THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 503/09

In the matter between:

MERVYN DE VOS **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *De Vos v The State* (503/2009) [2010] ZASCA 60 (1 April 2010).

Coram: Mpati P; Mthiyane, Cachalia JJA, Theron and Saldulker AJJA

Heard: **9 March 2010**

Delivered: **1 April 2010**

Summary: Criminal law – self-defence – appellant facing two counts of attempted murder arising from a shooting incident at a nightclub. Appellant's version reasonably possibly true.

ORDER

On appeal from: Northern Cape High Court, Kimberley (Bosielo AJP and Majiedt J sitting as court of appeal).

The following order is made:

1. The appeal is upheld.
2. The order of the court below is set aside and the following order is substituted in its place:

'The appeal is upheld and the convictions and sentences are set aside.'

JUDGMENT

CACHALIA JA and SALDULKER AJA (Mpati P, Mthiyane JA, Theron AJA concurring):

[1] The appellant, Mr Mervyn de Vos, who was 44 years old at the time of the events discussed below, was convicted on two counts of attempted murder in the regional court, Kimberley, on 2 October 2006. The two counts were taken

together for the purposes of sentencing and he was sentenced to seven years' imprisonment. He appealed against his convictions to the Northern Cape High Court (Bosielo AJP and Majiedt J). The respondent opposed the appeal and gave notice of its intention to appeal against the leniency of the sentence. The high court confirmed the convictions and increased the cumulative sentence on the two counts to ten years' imprisonment. This appeal, with leave of the high court, is only against the convictions.

[2] The charges arose from an incident that occurred in the early hours of Sunday, 17 July 2005, at a night club in Kimberley known as 'Squeezas', when the appellant fired a single shot from his firearm, injuring two people. The shot, which was fired at a Mr Gavin Sylvester at close range, caused the bullet to penetrate his left cheek and exit near his right eye. (Sylvester is the complainant in count 1.) After exiting from Sylvester's face the bullet penetrated the right leg of a Mr Samuel Serata. (The complainant in count 2.) Sylvester was employed at the nightclub at the time to perform security duties. He lost his eye-sight in the incident. Serata appears to have been a patron at the club. The appellant's case is that he fired the shot in self-defence – to ward off an attack by Sylvester.

[3] The state led the evidence of Sylvester and two of his colleagues Mr John Masuku and Mr Isa Isak, who were also employed to perform security-related functions at the club. They were colloquially known as 'bouncers'. Their job was to remove people who they considered to be trouble-makers from the club – forcefully if necessary. It was their use of force in removing the appellant from the club which precipitated the chain of events that culminated in the shooting. Constable Malete was on duty on the night of the incident. He saw the appellant twice that evening. The first was shortly after the bouncers had forcefully removed the appellant from the club and he arrived at the police station to complain about his treatment by them. The second was some two hours later

when the appellant returned to the police station after having fired the shot which injured the complainants. Constable Alexander corroborated his colleague's testimony regarding the events related to the appellant's second visit to the police station.

[4] The appellant testified in his defence. He called two witnesses to support his case. Mr Titus Bloem, a friend, testified regarding the circumstances of their removal from the club. The second witness, Mr Andre Smit, the appellant's niece's nephew, was at the club when the shooting incident occurred, although he did not see what happened.

[5] By the time the matter was argued before us much of the evidence had become common cause or was no longer disputed. The essential dispute turned on whether the appellant had fired the shot during a life-threatening assault on him by Sylvester and Masuku.

[6] The essential facts are these. The appellant arrived at the club with his niece's two sons at about 11 pm. They entered and the two young men went their own way. The appellant then met Bloem. After a while the appellant and Bloem were forcefully removed by Masuku and Isak, apparently because the bouncers thought that the two men had been fighting with each other. They denied that they had been fighting. Be that as it may, the appellant felt very aggrieved and humiliated by the manner in which he was taken out of the club.

[7] He then drove to the police station a short distance from the club to report the incident. There were two police officers on duty, Constables Malete and Alexander. The appellant wanted the police to return to the club with him. But, according to Malete, he was rude and aggressive. Malete could not calm him down. During the course of their exchange the appellant said that he was going

to return to his home to fetch his gun so that he could return to the club to shoot the people who had assaulted him. After he had left the police station Malete made an entry in his occurrence book and in his pocket book. He also alerted the police on patrol duty to be on the look-out. The appellant denied that he had threatened to get his gun to shoot his assailants at the club but, we think, the learned magistrate and the trial court correctly disbelieved his evidence on this aspect. It is significant, however, that Malete confirmed a crucial part of the appellant's version – that he had no visible injuries at the time. The significance of this evidence will become clear later.

[8] The appellant returned to the club a few hours later, to collect his niece's two nephews who he had left there earlier. It was some time after 2 am. The state disputed Smit's evidence that he was at the club that night but was unable to gainsay it. And for present purposes we must accept his testimony that he was.

[9] The appellant testified that when he arrived on the scene he did not see the boys outside the club. So he looked through the doorway to see whether they were inside, but could not see them. He then saw Masuku and Sylvester. Masuku, he testified, pulled him into the entrance and Sylvester hit him over the head with a baseball bat. He staggered backwards – then Masuku swung a baseball bat he was holding and struck him on his left jaw. The appellant said he became confused and recalled falling to the ground. He pulled himself up next to his car, which he had parked in front of the club and tried to support himself by placing his hands on the car. He noticed that his keys had fallen out of his pocket during the fracas. He recalled trying to support his injured jaw with his left hand while this was happening. He then stepped forward towards the club to retrieve his keys. And as he did so he saw Sylvester move towards him wielding a baseball bat. He heard him utter expletives to the effect that he was going to kill

him. As Sylvester moved towards him and at a distance about 2 meters from him, the appellant reached for his gun and fired a shot at him.

[10] The state's case was that after the appellant had been taken out of the club he armed himself with his firearm, and returned later, intent on exacting revenge for the way he had been treated earlier. And unprovoked, he fired a shot at Sylvester. Although the state did not contest that the appellant had also sustained injuries during the course of the evening, its case was that he was not injured at the time of the shooting and also that there had not been any fight between the state witness and the appellant during the shooting.

[11] After firing the shot, which struck both complainants, the appellant got into his car, reached for his spare keys, which happened to be in the vehicle, and drove to the police station. It is of some significance that when he entered the police station this time Malete noticed that he had blood on his hands and that his jaw was swollen.

[12] Some time later that morning the appellant was taken to the district surgeon, who recorded that the appellant's left forearm was tender and bruised, that his left jaw had been fractured and was very tender. He was wounded on the head but did not need stitches. There was also bleeding in the mouth. The appellant spent eight days in hospital recovering mainly from the injury to his jawbone, which necessitated the insertion of metal screws and plates during surgery. He had clearly been badly injured.

[13] Neither the learned magistrate nor the high court accorded any weight to the circumstances under which the appellant sustained these injuries. Instead they placed their emphasis on Malete's evidence regarding the appellant's threat to arm himself so that he could exact revenge on those who had assaulted him

earlier. And from this emphasis, the rest followed. They implicitly accepted the evidence of the state witness that they had not used any violence when the appellant arrived at the club on the second occasion, least of all with baseball bats. On the evidence of the state witnesses baseball bats were not kept on the club premises. I should mention that Bloem, during his testimony, was asked by counsel for the state whether he had ever seen baseball bats on the premises – his reply was that he had not seen any on that night but that he had, on previous visits to the club, seen a 'kierie'. His description of the 'kierie' resembled that of a baseball bat, which places the state's version that no baseball bats were kept on the premises in doubt.

[14] Counsel for the state had considerable difficulty explaining how the appellant had sustained his injuries. He submitted that the appellant was injured at the time that he was first removed from the club. That submission is fanciful and improbable for two reasons. First, Malete would have noticed these injuries when he saw the appellant at the police station on the first occasion. Malete's evidence that he noticed the injuries only on the second occasion is consistent with the appellant's version that he had sustained the injuries at the time of the shooting. Secondly, with a fractured jaw, it is difficult to accept that the appellant would have returned to the club in this condition to exact revenge two hours later.

[15] The other evidence that the state had difficulty with was a statement that Isak had made to the police shortly after the incident, which contradicted his oral testimony that they had not been involved in an altercation with the appellant at the time of the shooting. In it he says clearly that when the appellant arrived on the scene for the second time they had a fight. But during his oral testimony he was not able to explain why he had said this in his statement. This lends further support to the appellant's version that he was assaulted just before shooting Sylvester. Moreover, one must ask why he would return to shoot Sylvester when,

on the state's version, Masuku and Isak – not Sylvester – had treated him badly earlier on.

[16] We accept that the appellant had armed himself before returning to the club. But his evidence that he had returned to collect his niece's sons – not to exact revenge – cannot be rejected – particularly in light of the fact of Smit's evidence that he was in the club at the time. Of course it is clear that the fact that he returned to the club with his firearm meant that he expected trouble. And it was probably irresponsible and even reckless for him to have gone back after what had happened earlier. However, once it is accepted that the appellant could only have sustained the injuries at the time he came back to the club, as we believe we have to, it follows that his version that he acted in self defence when he discharged a shot from his firearm cannot be rejected as false.

[17] We should add that both the learned magistrate and the high court found the appellant, on his own version, to have at least exceeded the bounds of self defence by retaliating when he could have left. But this conclusion could only be reached by rejecting his version that Sylvester had attacked him with a baseball bat. And we do not think we can. Indeed counsel for the state properly conceded that if we accept that the appellant was injured immediately before the shooting, as he testified he had, the only conclusion is that the appellant's version that he had fired in self-defence was reasonably possibly true.

[18] For these reasons the appeal must succeed. The following order is made:

1. The appeal is upheld.
2. The order of the court below is set aside and the following order is substituted in its place:

‘The appeal is upheld and the convictions and sentences are set aside.’

_____

A CACHALIA

JUDGE OF APPEAL

_____

H SALDULKER

ACTING JUDGE OF APPEAL

APPEARANCES:

APPELLANT:	J Nel Instructed by Honey Attorneys, Bloemfontein
RESPONDENT:	T Barnard Instructed by Director of Public Prosecutions, Bloemfontein