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Judgment

The State

v.

Fleisch

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(WITWATERSRAND LOCAL DIVISION)

BEFORE: The Honourable Mr. Justice BRESLER.

In the matter of:

THE STATE vs. H.J. FLEISCH

Appearances:-

For the State: Mr. du Toit.  
For the Defence: Mr. Aarons.

22ND OCTOBER, 1964.

--: JUDGMENT :-

BRESLER, J.:

The accused, Hayman Jacob Fleisch, is charged with the crime of assault with intent to commit murder and in that upon or about the 21st October, 1963, and at or near Johannesburg in the district of Johannesburg the accused did unlawfully, maliciously assault Griffith Vaughn Olokers by discharging a firearm at him, inflicting injury with intent to murder him.

I do not propose going into any detail as far as the inception of the evidence is concerned, but it appears that complainant with one Sophocles Nissiotis and three women, namely Stella Maureen Churchill, now Mrs. Honey, Maureen Griffin and Bertha Mary Barnard, happened to be present on the date in question at a party given by the accused at his house.

It seems clear that much liquor was consumed and that of the men, accused and Nissiotis had consumed a considerable amount, of what was available, known as "hard liquor." But complainant however, who said he was a professional boxer in hard training, said that he had had one, perhaps two, beers only.

At some time during the dancing that ensued, accused, on the evidence that I accept, kissed Maureen Griffin, whom complainant said was his fiancée - but I think it is plain from the evidence that that was somewhat of an overstatement. Complainant took exception to this familiarity and after an altercation and an incident or two, the accused shot complainant in the stomach with a Luger 9mm pistol, which is one of the most powerful firearms of its kind.

Now the defence has told the Court that the accused suffered from certain physical disabilities, and I think the impression was created at an early stage and probably maintained throughout perhaps in a qualified form, that the accused fired in self-defence when attacked by the complainant Ockers. Now I think it seems fair to assume that accused had consumed, at least, his share of the not inconsiderable amount of liquor available, and I think it can be said that he had not less than eight tots.

Now the complainant has had several previous convictions for house-breaking with intent to steal and theft, and is at the moment serving another sentence for the same crime, and I think it was also pointed out that he had been convicted once for car theft. He began his criminal career as a juvenile, and is only 22 years of age now, and obviously his evidence must be scrutinised very carefully and can only be accepted if and where it receives credible corroboration on some material aspect of the case.

The presence of this Luger is explained by the evidence, that <sup>namely</sup> according to Nissiotis the accused was showing his war souvenirs, including this pistol, and I don't think that there is the slightest doubt that that is so. The history of this Luger is an interesting one in that the accused, with a machine-gun or tommy-gun, shot a German

officer and so possessed himself of the Luger in question. ~~Now~~ <sup>The</sup> accused explained the mechanism of this Luger; according to Nissiotis he unloaded it and thereafter again ~~he~~ loaded the chambers of the magazine.

The evidence of Nissiotis, against whom I do not think any severe comment was levelled, includes more detail than that of the complainant because he has testified to what happened in the bed-room, where he had gone to telephone his mother at Durban. I should point out that at that stage the complainant was still in the lounge. They agree however that at one stage Nissiotis and accused were examining the Luger near the wireless, whilst the complainant was sitting some distance away in the lounge. Nissiotis then threw a cartridge at Olckers, asking him how he would like to be shot at with such a cartridge, whereupon Olckers understandably answered that he would not like to be shot at all, and at the time the complainant threw this cartridge back to Nissiotis.

According to Olckers - I don't think that his knowledge is perhaps the best that we have heard in this case - the incident of which he complains took place after that. As I say, I am not very sure whether he gave me the details in a very good chronological order, but that is by the way. Now after Olckers had rebuked accused because of the liberty he had taken in kissing Miss Griffin, accused, according to Olckers, said that he, Olckers, thought that as a professional boxer he regarded himself as a strong man. And according to Olckers the accused said that twenty years ago he, accused, would have been able to deal with people of the calibre of the complainant.

Apparently peace was restored, according to Olckers, and they shook hands, and it was thereafter, he said, that accused and Nissiotis went into the bed-room in

order to enable the latter, as I have indicated, to telephone his mother at Durban. The evidence then proceeds that on their return accused had the gun, and this is now the crucial stage of the shooting, when Olckers complained to Nissiotis, blaming him, remonstrating with him, for having invited him to this sort of a party, and then, according to the case for the State, the accused said 'Well, I'll put an end to this argument,' and shot Olckers with the Luger in the centre of his stomach and ~~of course~~ Olckers fell to the ground, and as he put it, he woke up after an operation had been performed upon him. So that after he had been shot he was of course in no position to add further testimony to the State case. Incidentally, he was detained in hospital for some 16 days.

Now he made a point which is also crucial in this case: he said that while he was talking to Nissiotis, complaining about the quality of the party, that the accused shot at him from an angle and not from directly in front as he would have shot a person who was attacking him, as at one stage the accused averred. The entrance wound is well just below the navel, but the exit wound is in the region of the right hip, and there was no medical evidence forthcoming to explain the track of that bullet. Otherwise we have merely the presumption that with an extremely powerful weapon like this 9 mm Luger the track of the bullet would support Olckers that he was fired at obliquely, and not as one who was rushing to attack the accused.

Some part of the case is devoted to his own conduct, but he denied that he was noisy, rowdy and screaming. But he did admit that after this incident involving Miss Griffin that he indicated to him, to use his words, he would "knock his block off." Because of the unwelcome attentions to which Miss Griffin had been subjected. He

denied that he asked Nissiotis to assist him in assaulting the accused. There was some evidence to this effect later by Mrs. Honey, but that evidence was hardly worth mentioning.

He explained in some detail how he was standing when he was shot. Now it was necessary for the defence to put to Olckers not merely the evidence of the accused but the evidence of the former Miss Churchill, now Mrs. Honey, and he denied the gist of what was put to him. He said he heard no remark about a "41st shot" which it was said the accused had made. There was evidence by Nissiotis that after this shooting the accused indicated to him that this was apparently his 41st victim, but I am not going to attach any importance to that. Apart from the fact that I do not think it is very relevant, I do not think that it can possibly be said that this was in fact the accused's 41st victim.

The mental state of the accused is of some importance, and what Olckers can remember of his condition was he thought <sup>that</sup> he was either mad or drunk. That, of course, would be the approach of a man who, for no reason at all when he was not even involved in a controversy with the accused, had been shot.

As I have indicated, the evidence of the complainant requires to be supported in some material respect, and I do not think that any real damage was done to the evidence of Sophocles Nissiotis. He was present at the shooting. He also referred to the inspection of certain war souvenirs, including the possession of this Luger, and in brief his evidence amounts to this, that just before the shooting he went into the bed-room of accused in order to put through a telephone call to Durban to his mother. He said that at that stage for some reason or other the accused seemed aggressive, and kept mumbling something about the 40th or 41st, and it was at that stage that he began to load the Luger. And

Nissiotis said that while he was involved in this conversation with Olckers to which I have already referred, that the accused shot ~~him~~<sup>Olckers</sup>, at a stage when they were facing one another obliquely, and there was apparently some further reference now to the "42nd" or words to that effect.

Nissiotis grappled with the accused. ~~That~~ He possessed him<sup>self</sup> of the pistol - and fired a warning shot, which apparently had the effect of calming the accused somewhat. But he said that prior to this, and he said so in rather adjectival detail, that his appearance was tense, angry, abnormal and indeed somewhat in the nature of being beserk.

Insofar as it may be relevant to deal with the struggle between Nissiotis and the accused, there is a shirt before the Court of Nissiotis to show that that shirt was torn in the course of that struggle, and I mention that again in the light of some of the defence evidence, because the accused has denied that struggle, and he explained - I'm afraid in a way which I am not prepared to accept - how the Luger was dropped by him on to the ground.

In view of what was put to Nissiotis, Nissiotis denied that while he was possessed of the Luger he menaced accused in order to extort a sum of R2,000 from him, and he denied that he fired a shot at accused which missed him. He said too that accused was averse to securing the services of a doctor. Nissiotis said that there may very well have been a misunderstanding, because what he mentioned was, after the shooting when he had wrested the Luger from the accused, he said to him, 'Look here, you know, this can cost you anything from R1,000 to R2,000,' and apparently he mentioned things such as medical services and hospitals. And he specifically denied that he, Nissiotis, told the accused to write out a Barclay's or Volkskas cheque, and he added that ~~he did not know that~~ - he couldn't understand the evidence of the

accused, <sup>namely</sup> that he, Nissiotis, could have said to the accused, 'Well, you sign a cheque now. I don't like Barclay's, you must sign a cash cheque to Volkskas'; ~~that he~~, Nissiotis, could <sup>not</sup> possibly have been in a position to hush up the shooting which, as I have indicated, was the evidence of the accused. And it was actually, he says, in the course of this struggle when his shirt was torn that he, Nissiotis, struck the accused with the Luger.

One aspect which from the defence point of view should have been put to Nissiotis was that which accused gave for the first time, namely, when he entered the witness box, and that is that Nissiotis had actually tried to murder him by firing at him whilst he, accused, was sitting on the bed. Apart from the fact that this piece of evidence seems to me to have been a clear afterthought, the bullet struck the wall at a height of over 6 ft., which in any event destroys this allegation completely. And why Nissiotis, who wanted to extort a cheque for R2,000, would then add murder to his requirement is very difficult for me to understand.

If it is necessary to say more about this part of the case, the relative statures of Nissiotis and the accused, apart from anything else, would rule out this attempt in the light of the place where the bullet was extracted. And this is just one part of the evidence of the accused which in my view violates most of the canons of in-herent probability.

I have indicated, of course, that some corroboration in some material respect should be forthcoming in order to render the evidence of Olckers acceptable, and this, in my view, has been furnished by the evidence of Nissiotis, but even more particularly by that of Miss Griffin, ~~an~~ <sup>an</sup> intelligent young woman who matriculated at the age of 16, and who I think is now 19 years of age. I think that Mr. Aarons, for the accused, had to concede that there was very

little fault to be found with the evidence of Miss Griffin, and she did concede that Olckers, who was not her fiancé, was annoyed because the accused had kissed her, but she said that peace was restored.

It seems to me that this incident must have rankled in the mind of the accused. He was an older man. He was the host. He had received a dressing-down in front of everybody else, and I have come to the conclusion that the accused did not succeed in forgetting this incident.

Now on the more crucial aspect of the case, she said that whilst an altercation was proceeding between Olckers and Nissiotis, accused announced that he intended putting a stop to the argument, and shot Olckers from an oblique angle. The course of the bullet corroborates both Olckers and Nissiotis, and actually is consistent with the evidence of Miss Griffin who I do not think knew anything about the track of the bullet. And she also said that it was from the bed-room that the accused came with the pistol, and this also bears out Nissiotis, and it lends colour to the view that he had gone there - he had put it in the wardrobe - and that he had then loaded it.

I have already indicated that Miss Griffin made a very good impression upon me, and she was not shaken at all in cross-examination. But I have considered, as I must, the fact that she is a friend of Olckers.

The evidence of Groenewald, a detective-constable, <sup>then</sup> was given. It has this importance, <sup>namely</sup> ~~he says~~ that he arrested the accused just afterwards, and he then walked and spoke normally. It may of course be that he apparently sobered up somewhat in consequence of the shock, and the evidence is that he seemed to become calm after Olckers fell and he had been dispossessed of the pistol. And it is true that the accused was co-operative at this time.

Counsel for the defence has conceded that he found it difficult to submit that the evidence of his client revealed sufficiently credible evidence for him to rely on it, and I think counsel correctly did make that admission because his evidence is very largely suspect throughout. There are aspects of his evidence to which I must refer. <sup>but</sup> I do not propose referring to them all. I think in the reconstruction of the shooting he was asked to show me exactly how it came about that he shot the complainant. Now this Luger has a very large and a very obvious safety <sup>catch;</sup> he had this gun in his waist-band, and when he pulled it out the manner in which he pulled it out seems to me to be quite impracticable and quite unacceptable. By the time that he had his finger on it he was holding this Luger not in the way in which one shoots a person, but the plane of the Luger was parallel with that of the ground, and somehow or other his finger managed to get around to the trigger. Well, now, to my mind that demonstration is clearly an indication that the shooting could not have happened in the way in which he said.

Now I am thinking of this portion of his evidence: He said, "Olckers made a sudden move to me at two paces. I was in fear. I pulled the gun and it discharged itself." Now no Luger discharges itself. And not merely is this a variance with the details of the demonstration but it sounds inherently most unlikely, apart from the time factor involved <sup>that</sup> in a man ~~who~~ is shot when he starts to rush another at two yards. And it appeared strange to me that almost in the same breath he said he wanted to use the pistol as a guard. How you use a pistol as a guard when in point of fact he never raised it higher than his waist is very difficult for me to understand.

Now the accused is a war veteran. <sup>He</sup> has fought

against the Germans; he has fought against Arabs and, I think the Egyptians, and he is a man who in the course of his training became quite au fait, especially with the use of pistols, and I cannot accept this part of his evidence and I certainly cannot accept that part of his evidence in which he tried to account for the subsequent fate of the Luger by saying that there was a recoil from the Luger which caused him to drop it.

There is too the incident that I have already referred to, that Nissiotis is alleged to have demanded a cash cheque of R2,000 from him, preferring a Volkscas cheque to a Barclay's bank cheque. Now apart from the various criticisms which can be levelled at this piece of evidence, I do not think that he mentioned this to the police, just as he failed to inform the police of the attempt to murder him. These are two very serious allegations to make. In the first instance there was an attempt to extort R2,000 from him, and then there was an allegation that the man who wanted money from him tried to murder him. I cannot imagine that if this were true, the accused could have failed for one moment to inform the police of such conduct.

There was one stage, I think, in which he deliberately told me something which couldn't be true, when this whole question of the track of the bullet was considered and I put it to him that a shot fired from that Luger at point-blank range would have splintered any bone in the way, and I think he was then ready to say that he had himself been shot in the pelvis without any splintering. This evidence was given, I think, in order to deal with the clear evidence regarding the track of the bullet.

I have not had the advantage of any medical examination or any medical evidence on this, but prima facie a wound which, from a powerful weapon like a Luger enters

near the navel and comes out at the right side would normally not have hit anything which might deflect it, and it is something which might also have been put to Olckers who had the operation and who would have been in a position to deal with it. But it apparently was not thought advisable to deal with it at that stage.

Now having this difficulty with the evidence of the accused, I was then referred to the evidence of Mrs. Honey, formerly Miss Churchill. She was called to corroborate the accused, but her evidence is hardly worth any credence and Mr. Aarons, I think, frankly conceded that. She appears to be a demi-monde type <sup>who had</sup> lived for months in the same house as Fleisch in circumstances of social irregularity at least, and <sup>she</sup> conceded that during those months she was supported by Fleisch. The evidence she gave in this court varied from and at times contradicted that in the statement she made to the police. One part of her evidence, namely that relating to the dropping of the pistol by accused, was conceived and excogitated in order to coincide with that portion of the evidence of the accused, which unfortunately I couldn't accept. She was a poor witness, and most of her contradictory evidence she sought to explain on the basis of her persistent nervousness. But she is no violet by the mossy stone, and I am not prepared to accept her evidence that throughout she was in such a state of nervous prostration that she was not able to tell us the truth.

She has also introduced the evidence of a concerted attack by Olckers and Nissiotis on accused. Now why Nissiotis should want to attack the accused is not clear to me. There was some suggestion that at this stage Nissiotis said to Miss Churchill, 'you must watch where he, (accused,) puts the gun,' and there was some semblance of a conspiracy

which was mooted at this stage, but I have not been able to find any substance in that suggestion, and her evidence, as on practically every other aspect, is so suspect that it can be of no value at all either to the accused or to this Court in trying to assess the truth.

Now Mr. Aarons was compelled, in the light of the evidence, to concentrate on the question of intention. I think this was a correct approach on his part. He had had a very difficult task throughout owing to the poor and unacceptable quality of the defence evidence - although no case is decided entirely on the defence evidence.

Now it is true that .26 of weight over volume of liquor was shown in <sup>Accused's</sup> his case afterwards, and it shows that accused was under the influence of intoxicating liquor. But that did not in fact, in the circumstances of this case, deprive him of the faculty of forming an intention, because on two occasions at least he told me that he knew what was happening, and his account of what happened shows that neither his memory nor his judgment <sup>has</sup> ~~have~~ been impaired so as not to be able to entertain the requisite <sup>special</sup> intention to commit the crime in question. He was certainly not so drunk that he did not know what he was doing, and looking at the case as a whole, due regard being had to the onus, it cannot be said that there is any possibility that the evidence for the defence, including that of the accused of course, could reasonably or substantially be true. Consequently, the accused is found GUILTY AS CHARGED.

Collection Number: AD1901

**SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, Security trials Court  
Records 1958-1978**

**PUBLISHER:**

*Publisher:-* Historical Papers, University of the Witwatersrand

*Location:-* Johannesburg

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