



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 21/2010

In the matter between:

THE STATE

and

HANGULA SIMSON MWANYANGAPO

Neutral citation: *Mwanyangapo v State* (CC 21/2010) [2012]
NAHCMD 31 (17 October 2012)

Coram: SHIVUTE, J

Heard: 01 – 10 August 2011
28 May 2012; 27 July 2012

Delivered: 17 October 2012

Flynote:

Criminal Procedure: Whether there is legal requirement that a medical report handed into evidence under s 212 (4) or 7 (a) of the Criminal Procedure Act only becomes admissible if confirmed by medical officer who completed it - No such requirement.

Criminal Law:

Requirements for private defence

- Unlawful attack - upon legal interest - which had commenced or imminent.
- It must be directed at the attacker - necessary to avert the attack - means used must be necessary.
- Inquiry twofold – first leg – whether conditions or requirements have been met – includes the question – whether bounds of self defence were exceeded.
- Test objective – *onus* on the state beyond reasonable doubt – conditions or requirement for self defence did not exist or – the bounds of self defence have been exceeded – when reasonable test applied – court must put itself in position of the accused at the time of attack – If state fails to discharge *onus* – accused must be acquitted – If state discharges *onus* proceed with second leg of inquiry.
- Whether state has proved beyond reasonable doubt that accused did not genuinely believe – he was acting in self defence – that he was not exceeding the bounds of self defence.
- Accused's intention not to kill deceased,
- But to injure him. Shot on the leg meant to injure – lawful act.
- Accused by hitting deceased on the head – cocked gun – finger on trigger – negligence. Accused ought reasonably to have foreseen – that trigger may be pulled – shot may go off. Accused ought reasonably to have foreseen – he was using more force than necessary – Ought reasonably to have foreseen – he was using more force than necessary – Ought reasonably to have foreseen possibility of death may occur – as indeed happened.

Conviction – Culpable homicide based on culpa.

Summary:

The accused was indicted on a charge of murder. He pleaded not guilty. The basis of his defence was that he was acting in self defence. His life was put in danger by the deceased who wanted to attack him with stones. Before the deceased threw a stone the accused fired at him. The deceased was struck on the leg. The deceased threw a stone at the accused and he ducked it. The accused hit the deceased on the head with a barrel of the gun. The gun was cocked and his finger was in the trigger. The shot went off and struck the deceased on the head. The accused thought when the shot is fired it would go off in the air. Counsel for the state wanted to produce a medical report in terms of s 212 (4) of the Criminal Procedure Act 51 of 1977. Counsel for the defence objected to it. The reason being, that, it should be confirmed by the doctor who completed it.

Held: In terms of s 212 (4) of the Criminal Procedure Act there is no requirement that a medical report handed into evidence under the above section only becomes admissible if confirmed by the medical officer who completed the report. Had that been required it would completely defeat the purpose of section 212 of the Act which specifically provide for proving certain facts by affidavit or certificate.

Criminal Law: *The requirements of private defence can be summarised as follows:*

- (a) *The attack: "To give rise to a situation warranting action in defence there must be an unlawful attack upon a legal interest which had commenced or was imminent.*
- (b) *The defence must be directed at the attacker and necessary to avert the attack and the means used must be necessary in the circumstances.*

When the defence of self defence is raised or apparent, the enquiry is actually twofold. The first leg of the enquiry is whether the conditions and/ or requirements of self-defence have been met, which includes the question, whether the bounds of self defence were exceeded. The

test here is objective but the onus is on the State to prove beyond reasonable doubt that the conditions or requirements for self defence did not exist or that the bounds of self defence have been exceeded. When the test of reasonableness and the conduct of the hypothetical reasonable man is applied, the Court must put itself in the position of the accused at the time of the attack. If the State does not discharge this onus the accused must be acquitted. On the other hand, if the State discharges the said onus, that is not the end of the matter and the second leg of the enquiry must be proceeded with. The second leg of the enquiry is then whether the State has proved beyond reasonable doubt that the accused did not genuinely believe that he was acting in self defence and that he was not exceeding the bounds of self defence....”

Held: Test is whether objectively, accused had fear of an attack. On his version such fear was present. The deceased took stones. He threw one stone which the accused ducked. However, by hitting the deceased with the barrel of the cocked pistol with his finger on the trigger the accused ought reasonably to have foreseen that the trigger may be pulled and a shot may go off. The accused ought reasonably to have foreseen that he was using more force than necessary. He ought reasonably to have foreseen that the possibility of death may occur as indeed happened.

Held: That the state proved its case beyond reasonable doubt that the accused person caused the deceased's death negligently. The accused is found not guilty of murder but guilty of culpable homicide based on culpa and convicted accordingly.

JUDGMENT

SHIVUTE J:

[1] The accused is indicted in this court on a charge of murder. The state alleges that upon or about the 12th day of October 2008 at or near Keetmanshoop in the

district of Keetmanshoop, the accused unlawfully and intentionally killed Clarence Aubrey Jash, a male person.

[2] The accused is represented by Mr McNally and Ms Ndlovu appears on behalf of the State.

[3] The accused pleaded not guilty to the indictment and the basis of his defence was given as follows: The accused was driving late at night along the gravel road at Tseiblaagte, Keetmanshoop slowly in a first gear due to the bad condition of the road. Whilst he was driving, an unknown person who was later identified as the deceased opened the door of his car. The sudden and unexpected action of the deceased frightened him and he believed that the deceased had an intention of robbing him. The accused braked the vehicle and requested the deceased to get out of his vehicle. The deceased threatened to damage the accused's motor vehicle and injure him. The accused exited the motor vehicle. He took along his pistol to protect his life. The deceased got out of the motor vehicle, moved a few steps and picked up stones. Whilst the deceased was picking up stones, the accused fired a warning shot behind him on the ground. The deceased turned and threw a stone aiming at the accused's head. The accused struck the deceased over the head with a pistol and in this process a shot went off and the deceased fell to the ground. At all relevant times during this incident the accused feared for his life and he had no intention whatsoever to kill the deceased which is evident from the fact that the first shot went through the deceased's leg and the second shot accidentally went off when the accused struck the deceased over his head. When the accused first shot onto the ground he was unaware of the fact that the shot had struck the deceased. Furthermore the defence disputed that the deceased died as a result of a gunshot that was fired by the accused.

[4] However, the defence made formal admissions admitting the name of the deceased, the date of his death and that the deceased's body did not sustain further injuries.

[5] The State called Dr Kabandje to explain the report on medico-legal post-mortem examination. The post-mortem examination was conducted by the late Dr Shangula. The report on medico-legal post-mortem examination accompanied by an

affidavit was admitted in evidence in terms of s 212 (4) (a) of the Criminal Procedure Act, 51 of 1977.

[6] According to the post-mortem examination, the chief post-mortem findings were the following:

- (a) A gunshot injury on the right calf; a large entrance wound on the parietal frontal aspect of the head; lacerated brain and a projectile in the cerebellum.
- (b) The cause of death was gunshot injuries of the head.

[7] Dr Kabandje explained that the fact that there was a bullet lodged in the skull inside the brain is an indication that it was indeed a gunshot. The post-mortem report also shows that soot was found around the wound on the head. Dr Kabandje explained that soot is an indicator of a gunshot fired at close range. In a contact wound, the bullet leaves drops and causes soot. He further testified that the gun was fired from a close range of approximately 50 centimetres.

[8] Sergeant Thomas Goliath testified that he compiled a photo plan as well as a sketch plan after he took photos of the scene of crime. The photo plan is marked as Exhibit 'D'. The scene of crime was pointed out to Sergeant Goliath by Ms Swartbooi and Ms Jossob who were sitting a distance of 8-6 meters from each other when they heard gunshots. From where Ms Jossob was allegedly standing to the place where the deceased was lying still alive in the pool of blood was a distance of 91.3 meters. The deceased was allegedly lying 3.3 meters away from the vehicle before it drove away after the shooting. From the vehicle to the light pole there was a distance of about 39.8 meters. According to Sergeant Goliath, visibility was good because there was a street light at the scene of crime.

[9] Apart from the photo plan pointed out to Sergeant Goliath by Swartbooi and Jossop he also prepared a sketch plan of points that were pointed out to him by witness Lazarus Kooper who was allegedly sitting under a tree at House No. 772 during the time of the incident. The distance between where Mr Kooper was seated and where the accused's motor vehicle allegedly stopped was 103 meters. From where the accused's vehicle had stopped to where the deceased allegedly fell down after he was shot there was a distance of 18 metres. The additional sketch plan was marked as Exhibit 'E'.

[10] Mr Deon Domingo testified that at the time of the incident he was employed by International SOS as a life support paramedic. On 13 October 2008 at about 02h00, he was dispatched by his control centre at E-Med Rescue 24 to Keetmanshoop because they received a report of a shooting incident. They went by air and they found the deceased at the theatre at Keetmanshoop Hospital. The deceased was still alive by then. He examined the patient. The patient had injuries on the right leg and on the head. He had a bandage on the head. He gave the patient some first aid. Thereafter the patient was taken on the air craft and he was flown to Windhoek Medi-Clinic. The patient did not suffer any injuries during his transportation. The witness has also prepared a medical report concerning the patient. The medical report form was marked as Exhibit 'F' after it was admitted in evidence.

[11] Mr Collin Gusha gave evidence to the effect that on 12 October 2008 at about 23h00 he was in the company of the deceased and other friends socializing at Club La Tropicana. There was an advert that was hanged on the ceiling of the bar and the deceased pulled it down. He was told to put the advert back and he complied. Thereafter the deceased ran out of the club. He disappeared for about 30 minutes. Whilst they were sitting in the bar they heard three gunshots fired within seconds from each other. Immediately Ms Colleen came running and told him that 'Puki' had been shot. Puki is another name of the deceased. The witness and Constable Otto ran out of the bar.

[12] When the witness was outside Club La Tropicana, he was able to see where the deceased was lying. He also observed a white car passing between J A Nel Secondary School and Club La Tropicana. When he arrived at the scene, he observed that Puki was bleeding from the right leg and his head. Constable Otto went to call the police. When the police came Puki was loaded in a police vehicle and taken to the hospital. When the witness went to the scene they found Mr Kooper and one Rene there. Colleen was also at the scene. The witness had also seen Rene and Colleen before the incident standing in front of the shop at an open space which is part of the building housing the club.

[13] The witness further testified that although they spent about 3 to 4 hours at the club drinking beers he was in a sober state of mind. Through cross-examination the witness indicated that he was in the company of Constable Otto, Ashipala and the deceased at the club. The deceased had consumed beer and before the witness and his companions who included the deceased went to Club La Tropicana they had consumed two litres of Tassenberg wine although the deceased did not consume much. It was put to the witness that the fact that he did not mention in his statement which he gave to the police that he heard three gunshots is an indication that he never heard three gunshots. The witness explained that he omitted to say it in his statement because he was overwhelmed by emotions.

[14] Sendritha Lizell Colleen Swartbooï's evidence was that she was at Club La Tropicana when she heard three gunshots. She was in the company of Rene Jossob, outside the club. They stood and saw the deceased lying on the ground. The person who shot the deceased drove away to the direction of La Tropicana and J A Nel Secondary School. The witness and her friend went to the place where the deceased was lying. She observed gunshot injuries on the deceased. According to the witness, she was able to see what was happening at the scene of crime whilst she was at Club La Tropicana because there was light near the scene. The gun shots were fired continuously.

[15] Sergeant Mervin Otto testified that on 12 October 2008, he was at Club La Tropicana socializing with friends including the deceased and Collin Gusha. However, the deceased left them at the club before 23h00. Between 22h30 and 23h00 they heard three gunshots. They went outside the club and he observed a white car parked along the gravel road; next to it there was a person lying. They approached the scene and the vehicle drove away. When they reached the scene he recognised the deceased as Puki, his friend. By then he was still alive. He went to fetch the police. He further testified about the event of the advertisement poster that was pulled off by the deceased in the club before he met his death.

[16] Ms Martha Kasheeta, a nurse at Keetmanshoop state hospital, testified that she was on duty when the deceased was brought to the hospital. She assisted the deceased by putting him on the drip and by giving him oxygen as he was short of breath. She went to call Dr Verkusha who was on standby duty and he arrived within

five minutes. Dr Verkusha attended to the patient. Since the patient had his private doctor, Dr Coetzee took over from Dr Verkusha. Later on people from EMed-Rescue arrived and air lifted the patient to Windhoek Medi Clinic. The witness accompanied the patient up to Keetmanshoop Airport. The patient was in a critical condition. From the hospital to the airport he did not suffer further injuries.

[17] Mr Benjamin Lazarus Kooper's testimony was that on the date in issue and at the time of the incident, he was sitting under a tree at their house. He saw a person walking along the road. Thereafter a car came from behind the pedestrian. The driver of the vehicle stopped and shouted in Afrikaans: 'Bastard, bastard, what are you doing in the road?' The pedestrian swore back to the driver by repeating the same words. The driver and the pedestrian fought in front of the car. The driver turned around to his vehicle. He did not open the door. With his upper body he leaned onto the car window. He turned around and he moved towards the pedestrian who was still in front of the car. At that stage the driver lifted up both arms outstretched in front and made a cocking movement with his left hand and started to shoot. The pedestrian staggered. He tried to get up and the driver fired a second shot. The pedestrian tried to run. He was wobbling again. The driver ran after him. When the pedestrian saw the driver approaching he turned around. The driver then shot him. The pedestrian fell down. The driver uttered the following words. 'Do you know who I am?' The driver walked away and spoke in Oshiwambo language.

[18] Although the witness had observed the shooting, he was not able to tell on which part of the body the deceased was shot. However, he only found out when he went to the scene of the shooting. According to Mr Kooper when the third shot was fired the deceased was in a bending position wobbling or staggering. The witness was able to see because there was spray light in the vicinity. After the incident the witness walked towards Club La Tropicana. The driver drove past. At Club La Tropicana the witness found two girls outside and told them that there was someone lying on the road. The girls were Swartbooi and Jossob. Mr Kooper and the two girls went to the man who was lying and they recognised him as Puki. Later on Puki was loaded in a police vehicle. After some time the witness was called by the police to give a statement and to point out certain points at the scene of the shooting.

[19] It was put to the witness in cross-examination that he did not see the incident and that it was not possible for the witness to hear the accused and the deceased exchanging words. The witness was adamant that he witnessed the incident and heard what was said. It was further put to the witness that there was no fight between the deceased and the accused. The witness, however, insisted that there was a fight. It was again put to the witness that it was the deceased who jumped into the accused's car unexpectedly. The witness responded that there was nothing like that. It was further put to the witness that the deceased threatened to damage the accused's car and injure him, after the deceased alighted from the car he took a stone and threw it to the accused but fortunately the accused ducked and the stone missed him. The witness replied that no such things took place.

[20] Constable Paulus Namhindo testified that he took photograph depicting the body of the deceased during the postmortem examination. These are photographs 10 – 13 which are collectively marked as Exhibit 'D'.

[21] Sergeant Joseph Haimbodi's testimony is that he was on duty on 12 October 2008 when the accused came to the police station and reported that he had shot a person but he did not know whether the person was dead or alive. He handed over the firearm (pistol) with a magazine containing two rounds of ammunition and a licence for the firearm. The trigger of the pistol was dislocated or loose and the barrel was out of order. The witness identified Exhibit '1' as the firearm that was given to him. One round of ammunition was in the chamber and another one was on the magazine. The pistol was later handed over to Warrant Officer Kutongondo by the witness.

[22] Warrant Officer Theodor Kutongondo gave evidence to the effect that when he arrived at the scene he was able to see because there was street light. The photographer who took photographs of the scene of crime was also able to see because of the street light. He further testified that Exhibit '1' and two rounds of ammunition were handed over to him. Warrant Officer Kutongondo testified that the accused told him that he shot twice at the victim. He gave some of the reasons for shooting similar to those indicated in his plea explanation. The witness searched the accused's vehicle and found one spent cartridge on the back seat. It is further the witness' evidence that after the firearm Exhibit '1' was handed over to him, he

examined it and it was in a good working condition except that the trigger was dislocated.

[23] It was put to the witness that the accused told him that the deceased attacked him with stones. The witness replied that the accused did not tell him that. As to the question whether the accused told him that he had struck the deceased with a pistol over the head and a shot was discharged and that was the reason the barrel as well as the trigger mechanism got dislodged or dislocated, the witness answered that the accused did not tell him those things. It was again put to the witness that the accused told him that he had fired a warning shot and when the deceased advanced towards him with stones it was at that point that the accused hit the deceased with a pistol over the head. The witness responded that the accused never mentioned that to him.

[24] Dr Vyachestan Verkusha gave evidence that on 13 October 2008, he treated the deceased. The deceased was in a critical condition and he observed two gunshot wounds, one on the head and the other on the right leg. Due to the patient's critical condition, he referred him to central hospital for further management by a neuro surgeon and for him to be admitted at intensive care unit. The deceased's chances of surviving the injuries were very low.

[25] Sergeant Donald Goraseb gave evidence to the effect that he received exhibits in this matter that were properly sealed from Constable Goliath. The exhibits were listed as a pistol, two bullets, spent cartridges, a projectile and a holster. He kept the exhibits in safe custody and forwarded them to the National Science Institute for forensic examination. The laboratory reference number that he was given was 42/2009.

[26] Sergeant Kavazeua Andries Katjipuka testified that he completed application for forensic examination in connection with this matter, being CR. No. 106/2008. The type of exhibits to be examined were, 9.8 pistol serial number 99802407, 1 magazine containing two live bullets, one spent cartridge, one projectile and a pistol holster. Thereafter the exhibits were handed over to Sergeant Goraseb by Constable Goliath.

[27] The last witness called by the state was Mr William Onesmus Nambahu from the National Forensic Institute whose duties include analyzing firearms and tool marks. He testified that he performed ballistic duties and examined the deceased's body after the post-mortem was already conducted by the late Dr Shangula. He then compiled a report. According to his findings, the body had two apparent gun wounds on the lower leg, and on the upper head. The bullet which caused the wound on the lower leg seemed to have entered from the rear. From the tissue damage around the wound it appeared that the bullet entered the skull from the front. The bullet entered the skull and lodged in the brain. In considering the above, he inferred that the victim was probably shot on the lower left leg first and then collapsed. He was then subsequently shot on the head, while lying on the ground.

[28] According to Mr Nambahu's experience soot is found if it is a close shot which was fired from a distance of one metre. The reason for him to say that the victim was first shot on the lower leg and collapsed and thereafter was shot on the head was because the angle or the projectile entering the head and the place where the entrance wound was found were an indication that the victim or the target was lower than the shooter. One can only shoot another, right closer to above the head if the target is a little bit lower than the shooter. If someone is to be hit with a barrel of a gun for it to tear the skin, it had to be pushed or dragged from front to the back part of the skull for it to cause the type of injuries like those suffered by the deceased. From the injuries on the deceased's skin, the way it was formed was caused by something dragging from the skull. In order for the firearm to discharge the trigger has to be pulled.

[29] Mr Nambahu's further evidence was that he was given 1 x 9mm M pistol with serial no. 99802407, a pistol magazine 1 x 9mm M spent case and 1 x 9mm M spent projectiles from the police. He did a ballistic examination and found that the pistol was in good working condition. Three bullets were test-fired from the said pistol. He compared the spent cases projectiles with the ones which accompanied the pistol. From the markings on the spent projectiles he found sufficient agreement of individual and class characteristics. He concluded that a spent case and a spent projectile that accompanied the pistol with serial No. 99802407 were fired from the said pistol. He also analysed the above mentioned exhibit and found that the muscular effort needed to apply to the trigger in order to fire the pistol was found to

be 3.32 kgf (3.32 Newton). He again testified that it is not possible to fire the pistol in question without pulling the trigger.

[30] According to the court chart of ballistic identification produced by Mr Nambahu, his findings on the spent case was that the bolt of the pistol in issue is defective, and that was the reason why it did not eject the spent cartridge that was fired from it. Concerning the spent projectiles his findings were that they came from the same firearm, because they were super imposed. It was put to the witness through cross-examination that his comment that the deceased was shot while lying on the ground was a mere speculation. He responded that what he meant was that the target was lower than the shooter.

[31] After the state had closed its case the accused was called to the witness box to testify and he called one witness. I will now proceed to summarize the evidence of the defence.

[32] The accused testified that on 12 October 2008, he was driving his vehicle slowly along the road at Tseiblaagte area in Keetmanshoop. Whilst he was driving a stranger opened the right back door of this vehicle and entered the vehicle. The accused told the stranger who happened to be the deceased to disembark but the deceased refused. He threatened to shoot the vehicle's tyres or smash the windows. The accused stopped the vehicle and alighted. The deceased jumped out of the vehicle and ran for a short distance. He picked up stones about two to three metres from the vehicle. After the deceased took two stones the accused went into the vehicle and took his firearm. He cocked it. The deceased was approaching. Whilst the deceased was near him, accused fired a warning shot between deceased's legs.

[33] After the accused fired the shot he did not know whether the bullet had struck the deceased. Half of the accused's body was still in the vehicle. The deceased approached him and threw a stone at him. He ducked it. The deceased went behind the door of the vehicle. The accused got out of the vehicle to approach him. The deceased took a stone. The accused wanted to hit the deceased with the butt of the firearm. The deceased moved backwards a little bit. He was grabbing the pistol and the pistol was already cocked, the gun was still in the accused's possession. Suddenly the bullet went off. The intention of the accused was to hit the deceased

with the pistol and he was of the opinion that if he hit the deceased with the pistol and a bullet went off, the bullet will go into the air. The accused proceeded with his testimony that when he wanted to hit the deceased over the head with a firearm the deceased moved backwards and the accused's finger was already on the trigger and the bullet went off because he had already fired previously. The accused did not hit the deceased with the butt of the pistol but he hit him with the barrel of the pistol because he moved backwards. After the bullet went off the top of the pistol dislocated and that was the reason it became loose.

[34] The accused disputed that he fought with the deceased or he put his upper body in the vehicle and took something from the vehicle. He disputed that three shots were fired. He vehemently denied that when the deceased turned around to face him, he fired a third shot. The accused testified further that he felt bad about the death of deceased but he had no choice because the deceased caused his own death. After the shooting the accused handed himself over to the police.

[35] Accused was asked in cross-examination whether the pistol was in a good working condition and he confirmed that it was. He was furthermore asked whether he was aware that for him to fire a shot the finger has to be on the trigger and to be pulled. He replied that he was aware. The accused stated through cross-examination that the second bullet that hit the deceased on the head caused him to fall down. The accused explained through cross-examination that the cartridge that was found in the vehicle by the police came from his firearm after he fired the first shot.

[36] Mr Sebastian Jossop testified that on 12 October 2008 he was at Club La Tropicana at about 22h00. The deceased was also at the same club. Whilst at the club, he observed the deceased jumping on chairs and tables. He was also pulling out posters that were in the club. After sometime, the witness escorted an acquaintance with whom they were drinking together outside the club. Whilst he was still outside, he observed a vehicle and a pedestrian coming from the same direction. The vehicle was being driven very slowly. The pedestrian whom he identified as the deceased opened the vehicle door and entered with his one leg. After a minute the deceased went over the road and picked up two stones; they were both in his hands. From there a shot went off. The deceased threw a stone. The person who was in the car ducked.

[37] The deceased and the accused started to argue and they started fighting and then he saw the person lifting his arm again and the shot went off. The deceased fell down. The driver of the vehicle looked at the deceased and drove away. At that stage Renè Jossop and Swartbooi were seated outside the club. They went to call Collin Gusha and Mervin Otto from the club. There was music playing loud at La Tropicana. From there he went together with Renè, Swartbooi, Gusha, Otto and many other people who were at the club to the scene. The witness further testified that Otto and Gusha could not have heard the gunshots because there was loud music at the club. He claimed that Renè and Swartbooi did not hear the shots as they were listening to music whilst they were outside the club.

[38] The witness was asked where the accused was at the time the first shot was fired. He replied that the accused was outside the vehicle. It could not be correct that he was partly inside the vehicle. He was outside when he ducked the stone that was how they started to fight. The accused and the deceased were beating each other. When it was put to the witness that according to the accused, there was no physical fighting, the witness changed his version and said that he did not see the accused fighting but the deceased came to fight him. The accused did not fight; he was just shielding or blocking the deceased with his hands. It was further put to the witness that according to the accused person, when he reached where deceased was, the deceased wanted to throw a stone and was not physically fighting the accused. The witness again turned around and stated that in all honesty the accused and deceased were physically fighting, beating each other.

[39] The witness was asked as to how far he was when he witnessed the incident he estimated the distance to be about 200 meters away. When it was put to him that Mr Kooper was in a better position to observe what was happening since he was 103 meters away from the scene the witness responded that he was standing in front of the club where there was a light pole where he could observe and see everything.

[40] After the end of the defence case, counsel for the state argued that the evidence of Kooper should be accepted as the correct version of events that day. Although Kooper was mistaken about the colour of the accused's car, he was credible because he admitted his mistake. Kooper was able to hear what was said.

After the deceased and the accused exchanged words the accused went to his car and took his pistol. The probabilities are that when the pistol was cocked and the deceased realised that the accused was going to shoot, he tried to run away. Mr Nambahu an expert witness observed a splash of blood around the wound on the leg which is an indication that the bullet entered from behind. The points of entry and exit were corroborated by the evidence of Dr Vermaak. This corroborates the evidence of Kooper when he said the deceased upon hearing the cocking sound turned to run away. Kooper testified that after hearing the sound of the first shot, the deceased was moving in a staggering and wavering manner. She submitted that after the deceased was shot on the leg, the probabilities are that the deceased tried to run away and he staggered.

[41] Counsel for the state further argued that it was highly unlikely for the deceased to go and confront the accused with stones whilst the accused was armed with a firearm. The deceased would not have been in a position to engage in a physical fight with the accused with the injuries on his leg as the accused and his witness would want the court to believe. Therefore the court should believe Kooper's version that there was a second shot and then a third shot that hit the deceased and caused him to fall. The evidence of Kooper in this respect was corroborated by Gusha and Otto that they heard three gun shots. Kooper's evidence that as a result of the shot in the leg, the deceased had difficulty walking and turned towards the accused with his head in a bent position. This evidence was corroborated by the evidence of Dr Kabandje and Mr Nambahu who testified that the deceased was in a lower position whilst the shooter was in a higher position.

[42] The firearm could not have been in contact with the deceased's head as the shot first ploughed along the scalp. The bullet started its journey from the very edge of the deceased's head. The way the bullet lodged down in the deceased's head shows that the trajectory was down ward. It was further submitted that Mr Kooper is a single witness as far as what transpired between the accused and the deceased. Although there were some discrepancies in his testimony concerning the colour of the accused's vehicle, he explained those discrepancies. It was further submitted that those discrepancies were not material. The witness was not shaken during cross-examination when he testified on the movements of the accused and the

deceased. He was corroborated to a larger extent by the post-mortem report as well as by witnesses Gusha, Swartbooi and Otto.

[43] Furthermore counsel for the state argued that the accused's testimony that he meant to hit the deceased with the butt of the pistol whilst the barrel was pointing upwards could not be correct. Her submission was that the barrel was pointing downwards and at a distance from the deceased's head, hence the bullet travelled down. If the accused's intention was to hit the deceased on the head with the firearm he would have no reason to have his finger on the trigger. The accused was familiar with his firearm and he was aware that it was in a good working condition.

[44] Counsel for the state criticised the evidence of Sebastiaan Jossop that he was trying to create an impression to the court that Kooper was not at the scene of crime and that he did not see anything. He claimed to have told Reneè and Swartbooi about the incident whilst Swartbooi said she was informed by Kooper. Kooper's evidence was not challenged to this effect. Although Jossop testified that one could not hear anything as the juke box was playing music, his evidence was contradicted by Kooper who testified that there was no music at the particular point and he could hear clearly. Counsel continued to argue that the accused killed the deceased intentionally and he was not acting in self defense because his life was not in danger. At the time the fatal shot was fired the deceased was retreating after having been shot on the leg and he had posed no danger to the accused.

[45] The shot that hit the deceased was not a ricochet, the time the first shot was fired, the deceased had already turned to retreat. This is supported by Kooper's testimony. If indeed the deceased had thrown stones at the accused after the first shot was fired and had hit the deceased, there was no need for the third shot to the head. The accused could not have believed that he was in danger from the fleeing deceased. It was submitted that the state had proved its case against the accused beyond a reasonable doubt.

[46] On the other hand counsel for the defence, argued that Dr Kabandje's evidence that the shooter must have been higher than the deceased was just speculation. I do not agree with this proposition, because the dr gave his opinion based on forensic evidence especially the location of the wound and the entrance of

the bullet. Counsel for the accused argued further that Mr Kooper was a single witness as regards the incident he allegedly saw. He was evasive, the evidence he gave in cross-examination contradicted his evidence in chief. He admitted to downright lying in court. He did not observe properly. He testified that he heard shots, the third shot caused the person to fall down and again he said when the third shot was fired, the two persons were about 3 – 4 metres from each other. Kooper's evidence in this regard should be rejected. The court should accept the evidence of Dr Kabandje which is not disputed that the firearm was no further than 50 centimetres from the deceased, at the time the head wound was inflicted. It was further argued that if Kooper had a clear view of the scene he could have known the colour of the clothing the driver was wearing, who started the fight and how many punches were exchanged between the accused and the deceased. It was again a point of criticism that he had no compunction by telling the police that he saw the shots striking the deceased despite him telling the court that he did not see at which part of the deceased's body was the firearm pointed when the first shot was fired.

[47] Counsel for the accused when he argued that Kooper was evasive through cross-examination he referred to a question that was posed to Kooper to tell the court as to which part of the body of the pedestrian (deceased) was the firearm pointed when the second shot was fired. Mr Kooper was unable to answer this simple question. After a long ruble he said that he could not tell. It was again a point of criticism that Kooper lied to the police concerning the colour of the vehicle. Counsel for the accused proceeded to argue that the evidence of Kooper that the accused aimed at the deceased and shot him is not supported by objective facts from the two doctors.

[48] If the accused had an intention to kill the deceased he could have shot him in the chest or forehead. The court was urged not to prefer the version of Kooper against that of the accused. It was argued that the accused did not contradict himself. He was not shown to have lied under oath; he answered questions to the best of his ability and he was not evasive. It was further submitted that the accused's witness gave a good account of himself. Both counsel gave authorities concerning single witnesses' evidence; self defence or private defence and authorities concerning discrepancies in witnesses evidence as well as principles on

how a court should consider conflicting evidence between the accused and the state witnesses. The court is indebted to counsel for their assistance.

[49] Having summarised the evidence as well as both counsel's arguments placed before me, I propose to deal first with accused's plea explanation and admissions made. It is common cause that the identity of the deceased is not in dispute. It is common cause that the deceased died on 13 October 2008. It is also common cause that the deceased did not sustain any further injuries during his transportation to the mortuary until the post-mortem was conducted. However, the defence disputed that the cause of death was not as a result of a gunshot by the accused. There is evidence from all the state witnesses who went to the scene of crime that when they found the deceased lying at the scene they observed a gunshot on the right leg and a gunshot on the head. There is evidence from Mr Otto, a police officer, that when the deceased was removed from the scene he did not suffer further injuries up to the hospital. According to the post-mortem report the cause of death was gunshot injuries to the head.

[50] Counsel for the state correctly produced the medical report in terms of s 212 (4) (a) of the Criminal Procedure Act 51 of 1977. As observed by Liebenberg J in *S v Kambala* Case No. CA 74/2010 delivered on 09 December 2010 at page 3 unreported.

"Secondly, there is no legal requirement that a medical report handed into evidence under s 212 (4) or 7(a) of the Criminal Procedure Act ('the Act') only becomes admissible if confirmed by the medical officer who completed the report. Had that been required, it would completely defeat the purpose of Section 212 of the Act which specifically provides for proving certain facts by affidavit or certificate".

The court having considered the evidence adduced by state witnesses that the deceased had gunshot injuries and that he did not sustain further injuries strengthened by the doctor's findings in respect of the cause of death, I have no doubt that the cause of death was gunshot injuries on the head caused by the accused. There is also no evidence to the contrary adduced by the defence.

[51] One of the remaining issues to be decided by this court is whether the accused acted in self defence. I have no doubt that Mr Kooper witnessed the

incident, and this was the reason he walked towards Club La Tropicana where he found the girls and informed them of the incident. This piece of evidence was corroborated by the testimony of Swartbooi who testified that Kooper came to them outside the club from the direction of his house inquiring from them whether they had seen the person who had been shot. However, there are some discrepancies in Kooper's evidence, and I have some reservations about the accuracy of observations. It is on record that Mr Kooper was mistaken as to the colour of the vehicle the accused was driving. He was unable to tell the court as to who started the fight. He indicated that when the accused fired the third shot which caused the deceased to fall down the accused was about 3 – 4 metres away from the deceased. This piece of evidence is contradicted by medical evidence that the deceased was shot at a close range of about 50 centimetres.

[52] Mr Kooper informed the police in his statement that he saw the shot striking the deceased. However he conceded in court that he did not see exactly where the deceased was shot. He only came to see it when he arrived at the scene. Mr Kooper insisted that the accused fired thrice. His evidence was corroborated by Gusha, Otto and Swartbooi. Although the three witnesses claimed to have heard three gunshots there is no physical evidence of the third shot and I am not convinced that a third shot was indeed fired. However, I have no doubt that the witnesses heard some gunshots.

[53] Mr Jossop, the defence witness, testified that the deceased opened the accused's vehicle which was moving slowly and entered with his one leg, after a minute he went over to pick up two stones both in his hands. From there a shot went off then he threw a stone. The stone went over the soccer field. They started to argue and the fight started. The deceased and the accused were beating each other. The witness emphasised that in fact the fighting took place before the first shot. This witness changed his version by saying the accused was not fighting but he was blocking the deceased. When it was put to him that the accused in his testimony said that he and the deceased did not fight physically the witness said: *"To be honest the guys were beating each other and from there I just saw the accused blocking."*

[54] The evidence of Mr Jossop is not without defects, he contradicted himself as to whether there was a physical fight between the accused and the deceased. He changed his version and this has cast doubt as to his credibility and reliability. His evidence was also contradicted by the accused who said there was no physical fight. Although Kooper and Jossop have witnessed the incident I have difficulty accepting their evidence in its entirety.

[55] Mr Kooper and Mr Jossop are single witnesses. Their evidence is uncorroborated in material respects. It is unsafe to rely on their evidence. This leaves the court with the version of the accused. His avowed intention was to injure the deceased and ward off what he perceived to be an attack directed at him. He did so by injuring the deceased on the leg. This shot was clearly not a warning shot; for if he had intended to warn him one expected him to fire in the air. The firing on the body with the first shot is consistent with the professed intention to injure the deceased. His hope that if a bullet were to go off in the air in the process of hitting the deceased with a cocked gun and a finger in the trigger is misplaced. It was a reckless disregard of the deceased's life and security of his person.

[56] Mr Nambahu's testimony that the pull force of the trigger was 3.3 kgf is a clear testimony that the trigger could not have gone off accidentally but that it must have been pulled for this pistol to discharge the bullet.

[57] I fully agree with the requirements of self defence as set out in *S v Naftali* 1992 NR 299 (HC) as referred to me by both counsel; and I wish to approach this matter with regard to the said principles.

"Self defence is more correctly referred to as private defence. The requirements of private defence can be summarised as follows:

- (a) *The attack: "To give rise to a situation warranting action in defence there must be an unlawful attack upon a legal interest which had commenced or was imminent.*
- (b) *The defence must be directed at the attacker and necessary to avert the attack and the means used must be necessary in the circumstances. See Burchell and Hunt South African Criminal law and Procedure vol 1, 2nd ed. at 323-9.*

When the defence of self defence is raised or apparent, the enquiry is actually twofold. The first leg of the enquiry is whether the conditions and/ or requirements of self-defence have been met, which includes the question, whether the bounds of self defence were exceeded. The test here is objective but the onus is on the State to prove beyond reasonable doubt that the conditions or requirements for self defence did not exist or that the bounds of self defence have been exceeded.

When the test of reasonableness and the conduct of the hypothetical reasonable man is applied, the Court must put itself in the position of the accused at the time of the attack. If the State does not discharge this onus the accused must be acquitted. On the other hand, if the State discharges the said onus, that is not the end of the matter and the second leg of the enquiry must be proceeded with. The second leg of the enquiry is then whether the State has proved beyond reasonable doubt that the accused did not genuinely believe that he was acting in self defence and that he was not exceeding the bounds of self defence....”

[58] Test: Whether objectively accused had fear of an attack. On his version such fear was present. The deceased took stones. He threw one stone which the accused ducked. However, by hitting the deceased with the barrel of the cocked pistol with his finger on the trigger the accused ought reasonably to have foreseen that the trigger may be pulled and a shot may go off. The accused ought reasonably to have foreseen that he was using more force than necessary. He ought reasonably to have foreseen that the possibility of death may occur as indeed happened.

[59] For the foregoing reasons I am satisfied that the state had proved its case beyond reasonable doubt that the accused caused the deceased's death negligently.

[60] In the result the accused is found not guilty of murder but guilty of culpable homicide based on culpa and convicted accordingly.

N N Shivute
Judge

APPEARANCES

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