RE-ASSESSING THE INTERPRETATION OF "POINTING" FOR PURPOSES OF ESTABLISHING THE OFFENCE OF POINTING A FIREARM

***Xabendlini v State* (608/10) [2011] ZASCA 86**

1 Introduction

The case under discussion sheds light on the proper construction and interpretation of the term "pointing" for purposes of establishing the offence of pointing a firearm. The offence of pointing a firearm is currently provided for in terms of section 120(6) of the Firearms Control Act 60 of 2000 which renders it an offence to *point* any firearm, antique firearm or airgun; whether or not it is loaded or capable of being discharged; or anything which is likely to lead a person to believe that it is a firearm, antique firearm or airgun, at any person, without good reason to do so. The precursor to the latter section was section 39(1)(i) of the Arms and Ammunition Act 75 of 1969 which made it an offence for any person to wilfully *point* any firearm, air rifle or air revolver at any person. The facts giving rise to the case under discussion took place when Act 75 of 1969 was still operative. Act 75 of 1969 has, however, subsequently been repealed in its entirety and replaced with Act 60 of 2000. It is, however, trite that the definitional element of the offence, namely "pointing", is the same in both Acts and forms the cornerstone of the decision under discussion.

2 Facts

The appellant and his co-accused were charged in the Regional Court in Cape Town with robbery, theft, unlawful possession of a firearm and ammunition and the pointing of a firearm. Despite his plea of not guilty, the appellant was convicted in December 1999 on all counts and was sentenced to an effective term of twenty years imprisonment. On appeal, the Cape Town High Court in 2003 set aside the convictions pertaining to the unlawful possession of a firearm and ammunition. The appellant accordingly appealed against this conviction of the pointing of a firearm. The facts giving rise to the appeal were the following:

During the morning of 4 June 1998, John Thompson ("Thompson") and Jean Badenhorst ("Badenhorst"), both employed as security officers by the company known as Fidelity, a company involved in the transportation, delivery and collection of money, 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 as well as the firearm which Badenhorst had in his possession. A taxi driver, Moegamat Bowers ("Bowers") who had been parked near the entrance to Woolworths, had noticed three males, one of whom had been armed with a firearm, enter Woolworths at the entrance normally reserved for the receiving of goods. Bowers later observed the three men running out of the store carrying a metal trunk and departing from the scene in a white Ford Bantam bakkie. Bowers pursued the bakkie as it drove off. At the same time, 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 accordingly pursued the bakkie. At a further 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 then noticed a passenger in the bakkie, the appellant, pointing a firearm at them. The police then fired shots directly at the appellant, whereafter he disappeared from their view. The bakkie then crashed into another vehicle and was later forced to stop. The two occupants, the appellant and his former co-accused, were then arrested.

3 Question on appeal

The question before the Supreme Court of Appeal pertained to the issue as to what constitutes the pointing of a firearm for purposes of the then applicable section 39(1) of Act 75 of 1969. More specifically, the construction and interpretation of the element of "pointing" was revisited.

4 Assessment of applicable law

The interpretation of the expression or concept of "pointing at" for purposes of establishing the offence of pointing a firearm, has been the topic of discussion in various decisions (*R v Humphries* 1957 2 SA 233 (N); *S v Van Zyl* 1993 1 SACR 338 (C); *S v Hans* 1998 2 SACR 406 (E); see also Snyman *Strafreg* (2012) 487–488; Snyman *Criminal Law* (2008) 466–467). The anomaly in respect of the construction of the concept of "pointing at" specifically relates to the question as to whether the concept should be amenable to a *narrow* or a *broad* interpretation (Snyman (2012) 488; Snyman (2008) 467). If the concept of "pointing at" is interpreted within its *narrow* ambit, it means that an individual will be guilty of the offence if he or she pointed a firearm at another person in such a way that, if discharged, the bullet would actually hit the person or victim (Snyman (2008) 467; *Van Zyl* 340g). If, on the other hand, the concept is interpreted in its *broader* sense, it would mean that an individual will be guilty of pointing a firearm if the firearm was directed at another person in such a way that if it were discharged, the bullet would either strike the victim or pass in his or her immediate vicinity (Snyman (2012) 488; Snyman (2008) 467; *Humphries* 234d–g; *Hans* 411–412).

The Supreme Court of Appeal proceeded to analyse the conflicting opinions advanced in the case law dealing with the topic as to whether the narrow or broad interpretation of the concept of "pointing at" is preferable (see paras 6, 7 and 8 of the judgment). In *Humphries*, Selke J opined that the phrase "pointing" a firearm was less precise than aiming a firearm. The 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 rather "embraces 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" (234F–G).

The court (paras 6–7), in addition, addressed and discussed the decision in *Van Zyl* where Williamson J followed the narrow interpretation of the word "point" and concluded that the offence of pointing a firearm as envisaged by section 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" (340G–H). In contrast to the latter decision, the court further assessed the more recent decision in *Hans* where the broader or wider interpretation was supported and Erasmus J found that it was irrelevant for the purposes of section 39(1)(i) whether the weapon, if discharged, would have injured any person. It was reasoned in *Hans* that

it was not necessary to introduce, as Williamson J in *Van Zyl* had, such a requirement in assessing the meaning of the section (411H–412A).

The court, after assessing the narrow interpretation of the concept "point" as adopted in *Van Zyl* contrasted to the wider interpretation as followed in *Humphries* and *Hans*, held that the wider interpretation is preferable. It is submitted that the wider interpretation of the word "point" is preferable. In support of the latter the court stated three reasons for finding in favour of the broader interpretation of the word "point" which were the following:

(a) Firstly, 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 consequent fear induced in the mind of the person at whom the firearm is pointed that he or she could be struck (see Snyman (2012) 487–488; Snyman (2008) 467). The offending conduct for purposes of the offence is merely the pointing of the firearm. As was held in *Hans* 411g–h, it is not even necessary that the weapon should be cocked or loaded, or even that it is capable of discharging ammunition. The latter view is supported as it would lead to absurd consequences to require that the firearm, if discharged, would have struck the victim as it would defeat the aim of the offence which is to criminalise the act of pointing a firearm at another person.

(b) Secondly, based 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. The court correctly refers to the dictum in *Hans* where Erasmus J acknowledged the impracticality of this approach by stating the following:

> "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, of 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 oogmerk van die Wet grootliks verydel" (411D–G).

The latter view is supported. To require proof that the bullet, if discharged, would in actual fact have struck the victim, would place an onerous and impossible burden on the prosecution inadvertently rendering the offence of pointing a firearm of mere theoretical and academic nature as it would be virtually impossible to secure a conviction based on this offence due to the fact that it would be extremely difficult to prove that the bullet, if discharged, would in actual fact have struck the victim. It would, in addition, as noted by the court, be contrary to the purpose of the Act. If one further considers that section 120(6)(b) of Act 60 of 2000 currently also criminalises the act of pointing "anything which is likely to lead a person to believe that it is a firearm, antique firearm or an airgun", it is clear that the

legislature intended the criminalisation of "pointing" a firearm at someone else regardless of whether such firearm is loaded, cocked or capable of discharging ammunition. As such it is the "pointing" of a firearm which is criminalised, and not the eventual result as to whether the bullet, if discharged, would have struck the victim. The broader interpretation, it is submitted, thus accords with the intention of the legislature.

(c) Thirdly, the court endorsed the view espoused by Snyman that the specific harm sought to be combated by the legislature, which relates to the inducing of 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 (Snyman (2012) 487–489; Snyman (2008) 467).

5 Decision

The Supreme Court of Appeal dismissed the appeal and held that the police officers were travelling close behind the bakkie in which the appellant and his former co-accused were travelling. The court found that the appellant and his former co-accused must have been aware that they were being pursued by the police. The police officers noticed that the appellant was pointing a firearm at them, but they were uncertain whether they would have been struck by the bullet fired by the appellant. The court accordingly stated the following (para 8):

> "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."

6 Conclusion

The decision of the Supreme Court of Appeal can be welcomed. It sheds light on the issue of the proper interpretation of the term "point" for purposes of establishing the offence of pointing a firearm and re-affirms the stance taken in *Humphries* and *Hans*, that the broader interpretation of this concept is preferable. The latter view is supported as it is in line with the intention of the legislature which, it is submitted, relates to the criminalisation of the act of "pointing" a firearm at someone else whether or not it is loaded, cocked or capable of discharging ammunition. The decision further elucidates and provides clarity as to whether the narrow or broad interpretation should be adhered to. Within our current climate of criminal activities taking place on a daily basis, the use of firearms within such context remains an inescapable reality. The offence of pointing a firearm will in all likelihood surface on a more regular basis in future. As such the decision under discussion provides a yardstick regarding the interpretation of the term "point", putting an end to the confusion in this regard and as such easing the burden on the prosecution in terms of proof required to secure a conviction in respect of the offence of pointing a firearm.

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