THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 608/10

In the matter between:

MANDLA XABENDLINI Appellant

and

THE STATE Respondent

Neutral citation: *Xabendlini v State* (608/10) [2011] ZASCA 86 (27 May 2011).

Coram: HARMS DP, MALAN and THERON JJA

Heard: **24 May 2011**

Delivered: **27 May 2011**

Summary: Arms and Ammunition – Pointing a firearm in contravention of s 39(1)(i) of the Arms and Ammunition Act 75 of 1969 – Pointing - What constitutes – Wider interpretation that offence not only committed when firearm is pointing directly at person concerned is preferred as it accords with the intention of the legislature.

ORDER

On appeal from: Western Cape High Court (Cape Town) (McDougall AJ with Thring J concurring, sitting as a court of appeal)

The appeal is dismissed.

JUDGMENT

THERON JA (HARMS DP and MALAN JA concurring):

[1] The appellant and his co-accused were charged in the Regional Court (Cape Town) with robbery, theft, unlawful possession of a firearm and ammunition and the pointing of a firearm. The appellant was convicted already on 10 December 1999 on all the counts despite his plea of not guilty and was sentenced to an effective term of 20 years' imprisonment. On appeal, the Cape Town High Court on 2 March 2003 set aside the convictions relating to unlawful possession of a firearm and ammunition. The appellant appeals against his conviction in respect of the pointing of a firearm, with the leave of the high court which was granted on 7 June 2010. (We refrain from commenting on its reasons for granting condonation and leave.)

[2] The question on appeal is what constitutes the pointing of a firearm for the purposes of the then applicable s 39(1)(i) of the Arms and Ammunition Act 75 of 1969. Section 39(1)(i), which was introduced by s 6 of the Arms and Ammunition Amendment Act 16 of 1978, made it an offence for any person to wilfully point any arm, air rifle or air revolver at any other person.

[3] The facts giving rise to this appeal are briefly the following. John Thompson and Jean Badenhorst had been employed as security officers by Fidelity, a company involved in the transportation, delivery and collection of money. They were on duty on the morning of 4 June 1998, and had delivered money to Woolworths in Adderley Street, Cape Town. As they were leaving Woolworths they were attacked and robbed of an empty metal money container and the firearm which Badenhorst had in his possession.

[4] A taxi driver, Moegamat Bowers, who had been parked in Strand Street, near the entrance to Woolworths, had noticed three males, one of whom had been armed with a firearm, enter Woolworths through the entrance normally reserved for the receiving of goods. He later observed the three men running out of the store carrying a metal trunk and leaving the scene in a white Ford Bantam bakkie. Bowers pursued the bakkie as it drove off.

[5] Sergeants Nicholas du Toit and Richard Beesley had stopped at a nearby traffic light controlled intersection when they were alerted to the robbery and the involvement of the bakkie. They then pursued the bakkie. At a further traffic light controlled intersection, two males alighted from the bakkie and ran into a nearby train station. While in pursuit of the bakkie, the police officers fired shots directed at the wheels of the bakkie. They noticed a passenger in the bakkie, (later established to be the appellant) pointing a firearm at them. The police then fired shots directly at the appellant, whereafter he disappeared from their view. The bakkie crashed into another vehicle and a short while later was forced to stop. The two occupants, the appellant and his former co-accused, were arrested.

[6] There has, to date, been conflicting interpretations by the courts of s 39(1)(i) and its predecessor, s 114 of the General Law Amendment Act 46 of 1935 which read:

'Any person who knowingly and without lawful cause points a firearm or an air gun or air pistol at any other person shall be guilty of an offence . . . .'

In *R v Humphries* 1957 (2) SA 233 (N), Selke J stated that the phrase 'pointing a firearm' (as used in s 114) was less precise than aiming a firearm. The learned judge held that 'pointing a firearm' did not mean the deliberate and careful taking of aim with the idea of hitting a person with the shot if one were fired, but that it rather embraced 'the notion of directing the firearm towards a person in such a way that, if it were discharged, the bullet would either strike that person or pass in his immediate vicinity'.[1] Williamson J (van Deventer J concurring) in *S v Van Zyl* 1993 (1) SACR 338 (C) held a somewhat different view and concluded that the offence of pointing a firearm at a person, as envisaged by s 39(1)(i) was only 'committed when the firearm is pointed directly at the person concerned so that if discharged the bullet would hit the victim'.[2] More recently, in *S v Hans* 1998 (2) SACR 406 (E), Erasmus J found that it was irrelevant for the purposes of s 39(1)(i) whether the weapon, if discharged, would have injured any person. The court reasoned that it was therefore not necessary to introduce, as Williamson J in *Van Zyl* had, such a requirement in determining the meaning of the section.[3]

[7] In *Van Zyl*, the court adopted a narrow interpretation of the word 'point', as meaning pointing at a person in such a manner that if the firearm was discharged, the person would be struck. A wider interpretation was favoured in *Humphries* and *Hans*. In my view, the wider interpretation is to be preferred. First, it accords with the intention of the legislature which is to protect the public from the dangers associated with the handling and use of firearms and the resultant fear induced in the mind of the person at whom the firearm is pointing that he would or could be struck.[4] It is trite that the words

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[1] *R v Humphries* 1957 (2) SA 233 (N) at 234F-G.
[2] *S v Van Zyl* 1993 (1) SACR 338 (C) at 340G-H.
[3] *S v Hans* 1998 (2) SACR 406 (E) at 411H-412A.
[4] C R Snyman *Criminal Law* 5ed (2008) p 467.

of a statute must be given its ordinary, grammatical meaning having regard to the text as a whole. The offending conduct, in terms of s 39(1)(i), is the pointing of a firearm. As was noted in *Hans*, it is not necessary that the weapon is cocked or loaded, or even that it is capable of discharging ammunition. The mere pointing of a firearm, at another person, constitutes the offence. The current formulation of the relevant section confirms this position. Act 75 of 1969 was repealed in its entirety and replaced by the Firearms Control Act 60 of 2000. Section 120(6) of the latter Act, which creates the offence of pointing a firearm, reads:

'It is an offence to point—

a) any firearm, an antique firearm or an airgun, whether or not it is loaded or capable of being discharged, at any other person, without good reason to do so; or

b) anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun at any other person, without good reason to do so.'

Second, on the narrow interpretation it would not always be possible, to prove that the bullet, if discharged, would have struck the person at whom the firearm was pointed. Erasmus J in *Hans*, recognised the impracticality of this approach:

'Op dié uitleg sal die artikel weinig impak hê. Eerstens: dit beperk die teoretiese trefwydte van die bepaling tot 'n mate wat die Wetgewer na my oordeel nooit bedoel het nie. Op dié uitleg sal 'n persoon wat op 'n teiken aanlê, maar dan mis skiet, of sou mis geskiet het indien hy die sneller getrek het, nie sy geweer "op" die teiken "gerig" het nie − al is hy 'n geoefende skut wat met noukeurige doelgerigtheid gekorrel het. Gesonde verstand sê vir jou dat so 'n gevolg indruis teen die Wetgewer se bedoeling soos uitgespreek in die bewoording van art 39(1)(i). Tweedens: die betekenis wat die *Van Zyl*-uitspraak aan die begrip "rig op" toesê, sal die toepassing van die artikel erg aan bande lê. Probleme met bewys sal die verbod in die praktyk beperk tot gevalle waar 'n persoon direk deur 'n afgevuurde koeël getref is, óf waar die wapen trompop gerig is. In alle ander situasies sal dit bykans onmoontlik wees om te bewys dat die koeël 'n persoon sou getref het indien dit gevuur was; of, as die wapen nie gelaai was nie, dat 'n denkbeeldige koeël 'n persoon sou

getref het indien dit afgevuur was. Die uiters eng vertolking van die artikel sal gevolglik, na my oordeel, die oogmerke van die Wet grootliks verydel.'[5]

Third, I endorse the view expressed by C R Snyman that the specific harm sought to be combated by the legislature, namely, inducing fear in the mind of the person at whom the firearm is directed, would exist irrespective of proof that the bullet, if discharged, would have struck or missed him or her.[6]

[8] Every case must ultimately be determined with reference to its facts. I turn now to the facts of this matter. The police officers were travelling close behind and in pursuit of the bakkie in which the appellant and his former co-accused were travelling. The police officers had fired shots at the bakkie. The occupants of the bakkie were, or must have been aware that they were being pursued by the police. The police officers noticed the appellant pointing a firearm at them. They were uncertain whether they would have been struck by a bullet fired by the appellant. Sergeant du Toit testified that that possibility existed. Sergeant Beesley said in evidence that he could not express an opinion on whether any bullet fired would have struck them or their vehicle. What is clear, however, is that the appellant's pointing of the firearm in their direction induced the belief in their minds that they were going to be shot at. The police officers retaliated by shooting at the appellant. The appellant's motive in pointing the firearm at the police officers could only have been to impede their pursuit of him and his companion and to evade arrest. In the circumstances, the appellant's conviction is supported by the evidence.

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[5] *S v Hans* 1998 (2) SACR 406 (E) at 411D-G.
'This interpretation will severely limit the impact of the section. First: it limits the theoretical effect of the section in a manner which the Legislature, to my mind, could never have intended. On this interpretation a person who aimed at a target but then missed or would have missed the target if he had pulled the trigger, would never have "pointed" his firearm "at" the target. – even if he was an expert marksman who had taken careful aim. Common sense dictates that such a result would go against the intention of the Legislature as expressed in the wording of s 39(1)(i). Second: the meaning ascribed to the term "pointed at" in Van Zyl would seriously limit the application of the section. Evidentiary problems would, in practical terms, limit the prohibition to incidences where a person was hit by a bullet fired directly at him, or where the firearm was pointed at point-blank range. In all other situations it would be virtually impossible to prove that the bullet would have struck the person if it had been fired, or, where the firearm had not been loaded, that an imaginary bullet would have struck the person had it been fired. This extremely narrow interpretation of the section would, in my mind, frustrate the intention of the Legislature.'

[6] C R Snyman *Criminal Law* 5ed (2002) p 467.

[9] The appeal is dismissed.

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L V THERON
JUDGE OF APPEAL

APPEARANCES:

APPELLANT:	C Stamper
	Instructed by Legal Aid, Cape Town Legal Aid South Africa, Bloemfontein
RESPONDENT:	M M Tsheole
	Instructed by Director of Public Prosecution, Cape Town Director of Public Prosecution, Bloemfontein