IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A73/2012

DATE: 24 AUGUST 2012

In the matter between:

HENRY PONY Appellant

and

THE STATE Respondent

J U D G M E N T

STELZNER, AJ

The appellant was convicted on a count of attempted murder on 5 November 2010 and was sentenced to 12 years direct imprisonment on the same date. This appeal is against both his conviction and sentence.

Relying on *inter alia* S v Van der Meyden 1999(1) SACR 447 (W) the appellant argues that the State did not prove his guilt beyond reasonable doubt.

It was submitted on his behalf that since it was reasonably possible that he may be innocent of the charge, he should have been acquitted by the regional court magistrate and should now have his conviction set aside in this court.

With reference to *inter alia* S v Van Aswegen 2001(2) SACR 97 (SCA) at 101 it was further submitted on the appellant's behalf that there was no onus on him. When an accused places his version before a court, even where the said version may be improbable, the court cannot convict unless it finds that the state has proven its case beyond reasonable doubt.

The argument for the appellant by Mr Paries who appeared on his behalf also relied on S v Gheme 1969(1) AH H78 (N) which sets out the proper approach to the evidence of a single witness namely that it must be clear and satisfactory in every material respect and the enquiry further needs to be such that after a fair appraisal of the accused's denial the evidence of the single witness must so outweigh the accused denial as to satisfy the court beyond a reasonable doubt of the accused's guilt.

Applying these principles to the proven facts in this matter, has the following result.

The evidence in support of the state's case was indeed that of a single witness, the complainant, Abongile Yelani, hereafter the complainant. The essential issue in dispute is whether the appellant perpetrated the attempted murder on the complainant. The complainant's evidence, it is argued, was not clear and satisfactory in every material respect. Nor did it so outweigh the appellant's denial as to prove the appellant's guilt beyond reasonable doubt because of a previously inconsistent statement.

For this reliance is placed on what the complainant was reported to have told an Inspector Treurnicht at the scene of the shooting when he was drifting in and out of consciousness and the Inspector himself was not interested in establishing the identity of the perpetrator at that point.

The magistrate referred to the statement having been confused. This is understandable given the fact that the complainant had been shot twice some 20 minutes before; had recently surfaced out of unconsciousness; was on the point of being taken to hospital and was in the presence of not only a police officer but also numerous other bystanders. In those circumstances any inaccuracies in the statement which was made to Inspector Treurnicht, the contents of which were furthermore in fact relayed by Inspector Treurnicht to the

court, are understandable.

The complainant himself had no recollection of what he told Inspector Treurnicht at the time. This is also understandable in the circumstances.

In a written statement made to the investigating officer, which although undated and does not appear to have been properly commissioned was made some 10 weeks after the shooting, the complainant stated *inter alia* that:

> "On Saturday 17 May 2008 I was walking home. As I was walking I saw Henry who is known to me as I had known him for approximately eight years. Henry came to me and took out a gun and shot me. Henry also resides in Crossroads. I am not certain about the physical address but I know where he stays. He always asks me why I went to the police to have his friends Thabo and Siyabulela arrested for murder. Thabo and Siyabulela are still in custody for a murder case of which I am a witness. When I woke up again I was in hospital. That is all I can remember. I have seen Henry approximately five times and every occasion that he saw me he asked me why I had his friends arrested. He used a

pistol to shoot me. I only remember two shots being fired and I cannot remember how many were fired afterwards. When Henry asked me, he was always angry and I could see on his face that he was not happy. Henry is light in complexion and he is tall. He wears earrings. He was arrested a lot in 2005 for gang related crimes. I could not get a chance to run and dropped right next 1660 Crossroads. That is all I can say."

The circumstances in which the previous oral statement was made would clearly explain any discrepancies or inconsistencies there may have been. On its own it is not destructive of the complainant's version.

The written statement which was consistent with the subsequent evidence of the complainant is evidence of previous identification which is both relevant and weighty. See S v Rasool 1932 NPD 112.

What is noteworthy of the written statement is that the friends of the appellant are specifically mentioned and what was stated to Inspector Treurnicht at the time of the shooting, according to Treurnicht, was to a similar effect namely that the complainant was a witness in a matter which related to a

killing.

The appellant argues that the written statement to the police made a few weeks after the incident, in hospital, was not only inconsistent but could have been a fabrication since the complainant had had a lengthy period, much of which was spent under police protection, in order to fabricate his story.

The reference to the complainant having been a witness both in his statement to Inspector Treurnicht and in the written statement, does not support this argument.

In his evidence, the investigating officer stated that the complainant gave the investigating officer the residential details of the appellant. He told him the appellant's address was 1655 Unathi Crossroads. Based on that address provided to him by the complainant the investigating officer stated that he first went to the appellant's address and found someone who almost looked like the appellant, but he was not sure and found out later that it was not the appellant.

The investigating officer further gave evidence that the complainant did not provide him with Henry's name the first time he visited the complainant which appears to have been in hospital, but gave him a name when he went to the

complainant a second time when the complainant was under witness protection, although only the first name of the appellant, not his surname, was provided. In this regard the investigating officer's evidence was not very clear. He stated at one point that the complainant was not sure about the surname. At another point he stated that the complainant did mention Henry's surname but he was not sure about it.

The appellant argues that these further inconsistencies create a reasonable doubt. The fact of the matter is that the investigating officer went to the appellant's home on a second occasion, this time with a Constable Bamba, who was assisting him with the case because Constable Bamba knew the appellant and would be able to identify him. It is not clear whether this identification was based on the description of the appellant given by the complainant or because of the name provided, but what is clear is that the description of the appellant in the statement, the written statement referred to above, namely being light in complexion and tall matched that of the appellant as well as his first name. Whether the nickname or surname was mentioned or not, it takes the matter no further as the identification of the appellant is concerned.

These omissions or discrepancies do not effect the material part of the complainant's evidence namely that he knew the

appellant well, that they had been acquaintances for some eight to nine years prior to the shooting and that it was the appellant who had shot him on the night in question.

It was further argued that there were power interruptions on the night in question and that according to the Inspector who arrived on the scene some 20 minutes after the shooting the electricity in the vicinity was out.

Elsewhere in the record it appears that the lighting was good enough for the complainant to have seen who had shot him.

It was argued on behalf of the state that whatever the position with the electricity supply, the fact that the complainant had been shot a close quarters some one and a half metres away from him and the fact that the complainant knew the appellant well would have made it very easy for the complainant to have correctly identified the appellant. I am in agreement with these submissions.

A further argument presented on behalf of the appellant to support the argument that there was reasonable doubt and whether the evidence of the complainant was satisfactory and clear in every material respect is an argument surrounding whether the complainant had informed the investigating officer

at the time that the appellant resided in Vesa when according to the appellant he in fact resided in an area of Crossroads know as Unathi.

The record, especially the reconstructed part of the record, shows that these areas are as it was put, intertwined. The address of the appellant at which he was arrested was not in that part of Crossroads referred to by local residents as Vesa, but in another part of Crossroads known as Unathi. Unathi appears to be in the immediate vicinity of Vesa and a road separates the two. It, the Vesa area, consists of more recently built smaller RDP houses which appear to be within the greater Unathi area. In the reconstructed part of the record it was reiterated the two were but a street apart.

Once again, apart from the circumstances in which the original statement was made, the material issue, the identification of the appellant as the shooter remained consistent. Whether he lived in a part of Unathi known as Vesa or whether he lived in the greater Unathi, what remained was the fact that he was identified by name and also by description.

The complainant had known the appellant for some eight to nine years. They grew up together in the same general area. The appellant appears to have been readily identifiable

because of his lighter complexion and this was confirmed in the court proceedings themselves.

The appellant placed himself on the scene of the crime, albeit, according to him, only after he heard shots being fired. He had, on the complainant's version, a clear motive to kill the complainant who was to give evidence against friends of his, those named in the written statement referred to above. The complainant was placed under witness protection after the shooting. All of this is supportive of his version.

It was argued with reference to an aspect which was brought out in cross-examination that the complainant had another motive to falsely accuse the appellant namely that the appellant had previously slept with the complainant's girlfriend. Apart from the fact that this was only elicited in cross-examination of the appellant it was never put to the complainant during either his first evidence or after being recalled when the appellant changed attorneys.

The appellant himself ultimately conceded that he did not consider this to be a reason for his having been accused. His evidence was that he had no reason for why the complainant would falsely accuse him. He also stated that the incident with the girlfriend had transpired approximately a year before the

shooting, further suggestive of the fact that it was of no real relevance.

What was argued was that the other motive that the complainant may have had for falsely accusing the appellant was that there was bad blood between them. The bad blood referred to in argument was the fact the complainant was the witness in a trial with regard to the appellant's friends. Far from being a motive for falsely accusing the appellant, that fact is supportive of the argument that the appellant had a clear motive to try and kill the complainant.

The appellant further claimed he was accompanied by three girlfriends and was not at the scene of the shooting at the time of his hearing the shots. It was further put to the complainant these three friends would testify to that effect. This suggested evidence was strongly denied by the complainant when put to him. Not one of the friends was subsequently called.

Only the appellant gave evidence. He confirmed that he had known the complainant for some nine years and that they lived in the same area, some seven houses apart. He confirmed that the complainant knew his name, his surname and his nickname. He claimed the area was well lit although the electricity was off when he came onto the scene. He confirmed

that there were other people, some women, on the scene. In his cross-examination no mention of the common girlfriend was made and this was never put to the complainant as being a motive for falsely implicating the appellant.

The appellant was afforded every opportunity to put his version to the complainant, both because he had two sets of attorneys and also because when the second attorney was appointed the complainant was recalled for further cross-examination. None of this, most importantly the suggestion of the common girlfriend being a motive for falsely implicating the appellant, was put to the complainant. This suggests that the appellant fabricated all of this as an afterthought.

As stated before the appellant could provide no reason for his allegedly having been falsely accused. He further claimed that it was he who called the police. This was never put to either the complainant or Inspector Treurnicht nor was it put to either of them that the women onlookers tried to get the complainant to move away and that he the complainant asked the appellant for assistance or that the complainant did not lose consciousness.

The magistrate was well aware of the caution required in assessing the evidence of the complainant as 'n single

witness. He refers to and applied the principles set out in R v Mokoena and S v Sauls. He found the complainant's evidence to have been detailed and consistent on the material aspects even after being recalled a year after his evidence-in-chief and cross-examination at that time and subjected to further cross-examination by the appellant's second attorney.

On this and his further assessment of the evidence he cannot be criticised for having erred or misdirected himself. It was argued that he did not evaluate the appellant's evidence and did not provide reasons in his judgment for why the appellant's evidence should be disregarded. It is apparent from his evaluation of the evidence as a whole, that the evidence of the appellant and the arguments submitted on behalf of the appellant were indeed taken into account in his judgment and the conclusion reached.

The fact that the judgment may not be as complete as one may wish it to be, does not detract from the fact that the conclusion is borne out by the evidence which served before him.

The magistrate had no doubt in his mind that the appellant was the person who shot the complainant and I am satisfied that the state proved this beyond reasonable doubt. I would uphold the conviction.

The appeal is also against the sentence of 12 years imprisonment imposed on the appellant a first offender, who was 23 years old at the time of committing the crime, 26 years old at the time of sentence, having spent some two years in custody awaiting trial. All of this, together with the other mitigating circumstances relied on by the appellant, was taken into account by the magistrate in imposing a sentence of lengthy imprisonment.

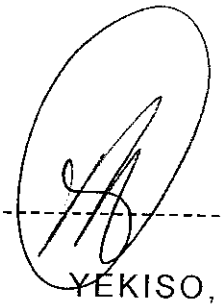
He contemplated a sentence of 15 years imprisonment because of the pre-meditated nature of the crime - a most serious and callous one aimed at killing the complainant for doing his civic duty. He further took into account the demands of the community. Because of the period in custody awaiting trial and the mitigating circumstances, this was tempered to 12 years. In striking this balance the magistrate can also not be faulted.

In the circumstances I would uphold the sentence too and **DISMISS** the appeal against both conviction and sentence.

STELZNER, AJ

/RV

I agree and it is so ordered.



YEKISO, J

/RV