CASE NO. 586/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

Andre Jonas — Appellant

and

The State — Respondent

BEFORE: VIVIER, SCHUTZ JJA and MPATI AJA

HEARD: 9 MAY 2000

DELIVERED: 12 MAY 2000

Criminal procedure - numerous serious misdirections by magistrate - as to major conflicts between State witnesses, evaluation of defence witnesses, facts conceded by State, whether unlawful in itself to enter bus through open window, lip service only to rules on onus - High Court on appeal failing to address misdirections - duty of appeal court to rehear - convictions set aside on further appeal.

W P SCHUTZ

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J U D G M E N T

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SCHUTZ JA:

The first of the misdirections committed by the regional magistrate who convicted the appellant was to concur in the proposition that it is unlawful to enter a bus through an open window. Despite this and numerous other misdirections, the High Court Bisho (per Pickard JP and Ebrahim AJ) found no significant fault in the magistrate's findings, when confirming on appeal a conviction of culpable homicide, two of attempted murder, and a composite sentence of eight years imprisonment, of which three were suspended. The three convictions all involved the use of a firearm. Leave to appeal having been refused below, it was subsequently granted on petition to the Chief Justice.

The version of the State co-incides with that of the defence in many respects, but there are vital differences. The magistrate believed the two State witnesses, Mjoli and Balakisi, when their versions co-incided (and one above the other when they did not), and rejected the evidence of the appellant and his three witnesses, two women named Natasha and Angela (the former being his fiancée) and a male friend Lee Smallman.

The story begins with the uncontradicted version of the defence witnesses. The appellant, Natasha, Angela and Smallman visited the Fish River Sun Hotel on 10 September 1995, travelling there in company with others in a bus. The tour organiser was a woman named Noelle, who accompanied them on the trip. At some time in the evening the quartet, feeling tired and hungry, returned to the bus, which was parked in the parking ground, to rest and eat their sandwiches, only to find the bus locked. They returned to the hotel where Angela located Noelle. Angela reported that Noelle had given permission for them to return to the bus,

where the driver would meet them and let them in. There arrived they found that although the door was still locked, one of the windows had been opened since their last visit. They decided to enter through the open window. Some time after they had done so, and while the appellant was eating bread, there was a knock on the front window. This was one of the security guards, Mjoli. He asked what they were doing there. According to him he told them that it was "unlawful to get into the window of the bus". According to the appellant, when he was asked if he had permission to be in the bus he said no, but that the organiser knew that they were at the bus. Mjoli then left.

He returned with the senior security manager on duty, Balakisi. In his turn he knocked on the window. He asked what they were doing in the bus and said they had no right to be in it. He ordered them out. The appellant threw out the bread he was busy eating. There is some dispute as to quite what Balakisi had said to him about his bread. According to Balakisi he said that the bread must be eaten

up or left in the bus. According to the appellant his request to finish the bread was refused. He had to throw it out. He and Smallman then alighted through the open window. There is an important dispute as to who then started displaying aggression. The appellant says it was Balakisi. Balakisi says it was the appellant. Whichever it was, things were heating up. What is revealing is Balakisi's answer when he was asked why he claimed that the appellant was aggressive, "The reason why I say he acted in an aggressive manner is because when I was asking him to get out of the bus he said that the driver gave us permission to get into that bus. And he was talking like that eating bread and I further told him they are not allowed to eat." He added to his explanation, that the appellant was demanding the presence of the white manager and was talking loudly, even shouting. The appellant's account of his demands or requests is quite different. He denied that he wanted a white manager. What he did want was that either Noelle, or the driver, or the manager of the Fish River Sun be fetched. Balakisi stated that he wished the party

to come to his office where he could prepare a report. The appellant agreed that this request was made but stated that his response was that Balakisi could make his report, but that in the meantime the presence of one of the persons requested was required. This eminently reasonable request was refused. Balakisi claimed that he demanded that the appellant and Smallman procure that the two women alight. It is rather strange that Balakisi did not address the women directly, but Smallman agreed with Balakisi that the demand was made, although the appellant denied it.

The appellant and his witnesses describe the next event, the very existence of which is denied by the State witnesses. The appellant was struck on his right cheek by Balakisi's hand. Smallman said that Balakisi used his fist. In his evidence-in-chief the appellant referred only to Balikisi's hand. In cross-examination he said he did not know if the hand was open or closed (this was overlooked by the magistrate, who found there was a conflict between the appellant and Smallman on the point whether a fist or an open hand was used). Further, the

appellant called out to Natasha to see that he had been hit quite unnecessarily. Between him and Smallman remarks were made to the effect that things were now getting out of hand, that the appellant had his rights, that it was wrong that he should be subjected to such an assault and that they were going to call the manager of the hotel. It had been put to Mjoli and Balikisi that the defence version would be that the appellant was struck on his right cheek with a baton. This they denied and the appellant was emphatic in his evidence that he had not been struck by a baton. No explanation was offered for the disparity between his evidence and what had been put on his behalf. But the defence did put in a photograph of him which shows a substantial injury to his right cheek. I shall return to this photograph.

The appellant proceeds that he then set out in the direction of the hotel but was pulled back by one of the guards. This was denied by Mjoli, who was present. Balakisi, on the other hand, said that he saw Mjoli himself holding and thus restraining the appellant.

Mjoli's passage to the shooting is quite abrupt. Having described how the appellant had disembarked through the window and talked to Balakisi, his evidence-in-chief proceeds:

> "Prosecutor: He talked to Mr Balakisi and then?
> Witness: The accused said he will shoot him to death.
> . . .
> Witness: After that shots were fired."

The only reason advanced by Mjoli for this sudden action was that the appellant wanted the white manager, not Balakisi.

Balakisi's description of the transition to the shooting is almost equally abrupt. He was talking to Smallman, asking him to get the women out of the bus, whilst signalling to the appellant with his hand not to go to the hotel, when he heard the appellant say from behind him "I will shoot you". He turned round to see the appellant being held by Mjoli from the side. The appellant pulled himself clear and shot Mjoli. His second shot killed another guard, Lungisa Stevens, referred to in

the evidence as Lungisa, and the third hit him, Balakisi, in the left forearm.

The appellant's version of what led to the shooting is quite different. I left his account where he said that he was restrained by one of the security guards from going towards the hotel. The next thing, he says, was that three of them pulled their batons out. Both Mjoli and Balakisi deny that batons were produced or used, but there was a conflict between them. Mjoli said that the guards were not issued with batons. Balakisi said that they were. Presumably the magistrate regarded this as one of the "quite minor contradictions" between the two State witnesses, although he did not even list it among the contradictions that he did mention.

To proceed with the appellant's account: when the batons were produced, he threw open his jacket to show that he was armed with a pistol. Undeterred, the three guards raised their batons and came at him. He stepped back, pulled out his pistol and fired a warning shot in the air, but the guards kept coming at him with their batons raised ready to strike. In the witness box he demonstrated how they

bent forward as they came. They had a vicious look on their faces and he thought that they were going to kill him. Running away would have been futile. He then fired the three shots that wounded Mjoli in the head, killed Lungisa by a shot in the head, and wounded Balakisi in his left arm. (I shall return to the significance of the location of the entrance wounds on the heads of Mjoli and Lungisa). He ran back to the bus and climbed in. From there he saw Smallman near the entrance to the hotel being beaten with a baton by a fourth guard, whose dog was biting him. Within a short time the police arrived and the appellant was arrested.

The central misdirection of which the magistrate was guilty was to regard the appellant's entry into the bus through an open window as being unlawful conduct in itself. From this flowed the conclusion that the appellant was being unreasonable in not complying with Balakisi's demands. In fact the magistrate put a question to the appellant "Did they [the guards] not indicate to you that it was wrong for you to get into the bus through the window?" In asking this question he was accepting

the evidence of the guards, who had addressed the appellant in similar terms. It is nonsense to suggest that the mere act of climbing through the open window of a bus is an offence. Whether such an act is criminal depends on the actor's intention and whether he has authority to act in this way. If the window is broken, or if the intention is to steal or damage the bus or its contents the act would be criminal. But the outward appearances did not indicate anything of that kind. Nothing was broken and once inside the quartet made no visible attempt to decamp, with or without the bus or its contents. In addressing the appellant Balakisi referred to "his [the appellant's] bread." This indicates that he did not think the appellant was eating stolen bread. It also tends to indicate that he thought that the appellant was one of the bus's passengers. Also, the appellant repeatedly asked that either the driver or the tour organiser should be fetched. This was not the conduct of a guilty man. If either had been called and if the appellant was not entitled to be in the bus he would have been exposed immediately and convincingly.

Like any other citizen the guards had certain powers of arrest under s 42 (1) (a) of the Criminal Procedure Act 51 of 1977, namely to arrest a person committing a Schedule 1 offence in their presence or a person whom they reasonably suspected of having committed such an offence. Schedule 1 includes malicious injury to property, breaking or entering premises (premises include vehicles) with intent to commit an offence, and theft. As I see the position the guards were entitled, indeed because of their office obliged to investigate the quartet's unusual conduct in entering the bus through the window. But the situation with which the guards were then presented demanded circumspection. The guards did not accuse the appellant of committing any offence known to law. Nor did they name one in their evidence. Indeed the offence in their eyes was entering the bus through an open window. That view was shared by the magistrate, which resulted in an entirely skewed view of the case. From the outset the guards were in the right and the appellant was in the wrong. Consequently the appellant should have submitted to what was in effect

an arrest and the guards were entitled to lay hands on him when he tried to set off to find one of the persons who could establish his innocence.

The next serious misdirection relates to the photograph showing an injury to the appellant's right cheek. The photograph was put to Mjoli during his cross-examination. He conceded that it was a photograph of the appellant but denied all knowledge of the injury or of any assault upon him. The magistrate then asked whether there was a dispute that the photograph was taken immediately after the incident. Defence counsel said "No your Worship, I don't think my learned friend is willing to admit that, but he admits that it is a photograph of the accused showing an injury. That is the way I understood it." The prosecutor then responded "That is what I said your worship, that I admit that it was taken after the incident." Defence counsel indicated that the photographer was in court at the time. Not surprisingly in the light of the State's admission, he was not called as a witness. Nor was any cross-examination directed at the appellant on this score. Accordingly

it is with some astonishment that one reads the following in the judgment:

> "The Court indicated when the exhibit was handed in to Court that the manner in which it was being handed [in] was not a proper manner but because the State had no objection the Court thought that it should just wait until the matter is argued at a later stage. For instance the person who is supposed to hand in a photograph in a Court of law is the person who took the photograph."

I have several comments to make about this passage. First, the court gave no clear, if any, indication that it regarded the photograph as inadmissible. Secondly, the magistrate made no allowance that a statement made by the defence can become common cause by the State admitting it. That is what happened here. Thirdly, by keeping his reservation to himself the magistrate laid a trap for the appellant, who could, apparently, quite easily have led evidence of the photograph. Having voiced his complaints at being deprived of an opportunity to question the photographer as to times and places (of course the magistrate could have called him himself) he launched into the following tirade against the appellant:

"Court does not wish to belabour the point but the fact of the matter is that this is a clear fabrication of evidence to mislead the Court. . . . With respect the Court is of the view that the accused gave a fabricated story, a concocted story hoping that the Court would believe it. Small wonder therefore that his evidence was contradicted on a number of aspects by his companion Mr Smallman. The first thing being that he saw the accused being hit with a fist now and not an open hand."

I have two comments to make upon this passage. First, as I have pointed out, the appellant never unequivocally said that he was struck with an open hand. Nor was he attempting to make his evidence in cross-examination conform with that of Smallman, who gave evidence after him. This leads to a further misdirection by the magistrate when he said that in all his experience he had not seen such an injury as the appellant had suffered inflicted by an open hand. Secondly, there is no basis whatever for accusations of fabrication, concoction or misleading the Court. Nor were such allegations ever put to the appellant by the magistrate, even less by the prosecutor: cf *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 36 J - 37 E.

The next pair of serious misdirections relates to the final incident. I have pointed out already that although both guards denied that batons were produced, Mjoli claimed that the guards were not issued with batons, whereas Balakisi conceded that they were. But even while making a partial concession, Balakisi's evidence does not read convincingly. He was asked the simple question "Were the guards equipped with batons as a protection measure?" He answered "I did not notice when I got into the duty (sic) and I did not notice whether they were carrying batons or not because we do have batons." This evasive answer prompted another question "They are issued with batons?", to which he answered, as he should have in the first place, "Yes they are." The clear probability is, then, that the guards did have their batons with them that night, because they were part of their standard equipment. Another conflict between the guards was that Mjoli denied having laid hands on the appellant, whereas Balakisi described how Mjoli held and restrained him just before the shooting started. The magistrate dealt with the "quite minor

contradictions" between the guards by holding that where there were contradictions the evidence of Balakisi was to be preferred to that of Mjoli. However, he added "The Court does not reject the evidence of Rufus Mjoli. The Court accepts his evidence but only to the extent that it is corroborated by that of Balakisi." The logic of this process of reasoning escapes me. The two contradictions are not minor. They are major. They are concerned with whether the guards applied and threatened force, an issue vital to the resolution of the credibility question. If the appellant was restrained and if he was going to be struck with batons then there is a rational explanation for the shooting (I am not yet dealing with whether it is a sufficient explanation). If not, then we are asked to believe that the appellant shot three men for practically no reason at all. Indeed that leads on to a clear improbability in the story of the guards - that the appellant should suddenly start shooting for no reason other than pique. What the magistrate should have addressed his mind to was whether these two contradictions were not symptomatic

of the guards lying about the events leading up to the shooting - lying in order to protect themselves. In my opinion there must be a serious question whether that is not what happened.

The next misdirection relates to the bullet wounds on the scalps of Mjoli and Lungisa. The former's entrance wound was on top of his head, just within his hairline, above the outer edge of his left eye. The exit wound was on the right side of the middle of the nose. The entrance wound on Lungisa's scalp was plumb in the middle of the top of the head. It travelled downwards. The bullet did not leave the body. Both Mjoli and Balakisi said that Mjoli and the appellant were standing up straight when the former was shot by the latter. When the unlikelihood of the wound being inflicted in the way it was, was put to Mjoli, he, after a time, suggested "After he had withdrawn his firearm I do not know which position I was, whether I was trying to duck or . . .." Balakisi was clear about it. The two were standing up straight facing one another when the shot went off. When the magistrate

questioned Balakisi he put the following leading question to him "They [the guards] never tried to run away, take cover or whatever, go for him, jump at him, dive, they just stood as you observed them?" The best he could get out of Balakisi was "Everything happened so quickly to an extent that nobody thought of doing something." As far as Lungisa's wound is concerned, Balakisi stated, when asked why the bullet entered the top of the head, "I may not know as the accused is a taller person than the deceased, so he was at that distance maybe he shot him." Later, when asked the same question, he said "I do not [know] how it happened because the deceased was facing me and his back was to the accused." In my opinion these answers do not provide any explanation. Nor was Mjoli able to explain the location of Lungisa's wound. The appellant in the course of his evidence demonstrated how the guards came at him with their batons raised. His demonstration showed their upper torsos bent forward. The relevant passage will be quoted below.

The magistrate disposed of the argument based on the position of the entrance wounds summarily. Having referred to the argument he said:

> "But what is interesting about that argument is that even the accused himself, when he, Mr Bester, called him to explain as to how he shot the security guards, the accused himself could not explain. The Court is of the view that the evidence of the State witnesses has to be believed."

I have two comments about this passage. First, it was for the State rather than the appellant to explain how the wounds came to be where they were. Secondly, the appellant did give an explanation, if not an emphatic one. When asked if he could explain he said:

> "I dont know whether their heads were down but they were actually coming towards me, I just opened fire amongst them.
> Mr Bester: I see, you demonstrated to the Court with your upper torso bent forward?
> Accused: Yes."

The appellant did have an explanation. Balakisi did not. Mjoli had a very tentative one. So that, in addition to placing the onus on the appellant, the

magistrate misdirected himself on the evidence.

Another misdirection is contained in the statement "What needs to be decided by this Court therefore is whether or not a Court of law can rely on the evidence of the State witnesses and find accordingly or should reject their evidence and find for the accused." One does not have to reject the State evidence if one concludes that an accused is entitled to acquittal because his version may reasonably possibly be true. The magistrate did seek to cure the matter by reference to *S v Munyai* 1986 (4) SA 712 (V). However, the recitation of some of the old family favourites does not in itself fulfil the requirements of the law with regard to the burden of proof. In the context of accomplice evidence it was said in *S v Avon Bottle Store (Pty) Ltd and Others* 1963 (2) SA 389 (A) at 393 if - 394 A that warning himself by the trier of fact is not enough. He should demonstrate by his treatment of the evidence that he has in fact heeded the warning. See also *S v F* 1989 (3)SA 847 (A) at 853 C. This principle clearly has general application,

not only to accomplice evidence. That the magistrate failed to apply to the facts the elementary rules of criminal onus appears, for instance, from the manner in which he dealt with the bullet wounds, from his failure to give proper attention to the conflicts in the evidence of the guards, from his treatment of the defence witnesses (to be mentioned below) and by his failure to properly weigh the probabilities, particularly with regard to who was aggressive. In the latter connection I find Balakisi's own evidence as to what the appellant was to do with his bread, revealing. What right did a security guard have to make the remark he did? And what right did he have to regard the appellant as being aggressive for eating his own bread? His conduct here speaks of a domineering and arrogant attitude to the discharge of his duties, which helps to explain how matters moved on to their tragic ending.

The last subject for comment in the context of credibility is the magistrate's treatment of the defence witnesses. Smallman, Natasha and Angela each

corroborated the appellant's version to a greater or lesser extent, depending partly on their respective abilities to observe and their positions. There were conflicts in the defence case, for instance as to whether it would or would not have been easy for the women to alight from the bus through the window. These conflicts were not treated with the generosity accorded to those in the State case, notwithstanding that they were not, in my opinion, nearly as serious. The three witnesses were said to have "merely recited the evidence of the accused hoping that it would make sense to the Court". Their evidence does not read that way to me. My impression is rather that they were giving their recollections of an unexpected and disturbing event. Smallman was criticised, *inter alia*, for refusing to say whether he thought the appellant was justified in shooting. Perhaps he was being loyal to his friend, but I would not criticise his reason, that it is difficult to judge when you are not confronted with the reality of an attack such as the appellant faced. Judges with time on their side have often acknowledged just this problem. In the end the

evidence of all four defence witnesses was dismissed as a "pack of lies." I think that this statement is unwarranted. The magistrate seems to have considered corroboration of the appellant by his witnesses in some respects as proof that they were lying, whilst criticizing them for contradicting him and one another in other respects. I would add that I consider their account to have much more of the ring of truth about it than that of the guards, never mind being reasonably possibly true. Accordingly I am of the view the magistrate's credibility findings must be reversed and that the appellant's conduct must be judged on his own version.

His defence is self-defence. The onus is on the State to rebut it. Because of the way that this case has been handled that trite proposition requires re-emphasis. The magistrate says the appellant could have run away. The appellant says he could not have done so with safety. There were three guards close to him armed with batons that they were about to use. There was another guard with a dog in the vicinity. Running would, in my opinion, have been most risky, if it was indeed a

possibility. The determination of his assailants was established by their ignoring his production of his pistol and the firing of a warning shot. The magistrate also said he could have shot at their legs. This also would have been a hazardous thing to do, given how close to him they were and the fact that he would have had to disable all three of them. One does not judge his position as from an armchair: *SA Criminal Law and Procedure* Vol 1 3ed by Burchell 79. Nor, for the reasons already explained, could the conduct of the guards in restraining and then attacking him be regarded as lawful. The appellant was entitled to defend himself. Much as one must deplore the situation's having come to such a pass that one man was killed and two wounded, I consider that, judged objectively as he must be, the appellant was entitled to his acquittal.

One might have hoped that the travesty of justice in the Regional Court would have been set right on appeal to the High Court. But it was not. The question of the batons was brushed aside. Whether or not he was hit with the hand

was said not really to affect the issue. There was, it was said "nothing on the evidence" to justify his belief that the guards intended to kill him. Reference was made to the fact that the magistrate had found that Balakisi had given his evidence in a most satisfactory manner and was corroborated "to a large extent" by the other guard. No reference was made to the conflicts between them. The appellant, on the other hand, was criticised because what had been put on his behalf was not always the same as his evidence. Pickard JP said that "I cannot find any reason to criticise the finding of the magistrate in regard to credibility". Even a cursory reading of the record reveals numerous reasons. The appellant's version was said to be false beyond reasonable doubt. The blame for the shooting all rested with him. He should have gone to the guards's office as requested. (Impliedly then, his conduct had been unlawful and that of the guards lawful). As regards the two shots that entered "fairly high on the cranium" the answer was "to speculate about this at this stage without expert evidence is entirely impossible. But the magistrate comes

to the conclusion, and very likely the correct one, that everybody ducked for cover when he started shooting and that is when he hit them". This last is presumably a reference to the magistrate's failed attempt to lead Balakisi into the ducking theory. The appellant's evidence in this regard is ignored.

It is sufficient criticism of the High Court's judgment to refer to what I have said about the Regional Court's judgment, which was adopted without examination of its correctness. It was as if there was no appeal. An appeal involves a rehearing, whatever its limitations, not a rubber-stamping.

The appeal is allowed. The convictions and the sentence are set aside.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
VIVIER JA
MPATI AJA