



IN THE HIGH COURT OF AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
(Coram: Binns-Ward, J et Henney, J)

Case No: A69/2021

In the matter between:

NATHANIEL FELIX

Appellant

and

THE STATE

Respondent

Date of hearing: 6 August 2021 (The matter was dealt with on the papers in terms of s19 (a) of the Superior Courts Act)

Date of Judgment: 18 August 2021 (delivered via email to the parties' legal representatives and release to SAFLII)

JUDGMENT

HENNEY, J (BINNS-WARD, J concurring)

Introduction

[1] The appellant was arraigned before the Regional Court, sitting at Parow, on six counts of attempted murder, which emanated from an incident that occurred at about 9pm on 1 December 2018, when the six complainants were injured or placed in mortal danger when the appellant deliberately drove a motor vehicle through a closed gate into the area where the complainants were congregated at a braaivleis.

[2] On 18 February 2020, having entered a plea of not guilty to all the charges, he was convicted on counts 2 to 5 and acquitted on counts 1 and 6. On 22 September 2020, all counts being taken together for sentence, he was sentenced to six years'

imprisonment, of which two years were conditionally suspended for five years. His appeal, which is against his convictions only, is brought with leave granted by the court a quo.

Grounds of appeal:

[3] The appellant's appeal is based on three grounds. Firstly, that the state had not proven its case beyond reasonable doubt. Secondly, that the Regional Magistrate had misdirected herself in finding that the witnesses for the state were reliable; and thirdly, that the Regional Magistrate had misdirected herself in rejecting the version of the appellant as not being reasonably possible true. The third ground is, in reality, no more than a restatement, in different terms, of the first ground.

The Evidence:

[4] Not all the complainants mentioned in the charge sheet testified during the trial. The state based its case on the evidence of Ursula Lawrence ("Lawrence"), the owner of the property where the incident occurred; Leslie Khumalo ("Khumalo"), Lawrence's partner; Wesley Mitchell ("Mitchell"), Lawrence's son; Chantel Petersen ("Petersen"), an employee of Khumalo and Lawrence; and Lee Daniels ("Daniels"), also an employee, who was present at the scene on the particular evening. The complainants Shannon Mitchell ("Shannon"), also Lawrence's son, and Shahied Hendricks ("Shahied"), one of the other complainants and an employee at the business, did not testify. The appellant himself testified and also called his wife, Megan Felix ("appellant's wife") as well as his parents-in-law, Mr. and Mrs. Arrow.

[5] It was common cause that Khumalo and Lawrence conducted a car washing business from their property, situated in Thornton. It was also common cause that on the day of the incident, Khumalo and Lawrence decided to have a braai for their employees, as well as other people present on the property. The driveway of the property can be accessed from the public road in front of the property, through a remote controlled gate in a palisade fence. The driveway runs alongside the house and was used as the spot to place the drum that was used for the braai. All the employees and Lawrence's sons were outside, standing in the driveway, enjoying the braai.

[6] It was further not in dispute that after the appellant and his wife arrived at the property, Lawrence offered them some food. At that stage, the appellant and his wife had an argument and, according to Lawrence, he was very rude and abrupt with his wife, whereafter he wanted to leave. Khumalo intervened and pleaded with the appellant to calm down and not to speak to his wife in such a disrespectful manner. The appellant was not happy about being reprimanded by Khumalo, and swore at him. The appellant and his wife were asked to leave, and they proceeded to the gate accompanied by Khumalo. The appellant and his wife got into their car, whereafter, apparently in reaction to a remark the appellant made about her needing to take care how she handled her drink, she almost immediately got out of the car again, and did not want to leave with the appellant. Instead she went back into Lawrence and Khumalo's house.

[7] On the state's version, the appellant followed his wife into the house and continued arguing with her. Khumalo succeeded once again in getting him out of the house. The appellant left the property and, on Khumalo's version, he (Khumalo) closed the gate with the remote control. The appellant got into his car while Khumalo stood inside the property, behind the gate. On the versions of Khumalo and Mitchell, the appellant reversed his vehicle a few meters, and then changed into a forward gear and crashed his vehicle through the gate. Given the nature of the dispute, as well as the admission made by the appellant that he deliberately drove through the gate, not in the manner these witnesses testified, but in one motion, not much turns on the discrepancy between the two versions. Significantly, it was common cause that the appellant deliberately drove through the gate.

[8] Based on these common cause and undisputed facts, there is no need to deal with all the evidence in detail. Apart from the fact that most of the witnesses were aware that the appellant was involved in an argument, not only with his wife but also with Khumalo, which is also not in dispute, not all of them could hear exactly what was said and by whom. Not all of the state witnesses were able to give a clear account of what happened immediately before the car the drove through the gate.

[9] All the state witnesses' evidence regarding the injuries they sustained during the incident, caused by either the appellant's vehicle driving into them or by the gate

which the appellant knocked over, is beyond dispute, as said earlier. I will briefly deal with such evidence as is relevant to the issues raised on appeal.

[10] Lawrence was inside the house when the appellant crashed through the gate and only heard the noise of the crash. Her evidence mostly concerned the argument between the appellant and his wife, and later the appellant and Khumalo. She was not aware of the reason for the argument between the appellant and his wife. She also testified that the appellant was rude and very abrupt with his wife, which caused her partner Khumalo to intervene, which resulted in the appellant having an argument with Khumalo.

[11] During cross-examination she was confronted with her initial witness statement, wherein she had stated that, while in the lounge and on their way out, the appellant had told Khumalo 'I will kill you', which she had not mentioned in her evidence in chief. Her explanation was that she had forgotten to mention it. Khumalo, the appellant and his wife went outside, they proceeded to the gate, and the appellant and his wife eventually left the property. They drove away and the gate was closed. Lawrence stepped into the house to attend to her grandchild and after approximately 20 to 25 minutes, the appellant and his wife came back into the house. His wife came to the room where Lawrence was; his wife was in tears, and she uttered the words 'I can't stand this any longer'. Lawrence, in reply, told her to go home and sort out whatever problem she had with the appellant.

[12] The appellant's wife then proceeded to call her parents. While Lawrence was in the room with the appellant's wife, she heard the commotion outside and observed that the appellant's vehicle had crashed into their Volvo motor vehicle. She went outside and saw blood and bodies lying in the driveway. She also observed that the gate had been knocked over. She further testified that nobody at the scene had been intoxicated. She was not aware as to whether the appellant's wife had consumed any alcohol and denied that appellant's wife had been drunk. According to Lawrence, she was sober. She further denied that the appellant had been denied entry to the property to fetch his wife. She also denied that Shahied had threatened the appellant with a long knife and had prevented him from entering onto the property.

[13] Petersen testified that, while standing in the middle of the driveway, she saw the car rapidly approaching in her direction, and turned away from the oncoming vehicle. She was not able to get out of the way in time, and was hit on the left side of her body. At the time, Shannon and Shahied had also been present in the driveway. Her wrist was fractured, she sustained an injury to her left ankle, and some scrape wounds on her stomach. This witness's evidence was not really disputed by the appellant since, on the version put to her, the appellant had not known where she was when he drove his car into the driveway. She denied that the appellant's life, or that of his wife, had been in danger, or that anyone had threatened the appellant with a knife before the incident.

[14] Khumalo's evidence was that he had been right behind the gate on the inside of the driveway, and assumed that the vehicle reversed to gain momentum to ram through the gate. He testified that, on impact, the gate flipped over and fell to the other side of the driveway, landing on top of him. He sustained very serious injuries to his left eye, which was dislodged from its socket. As a result of this, he partially lost the sight in this eye. His wrist was also fractured and he sustained a rib injury.

[15] Khumalo had been more involved with the appellant and his wife on the evening of the incident, and his version was more detailed than that of the other witnesses. His interaction with the appellant continued at the gate, and he had further discussions with him about his treatment of and behaviour towards his wife, which the appellant did not like. He stated the appellant told him that that was the last words he would be uttering and the appellant threatened to crash his car through the gate. He denied that Shahied had, at any stage, threatened the appellant with a knife before the incident, or that the appellant had been denied access to the property to fetch his wife. According to him, the appellant's wife was free to leave at any time but chose to stay on the property.

[16] Mitchell also gave a very detailed version of the events. His evidence about the appellant's conduct on that particular day corroborated that of Khumalo. He described the argument between the appellant and Khumalo as one-sided, and described Khumalo's demeanour as very calm. According to him, Khumalo tried to calm down the appellant. When he observed the appellant and Khumalo arguing, he was

approximately 5 to 6m away from the gate. At that stage, he heard the appellant saying to Khumalo 'do you want to die tonight'.

[17] The appellant left his wife, drove off, came back after two minutes and once again proceeded to argue with Khumalo. Thereafter, the appellant got back into his car, reversed, and immediately changed direction by moving forward very fast, and drove his car into the gate, which in turn hit Khumalo. The appellant stopped for about two seconds, and then continued, and in the process knocked over a number of people. He observed that Petersen had been knocked over and was lying with her face flat on the ground next to the front tyre of the appellant's car. He also observed that his brother Shannon had a broken tooth, which had been completely chipped off.

[18] When the appellant thereafter tried to run away, Shahied and Shannon tried to stop him, but they could not pin him down. He further testified that all of them were in the driveway when the vehicle smashed through the gate, as they had all been standing around the braai. He was not injured, because he managed to jump out of the way before the car could hit him. It must be mentioned that this witness's version, that the car came to a standstill, whereafter it moved and collided with the people standing in the driveway, is not consistent with the version of the other witnesses. Especially Daniels, who testified that the appellant, after the vehicle crashed through the gate, did not move from that position. This witness also denied that the appellant had been denied access to the property to fetch his wife, and while he conceded that the appellant had been threatened with a knife by Shahied, he stated that this only happened after the incident.

[19] Daniels had been involved with the braai in the driveway at the time when he observed Khumalo standing by the gate. According to him, Khumalo was in the car's pathway. He heard the car crashing through the gate, whereafter the vehicle crashed into him while he was standing in the driveway, causing him to land on the vehicle's bonnet. He was subsequently taken to hospital. He sustained only a mild injury to his right leg. Petersen and Shannon had also been in the driveway with him, but he could not say whether they were injured in the collision. He recalled that Shannon fell over the braai when the vehicle collided with him. He was unable to say whether the appellant's wife had been intoxicated or whether her drink had been spiked.

[20] He denied that his leg injury had not been the result of his attempts to straighten the gate after the accident. He testified that Shahied had pulled a knife and wanted to attack the appellant after the incident, but denied that this had happened before the incident. He was further adamant that he, Shahied and Petersen had been in the driveway and that Khumalo stood immediately on the inside of the driveway, right at the gate, when the vehicle rammed through it.

[21] The appellant confirmed that he and his wife had been at Lawrence and Khumalo's property. He had taken his car to Khumalo's business to be cleaned earlier that day, and he and his wife had been invited to come over for a braai later. At that time, Khumalo had been drinking some beer. While at the braai, they started socialising and he observed his wife's behaviour to be very strange, after she had consumed a slight amount of a Savanna alcoholic beverage. He described her as being not her normal self, confused and dazed after taking a only sip of the Savanna. Because of his experience as a barman, he inferred that her drink had been spiked. He also observed that Khumalo, Daniels, Petersen, Shahied, as well as Mitchell, were all drunk at that stage. He did not see Lawrence drinking anything, because she was busy putting her grandchild to bed.

[22] When he observed his wife's condition, he asked her if she wanted to leave and she said yes. As they were about to leave, they were stopped because they were offered some food. The homeowners did not want them to leave. While they were dishing some food, Lawrence suddenly came out of the room and told them they could not leave, because by doing that they would be belittling and embarrassing them before their employees. His wife then changed her mind and said she would stay. He was upset with his wife for changing her mind.

[23] His wife then disappeared and he went to look for her inside the house. He found her in the en-suite bathroom adjacent to one of the rooms, where she was sitting on a toilet seat, with Khumalo and Lawrence towering over her. He took his wife by the hand and told her that they would be leaving, because he did not like what he was seeing. They then proceeded through the gate. At that point, Khumalo and the other people, which included Shahied, Petersen, Daniels and Shannon, were making comments and wanted to interfere with them wanting to leave. They told him that he should leave his wife and that he could go, and that she should stay there with

them. He did not want to leave his wife there, because she was under the influence and she looked as if she had been drugged, and was not in a sound state of mind.

[24] He also did not feel comfortable with the people present. He was especially uncomfortable with leaving his wife in the company and presence of Khumalo, who had on a previous occasion made derogatory remarks about women. After they got into the car, he told his wife that she needed to handle her drink, and in reaction to this she jumped out of the car and ran back inside the house. He thought she might have forgotten her purse, and he proceeded to get out of the car and smoked a cigarette while waiting for her. Later he approached Khumalo, who was standing at the gate at that time, and asked him whether he knew where his wife was. Khumalo told him that he did not know where she was and further that she did not want to leave with him. He also told him that she was not “his property”.

[25] This irritated the appellant, because he could see that Khumalo was extremely drunk and he was not willing to leave his wife with him. He regarded Khumalo as a shady character, because during a previous encounter between them, Khumalo had told him about being at a nudist camp. Khumalo continued telling him that his wife did not want to come home with him. The conversation between himself and Khumalo became a bit louder, and he saw Shahied approaching with a shiny object, which he identified as a knife. He then told Khumalo, as a final warning, that if he did not let his wife come out, that he would take his car and drive through the gate. His intention was to cause some commotion, so that the police could come to assist him.

[26] Khumalo was laughing and did not take him seriously. He then got into his car and took a drive around the block, because he wanted to call his father-in-law to get people to come and assist him, but his cell phone battery went flat. He thereafter went back to the driveway, parked his car in front of the gate on the outside, and once again asked Khumalo where his wife was. Khumalo did not reply, but quoted some Bible verse. At that point the gate was partly open, with Khumalo standing to the side of the gate. He then proceeded to tell Khumalo that he would drive his car through the gate if Khumalo did not let his wife come out. He switched on his car’s lights; there was nobody behind the gate that he could see that would be harmed.

[27] His thinking was that if he went through the gate, he would not be injuring anyone; he wanted to crash into the car (Volvo) that was standing on the property, and by doing so he would also be able to prevent anybody from driving away with that car. He then proceeded to drive through the gate; nobody was in front of him at that point, there was no one in the driveway. The gate went under his car. He did not, after he crashed through the gate, stop and then proceed to drive further. He only saw Petersen lying against the car for some or other reason, but he thought that she could have tripped against a gutter at the front of the stoep causing her to fall onto the car.

[28] He did not see anybody lying on the ground. He then ran away, because he was going to be attacked by the people on the premises. He saw Shahied with a long pick axe handle or metal object in his hand. Shahied used this object to hit against the vehicle. Shannon was also trying to attack him. He ran away and managed to get to a nearby shop, where he asked the manager to call the police. He thereafter went back to the scene, when he saw the police and his in-laws there. He was later placed in the police vehicle for his own safety. He denied that the injuries that were sustained by the witnesses could have been caused by his conduct. It was never his intention to kill anybody when he decided to ram his car through the gate.

[29] The appellant's wife testified and confirmed his evidence regarding them attending the braai. While sitting on the stoep with the appellant, she was given a Savanna drink by Khumalo. After having a sip of this drink, she felt "tipsy". She did not feel too well, and she and the appellant decided to leave. She vaguely recalled Lawrence coming from the room and saying that she must make up her own mind about going home. In response to this, she told Lawrence that she and the appellant had decided to leave.

[30] They left the premises and when they got into the car, parked outside the gate, the appellant told her that she needed to handle her drink better. The appellant's remark upset her, and she got out of the car and went back inside the property. She could not remember what had happened inside the house, but thought that she had gone to fetch her bag. A lot was said, but she could not remember exactly what. She believed that the reason she could not remember, was because she had been drugged. She could not recall everything that happened.

[31] She described the appellant's demeanour as being calm, and she could not recall the appellant being abrupt, aggressive and disrespectful to her, or even swearing at Khumalo. According to her, she was the one that had been out of line and swearing. She never said that she did not want to go home. After going back into the house, everything was a bit unclear to her; she recalled that she was sitting in the toilet and she heard Lawrence saying that something had happened outside. She looked through the window and saw that their car had crashed into the Volvo. She could not see if anybody was injured.

[32] Although she saw Khumalo, she did not see that he had any injuries. She did not go outside immediately, because she was not herself. She did not see the injury to Khumalo's eye, or any blood on him, because it was chaotic. She did not see any other people that had been injured. She could not recall that she called anybody, but later stated that she remembered calling her mother, and may have also called the police. She could not remember much of the detail. She furthermore could not recall what words were said between Lawrence, Khumalo and the appellant. The other people on the premises appeared to be drunk, according to her. In cross-examination by the prosecutor, she stated that she did not at any stage feel threatened by anyone that present on the premises on that particular evening.

[33] The appellant's father-in-law, Mr. Arrow, testified that he received a call from the appellant on the evening of the incident, but he could not speak to him because the phone went off. Ten minutes thereafter, his daughter called and she was hysterical and told them to come to Thornton. She could not give them the address. His wife spoke to Lawrence, who gave them the address. They went to the scene of the incident and found their daughter, as well as the appellant. This witness testified mostly about what happened after the incident, and his evidence did not take the matter any further. Similarly, Mrs. Arrow, his wife, only arrived at the scene after the incident happened, and her testimony also did not take the matter any further.

Evaluation:

[34] I do not agree with the appellant's submission that the Regional Magistrate erred in accepting the evidence of the state witnesses, especially with regards to the circumstances that prevailed on that specific evening, which led to the appellant

crashing his car through the gate of Lawrence and Khumalo's property. Khumalo, as well as Lawrence, came across as honest and reliable witnesses, who did not contradict themselves. The contradiction of note in the versions of the state witnesses, is whether the appellant first reversed his vehicle to pick up momentum before he proceeded to drive forward into the gate. Khumalo in his evidence initially created that impression, but afterwards in cross-examination said that he assumed that that had happened. Similarly, Mitchell's version that the appellant first, after crashing through the gate, came to a standstill, then proceeded to drive further into the persons standing in the driveway, was contradicted by Daniels, who said that the appellant crashed through the gate in one motion which resulted in them being injured. In light of the admission the appellant made, that he deliberately drove his car through the gate for the reasons that he had given, I do not view these contradictions in a very serious light, and they are not material.

[35] There was no indication that the state witnesses were out to falsely implicate the appellant. It is clear, even on the versions of the appellant and his wife, that they had been invited to join Lawrence and Khumalo for a braai on that particular evening, which they shared with their employees and their family. It is difficult to imagine that Khumalo, in cahoots with Lawrence, would devise such an evil plan as the appellant would have had the trial court believe: firstly, to spike his wife's drink with some drugs and, secondly, to hold his wife against her will to harm her, whilst their employees and their children were present. And then thirdly, that they would prevent the appellant from entering the property or prevent the appellant's wife from leaving the property.

[36] The appellant's version, and that of his wife, that Lawrence and Khumalo had ulterior motives to do something untoward to the appellant's wife, is clearly a fabrication to justify the appellant's behaviour. The picture presented by the evidence of Lawrence and Khumalo, about the appellant's behaviour to his wife and his conduct, in my view, is acceptable and is clearly consistent with his conduct afterwards. On the evidence, it is clear that he was a jealous and possessive person, and it is furthermore clear that his wife was upset by his behaviour and did not want to leave with him when he wanted to go. It was for that reason that she decided to stay; and not because of Khumalo not wanting her to go with him. It was because of the argument between the two of them that she decided to stay at Lawrence and

Khumalo's house. He could not accept that, and that was the reason why he rammed his car through the gate. His evidence as to why he acted in this manner is implausible and clearly not convincing. His version is highly improbable and dishonest.

[37] He was not a good witness and the Regional Magistrate correctly rejected his version as not reasonably possibly true. It was clearly contradicted by his wife, whose evidence was that she was not forced by anyone not to leave. His wife's evidence given during the trial was clearly designed to protect the appellant, after she realised the consequences of his actions, and her evidence about the appellant being calm and not being involved in any arguments with Khumalo, was unconvincing, and inconsistent with the inherent probabilities.

[38] The appellant's wife was selective in what she chose to remember. When she was confronted with the version of the state witnesses regarding the appellant's behaviour, about his arguments with and the aggressiveness he showed towards Khumalo and Lawrence, she conveniently could not remember. Her evidence regarding what really happened to cause the appellant to drive through the gate, was vague and unhelpful.

[39] Based on the common cause facts and the objective evidence in this case, it seems that the appellant deliberately, on his own version, drove through the gate onto the driveway of this premises, which resulted in the complainants having sustained the injuries in the manner they testified before the court a quo. The appellant's denial that any of the persons sustained any injuries, given the overwhelming evidence that it had been caused as a result of him crashing through the gate onto the driveway, is not sustainable, based on this strong objective evidence as presented by the prosecution. His version that the various complainants could not have sustained the injuries cannot be accepted, as it is not reasonably possibly true. The Regional Magistrate, in my view, was correct in accepting the evidence of the various state witnesses in this regard. The evidence could not in any way be gainsaid by the appellant, and he could not explain how the complainants could have sustained their injuries, especially Khumalo and Petersen, who sustained very serious injuries.

[40] On the undisputed and objective evidence, it is clear that the braai drum was placed in the middle of the driveway, which was directly in the pathway of any vehicle that would have entered that driveway, and standing around the braai drum were Petersen, Daniels, Shannon and his brother Mitchell. According to the witnesses, it was still light and the appellant, on his own version, stated that his motor vehicle's headlights were on. The driveway gate was made of palisade square tubing, placed 10 cm apart, through which one could see clearly from the outside onto the driveway or from the inside onto the road. Based on the evidence, therefore, appellant must, firstly, clearly have been aware of the presence of people standing in and around the braai area in the driveway and, secondly, must have seen these people, and especially Khumalo, congregating in the driveway.

[41] The Regional Magistrate, in my view, did not err in accepting the evidence of the various state witnesses that observed what happened on that particular day. It may well be so that the witnesses did not exactly corroborate each other on each and every point. This is to be expected under circumstances such as happened in the present case, where they were confronted with a scene that was not static, and where they observed the scene from various vantage points and with different opportunities for observation.

[42] They observed the scene, as the car came crashing through the gate, at different stages while it was unfolding. Mitchell, for instance, it seems, was more aware of what happened between Khumalo and the appellant, and was more observant than the other people. It was for that reason why he was able jump out of the pathway of the vehicle before it reached him, whereas Petersen and Daniels were less observant and were unable to take evasive action. Khumalo, on the other hand, was nearest to the gate and the vehicle, which explains why he was so severely injured, to the extent that the gate fell on top of him. As Nicholas J¹ (as he then was) once observed:

'Different witnesses see the same incident from different vantage points and slightly different points of time. They may have different opportunities for observation. Again discrepancies may arise quite innocently because witnesses have different powers of

¹ In the unreported matter of S v Joseph Khoza dated 11 September 1987 (Witwatersrand Local Division) cited in S v Grove [2005] ZAGPHC 263 (6 June 2005).

observation. The impression may be coloured by different emotional states such as fear and their powers of recollection and their powers of description differ. The fact that there are discrepancies between the accounts of one witness and another does not in itself show that either of them is untruthful or unreliable or the case of the party calling them is built upon uncertain foundation. If it can be found that the evidence of one witness on the particular point is true, and that of another is false, that may, depending on the circumstances, constitute a ground for regarding with suspicion the evidence of the second witness on other points, or discrepancies between the two witnesses may be so numerous and of such a nature as to lead to the inference that the evidence is not based on facts, but has been fabricated.'

[43] The Regional Magistrate, in my view, correctly rejected the appellant's version, that he acted in circumstances of emergency when he was denied access to Lawrence and Khumalo's property. His version about him fearing that his wife would be harmed is clearly a fabrication. No such circumstances existed, and even on the evidence of his wife, she did not appear to be in a situation of imminent harm that would have justified the appellant acting in the manner which he did, by ramming his motor vehicle through the gate into a driveway on which he knew people were holding a braai.

[44] In my view, the evidence objectively shows that he deliberately drove through the gate, because his wife did not want to accompany him, he was upset with Khumalo for telling him that his wife was not his property, and that she did not want to go with him, and it was for that reason that he acted the way he did. He could not get his way and for that reason, knowing full well that Khumalo and the other complainants and witnesses were present in the driveway, he deliberately drove through the gate. The next question to consider is whether the appellant, in doing so, had the necessary intention to commit murder.

[45] A court is seldom faced with direct evidence about the intention of an accused person formed during the commission of an offence. This fact is usually inferred from the evidence concerning the circumstances in which the accused carried out the *actus reus*. The appellant, on that particular day, was very aggressive; Lawrence testified that he made some threats to Khumalo, saying that he would kill him. Khumalo on the other hand, said that the appellant told him that it would be the last words he would say. Mitchell similarly heard the appellant say to Khumalo 'do you want to die tonight'.

[46] Given the contradictions in the versions of the state witnesses as to the precise words uttered by the appellant to Khumalo, which is understandable, I do not think the court can conclude that the appellant indeed threatened to kill Khumalo.

[47] In my view, the court a quo was correct in coming to the conclusion that the appellant had formed the requisite intention in the form of *dolus eventualis*. This form of intention is well established in our law. *S v Sigwahla*² stated the following principles:

‘1. The expression “intention to kill” does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis*, as distinct from *dolus directus*.

2. The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The *factum probandum* is *dolus*, not *culpa*. These two different concepts never coincide.

3. Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.’

The principles set out in *Sigwahla* have in the recent past been reaffirmed by the Supreme Court of Appeal in *S v Humphreys*³.

The Regional Magistrate relied in her judgment on *S v Ndlanzila*⁴, where the following was said in the context of intention to murder where a motor vehicle was used as an instrument, as in the instant case:

² 1967 (4) SA 566 (A) at 570B-E.

³ 2015 (1) SA 491 (SCA), paras 12-17.

[34] The appellant conceded that it was peak hour traffic and there were many pedestrians. They were rushing to catch taxis and were on the pavement and in the road. The appellant maintained, however, that the pedestrians on the pavement were at a distance moving away from him. When he drove onto the pavement he saw the newspaper stand and the other objects in his vehicle's path and he believed he would "overcome" them but collided with them. He maintained that he never saw the deceased because he "was looking back and sideways".

[35] Any person with a modicum of intelligence would have appreciated that driving a motor vehicle onto the pavement in the prevailing circumstances of this case raised the possibility that a collision with a pedestrian would occur with fatal consequences. Any right-minded person would have foreseen the possibility of the death of a pedestrian.

[36] On the evidence there is no basis for concluding that the appellant did not possess the requisite subjective intent in accordance with this standard.

[37] The second element of *dolus eventualis* requires proof that the appellant reconciled himself to the foreseen possibility of the death of a pedestrian. As pointed out by Brand JA in *Humphreys* at 9*i-j*:

"The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his action. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established."

[48] In my view therefore, the Regional Magistrate was correct in concluding that the appellant formed the requisite intention to murder the complainants. Based on the evidence presented, the state proved its case beyond reasonable doubt. The appeal against conviction therefore falls to be dismissed. I make the following order:

"The appeal against conviction is dismissed."

⁴ 2014 (2) SACR 256 (SCA).

R.C.A. HENNEY

Judge of the High Court

A.G. BINNS-WARD

Judge of the High Court