FORM A

FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISIONJUDGMENT

PARTIES: W M Arnott & State
Case Number: CA&R162/07
High Court: Eastern Cape Division
DATE HEARD: 03 March 2010

DATE DELIVERED: 05 March 2010

JUDGE(S): Roberson J

LEGAL REPRESENTATIVES –

Appearances:
for the Applicant(s): Adv Xoswa
for the Respondent(s): Adv Engelbrecht

Instructing attorneys:
for the Applicant(s): Justice Centre
for the Respondent(s): DPP

CASE INFORMATION –
Nature of proceedings.
Topic:
Key Words:

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO. CA & R 162/07

In the matter between

WILLIAM MORRISON ARNOTT **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

ROBERSON J

[1] The appellant was convicted by the Regional Court East London, of attempted murder, and was sentenced to 8 years imprisonment. He appeals against conviction and sentence.

CONVICTION

[2] The issue on appeal was whether or not the court a quo was correct in finding that the appellant had the necessary intention to commit the crime of attempted murder. It was submitted on behalf of the appellant that he should only have been convicted of assault with intent to do grievous bodily harm.

[3] With one exception, the magistrate's findings of fact were not attacked on appeal, and the events leading to the charge can be recounted as follows: the appellant and the complainant were neighbours. On the evening of 27 October 2004 the complainant and his girlfriend, Denise Nagel, returned home from an evening out and found certain unwanted persons on the verandah of the complainant's home, one of whom was the appellant's brother, who had been warned by the police not to enter the complainant's premises. The complainant assaulted one of the persons and also pushed another person and the appellant's brother off the premises. An argument ensued between the complainant and the appellant's brother, in which the appellant interfered. The argument subsided but then the appellant's wife appeared on the scene and told the appellant he must not hit the complainant, he must kill him. The complainant then entered his house and the last he remembered before he woke up in hospital was that he was standing with

his back to his bedroom door. After he entered his house, the appellant and his co-accused, his stepson Derrick Botha, entered the house. Nagel followed to see what was going on and saw Botha hitting the complainant with a pool cue. The appellant was next to him but she did not see a weapon in his possession. Nagel ran out of the house to get help and the appellant and Botha also came out of the house. The appellant was carrying a small axe. The appellant said to Nagel 'now you can phone an ambulance'.

[4] The injuries suffered by the complainant were, *inter alia*, a compound fracture of the frontal bone of his skull and trauma of the right eye socket. His brain was very traumatised, with a number of large bone fragments depressed into the brain necessitating a craniotomy to remove these fragments. The bone of his right eye was also fractured and driven into the eye to a certain extent. According to the neuro-surgeon who treated the complainant, his injuries were life threatening and an injury to the head caused by an axe is usually a devastating one, with many victims not even reaching hospital. The neuro-surgeon was of the opinion that lacerations on the complainant's forehead were consistent with a sharp object, because they had linear and abrupt edges. If a blunt object had been used, she would have expected irregular wounds.

[5] The magistrate correctly rejected the appellant's version that the complainant had threatened him with an axe and that he had hit him with a pick handle while the complainant was trying to hit him with the axe.

[6] The magistrate specifically found that the appellant had assaulted the complainant with an axe and that Botha had assaulted the complainant with a pool cue. Both were convicted of attempted murder, having acted in concert.

[7] In finding that the State had proved that the appellant had the requisite intention to commit attempted murder, the magistrate said the following:

> '……. clearly the evidence discloses that the complainant was hit on the head more than once with a lethal object, namely an axe and no person in his right mind could for one single moment think that if a person is assaulted in this way that death is not hovering in attendance. …….. The intention to murder is the only reasonable inference in view of the nature of the attack on the complainant and the nature of the weapon used to do so and the nature of the injuries he sustained as result of this attack.'

[8] It was submitted on behalf of the appellant that the magistrate did not have proper regard to the subjective state of mind of the appellant at the time of the assault. Instead of putting himself in the position of the appellant at the time of the assault, the magistrate was influenced by *ex post facto* knowledge. Further it was submitted that the State had not proved what instrument was used to inflict the injuries, and the magistrate should have found that the weapon used was a pick handle.

[9] I am satisfied that the use of an axe to inflict the injuries was proved. The evidence of Nagel that she saw the appellant in possession of an axe when he came out of the house after the assault, as well as the evidence of the neuro-surgeon that the lacerations

were consistent with a sharp object, in my view constituted sufficient proof of the use of an axe.

[10] In the absence of evidence from the appellant about his subjective state of mind when he assaulted the complainant, the magistrate had to resort to inferential reasoning in order to determine whether or not the appellant had the requisite intention. In my view he reached the right conclusion. A person who strikes another several times on a vital and vulnerable part of his body, namely the skull, with a lethal weapon such as an axe (or, for that matter, a pick handle), with sufficient force to fracture the skull and drive bone fragments into the brain, must subjectively foresee that death might occur. In continuing with the assault, the appellant reconciled himself with this result. I cannot see what other intention can be inferred, other than an intention to kill.

[11] In *S v Nango* 1990 (2) SACR 450 (A) the appellant was found to have been standing over the complainant who had fallen, holding an axe high as if he was about to strike the complainant. The appellant's appeal against his conviction of attempted murder was dismissed. Smalberger JA said at 457c – f:

> 'Was die appellant se voorgenome bedoeling om Welgemoed net ernstig te beseer, of om hom te dood? Met opset om te dood het ek nie direkte opset om te dood (*dolus directus*) in gedagte nie (want dit sou nie die enigste redelike afleiding wees nie), maar opset in die sin van 'n subjektiewe voorsiening deur die appellant van die moontlikheid dat sy handeling die dood van Welgemoed tot gevolg mag hê gepaard met roekeloosheid ten aansien van die intrede van daardie gevolg (*dolus eventualis*) – kyk *S v Sigwahla* 1967 (4) SA 566 (A) op 570A-E. Waar daar met 'n skerp voorwerp soos 'n byl met geweld gekap word (wat die geval sou wees as daar van bokant die kop geslaan is) op 'n persoon wat op die grond lê, kan die hou noodwendig enige deel van die persoon se liggaam tref en

> gevaarlike, selfs noodlottige gevolge kan hê. In die afwesigheid van getuienis deur die appellant wat op die teendeel dui, is die enigste redelike afleiding wat gemaak kan word dat die appellant, toe hy gepoog het om Welgemoed met die byl te kap, die moontlikheid voorsien het dat sy handeling, indien geslaagd, die dood van Welgemoed kon veroorsaak, en hy roekeloos gestaan het teenoor die gevolge van sy optrede. Gevolglik het hy gepoog om Welgemoed aan te rand met die opset (*dolus eventualis*) om hom te dood.'

In the present case the appellant went even further and actually struck the complainant on the head.

[12] The appellant was therefore correctly convicted of attempted murder and the appeal against conviction must fail.

SENTENCE

[13] This court may only interfere if the magistrate misdirected himself or the sentence is startlingly disproportionate to the offence.

[14] At the time of sentence, the accused was 42 years old, married with four young children, self employed and the sole breadwinner in the family. He had previously had a drinking problem but in 2002 had stopped drinking, resulting in improved family relationships. He had several previous convictions which were old and correctly not taken into account for the purpose of sentence.

[15] The magistrate carefully considered all the relevant factors before imposing sentence, and in my view did not over-emphasise any factor at the expense of another. He concluded that a term of imprisonment was the only appropriate sentence. He had regard to the accused's personal circumstances, including the fact that he had changed his way of life and improved his relationship with Botha. The magistrate also took into account the extreme seriousness of the offence. This was a severe case of attempted murder. Even the appellant's attorney mentioned in argument that the complainant was lucky to be alive. In addition to the injuries already described, the complainant had been left with impaired vision in the injured eye. Although there was an atmosphere of conflict on the evening of the assault, there was no need for the appellant to interfere and his attack on the complainant was unprovoked. What is more, he invaded the privacy and sanctity of the complainant's home, after the complainant had left the scene of conflict. The magistrate also took into account the interests of society and the prevalence of crimes of violence and the frequent resort to violence to resolve conflict. The incidence of violent crime in this country is frighteningly high and law-abiding people need to be reassured that the courts take as serious a view of violent crime as they do, and that sentences are imposed which reflect the seriousness of such crimes and act as a deterrent. It follows that I am of the view that there was no misdirection on the part of the magistrate.

[16] Appellant's counsel submitted that a sentence of correctional supervision would have been more appropriate. In my view such a sentence would not have met the seriousness of the offence and direct imprisonment was the only appropriate sentence.

[17] The magistrate himself said when granting leave to appeal that the sentence was a robust one. However I am of the view that in the particular circumstances of this case the sentence is not disproportionate and does not warrant interference. As already said, this was a severe case of attempted murder, involving a brutal and near fatal assault. The appellant, without provocation, took it upon himself to inflict punishment on the complainant in his own home, when there was no need for him to have become involved in the prior conflict.

[18] In the result the appeal is dismissed.

J.M. ROBERSON
JUDGE OF THE HIGH COURT

I agree

L.T. SIBEKO
ACTING JUDGE OF THE HIGH COURT