

SOUTH AFRICA / JUDGMENT

Janki v S (AR65/2020) [2021] ZAKZPHC 67 (19 August 2021) [2021] ZAKZPHC 67

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mossop, Sibiya

CASE / FILE NUMBER

AR 65/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL
DIVISION, PIETERMARITZBURG
Case
No: AR 65/2020
In

the matter between:

NIVASH
JANKI APPELLANT
and
THE
STATE RESPONDENT
ORDER

On
appeal from: Estcourt Regional Court
(sitting as court of first instance):
The appeal is dismissed.

JUDGMENT

Mossop AJ (Sibiya J concurring):

- [1] When he stood trial in the regional court sitting at Estcourt, KwaZulu-Natal, the appellant was charged with one count of attempted

murder, it being alleged by the State that he had shot Mr Thembelakhe Nyoka (the complainant) with a firearm. The appellant pleaded not guilty when he was called upon to plead and disclosed his defence in writing in terms of the provisions of section 115 of Criminal Procedure Act 51 of 1977. In essence, his plea was that he had acted in defence of himself, believing that he was at immediate risk of being physically assaulted by the complainant.[1] What was pleaded was that the complainant had advanced towards the appellant to assault him with an iron rod. The appellant drew his firearm and fired a shot into the air. When that did not stop the complainant advancing towards him, the appellant fired a shot towards the legs of the advancing complainant.

- [2] The appellant, however, was ultimately not convicted of attempted murder. On 30 August 2019, he was convicted of assault with the intent to do grievous bodily harm and was sentenced to three years' imprisonment, wholly suspended for a period of five years on condition that he was not convicted during the period of suspension of any offence involving violence in respect of which a term of direct imprisonment was imposed. The appellant was also declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000 (the Act).
- [3] Dissatisfied with his conviction and his subsequent disqualification from possessing a firearm, but otherwise content with his sentence, the appellant sought leave to appeal from the court a quo. He was granted such leave. This appeal accordingly only deals with whether the appellant was correctly convicted in the court below and whether he ought to have been disqualified from further possessing a firearm.
- [4] The conviction of the appellant was based upon the evidence of two witnesses called by the State, one of whom was the complainant. At the conclusion of the defence's case, the court also called the oral evidence of a medical doctor (the doctor) who attended to the complainant after he had been shot. The doctor's evidence was called to clarify aspects of the medical examination form, commonly known as a 'J88', that he had completed while examining the complainant. In his defence, the appellant testified, and after successfully applying to reopen his case, called two expert witnesses, largely to counter the oral evidence of the doctor called by the court.

Representation

- [5] Before us, the appellant was represented by Mr Moodley SC and the respondent was represented by Ms Sokhela. They are both sincerely thanked for their submissions and their assistance.

Private defence

- [6] While the defence indicated that the appellant allegedly acted in defence of himself, the more correct classification of his defence is that of private defence.[2] The requirements for private defence are well-settled. The attack upon the person acting in private defence must be unlawful, must be directed at an interest which legally deserves to be protected and must be imminent but not yet completed.[3] As regards the defence, it must be directed at the

attacker, it must be necessary in order to protect the interest threatened, there must be a reasonable relationship between the attack and the defensive act, and the person attacked must be aware of the fact that he is acting in private defence.[4]

- [7] The test for assessing private defence is an objective one and is to be considered as against the conduct of a reasonable person.[5] The question whether an accused person claiming to have acted in private defence can successfully maintain that defence, is determined

by objectively examining the nature of the attack and defence to determine whether they conform with the principles of law set out above. In doing so, each aspect and requirement of the attack and the defence must be judged from an external perspective rather than in terms of the accused's perceptions and his assessment of the position at the time that he resorted to private defence. Whether an attack is to be regarded as imminent is decided by the court's assessment of the evidence of the circumstances of the attack and not according to the accused's belief that he was in imminent danger of being attacked. However, as was said in *S v Ntuli*: [6]

'In applying these formulations to the flesh-and-blood facts, the Court adopts a robust approach, not seeking to measure with nice intellectual callipers the precise bounds of legitimate self-defence or the foreseeability or foresight of resultant death.'

- [8] In other words, the court must guard against becoming an arm-chair critic. In *R v Patel*, [7] Holmes AJA re-affirmed that the court should recognise that decisions in the real world are often made in split seconds:

"Men faced in moments of crisis with a choice of alternatives are not to be judged as if they had had both time and opportunity to weigh the pro and cons. Allowance must be made for the circumstance of their position." [8]

The complainant's version

- [9] The complainant was employed by JES Towing in Estcourt in this province. He testified that during 2017, the appellant's brother, Mr Shenile Janki (Shenile), had come to his workplace and had taken and removed what was described by the complainant as 'a canvas'. It appears that what was being referred to was a tarpaulin. Shenile allegedly never returned it. During January 2018, the complainant's employer, one Shevan (Shevan), asked the complainant where the tarpaulin was. He was told by the complainant that Shenile had taken it and had never returned it.

- [10] On the morning of 22 January 2018, the complainant was at work having just finished the night shift and was preparing to knock off. The appellant's brother, Shenile, arrived at the complainant's workplace in the company of his father and another person identified as 'Ashwin' (Ashwin). The complainant's employer requested the complainant to repeat to Shenile what he had said had happened to the tarpaulin. The complainant obliged, and an argument then broke out with Shenile, denying that he had taken the tarpaulin. As the argument intensified, Shenile produced a firearm and pointed it at the complainant and Ashwin then slapped the complainant in the face. The complainant's employer interceded

and instructed the complainant to withdraw into the workshop, which he did, and the situation was thus temporarily diffused.

- [11] However, ten minutes later, the appellant appeared at the complainant's workplace. Having shouted for the complainant, who was within the premises, the appellant entered and tried to assault him with an open hand and then also produced a firearm. He fired a shot close to the head of the complainant and then shot him in both legs. The complainant was certain that the wounds occasioned to both his legs were caused by a single shot fired by the appellant. Having shot the complainant, the appellant offered him no assistance and left the scene. The complainant was attended to by two of his colleagues and was taken to the Estcourt Hospital for treatment and was later transferred to the Ladysmith Hospital for further treatment. According to the complainant, he was hospitalised for four months as a consequence of being shot.

The appellant's version

- [12] The appellant asserts that he went to the complainant's workplace after the argument involving Shenile, his father and Ashwin. He was accompanied by one Ashok, with whom he was then conducting some business. He was also joined by his brother and Ashwin. On arrival, the complainant's employer was on the telephone but said that the appellant should go through to the workshop and speak to the complainant. The appellant went into the workshop area and shouted the complainant's name and when he heard this, the complainant armed himself with 'a strong iron pipe'. More about the object later in this judgment. The complainant began walking towards the appellant. The appellant asked him what he was going to do with the pipe that he held but received no response from the complainant. The appellant perceived himself to be under threat and fired a warning shot over the head of the complainant. The discharge of the warning shot by the appellant did not dissuade the complainant from continuing to advance towards him and the appellant then felt compelled to fire a single shot at the complainant which he aimed at the complainant's legs. Having shot the complainant, he admitted not rendering any assistance to him and, instead, he left the scene, got into his motor vehicle and drove in the direction of Pietermaritzburg, apparently to consult with his attorney over what had just occurred. He reported the matter to the police the next day.

Common cause

- [13] Given that the defence of the appellant was private defence, it follows that much of the evidence led at trial was common cause. The shooting was obviously admitted, as were some of the surrounding circumstances. It was not in dispute that there had been a prior argument between the appellant's brother, father and Ashwin and the complainant. The complainant's and the appellant's

description of the wounds were common cause, and both agreed that a single shot had caused all the injuries that the complainant

sustained to his legs. They were also agreed that the trajectory of the bullet was from the outside of the complainant's upper left thigh, proceeding at a downward angle through his left leg, out the inside of his left leg, entering the inside of his right leg and exiting from the top of his right leg close to his right knee cap.

[14] It was the evidence of the doctor called by the court that introduced discord into the essentially harmonious version of how the

complainant's wounds were caused. The doctor believed that two shots had been fired into the legs of the complainant, and not just one. This was based upon the size of one wound on each leg. Those two wounds, one on the lateral aspect of the left thigh and the other on the front aspect of the right leg, were small in size and the doctor concluded that they were therefore both entry wounds. This would mean that the complainant had been struck by two bullets and not just one.

[15] That the doctor may have been seduced by the wound sizes is to be understood. He would not be the first medical practitioner to have struggled with interpreting actions from wounds. As early as the 1870s, a forensic guide then in existence made reference to a notorious case where a lead ball broke into two pieces as it passed through a man's leg, and the pieces lodged in his other leg, producing three entrance wounds, two exit holes, and a puzzle for the examining doctor.[9] The doctor in this matter under appeal attempted to solve the puzzle of the wounds that confronted him. But he was no expert on bullet wounds. And, importantly, he did not appear to take cognisance of the version advanced by the complainant, who quite accurately described how he had been shot.

[16] The expert evidence called by the appellant after he was given leave to re-open his case, scotched the doctor's version of two bullets striking the complainant. It is plainly evident that a single shot caused all the damage. In any event, there was the direct evidence of both the complainant and the appellant that only one shot was fired at the complaint's legs, and the regional magistrate was accordingly correct in ultimately finding that all the wounds were caused by one shot.

Applicable legal principles on appeal

[17] It is trite that when an appeal against a decision of a criminal court is considered by an appeal court, the latter must take into account that the trial court was in a better position than the appeal court to form a judgment of what actually occurred. Holmes JA in *S v Robinson and others*[10] put it this way:

'A Court of appeal, not having had the advantage of seeing and hearing the witnesses, is of necessity largely influenced by the trial

Court's impressions of them. Having regard to the re-hearing aspects of an appeal, this Court can interfere with a trial Judge's appraisal of oral testimony, but only in exceptional cases as aptly summarised in a Privy Council decision quoted in *Parkes v Parkes*, 1921 AD 69 at p. 77:

"Of course it may be that in deciding between witnesses, he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact; but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony."

- [18] If there are no misdirections on fact, a court of appeal assumes that the court a quo's findings are correct and will accept those findings, unless it is convinced that they are wrong. [11] Therefore in order to interfere with the court a quo's judgment, it has to be established that there were misdirections of

fact, either where the reasons articulated by the court a quo on their face are unsatisfactory or where the record shows them to be such. Marais JA in *S v Naidoo and others*[12] affirmed the principle as follows:

'In the final analysis, a Court of appeal does not overturn a trial Court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.'

- [19] In *S v Monyane and others*, [13] the Supreme Court of Appeal stated that it is only in exceptional cases that an appeal court is entitled to interfere with the trial court's evaluation of oral evidence. However, the manifest advantages that a trial court enjoys over an appeal court should not be over-emphasised otherwise there would be no value in allowing appeals to occur.[14]

- [20] It is trite that the State is required to establish the guilt of an accused person beyond reasonable doubt. The accused person is

entitled to be acquitted if there is a reasonable possibility that his version may be true. In dealing with the relationship between

these two concepts, the court in *In S v Van der Meyden*, [15] explained that:

'These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'

- [21] It is acceptable in evaluating the evidence in its totality to consider the inherent probabilities that exist. In *S v Chabalala*, [16] Heher AJA explained the correct approach as follows:

‘The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and,

having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without

assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the

present matter the solution becomes clear.’

The

issues

[22] I propose to consider the three principal issues arising out of the evidence, namely, the nature of the weapon allegedly possessed by the complainant, the wounds sustained by the complainant and the alleged threat to the physical well-being of the appellant.

The nature of the weapon allegedly possessed by the complainant

[23] In his plea explanation, the appellant indicated that the complainant had armed himself with an ‘iron rod’. This was put to the complainant in cross examination on several occasions by Mr Moodley, who also appeared for the appellant at the trial. The complainant disputed that he had anything in his hands when he was shot. The second witness called by the State was Mr Sphamandla Sibusiso Hlongwane (Mr Hlongwane). He appeared to confirm the appellant’s version that the complainant had something in his hands, but he introduced a different description of the object. He said: ‘So if I am not mistaken it was a pipe or a metal object.’

[24] In cross-examination of Mr Hlongwane, the following was put to him by Mr Moodley:

‘Now is it correct that the first weapon to be drawn was the iron rod which you described, by the complainant? --- The first object that I saw was this pipe object or metal object.

Iron rod --- Iron rod.’

[25] The fact of the matter is that Mr Hlongwane never said that that the complainant had picked up an iron rod, he said it was a pipe or a metal object. Thereafter, Mr Moodley himself started referring to a pipe when completing his cross-examination of Mr Hlongwane. When the appellant testified, the transformation of the object from a rod to a pipe was complete:

'ADV MOODLEY And you say he pulled out a strong iron pipe --- Yes.

Just hold on there. Yes, go on. --- He came towards me holding the pipe. I did ask him what he wants to do with the pipe.'

[26] In my view, there is a difference between a rod and a pipe. The general understanding of a pipe is a hollow tube whereas a rod is a solid object. The word 'rod' has its origin in the late old English word 'rodd', meaning a 'slender shoot growing on or cut from a tree' but may also mean 'straight stick or bundle of twigs used to inflict punishment' and is probably related to the Old Norse word 'rudda', meaning 'club'.^[17] The appellant's own version as to what the complainant allegedly possessed was not consistent.

The wounds sustained by the complainant

[27] The appellant's version was always that the complainant advanced upon him, face to face. In other words, according to the appellant they were never at right angles, or any other angle for that matter, to each other. However, the wounds to the complainant's legs showed that the trajectory of the bullet was from the outside of his upper left thigh, proceeding at a downward angle through his left leg, out the inside of his left leg, entering the inside of his right leg and exiting from the top of his right leg close to his knee cap. The pathway through the right leg was more or less flat and horizontal to the ground.

[28] The face on approach by the complainant to the appellant as described by the appellant does not make the trajectory of the bullet seem possible or probable. For a single bullet to cause all the damage, which the regional magistrate correctly found that it did, the complainant had to be with his left side to the appellant when he was shot and not face to face. This is precisely what the complainant testified to: 'The second shot I had then turned around and it then entered.' The complainant explained that the appellant was on his left side as a consequence of him, the complainant, turning around. That position perfectly explains the trajectory of the bullet from the outside of the left leg through both his legs.

[29] The trajectory of the bullet was obviously something that the appellant needed to deal with thoroughly. To explain it, and whilst being cross-examined, the appellant stated that he had moved to the side when pulling out his firearm. This had not been mentioned in his evidence in chief. He was never asked to which side he allegedly moved. It is difficult to understand how a move either to the left or right made the actual trajectory of the bullet more likely because on his version, the complainant still continued to move towards him, face on. Accordingly as the appellant altered his position, the complainant did as well so the protagonists remained in relatively the same position in respect of each other.

[30] A different version was later put forward by the ballistics expert witness, Mr Jacobus Steyl (Mr Steyl), called by the defence. In the theory that Mr Steyl proposed, he did not include the appellant's version of stepping to the side. He could only provide the theory that the complainant changed his body position at the moment that the appellant pulled the trigger of the firearm. He testified that studies suggest that a person is capable of assuming a

different body position in the very short time period between the time the trigger of a firearm was pulled and the time that the bullet struck the complainant. That may well be so. However, that is not the version of the appellant: his version is that he changed his position immediately before firing and not that the complainant changed his position. When the appellant gave his evidence that he moved to the side, he did not know that Mr Steyl would be called to testify because the court had not yet informed the parties that it intended to call the evidence of the doctor who examined the complainant. That occurred only after the appellant closed his case, which he did after he completed his testimony. Mr Steyl was given a transcript of the trial proceedings and manuscript notes of the evidence of Mr Hlongwane and manuscript notes of the evidence and cross-examination of the appellant before he testified. Significantly, he did not incorporate into his theory the step to the side testified to by the appellant. Given what he was provided before preparing his report, he must have been aware of it. Had such a movement explained the trajectory of the bullet, there can be very little doubt that Mr Steyl would have relied upon it.

[31] In argument, Mr Moodley was asked to make submissions on the evidence of Mr Steyl and whether it ought to have included the accused's

version of the step to the side. Mr Moodley submitted that it would not have been proper for Mr Steyl to make reference to the facts of the matter. An expert, so he submitted, should be objective and not favour either version. I am unfortunately not able to totally agree with that submission. While an expert should not usurp the functions of the court, his evidence must be factually based. It is vital that the opinion evidence of an expert is solid:

“Solid” supposes [the] veracity of the facts of the particular case, expertise on the issue and an opinion that makes legal sense based on the facts combined with the expertise.’[18]

Mr Steyl, in advancing a general proposition, did not tie that proposition to the specific facts of this case, which speaks volumes.

[32] While Mr Steyl advanced the theory that the complainant could have changed his position, the appellant testified unwaveringly that the complainant had not ‘ducked’ or changed his position. Possibly, the appellant felt constrained to adhere to this version because if the complainant was not coming towards him head on but was, instead, turning away, ducking or taking cover, the appellant’s version that he was about to be attacked would seem to be improbable. This is what the appellant said whilst being cross-examined by the prosecutor:

‘PROSECUTOR Do you know what would have made the complainant to duck from you because that is the evidence that was testified by the second State witness.

That he saw the... [intervention] --- The complainant never ducked.

That he said he saw the complainant ducking? When the first shot [intervention] --- No.

Was fired. --- No.

You did not see that? --- No, the complainant never ducked.

Because that was the evidence of the complainant and the second State witness. ---

No. The complainant never ducked.'

[33] However, following questions put to the appellant by the court, his counsel was offered the opportunity to put further questions to the appellant. Asked if he had any further questions for the appellant, counsel said:

'I think just one. When you fired the second shot at the complainant, is it possible that he could have ducked and turned? Did you see that? --- He could have, it was, it was happening quite fast, so he could have moved or something, I cannot.'

The answer to the question was at odds with the appellant's earlier resolute testimony that the complainant never ducked or moved. From this it is evident that the appellant was pliable insofar as his evidence was concerned. He later reverted to form and denied that the complainant had ducked when further questioned by the prosecutor.

[34] On the aspect of the wounds suffered by the complainant, the appellant finds himself in a difficult position. The wounds sustained are simply not explicable in terms of his version, with the complainant walking towards him face on. They are only explicable if the complainant had his left flank exposed to the appellant when the shot was fired. This would mean that he was not proceeding towards the appellant face on. This casts grave doubt on the appellant's claim of being under threat of imminent physical threat. In fact, it destroys it.

The alleged threat to the physical well-being of the appellant

[35] As regards the conduct of the complainant that led him to believe that he was going to be attacked, the appellant's evidence was singularly lacking in detail. At no stage in his evidence in chief, or in cross-examination, did the appellant state that the complainant was holding or swinging the pipe in a way that indicated that he intended to strike the appellant with it. Only once the appellant had been cross-examined by the State and re-examination was declined by his counsel did the following interaction between the court and the appellant take place:

'And how was the complainant advancing on you? In what fashion? --- He was coming with the pipe like this.

Held, you are indicating held above the shoulder ... [intervention] --- Yes.

In a striking position? --- Yes.'

[36] That was the only evidence adduced by the appellant that could objectively be construed as a threat to his physical integrity. This is troubling. The appellant's case was that he genuinely believed himself to be under physical attack but he never provided any detail of precisely what that threat comprised until the eleventh-hour.

[37] The appellant's version was that the complainant went to a parked motor vehicle and pulled out the iron pipe. He did not identify from which part of the motor vehicle the pipe was taken. The complainant then came towards the appellant holding the pipe. The appellant asked him what he wanted to do with the pipe but received no response to this inquiry. The complainant just kept on coming towards him. The appellant drew his firearm and fired a shot in the air. The complainant came faster towards the appellant. The appellant stated:

'He was getting too close to me. And I was scared my life is in danger as he was carrying a pipe if he hit me with it. . .'

After firing over the complainant's head, the appellant then fired a shot, striking the complainant in the legs. In his evidence in chief, the appellant stated that: 'I could shoot him anywhere because he was, he was very close to me'.

[38] Objectively, the complainant was not very close to the appellant at any stage: at the time that the complainant was shot, he was five to six metres away from the appellant, on the appellant's own version. This was the closest that the complainant ever got to the appellant. If the complainant did hold a pipe, and he had swung it at the appellant at that distance he would not have been able to touch the appellant.

[39] As regards the way that the complainant allegedly approached the appellant, the appellant testified that the complainant was not

running but was 'walking fast' towards him. As to why he, the appellant, could not turn and run from the perceived threat, as the law requires him to do if circumstances permit,[19] the appellant said that that would not have easily occurred because of the presence of parked cars in the area where they were. The evidence on this point was not carefully developed at trial and it is difficult to form an impression of the scene. But if it would have been difficult for the appellant to run, then it would correspondingly have been difficult for the complainant to do so as well.

[40] On the appellant's version, what he postulates is that it was reasonable for him to discharge his firearm towards the complainant

simply because he was walking towards him carrying a pipe. His submission is that such conduct entitles him to use his weapon to

negate the perceived threat. I am unable to accept that proposition. In my view, the mere possession of a pipe is itself not a threat in the absence of any evidence that it was intended to be used against the appellant. It constitutes no more of a threat than being in possession of a firearm, as the appellant admittedly was: the fact that a person possesses a firearm does not mean he intends to use it or that it poses a threat to anyone else. More needs to be established before the appellant's proposition holds true.

Analysis

[41] From the facts of the matter, it is safe to conclude that the appellant was the aggressor in the situation that developed. He had been informed of the argument that had earlier occurred between the complainant and the appellant's brother, father and Ashwin

before arriving at the complainant's workplace. Under cross-examination, the appellant admitted that when he arrived there,

he was 'a little angry'.

[42] The court a quo found the complainant to be a good witness. In arriving at this finding, it remarked that the complainant was not a particularly sophisticated person but nonetheless concluded that he had given his evidence in a satisfactory manner. That such a finding regarding sophistication was made is not unsurprising: the complainant admitted that he had not attended school and could not read or write. That the complainant was viewed as being someone who could be manipulated, perhaps through his lack of sophistication,

emerges when one considers the complainant's evidence regarding the payment of money to him in exchange for the criminal complaint being withdrawn. The complainant was contacted telephonically by the appellant's father and offered R10 000 to withdraw the complaint. He rejected this but said he would accept R100 000. This occurred whilst he was still hospitalised and involved his employer, who spoke to the appellant's father on the telephone at the hospital and was the conduit through which the offer and counter offer was made. That this occurred was never denied by the defence. The complainant's counter offer did not find favour with the appellant's father. Once he was out of hospital, the complainant was taken to an attorney where a withdrawal statement was prepared in which he agreed to withdraw the charge without the payment of any money being made to him. It appears that the complainant did this in the belief that he would, nonetheless, be paid the amount of R100 000 by the appellant's father. It was suggested at trial that his willingness to accept money touched on his credibility as a witness. I do not see it that way. To me, it appears to be an attempt by the appellant's family to extricate him from a criminal prosecution.

[43] The finding that the complainant was a good witness was attacked by the appellant's counsel in argument before us. There was criticism of the sequence in which he gave his evidence and the regional magistrate's finding that he had given his version

chronologically. However, much of what the complainant said at the trial was never seriously challenged: for example, he testified that during the first incident Ashwin had slapped him, the appellant's brother had produced a firearm and his employer had interceded to diffuse the situation by ordering him back into the workshop and that later, with regard to the incident when he was shot, he had felt the warning shot fired by the appellant whistle past his head. None of this was disputed. After thoroughly considering the evidence and the judgment of the court a quo, I am satisfied that the regional magistrate did not err in her findings regarding the quality of the evidence of the complainant.

[44] It was further suggested in argument before us that the regional magistrate erred in disregarding the evidence of Mr Hlongwane regarding the object allegedly possessed by the complainant. It was emphasised that he was a State witness and his evidence conflicted

with the evidence of the complainant insofar as whether the complainant possessed an iron pipe.

[45] On a general level, the evidence of Mr Hlongwane was not satisfactory. The record is replete with complaints from the interpreter about the way in which Mr Hlongwane testified, not making himself clearly understood, and admonishments from the court to Mr Hlongwane to concentrate on what he was doing. Indeed, the court seems to have formed the view that something was troubling Mr Hlongwane whilst he testified. Specifically, it was asked whether there was anybody in the courtroom who was making Mr Hlongwane uncomfortable to testify freely.

[46] The court a quo found that the evidence of Mr Hlongwane on the aspect of the iron pipe could not be relied upon. In arriving at this finding, the court noted that Mr Hlongwane conceded that he had never previously mentioned the existence of the pipe to anyone. He did not inform the South African Police Services of this. It could therefore not have appeared in his witness statement. Mr Hlongwane confirmed that the first mention that he made of the pipe was when he was in the witness box testifying. His explanation for not mentioning the iron pipe was that he was asked about the person who was injured and not about the person who shot as to what was wrong when he shot. If this was indeed the case, it is not clear why when making his statement about the complainant he did not include the iron pipe. He was, after all, apparently told to focus on the complainant in his statement. He could also not account for the pipe after the shooting, explaining that he was 'no longer seeing it because I was shocked'. In my view, the evidence of Mr Hlongwane regarding the object allegedly possessed by the complaint was open to extreme doubt. I am therefore not able to conclude that the regional magistrate misdirected herself in finding that the complainant did not possess an iron rod or a pipe.

[47] The regional magistrate did not find the appellant to be a good witness. Was she correct in this assessment? It was submitted in argument by the appellant's counsel that, to the contrary, the appellant was a good witness. It appears that the appellant's evidence was delivered in a satisfactory manner, without any of the criticisms, for example, of the evidence of Mr Hlongwane. He was, however, a far more sophisticated person than either of

the State witnesses, apparently being a successful businessman. The version of the appellant was a simple one and was not overly complicated. It ought to have been relatively simple for him to adhere to it. Yet he was not able to do so. On a most material aspect of his defence, the appellant contradicted himself. In his evidence in chief, he stated as follows:

‘MR MOODLEY As the Court pleases. --- Yes.

Now after you shot him in his legs, rather I withdraw that. How far were you from him when you fired the shot into the air? --- About 12 metres away.’

Under cross-examination from the State, the appellant gave this answer to a similar question:

‘When you fired that warning shot, how far was the complainant from you? --- I would say maybe about 7 metres.’

The contradiction is stark, important and could not be explained in argument.

[48] The high-water mark of the appellant’s version is that the complainant picked up a pipe and walked towards him but never got

closer than five to six metres from him. Observing all of this taking place, were the appellant’s witnesses: Shaniel (his brother), Ashwin and Akram. When the shooting occurred, they were standing behind the appellant watching what was happening. The appellant agreed under cross-examination that these three persons would have seen the complainant advancing towards him holding the pipe. Not one of them were called as a witness to confirm the version of the appellant, this notwithstanding that it was put to the complainant in cross-examination that the appellant’s brother and his father would be called as witnesses by the defence. The regional magistrate considered the evidence of Mr Hlongwane regarding the issue of the iron pipe and declined to accept it. In my view, she was correct to do so. She was therefore correct in concluding that the complainant was not holding anything.

[49] The probabilities also do not favour the appellant’s version. It is improbable that the complainant would have continued walking towards the appellant after he felt the first shot whistle past his head. It is far more probable that he would have ducked to avoid any prospect of being hit by a further shot that might be discharged. That is what the complainant said that he did which was confirmed by Mr Hlongwane. It is also improbable that, if the appellant believed that he had narrowly escaped an unlawful physical assault, that he would, instead of immediately reporting the matter to the SAPS, instead seek legal counsel in Pietermaritzburg.

[50] In my view, there was objectively no immediate threat to the physical well-being of the appellant. If I am incorrect in arriving at the conclusion that the complainant did not possess the pipe, there was in any event no objective, persuasive evidence that the appellant was under any immediate threat of physical harm from the complainant wielding that pipe. The appellant’s conduct was unreasonable and was, therefore, unlawful. I am satisfied that the conclusions reached by the regional magistrate were properly arrived at and I am unable

to discern any misdirections

by her. The defence of private defence must accordingly fail.

Disqualification from further possessing a firearm

[51] In terms of section 103(1) of the Act, unless the court determines otherwise, a person convicted of an offence set out in section

103(1)(a)[20] becomes unfit to possess a firearm. The manner in which section 103(1) operates is that the disqualification of the accused is automatic unless the court orders otherwise having regard to all relevant facts and circumstances. In *S v Mkhonza*, [21] which concerned the loss of a firearm by the accused, it was recognised by the court that some cases falling under s 103(1) may not be very serious in nature, and that if regard is had to the personal circumstances of the accused, there may be no justification

for disqualifying the accused from the right to possess a firearm. What is required in such circumstances is that an accused should be invited to place before the court facts which may be relevant to such a determination whether he ought to be permitted to continue possess a firearm.

[52] The court a quo was mindful of this. At the invitation of the court, the appellant's counsel made the following submissions on this aspect:

'MR MOODLEY Yes, Your Worship, I meant to address you on that. A firearm was used in this case, but the nature of the accused business requires him to have a firearm. He is in various places. He is in a possession where his life ... [inaudible]. So I ask that the Court orders that his firearm be returned.'

[53] In an address in mitigation of sentence, it was explained by the appellant's counsel that the appellant had various businesses,

including the operation of a number of cattle farms in the district. He also had a scrap yard business and panel shops in Estcourt and Durban. In addition, he managed a logistics transport business and a plant hire business.

[54] 'Gun ownership is not a fundamental right under our Bill of Rights. It is a privilege regulated by law, under the Firearms Control Act'. [22] The correct approach in considering whether a person was fit to continue possessing a firearm was set out by Wallis J in *Mkhonza*. [23] A court is not entitled to merely adopt a supine attitude to the question but must actively explore whether it should grant an order negating the deemed declaration of unfitness. The court a quo did not adopt a supine attitude as it specifically raised the issue with the defence. In response, the defence made certain submissions that did not specifically clarify why the appellant was required to possess a firearm.

[55] The correct approach in determining this issue is to commence with the proposition that unless the court determines otherwise, the

legislature has provided that a conviction of a crime referred to in section 103(1) of the Act leads to the result that the accused is unfit to possess a firearm. Accordingly, the onus of satisfying the court that it should determine otherwise rests on the accused. As this part of the enquiry by the court is separate from the criminal trial and the decision on sentence, the accused may discharge that onus on a balance of probabilities.[24]

[56] When considering the question, a court should have regard to the following factors:

- ‘(a) the accused's age and personal circumstances;
- (b) the nature of any previous convictions or the absence thereof;
- (c) the nature and seriousness of the crime of which he has been found guilty and the connection that the crime has with the use of a firearm;
- (d) whether there is any background which suggests that the accused may make use of his or her licensed firearm for the purpose of committing offences; and
- (e) whether it is in the interests of the community that the accused be declared unfit to possess a firearm because of the fact that he or she poses a potential danger to the community.’[25]

The court should also have regard to any other relevant facts placed before it.

[57] In Mkhonza, Wallis J opined that the following factors should be added to the abovementioned ones, namely ‘ . . . the period during which the accused has possessed a licensed firearm, and whether there is any indication of previous irresponsibility in regard to that possession and use’.[26]

[58] In my view, whilst the appellant is a relatively young man and had no relevant previous convictions, he was convicted of a very serious offence. That offence involved the use of the firearm that he was later declared unfit to possess in the future. His conduct with that firearm caused serious consequences to the complainant, who was hospitalised for four months after being shot. The firearm was discharged in circumstances where the appellant admitted that he had been angry. In addition, having discharged the firearm and being aware that he had injured the complainant, the appellant showed no interest in his well-being. He rendered no assistance to him but walked away from the scene to his motor vehicle and drove off. In short, he showed no compassion for the complainant's position or well-being. He did not assist in summoning an ambulance or any form of medical treatment. People who are not able to control their emotions and who respond in anger to situations that do not directly involve them and who fail to recognise how precious life is may be viewed by members of the community as being persons who should not be permitted to possess a firearm.

[59] After considering the decision arrived at by the regional magistrate, I am not persuaded that she misdirected herself insofar as the entitlement of the appellant to continue to possess a firearm is concerned.

Conclusion

[60] In the circumstances, I would propose that the appeal be dismissed.

Mossop AJ

I agree and it is so ordered.

Sibiya J

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Date of Hearing: 6

August 2021

Date of Judgment: 19

August 2021

[1] ‘The principle that right does not have to yield to wrong has been a touchstone of civilised legal systems through the ages. The victim of an unlawful attack has been entitled to defend his person or property by virtue of a rule of law which has existed in all familiar legal systems for many centuries.’ *Ntsomi v Minister of Law and Order* 1990

(1) SA 512 (C) at 526D-E.

[2] *Ehrke v S*

[2012] ZAGPPHC 189 para 12.

[3] SV Hoorster Snyman’s Criminal Law 7 ed (2020) at 86-88.

[4] *Ibid* at 88-94.

[5] *S v Ntuli* 1975

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- [1] SA 429 (A) at 436E; *Mugwena and another v Minister of Safety and Security* 2006 (4) SA 150 (SCA) at 157J-158D.
- [6] S v Ntuli 1975 (1) SA 429 (A) at 437.
- [7] R v Patel 1959
- (3) SA 121 (A).
- [8] Holmes AJA quoting from *Union Government (Minister of Railways & Harbours) v Buur* 1914 AD 273 at 286.
- [9] D Jobb *The Case of the Murderous Dr. Cream: The Hunt for a Victorian Era Serial Killer* (2021) at 83.
- [10] S v Robinson and others 1968 (1) SA 666 (A) at 675G-H.
- [11] R v Dhlumayo and another 1948 (2) SA 677 (A) at 705-706.
- [12] S v Naidoo and others 2003 (1) SACR 347 (SCA) para 26.
- [13] S v Monyane and others 2008
- (1) SACR 543 (SCA) para 15.
- [14] *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) para 79.
- [15] S v Van der Meyden 1999 (2) SA 79 (W) at 80I-81B.
- [16] S v Chabalala 2003
- (1) SACR 134 (SCA) para 15.
- [17] <https://www.lexico.com/definition/rod> (accessed 10 August 2021).
- [18] M R v Road Accident Fund
- [2020] ZAFSHC 24 para 17.
- [19] *Ntamo and others v Minister of Safety and Security* 2001
- (1) SA 830 (TkH) at 839; *Bakharia v Mia* 1918 TPD 56 at 58; *R v Molife* 1940 AD 202 at 204; *R v Attwood* 1946 AD 331 at 340.
- [20] The range of offences is broad, covering a number of offences under the Act itself as well as crimes in the commission of which a firearm is used, offences involving violence, sexual abuse, dishonesty, the abuse of alcohol or drugs or dealing in drugs, offences under the Explosives Act 26 of 1956 and offences involving sabotage, terrorism, public violence, arson, intimidation, rape, kidnapping or child stealing, as well as any conspiracy, incitement or attempt to commit any of the offences specified in section 103(1). In some instances the automatic consequence that the person becomes unfit to possess a firearm if convicted only

attaches where the person is sentenced to a period of imprisonment without the option of a fine.

[21] S v Mkhonza

[2009] ZAKZPHC 9; 2010 (1) SACR 602 (KZP). Mkhonza also resolved the question of whether an order of disqualification from further possessing a firearm, while not forming part of the sentence imposed, is appealable. It was held that it was (para 33).

[22] Minister of Safety and Security v South African Hunters and Game Conservation Association [2018] ZACC 14; 2018 (2) SACR 164 (CC) para 1.

[23] S v Mkhonza

[2009] ZAKZPHC 9; 2010 (1) SACR 602 (KZP).

[24] Ibid para 35.

[25] Ibid para 22, where Wallis J agreed with the factors listed in S v Phuroe en Agt Ander Soortgelyke Sake 1991

(2) SACR 384 (NC) at 387B-D.

[26] Mkhonza para 22.

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