DPP REFERENCE NO	:	**9/2/5/1-202/10**
MAGISTRATES COURT APPEAL NO	:	**WSH124/08**
HIGH COURT CASE NUMBER	:	**A68/10**
		A402/10

In the matter between:

NDIKHO TYAWANA Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 30 NOVEMBER 2010

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1. On 12 June 2008 a meeting was held in Worcester town hall, which was convened by the provincial leadership of the African National Congress. The purpose of the meeting was to convey to the regional leadership that a decision had been taken to disband the Boland Region of the ANC. The decision was contentious, and appeared to cause dissatisfaction among a group of ANC supporters or members. One of the parties invited to address the said meeting on 12 June was Ncebisi Skwatsha. He arrived at the venue accompanied by two fellow ANC office bearers, Messrs Ozinski and van den Heever. On their arrival, they found a group of people singing and dancing outside the hall. Certain members of this group directed abusive

language towards Skwatsha and jostled and hit him as he was making his way to the entrance of the town hall. Skwatsha and his two companions managed, with some difficulty, to make their way into the hall, and the meeting commenced. Some twenty minutes later the door was kicked open, and the same group which had been dancing, singing and verbally abusing Skwatsha entered the hall. They picked up chairs and threw them at the people already gathered in the hall and certain of their members proceeded to the front of the hall where Skwatsha and other office bearers were standing. Fighting broke out. In the ensuing fracas Skwatsha was stabbed in the right posterior area of the neck. He was rushed to hospital where he had his wound explored and thereafter stitched up. The Appellant was arrested for the stabbing of Skwatsha. He was charged with attempted murder, tried in the Regional Court, convicted, and sentenced to eight years imprisonment, of which three suspended for five years. He appeals against his conviction only.

2. The facts outlined above are not in dispute. What is disputed is what occurred after the protesting group had gained entry to the hall, whether the Appellant was part of the group which attacked Skwatsha and his fellow office bearers, and whether the Appellant was the person who stabbed Skwatsha.

3. The evidence of Skwatsha was that he, together with certain other officials, was seated at the front of the hall. The meeting had already commenced when the group who had caused the disturbances outside kicked the door in, entered the hall and began throwing chairs at those in the front of the

hall. He was hit on the right arm by one of these chairs. A general mêlée then ensued, during which Skwatsha received a number of blows and he, in turn, tried to fight back against those who were attacking him and his ANC provincial colleagues. It was during this scuffle that he was stabbed in the neck. He had not initially realise that he had been stabbed, only becoming aware of this fact when he saw blood on his shirt. At about the same time he became aware that one of the assailants, who was standing approximately two metres in front of him and facing him, was carrying a knife. He saw no one else in the group wielding a knife. He indicated, in his examination in chief, that the person he saw carrying a knife was the Appellant.

4. In cross-examination, Skwatsha confirmed, he had not seen his assailant stabbing him. He had seen and felt the Appellant strike him in the neck, but did not at that moment know that he had been stabbed, only becoming aware of this a short while later when he saw that he was bleeding. He was unable to indicate precisely where the Appellant's blow had landed, explaining that he had been dealt various blows by the group attacking him.

5. Novantu Bushawana testified that she was present in the Worcester town hall when the attack on Skwatsha occurred. Her undisputed evidence was that she had known the Appellant for more than ten years. She saw the Appellant take out a knife, which she described as having a brown handle and a blade of approximately seventeen centimetres, and stab Skwatsha in his neck. According to her, Skwatsha was seated at the time and she did not notice any people other than the Appellant in Skwatsha's immediate

vicinity. She also did not see Skwatsha and any members of the protesting group exchanging blows. After the incident, she pointed the Appellant out to the police as the person who had stabbed Skwatsha.

6. Max Ozinski testified that he was standing next to Skwatsha when about ten to fifteen members of the disruptive group burst into the hall, and proceeded towards the front of the hall. They started throwing chairs. One of these attackers ran faster than the others in the group and, on reaching the front of the hall, attacked Skwatsha. At that stage Ozinski was under the impression that this person was hitting Skwatsha. Ozinski pulled this assailant away from Skwatsha, and wrestled him to the floor. While he was busy doing this someone called out that Skwatsha had been stabbed. Throughout this incident he had not noticed the Appellant holding a weapon, and did not see him actually stab Skwatsha. Ozinksi managed to get a good look at the face of the person he wrestled to the ground, stating that he was able to recall the person's face and pointed the Appellant out as the person in question. He testified that, while he did not know the Appellant well prior to the meeting, he had seen him around at ANC gatherings in the Worcester area.

7. The Appellant applied for his discharge at the close of the state's case. That application was refused. He thereafter elected not to testify, and closed his case without leading evidence. The consequence of his failure to testify, notwithstanding the direct evidence identifying him as the person who had attacked Skwatsha, and (according to Ms Bushawana) as the one who performed the stabbing, is that there is no evidence rebutting the

evidence that the Appellant was the perpetrator. In **S v Mthetwa 1972 (3) SA 766** the court, at **769 B** said the following:

> *"(a) Where the State case against an accused is based upon circumstantial evidence and depends upon the drawing of inferences therefrom, the extent to which his failure to give evidence may strengthen the inference against him usually depends upon various considerations. These include the cogency or otherwise of the State case, after it is closed, the ease with which the accused could meet it if innocent, or the possibility that the reason for his failure to testify may be explicable upon some hypothesis unrelated to his guilt; see* R v Ismail, *1952(1) SA 204 (AD) at p. 210, and* S v Letsoko and Others, *1964(4) SA 768 (AD) at p. 776B-D.*
>
> *(b)Where, however, there is direct* prima facie *evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general* ipso facto *tends to strengthen the State case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability."*

8. On appeal it was, firstly, submitted that there was no acceptable evidence identifying the Appellant as the person who stabbed Skwatsha. The need to carefully and cautiously evaluate evidence of identification was emphasised in **S v Mthetwa**, *supra* at **768 A to C**:

> *"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various*

factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused;s face, voice, build, gait, and dress; the result of identification parades, if any; an, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighted one gains the other, in the light of the totality of the evidence, and the probabilities."

9. There are three factors which have a bearing on the issue of whether the Appellant was correctly identified as the assailant. Firstly, the Appellant was well known to Ms Bushawana, and she unequivocally identified him as the person who had carried out the stabbing. The Appellant was also not a complete stranger to Ozinski who had seen him at previous ANC meetings. Both Ozinski and Skwatsha stated, in evidence, that they recognised the Appellant as the one who had attacked Skwatsha and their evidence in this regard was not challenged, in any meaningful fashion. Where a state witness identifies an accused as the perpetrator of the offence is question, the basis of that identification should at least be probed and challenged in cross-examination, and any factors allegedly detracting from the reliability of such identification should be pertinently put to the witness. This was not done. Furthermore, it appears from questions posed to Skwatsha in cross-examination that the Appellant admitted to having been present in the Worcester town hall, when the fracas already described above broke out. This is thus not an instance where the state witnesses mistakenly identified someone who claims not to have been present at all.

10. All these factors demonstrate, in my view, the reliability of the identification of the Appellant as the one who attacked Skwatsha. The suggestion that he was not properly identified in the evidence is incorrect.

11. Appellant also contended, on appeal, that the evidence did not establish, with the required certainty, that he had been the person carrying the knife nor, it was suggested, that Skwatsha had been wounded with a knife. The submission, in the argument, was that one of the punches thrown at Skwatsha might have cause the neck wound. I find it difficult to conceive how a blow with a fist could penetrate the leather jacket and shirt which Skwatsha was wearing and cause the wound described in the medical evidence. Any suggestion that such a blow could have caused the wound should, at the very least, have been raised with the doctor who treated Skwatsha, when he testified. This was not done.

12. The further submission regarding the knife, and the wound it caused, was that reasonable doubt had to exist as to whether the person who struck Skwatsha a blow in the neck was carrying a knife, having regard to the fact that neither Skwatsha nor Ozinski saw any knife prior to Skwatsha being stabbed. The failure of these two witnesses to notice the knife at that moment in time is explained in the evidence. Ozinski testified that he was not paying particular attention to what the assailant held in his hands, as he was trying to pull him away from Skwatsha and force him to the floor, and this evidence was not challenged in cross-examination. Skwatsha, too, was not paying particular attention to what his attacker held in his hands as he

was, immediately prior to the stabbing, busy fending off blows from various people and at the same time trying to fight back. It is quite understandable that his attention would have been focused elsewhere. It must again be emphasised that the Appellant did not testify, and made no attempt to rebut the direct evidence about his involvement and the knife which he was carrying. The totality of the evidence, in my view, shows that Skwatsha was wounded with a knife and that Appellant was the only person seen with the knife, at the scene of the attack.

13. This leads to the next contention advanced on appeal namely that, given the discrepancies between the evidence of Skwatsha, Bushawana and Ozinski, the court should find such evidence unreliable, and should accordingly hold that the commission of the offence is not established beyond reasonable doubt. The fact that there are discrepancies between the versions put forward by various witnesses does not mean that the evidence of such witnesses should be rejected *in toto*. The court is obliged to consider any factors which might account for such discrepancies. The factors to be taken into account would include the circumstances in which the various eyewitnesses viewed the events to which they testified and the opportunities they had to observe such events, the rapidity with which such events took place, and any other factors which may account for differences in their testimony.

14. In this appeal, a hostile group had forced its way into the town hall where the meeting was being held, had approached Skwatsha and his fellow office bearers, hurled chairs at them and assaulted them. The incident did

not stretch out over a long period of time. The eyewitnesses would justifiably have had some fear as to their personal safety. Furthermore, they had not expected a potentially fatal attack on one their members prior to the stabbing, and would thus not have concentrated on making detailed observations as to the individual actions of members of the attacking group. It would, in such circumstances, be understandable that their recollections might differ.

15. There is in any event no material difference between the testimony of Ozinski and Skwatsha. There are, indeed, differences between the evidence of Bushawana and the other two. Thus, for example, she states that Skwatsha was seated throughout the attack on him whereas his own evidence, and that of Ozinski was that he was standing. It must, however be remembered that he was seated immediately before the attack began. In addition the attention of Bushawana would have been focused on what the attacking group was doing and not on the precise moment at which Skwatsha rose to his feet.

16. Similarly, the fact that Bushawana did not notice that other people were also attacking Skwatsha, and that he was endeavouring to fight some of them off, may be explained by reference to two factors – the confusion which ensued when the attacking group entered the hall, and the fact that her attention would for obvious reasons have been focused on Skwatsha and the man who stabbed him with a knife, and not on other members of the attacking group who played a more peripheral role.

17. The approach which the court should adopt, in evaluating the evidence put forward by different witnesses, is that set out by Nugent J in **S v van der Meyden 1999 (1) SA CCR 447 (W)** at **450 B**:

> *"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence; some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."*

18. If I accept, as I must, that the evidence of Bushawana cannot simply be ignored, then four possibilities must be considered. The first is that she did not see the Appellant carrying a knife, or stabbing Skwatsha, and that the version of events described by her is a deliberate fabrication on her part. Nothing in the evidence would support such a conclusion and it was, in any event, not put to her that she was deliberately fabricating the evidence which she gave, implicating the Appellant. The second possibility is that the person she saw attacking Skwatsha was not the Appellant, but some other person but this can also, on the evidence, be discounted since Skwatsha and Ozinski also gave evidence about the Appellant attacking Skwatsha and the Appellant did not give evidence in rebuttal. The third possibility is that the object which the Appellant was carrying was not a knife, but something else, but this once again raises the difficulty that Appellant did not testify that he was carrying some other object capable of being confused, in the heat of the moment, with a knife. Any finding that what he had in his hands was an object other than a knife would thus be based on

pure speculation and the conclusion which the court must reach, on the evidence, has to be based on the facts presented in the evidence and not on speculative possibilities not raised in the evidence (**De Wet v President Versekeringsmaatskappy Bpk 1978 (3) SA 995 (C)** at **500**; **S v Ndlovu 1987 (I) PH H37 (A)** at **68**).

19. What remains, therefore, is the conclusion that Bushawana did indeed witness the stabbing incident as described by her, and that the discrepancies between her evidence and that of the other state witnesses are capable of explanation, having regard to the circumstances that were present, and to the considerations emphasized above.

20. In my view the learned Magistrate correctly found that the Appellant had indeed stabbed Skwatsha with a knife, in the neck.

21. A further submission raised on behalf of Appellant was that, even if the evidence showed that the Appellant had stabbed Skwatsha, such evidence could not justify a finding of attempted murder. Such a finding could only be made if the evidence discloses that the Appellant had the requisite *dolus*, or intent. *Dolus* may, take one of two forms, as was explained in **S v De Bruin en 'n Ander 1968 (4) SA 506 (A)** at **510 F to H**:

> *"The crime of murder requires that the unlawful killing should have been committed with* dolus. *This is a subjective state of mind. It never coincides with objective* culpa. *Broadly speaking, and*

leaving aside variants not here relevant, dolus *in murder cases may take one of two forms.*

First, dolus directus. *The accused directs his will to compassing the death of a person. He means to kill. The sole characteristic of this form of* dolus *is actual intent to kill. Its methods are legion, but poisoning is an example.*

Second, dolus eventualis. *The accused foresees the possibility, however remote, of his act resulting in death to another, yet he persist in it, reckless whether death ensues or not. On analysis, the multiple characteristics of this form of* dolus *are:*

1. *Subjective foresight of the possibility, however remote, of his unlawful conduct causing death to another.*
2. *Persistence in such conduct, despite such foresight.*
3. *An insensitive recklessness (which has nothing in common with* culpa*).*
4. *The conscious taking of the risk of resultant death, not caring whether it ensues or not.*
5. *the absence of actual intent to kill."*

22. Intent in the form of *dolus eventualis* is also sufficient where the victim is not killed, as a result of the assault perpetrated by the accused, and the charge is one of attempted murder (**S v Tissen 1979 (4) SA 293 (T) at 295 A to E**). The courts have repeatedly emphasized that the enquiry is not what the accused ought to have foreseen, but what the accused did foresee. The principle was thus stated in **S v Du Preez 1972 (4) SA 584 (A) at 588 H to 589 A**:

"For the purposes of the present appeal, it suffices to emphasise that the enquiry is not what the appellant ought to have foreseen, but what he did foresee; that the subjective foresight of resultant death which constitutes dolus eventualis *must be established by the State beyond reasonable doubt; and that although, like any other factual issue, such subjective foresight may be proved by inference, the inference must be the only one reasonably to be drawn from the facts of the particular case."*

23. An inference of *dolus eventualis* may be drawn from the circumstances of the case and the court may, in that regard, take into account any explanation or lack thereof put forward by the accused which might negative a finding of *dolus eventualis*. This, for example, was the approach adopted in **S v Nhlapo and Another 1981 (2) SA 744 (A)** where the court, after analysing the circumstances under which an armed robbery took place, said the following at **751B**:

In sum, the only possible inference, in the absence of any negativing explanation by appellants, is that they planned and executed the robbery with dolus indeterminatus *in the sense that they foresaw the possibility that anybody involved in the robbers' attack, or in the immediate vicinity of the scene, could be killed by the cross-fire. Compare the remarks of Rumpff JA in* S v Nkombani and Another *1963 (4) SA 877 (A) at 892A. Or, to adopt the words of Holmes JA in the same case (at 896), the shooting of one guard by another was, as far as the robbers were concerned, 'an envisaged incident or episode' in the crime planned by them."*

24. In the appeal before us the Appellant attacked Skwatsha with a dangerous weapon and stabbed him in the neck, a few centimetres from the carotid artery. Any person of ordinary intelligence can hardly contend that the potentially lethal consequences of such a stab wound was not foreseen by the attacker. The Appellant gave no evidence from which the court could draw the inference that, in his case, he did not in fact appreciate the potentially fatal consequences of the stab wound, or that he had intended to stab Skwatsha in some other part of his body and had, by chance, struck the knife blow in an unintended part of his victim's anatomy. The only inference reasonably to be drawn from the facts is, in my view, that he acted with the necessary *dolus eventualis*. I see no basis for interfering with the finding of the trial court in this regard.

25. The Appellant also sought to impugn the conduct of the Magistrate in the court below, suggesting that the Magistrate had interfered with the questioning of witnesses to such an extent that the Appellant had not been afforded a fair trial. It is undoubtedly so that a judicial officer must remain strictly impartial and must not conduct himself in such a manner as to create the impression that he has prejudged the matter (**S v Le Grange and Others 2009 (2) SA 434 (SCA) para 21 to 23**). It does not, follow that a presiding officer at a criminal trial is precluded from raising questions in order to clarify any part of the evidence, or in order to ensure that the questioning of witnesses remains within permissible boundaries (**S v Basson 2007 (3) SA 582 (CC)** at **paras 35 to 36**). The record in this matter does not, in my view, indicate that the Magistrate conducted himself in such a way that his impartiality could reasonably be called into question. I have

studied the various interjections from the bench appearing from the record and do not consider them to be excessive, unfounded or indicative of any hostile attitude towards the Appellant, the Appellant's legal representatives or any other participant in the trial. On occasions when the trial Magistrate indicated that he had a difficulty with a particular line of questioning, he allowed the Appellant's attorney to fully address him on such difficulty. I am satisfied that the Appellant was afforded a fair trial and that the submission that the trial Magistrate did not manifest the requisite degree of impartiality is not well founded.

26. I am accordingly not persuaded that there are grounds for interfering with the conclusions of the trial court, or for overturning the Appellant's conviction. In my view the appeal should be dismissed and the conviction confirmed.

A C OOSTHUIZEN

I agree. The appeal is dismissed and the conviction of the Appellant on the charge of attempted murder is confirmed.

A P BLIGNAULT J