The charges arose from the events that took place at Banda's Tavern in Westlake, a suburb of Cape Town, on the night of 3-4 October 2003, to which I shall revert. The trial in this matter commenced on 4 August 2005 and judgment was given on 13 October 2005, more than two years after the events in question. The appellant was

found not guilty on the charge of common assault and two of the charges of attempted murder. On the charge of assault with intent to do grievous bodily harm he was found guilty of common assault and he was also found guilty on two of the charges of attempted murder. On the conviction of common assault the appellant was cautioned and discharged. On the two counts of attempted murder, which were taken together for purposes of sentence, he was sentenced to five years' imprisonment of which one half was suspended for five years on appropriate conditions, and declared unfit to possess a firearm. The appellant appeals against the convictions and sentence with the leave of the magistrate.

[3] The precise course of events of the night in question is not clear. There was, however, concurrence amongst the State witnesses who were on the scene and the appellant on a number of the main features. I summarise the evidence, mainly from the perspective of the appellant's version.

[4] Banda's Tavern is a place of recreation where people go to drink and socialise. The appellant attended there after going off duty at 11pm on 3 October 2003. At the time,

the tavern was full of people, The evidence as to how many patrons there were differs from something of the order of 20 to 30, to the appellant's version of 50 people who were present at the time. His evidence of his reason for having gone there was not clear. At first he said he went there to play pool but later said he went there to gather certain (unspecified) information in relation to a matter he was investigating, and yet later he testified that he was there simply to relax.

[5] Appellant paid R10 to get to the front of the queue for the pool game and started to play. I point out that no attempt was made to reconcile this part of his version with his claim that he was there to gather evidence in some kind of semi-official capacity. In the latter regard his evidence was exceedingly vague; it was not substantiated or supported in any way. I say this without implying that there is any *onus* on the appellant. However, this version is something of which he alone had knowledge and why there was no effort on his part to substantiate it in the least, remains a mystery.

[6] In any event, it is common cause that the appellant did play pool. He became irritated by the behaviour of one of the State witnesses, one Lydia Fredericks, according to

the record a slightly built woman, who bumped into him a couple of times while he was playing pool and seemed to have gotten in the appellant's way. This made the appellant "angry" to use his own word. What happened thereafter remains in issue, but it is common cause that an altercation ensued between the appellant and Ms Fredericks. Precisely who struck whom first and precisely how hard each blow was, is in issue but it is quite clear that the two of them got into some kind of scuffle with each other.

[7] The appellant's version was that he pushed her because he was angry with her; she pushed him back; at some point he claims she smacked him and swore at him and he slapped her in the face, which made her fall to the ground. Ms Fredericks' companions did not take kindly to this treatment of her. They advanced on him. He retreated through the door to the yard outside the tavern. At some point he kicked a State witness Mr Henry Martin, either in the groin according to Martin, or on the thigh according to the appellant. Outside the tavern he was hit by an empty beer bottle thrown at him from behind. He withdrew his service pistol and cocked it. A round fell to the ground whereupon he says he fired two shots, on his version into the sand, to ward off a life-threatening attack

on him by unnamed persons who followed him from the interior of the tavern and others who happened to be outside the tavern. They were behind him and he could not identify them.

[8] According to the State witnesses, at least three shots were fired and some mentioned a fourth one. Four persons suffered gunshot wounds in the incident.

[9] Soon thereafter a police officer arrived on the scene; he found the appellant and a number of the tavern-goers standing outside in the yard. They were not fighting or arguing but he perceived that there had been some friction. The appellant told him he had been attacked but did not say that his life had been in danger.

[10] The appellant's defence is that he fired his weapon in self-defence. In this regard, the theme of the statements put on his behalf to the State witnesses was that he was the intended victim of an attack on him and that he feared for his life.

[11] The exact nature of this attack or perceived attack was not explained. The appellant claims that an empty beer bottle was thrown at him and that a "mob" was advancing on him with the intention of taking his firearm. On other

occasions he said that a particular statement was made by one of the State witnesses that his firearm should be taken from his side and so he concluded that the intention was to use his own firearm to kill him. With due respect, these explanations are fanciful and they were rejected, in my view correctly, by the trial magistrate.

[12] I am satisfied that the appellant's evidence of the extent and the seriousness of this attack on him was exaggerated and not reasonably possibly true. His evidence in chief was inconsistent with the statements put to Mr Martin. In cross-examination it was put to the latter that the appellant had kicked him because Martin had tried to take the appellant's firearm. In his own evidence the appellant said that he kicked Martin because the latter was trying to grab him, not the firearm. His alleged assailants were unarmed, indeed not one of them, save the hapless Ms Fredericks who was not on the scene when the shots were fired, laid a hand on him.

[13] There is no support at all for the appellant's version of the alleged threat on his life in anything said by any of the State witnesses who were present on the scene. I say this without confusing the incidence of the *onus* in

matters of this kind. We are, however, dealing with a version by the appellant of his own internal and subjective state of mind and in that regard it is justified, in my view, to test what he says against what one can establish from the objective facts drawn from a totality of the evidence.

[14] In addition, it is plain that the appellant played no small part in bringing about the confrontation of whatever intensity it had that he now relies upon as his defence. When the police arrived on the scene the appellant did not identify anyone as his alleged attacker and did not ask that anyone be arrested for threatening or assaulting him or, for that matter, for trying to take his service pistol. In the end one is left only with the appellant's say-so as to the alleged attack on him and his own perceptions in that regard.

[15] When deciding whether his version is reasonably possibly true the Court should not consider it in isolation and ask whether, taken on its own, it is plausible. The evidence must be considered in whole and the plausibility of the appellant's version considered in the full context of that totality. The well known authorities in this regard are S v Snyman 1968(2) SA 582 (A) at 588G; R v Miambo

1957(4) SA 727 at 738A-D and a case relied upon in the heads of argument on behalf of the appellant, and rightly so, S v Van der Meyden 1999(1) SACR 447 (W) at 448f-g where the following was said:

> "In whichever form the test is expressed it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true".

[16] Following this approach I respectfully agree with the trial magistrate who found that it was highly unlikely that there had been an attack on the appellant or any threats to take his firearm. I also agree with him that when the appellant fired the shots on the night he was not acting in self-defence and that his actions were unlawful. I n relation to the number of shots fired, the learned magistrate gave the appellant the benefit of the doubt and based his findings on there having been only two shots.

[17] To summarise thus far, in my view, the trial magistrate was correct in finding that the appellant fired at least two shots on the night of 3 to 4 October 2003 and that his actions in doing so were not justified by self-defence. There is no gainsaying that four people were injured by the shots. Precisely how that happened is a matter which was not explored or explained during the trial. Whether the shots ricocheted or whether the bullets disintegrated into shrapnel fall into the realms of speculation. That the injuries occurred and were caused by the shots was, however, not put in issue. No other explanation for them comes readily to mind.

[18] Concerning the element of *mens rea*, I also agree with the finding of the learned magistrate that the State did not establish direct intent on the part of the appellant and that *dolus eventualis* was the form of *mens rea* which was present on this occasion. He was also correct in finding that that is a sufficient basis upon which a conviction of attempted murder can be sustained and in this regard I would refer to the decisions in S v Sethoga 1990(1) SA 270 (A) at 275i-276b. The way it is put there is that:

> "The State must prove that the appellant had the subjective foresight of the possibility, however

remote, of the appellant's unlawful conduct causing death to others and persisted in such conduct with a reckless disregard for the possible consequences" (S v De Bruin 1968(4) SA 498 (A) at 510G-H).

[19] Although the appellant did not make any concessions in this regard, given the fact that he was at the time a member of the South African Police Service who had undergone firearm training, the conclusion is inescapable that he must have fired the shots with the foresight requisite for *dolus eventualis* to be present.

[20] In the circumstances, the elements of the offence of attempted murder were all established in this case. The appellant's self-defence version was rightly rejected. In my view, the conviction of attempted murder must therefore stand. Regarding the conviction of common assault on Mr Martin, I can find no basis for interfering with the conviction.

[21] Concerning sentence, the test was set out in the heads of argument on behalf of the appellant. One way of putting the question is whether the sentence that was imposed engendered a sense of shock. In my view, the basic sentence imposed by the magistrate of five years'

imprisonment does not give rise to a sense of shock and was justified.

[22] The crime was very serious. The appellant was a police officer. In whatever capacity he attended at Banda's Tavern, he had his service pistol with him. My view is that he went for his service pistol far too readily and that he allowed himself to become involved in this fracas in the most irresponsible manner. The seriousness of the offence and the position occupied by the appellant at the time, in my view, justify a heavy sentence, and the one of five years' imprisonment was quite appropriate.

[23] However, the appellant's personal circumstances as they are today and as they were at the time, in my view, also justify a different approach to that taken by the magistrate in relation to the question of suspension. It does induce some sense of shock in me to visualize the appellant in this case as a first offender serving a sentence of imprisonment without the chance of responding to the potentially rehabilitative effect (or the potential Sword of Damocles, as it has been put), of a complete suspension of this sentence. In this assessment I give much weight to his personal circumstances, which are that he is a 32 year old male married person, he has

a two and a half year old child, he holds down fixed employment of a responsible nature and he was a first offender. In my view the entire sentence of five years' imprisonment should be suspended. The conditions the Magistrate imposed in respect of the suspension of half of the sentence were appropriate and should still apply.

[24] To summarise, I would therefore uphold the conviction. In relation to sentence I would uphold the sentence of five years' imprisonment, however I would suspend the entire five years' imprisonment for 5 years on condition that the appellant is not convicted of murder, culpable homicide or assault with intent to do grievous bodily harm where a firearm is involved during the period of suspension.

[25] Finally, the Learned Magistrate's declaration that the appellant is not fit to possess a firearm was entirely appropriate, and is confirmed.

DUMINY, AJ

I concur, and it is so ordered.

D.H. VAN ZYL, J