IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A339/2010

DATE: 12 NOVEMBER 2010

In the matter between:

EDWARD LANGEVELDT Appellant

and

THE STATE Respondent

J U D G M E N T

DAVIS, J:

The appellant was charged in the Regional Court on two counts of attempted murder, alternatively the reckless endangerment of persons and/or property, and a further count of discharging a firearm while under the influence of being intoxicated. To all these counts, the appellant pleaded not guilty. He was found guilty on the main count of attempted murder and was sentenced to seven years direct imprisonment in respect of the two main charges running concurrently, therefore, in effect of seven years. He has appealed against

both conviction and sentence with the leave of the court.

The facts are in effect relatively simple but obviously tragic. Briefly, it appears that the following occurred, little of which was placed in dispute. The appellant is married to one Petronella Langeveldt. They lived in Ceres. They had two children born of the marriage, Reginald, the younger and Patrick the older son. Neither of them lived with the family in Ceres at the time of the accident. On the weekend of 24 March 2006, Patrick arrived at the common home. He found his mother alone in the house and although he searched for his father, was unable to find him.

It appears that he moved to the dwelling of a third party, Ms April, with whom the appellant was having an affair. It is clear that a physical confrontation ensured between Patrick and his father. It is clear that Patrick was extremely upset by his father's infidelity to his mother. Whoever started the particular confrontation, is not necessarily critical to the resolution of the dispute. What did happen, was that Patrick assaulted his father with his bare hands and his father, the appellant, fell on the floor. Patrick left the house of Ms April whom, I should add, was a witness to the confrontation, and returned to the common home.

There he found his mother in the kitchen and she had to tender

to his swollen hand, that is the hand which was injured as a result of the assault which he had inflicted upon his father. It appears that she was placing ice on the injured hand, when the appellant arrived. A further confrontation took place in the kitchen. The appellant was armed. A verbal encounter then took place. Shots were fired by the appellant in the direction of both Patrick and Ms Langeveldt, who were both wounded. Patrick fell on the dwelling's stoep. Ms Langeveldt fled to the neighbours.

The appellant was then confronted by a friend, who found the appellant with an empty firearm and as was later reported, by policeman Ntshanga, he was by then in a hysterical state and threatening to kill himself. There is evidence as well of an alcohol test which was taken of the appellant on 25 March, indicating a .2 alcohol blood content. Appellant testified that at the time of the incident, he was under the influence of alcohol, particularly having consumed a number of whiskeys.

As a result of his wounds, Patrick was taken to the Tygerberg Hospital where he required an operation. He spent three days in hospital. The wounds that were inflicted were of such a nature that he could count himself fortunate to still be alive. If the bullet had entered at a slightly different projectory, he would not have been alive to tell his story. Ms Langeveldt,

also suffered injuries to her left shoulder, her left cheek and to her right hand and she required attention in hospital for some 10 days. There can be no doubt from the evidence that both the injured parties had been placed in a potentially life threatening situation as a result of the shots.

The essence of the case, which was brought in defence of the charges by the appellant, was that he could not have formed the intention to have killed or threatened to kill either of the two injured parties. Mr Moller, who appeared on behalf of the appellant (and to whom this Court is truly indebted for his assistance in that it appears he was not given instructions to proceed, but on the request of this Court, continued most ably to represent he appellant, with the permission of the latter), contested the argument that there was the presence of *dolus*, in the form of *dolus eventualis*, that is that it could not, on the evidence, be concluded that the appellant foresaw the consequences of his action and acted reckless as to the possible actual consequences which ensued.

Mr Moller correctly pointed to the fact that an accused person must subjectively foresee the consequence and cognitively reconcile himself or herself with the reality that the consequence may actually ensure. As he noted, citing S v Minnie 1963 (3) SA 188 (A) at 190:

"The proposition is well established in our law that a person has the necessary intention to kill if he appreciates that the injury which he intends to inflict on another, may cause death, and nevertheless inflicts that injury reckless whether the death will ensue or not. Thus the prosecution is required to prove beyond a reasonable doubt that the appellant subjectively understood that his act may very well cause death or injury, not that he should or ought to have understood it at the time. That question of fact requires adjudication in the same manner as in the case where the Court seeks to draw a conclusion in respect of whether the accused had the requisite intent."

All of this is accepted law. In this case Mr Moller contended that the appellant was under influence of alcohol. Secondly, whatever intent he had, it could not have been to cause the death of either of the two complainants. As to the question of alcohol, the medical evidence is highly unsatisfactory in that the test was taken at a time which does not provide this Court with any definitive guidance as to the state of alcohol which was in the body at the time.

That difficulty is compounded, however, by the critical second problem which confronts the appellant. In the appellant's own evidence, he admitted that he had intended to cause harm to both his son and to the mother. To the extent that it is relevant, the evidence to which I shall return of Professor Bezuidenhout, in mitigation of sentence, is helpful. The appellant was angry, he had been humiliated by his son pursuant to the earlier incident to which I had already made reference. He proceeded, via his motorcar, to the common home, armed with a weapon. One might ask rhetorically what possible inference can be drawn from such actions other than that he proceeded from the home of Ms April to the common home with intent to cause harm.

But the court does not have to go so far as to engage in rhetorical devices. The appellant stated his intention. A couple of passages from the evidence will suffice. Under cross-examination he is asked the following"

> "U gaan vir u vuurwapen en wat wou u met die vuurwapen maak? --- Edelagbare, vuurwapen kan mense seer maak, kan skiet. Dit kan wees dat ek probeer het om ook om hom te dwing om te luister wat ek probeer sê. Hier kom hy en hy kom weer om te slaan.

En wat ek van u verstaan, mnr Langeveldt, toe op daardie stadium weet u alles wat gebeur het en u het volle beheer oor die situasie. U het uit u eie gegaan vir die vuurwapen en die vuurwapen gehaal. U sê die vuurwapen kan skiet en die vuurwapen kan seer maak, wat wou u met die vuurwapen maak? Wat (sic) u nou vir hom keer, die vuurwapen op hom rig dat hy kan teruggaan, wou u vir hom afskrik om 'n waarskuwingskoot te skiet, wat wou u doen? --- Edelagbare, dit was nie om my seun dood te maak of sy ma dood te maak nie. Is dat ek miskien die ding verkeerd hanteer het. Dit kan wees ook, Edelagbare, want ook in die getuienis wat ook sal gebeur, is dit ook dat ek sou - ek wou myself skiet nadat, meneer, as ek die huis - ek meen die huis - uit my huis uitgesit het ja, Edelagbare."

In short, if one examines the evidence of the appellant under cross-examination, he denies that he sought to kill either of the complainants. But he goes on to say:

"Edelagbare soos wat ek ook vir die Hof alreeds gesê het, ek het my vuurwapen - ek was woedend, Edelagbare. Ons kan die ding nog uitsorteer, Edelagbare, met alle respek teenoor die Hof, toe ek

by die deur inkom, die seun kom na my toe, die hand word gemasseer of iets aan my aangesmeer."

In short, as Mr Moller correctly conceded, the appellant was forced to accept that he had an intention to cause harm, albeit that he denied that he had the intention to kill. But the passages that I have already indicated, are a dextrous attempt to circumvent this obvious problem in that the appellant's attempts to reconstruct the events and to place himself in the best possible light.

The magistrate rejected this version of the appellant that Patrick, having had his hand injured and confronted with an angry father who was armed with a weapon, would then have sought to assault him yet again. Secondly, the magistrate concentrated on the evidence that the appellant himself recognised he had intent, albeit to injure. It is extremely difficult to draw a distinction between an appellant who foresees the possibility that the use of his firearm might well injure, (and indeed more than that) has a direct intention to injure, yet cannot be held to the standard of *dolus eventualis* to the effect that he foresaw the possibility that his actions which might have been directly to injure, could have caused the death and acted reckless thereto.

In short, the magistrate defined the key question as:

> "Of die beskuldigde se verhandelinge willekeurig was al dan nie, of sy handeling vrywillig was en/of hy meganies opgetree het en sy handeling dus uitgesluit is."

The answer is clear, once the appellant, on his own version, had conceded that he had acted with the intention to at least injure, the entire defence of some form of autonomism, howsoever defined, had to be rejected and the doctrine of *dolus eventualis* came decidedly into play.

In my view, therefore, there can be no doubt, even though all that has to be determined is beyond a reasonable doubt that the appellant came to the house of his wife, armed with a weapon, with the intent to cause harm. Harm was caused. The version that he put up was tailored to suggest that he was under attack and, therefore, acted in self-defence, or alternatively that he was so intoxicated that he did not know what he was doing. Both versions were correctly rejected by the magistrate for the reasons that I have already articulated and in my view, there is no justification with interfering with the conviction.

Mr Moller, sensing, in my view, the difficulties with a jurisprudential attack on the findings in respect of conviction, concentrated most of his submissions on the issue of sentence. To recapitulate, the appellant was sentenced to a direct term of imprisonment of seven years. Critical to Mr Moller's submissions that the Court should have considered an alternative form of punishment, perhaps one should not have the carceral component attached thereto, was a detailed report made available to the Court by Professor Bezuidenhout, a professor in criminology in the Department of Social Work and Criminology at the University of Pretoria. Professor Bezuidenhout provided the Court with a detailed document and furthermore, gave oral testimony to substantiate that which was contained in his report. In essence, the conclusion to which he comes, is well captured in the following passage:

> "Dat 'n opgeskorte vonnis aan mnr Langeveldt opgelê word. Dat mnr Langeveldt drie maande onder korrektiewe toesig geplaas word, byvoorbeeld hy mag slegs kantoorure van die huis af weg wees. Hy moet elke aand, vir drie maande, tuis deurbring en in die tydperk mag hy ook nie naweke sy huis verlaat nie. Hy moet elke Vrydag met die betrokke probasiebeampte ontmoet en 'n gesprek voer oor sy doen en late. Sodoende kan hy steeds sy plig deur

die week as balju vervul en sy oulike plig teenoor Faith, sy babadogter nakom. Dat mnr Langeveldt 'n boete ten opsigte van die verweerde klagtes aan die Staat betaal. Dat mnr Langeveldt se vuurwapenlisensie permanent teruggeneem word. Dat mnr Langeveldt op sy eie onkoste 'n sielkundige, wat deur die Staat geïdentifiseer word vir terapie, besoek vir 'n periode van drie maande. Dat mnr Langeveldt na hierdie drie maande 'n terapie periode gemeenskapsdiens, wat deur die Hof voorgeskryf word, vir 'n periode van drie maande verrig."

In substantiation of this particular set of recommendations, Professor Bezuidenhout refers to the psychological trauma that he contends occurred as a result of the assault by Patrick, that there were a series of psychological baggage which the appellant carried through his background and that further, there was what he called "*die waarskynlikheid van psigogene outomatisme*" which had to be taken into account.

Professor Bezuidenhout also emphasised the trauma which the appellant himself encountered subsequent to the incident in 2006, that he had had various physical illnesses, including an epileptic incident and that he lived with the shame and the regret for some considerable while thereafter. Furthermore

Professor Bezuidenhout emphasised the very limited rehabilitative advantages of a term of imprisonment, and then said:

> "Ek is van oordeel dat Eddie, vanweë sy sosialisering en persoonlikheidstipe, wel 'n skuldgevoel het teenwoordig baie sleg voel oor die insident."

It is perhaps arguable that the magistrate, faced with the unusual advantage of having so detailed and considered a report, might have spent longer in analysing the report in his reasons given for the sentence imposed. That itself, is not a sufficient ground to alter the sentence. It is thus correct that, as Mr Moller urged upon us, the magistrate could have engaged more thoroughly with the issues raised by Professor Bezuidenhout. Again the lack of detailed engagement with those issues, is not a justification for interfering with sentence. Courts on appeal do not change a sentence because they may consider that they would have imposed a different sentence if they had acted as a court of first instance; that is not the test, and were it to be the test, great uncertainty would result insofar as appeals against sentence are concerned.

The magistrate took account of all the factors which

traditionally are raised insofar as sentence is concerned, and indeed towards his sentence said this:

> "Soos die Hof reeds gesê het, mnr Langeveldt, the Hof het groot deernis vir u persoonlike omstandighede, maar hierdie optrede van u die betrokke nag, kan nie in 'n beskaafde samelewing met geweld wat absoluut hoogty vier in die Hof se bediensgebied, kan nie geduld word nie. Die Hof gaan soveel genade vandag aan u betoon, mnr Langeveldt, maar die Hof kan nie sy weg oopsien om aan u 'n ander vonnis op te lê as 'n termyn direkte gevangenisstraf nie."

In assessing sentence, courts need to take account of four separate sets of circumstances, the offender, his background or her background, the nature of the crime, the interests of the community and the concerns and the affect that the crime has on the victim. Victims are the silent parties in all too many criminal cases and their interests also need to be considered in the overall conspectus insofar as sentence is concerned. These two victims were fortunate to survive. They had an extraordinary fortunate escape and were clearly traumatised by the events of the night.

It is correct that there are factors in favour of the appellant insofar as his own background is concerned and those were taken into account by the magistrate. They were certainly emphasised by Professor Bezuidenhout. But this was a violent crime. These are two convictions for attempted murder in a society in which violent crime represents a foundational attack on the very constitutional enterprise which this country engaged upon in 1994. It cannot be over emphasised, that courts need to deal with violent crime in the most serious possible way. To the argument that imprisonment never really has a rehabilitative effect, the answer must be well then nobody will ever be sentenced to a term of imprisonment, because the argument will always be raised, and inevitably so, that imprisonment does not work.

I accept readily that there are huge difficulties with regard direct terms of imprisonment, but, in my view, when violence is the core of the offence, one has to look very carefully for compelling justification before an alternative sentence is imposed. In this case, the magistrate took account of these factors and there is no compelling justification to conclude that there was a misdirection of a kind which would justify this Court in interfering in the sentence.

I have set out these reasons in some detail, because we have

been advantaged by very careful argument insofar as sentence is concerned, and this argument which deserves an adequate response.

In the result, therefore, I would dismiss the appeal and confirm both the conviction and the sentence.

LE GRANGE, J: I agree.

LE GRANGE, J

DAVIS, J: It is so ordered.

DAVIS, J