



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case no: CC 09 /2015

In the matter between:

**THE STATE**

and

**JOSHUA HITUAMATA**

**ACCUSED**

**Neutral citation:** *S v Hituamata* (CC 09/2015) [2017] NAHCMD 45 (24 February 2017)

**Coram:** SHIVUTE J

**Heard:** 6-10 June 2016, 13-16 June 2016, 26, 28 September 2016, 1 December 2016

**Delivered:** 24 February 2017

**Flynote:** Evidence- Counsel for the defence arguing that contradictions, discrepancies in witness' statement and failure to mention something in his statement to the police or in court - An indication that witness is unreliable or something never happened –

Court held: The fact that the witness omitted to mention something does not mean it never happened – Contradictions and discrepancies in witness' evidence does not

mean that the witness is a liar, unreliable or dishonest – Court must consider – Nature of contradictions, their number and importance and their bearing on other parts of the witnesses' evidence – Court must weigh up the previous statement against viva voce evidence, assess evidence as a whole – to determine whether it is reliable or not-

Criminal Law – Private Defence – Test for private defence – Two fold – First leg - whether requirements of self-defence have been met – which includes the question, whether the bounds of self-defence were exceeded – Objective test – Second leg – Whether the State has proved beyond a 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 –Test subjective-

Criminal Procedure – Accused alleging that he was attacked by State witness – Failure to put version to the witness – Court held – It is unfair not to challenge witness testimony and later contend that the witness' testimony should not be believed.

Criminal Procedure – Accused charged with murder and discharge of a firearm in a public place – Duplication of charges – Test for duplication of charges – Whether a single intent is required in both offences – Single intent test – Whether the evidence necessary to establish one of the charges at the same time confirm the other offence – Evidence test – If the answer is positive it should be only one offence and the danger of duplication of convictions exists – Accused shot the deceased who was in the bar – Although two separate criminal conducts were committed – Accused had a single intent to kill the deceased – Accused guilty of murder and not guilty of discharging a firearm in a public place.

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## VERDICT

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1<sup>st</sup> Count: Guilty of murder with direct intent.

2<sup>nd</sup> Count: Not guilty and acquitted.

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## JUDGMENT

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SHIVUTE J,

[1] The accused faces an indictment containing two counts namely: murder and contravening s38 (i) (o) read with ss1, 38 (2) and 39 of the Arms and Ammunition Act 7 of 1996 – Discharge of a fire arm in or on any public place.

[2] 1<sup>st</sup> count: Murder

It is alleged that on 12 July 2013 at Okuryangava in the district of Windhoek, the accused did unlawfully and intentionally kill Nathanael Mushihange Showa, an adult male person.

2<sup>nd</sup> count: Unlawful discharge of a firearm in a public place.

It is alleged that on 12 July 2013 at Okuryangava in the district of Windhoek the accused did unlawfully and intentionally discharge a firearm, namely a 7.65 pistol with serial no. 3540 in a public place namely; the Stop and Shop Bar.

[3] The accused pleaded not guilty to both counts and puts the State to proof of each and every allegation. He did not disclose the basis of his defence. However, as the trial progressed, the accused admitted to have killed the deceased but claimed that he had acted in self-defence.

[4] The State called several witnesses. Akwenye Tjombe, one of the key witnesses, testified that on the fateful night he was on duty at the place where the

incident took place. The accused and the deceased had a dispute over N\$164 that was in the jackpot machine. The accused was claiming that N\$100 out of N\$164 was his, whilst the deceased was claiming that the whole amount was his. Tjombe gave N\$4 to the deceased and N\$160 was given to the cashier for the money to wait for the owner of the bar, who was out of town, to come and resolve the dispute. The deceased continued to play the gambling machine and the accused did not continue playing. After some time, Tjombe crossed paths with the deceased whilst he was coming from the counter. The deceased asked about the money. One of the bar patrons commented that the money belonged to the deceased.

[5] The accused, who was at the counter, shouted 'Man' and at the same time he stretched his hands in front going towards the deceased and Tjombe observed the deceased staggering backwards and falling to the ground. The accused moved towards the deceased and shot the deceased three times on the head as the deceased lay on the floor whilst his head was up. It is further Tjombe's testimony that he did not see other people with the deceased apart from seeing Amalwa who interfered when he said the money belonged to the deceased. He did not see any glass being thrown at the accused by the deceased or by someone else. Neither did he see other people attacking the accused or any person attempting to remove the firearm from the accused. If these allegations had happened, witness Tjombe would have seen all these.

[6] Petrus Shilimela corroborated Tjombe's version that there was a dispute between the deceased and the accused over the money that came from the jackpot machine where the two were playing. Shilimela left the accused and the deceased at the counter. However, he later heard a gunshot and observed the deceased staggering backwards. The deceased fell to the ground and the accused came and shot the deceased on the head. The witness further testified that he did not see any one fighting with the accused. He did not see any person throwing bottles at the accused. He did not see the deceased or any other person attacking the accused. He further did not see the deceased in the company of friends. The witness again testified that when the deceased fell down, the shoe that he was wearing fell on his right hand. Whilst the accused was still shooting, the deceased took the shoe and tried to throw it to the accused but did not go anywhere because the deceased was powerless.

[7] Modesh Dreyer was another witness called by the State. Her testimony is that she was in the company of Oscar Shatipamba whilst she was in the bar. Shatipamba went out to answer a phone call and when the incident happened Shatipamba was at the door. She then heard gunshots coming from the side of the counter. She saw the accused shooting whilst the deceased, who had a bottle of wine in his hand, was moving towards the accused. The deceased fell on the floor. Whilst he was trying to lift up his head, the accused came and shot him on the head and around the face three times. When the incident happened, she was very close to the counter and the jackpot machines. She did not see any person throwing bottles, if this had happened she would have observed it. Dreyer further testified that although when the first gunshot was fired Shatipamba was at the door, by the time the accused fired at the deceased' whilst laying on the floor, Shatipamba was inside the bar.

[8] On the other hand, Warrant Officer Oscar Shatipamba testified that when the accused started shooting he, (Shatipamba) was at the counter. He heard a sound saying' the money is mine. When he turned, he saw a male person having a pistol in his hand firing in the direction of the deceased. The deceased was struck by the bullet. The deceased fell down and the man who was firing at the deceased followed the deceased and fired at him whilst the deceased was laying on the floor. In total Shatipamba heard about seven gunshots that were fired. The bar was full of people. There was no fight that preceded the shooting incident whilst Shatipamba was in the bar.

[9] Sergeant Robert Karondere testified that he attended to the scene of crime. He took photographs of the deceased as found and collected exhibits from the scene. He further compiled a photo plan. At the scene, he observed some spent cartridges and projectiles that were collected for ballistic testing. The witness again observed a light bulb that was shot. Small glasses were scattered. Apart from the photo plan, he also prepared a sketch plan. The photo plan was admitted in court as evidence and was marked as exhibit 'C' whilst the sketch plan was marked as exhibit 'D'. Sergeant Karondere further prepared a list of items and compiled an application for scientific examination. According to exhibit 'E', application for scientific examination, the items that were sent for examination were:

one 32/7.65 FN Pistol serial no. 3540

face cloth,  
five projectiles found in the deceased's body,  
one projectile found under the table,  
one projectile found next to the deceased's legs,  
one spent cartridge found next to the deceased's right arm,  
one spent cartridge found under the deceased's body,  
one spent cartridge found under a jackpot machine,  
one spent cartridge found in the corner,  
one spent cartridge found near the corner,  
one spent cartridge found under the table,  
one spent cartridge found on the drum and  
one magazine with eight rounds of ammunition

Sergeant Karondere further testified that the firearm and magazine with 8 rounds of ammunition were received from Inspector Thourob as well as the face cloth. Furthermore, the five projectiles removed from the deceased's body were also handed over to him by Inspector Thourob. The exhibits were packed in NFB bags as per exhibit 'E' when they were sent to the National Forensic Science Laboratory.

[10] Furthermore, Sergeant Karondere testified that he also helped Inspector Thourob package the exhibits when Inspector Thourob prepared another application for scientific examination where the pistol with serial no. 3540, five spent projectiles retrieved from the deceased's body and five projectiles recovered from the scene were sent for testing to determine a trigger pull test, and whether the pistol operates automatic or semi-automatic and to determine whether the projectiles were damaged. The second application was admitted in evidence and marked as exhibit 'R'.

[11] Sergeant Rauna Nelenge also known as Ngoomoka testified that she received the exhibits from Sergeant Karondere that were destined to the science

laboratory, and she recorded them in the exhibit register. Thereafter, she checked whether the exhibits in the list corresponded to the physical exhibits. The numbers on the forensic bags also corresponded with the number on the form. The exhibits were sealed in a plastic bag bearing a serial number. She received the exhibits on 19 July 2013 and forwarded them to the laboratory on 22 July 2013. Whilst the exhibits were in her possession, they were never tampered with. The exhibits she received were listed in exhibit 'E'.

[12] Warrant Officer Ello Pombili Hamukwaya's testimony is that he received exhibits from Sergeant Karondere from the scene of crime. He checked whether the exhibits he received were corresponding with the form. He signed the form and forwarded it for forensic examination. The exhibits that he received were listed in exhibit 'R'.

[13] Constable Hilka Kaufiweni Kotokeni testified that on the date in issue around 22h30, she was on duty with Sergeant Hamukonda at Ombili Mobile Police Station. Whilst on duty, the accused came and reported to them that he shot somebody at Stop and Shop Bar. She called Warrant Officer David to come and assist. Warrant Officer David came. The accused mentioned that the person was dead. The accused had a firearm and handed it over to Warrant Officer David. Thereafter, Warrant Officer David took the accused away from the mobile police station.

[14] Nestor Shipopyeni David is a Warrant Officer in the Namibia Police Force and he confirmed that he was given a firearm by the accused person. The accused told him that he shot a person. The pistol was wrapped in a face cloth and it had a magazine with 8 rounds of ammunition. The serial no. of the firearm is 3540. The accused was arrested. Together with the firearm and magazine, they were taken to Wanaheda Police Station. The accused, the firearm, and the magazine with its content were given to Inspector Thourob. Whilst the firearm, magazine and rounds of ammunition were in possession of Warrant Officer David, they were not tampered with.

[15] Inspector Petrus Tankie Thourob testified that he observed pieces of glass of the light bulb on the floor. Apart from that, he testified that at the time he arrived at

the scene, the deceased was already dead. He observed seven spent cartridges around the deceased and two bullet points or projectiles under the body of the deceased. They were picked up by Sergeant Karondere who put them in exhibit bags. He further testified that he found the accused at Wanaheda Police Station with Sergeant David and the Sergeant handed over to him a pistol with serial no. 3540, a magazine with 8 rounds of ammunition and a face cloth. The firearm, magazine with rounds of ammunition and a face cloth were given to Sergeant Karondere who then packed them in exhibit bags to be forwarded to the laboratory for forensic examination. After the firearm was examined, he was instructed to send it back for further examination. He then sent the firearm, five spent cartridges from the body of the deceased and two spent projectiles from the scene of crime.

[16] Inspector Thourob testified further that before he charged the accused, he warned him in terms of the judges' rules. He took a warning statement from the accused wherein the accused informed him that he shot the deceased because the deceased swore at him. The accused got angry and he could not control his temper. He further said he arrived at the bar alone and the deceased took the money that he had won. Inspector Thourob, when taking the warning statement, used a standard pro-forma that contains questions, among others, pertaining to the accused's right to a legal representative and the right to remain silent. When the witness finished taking a warning statement it was read back to the accused. The accused, Inspector Thourob and Constable Mwandangi who was interpreting signed the document. The accused never informed Inspector Thourob that he was attacked by the deceased and his friend or that he acted in self-defence.

[17] It was again Inspector Thourob's testimony that he was present when Doctor Kabanje was conducting a post-mortem examination on the deceased's body. He observed the five spent projectiles that were retrieved from the deceased's body. The five spent projectiles were given to him and he later gave them to Sergeant Karondere to see to it that they are taken for forensic examination.

[18] Constable Andreas Mwandangi testified that he interpreted for the accused when Inspector Thourob was taking a warning statement from the accused. When he was interpreting, he interpreted correctly and that there was no misunderstanding between him and the accused. The accused elected to give a statement. After he



gave his warning statement it was read back to the accused and they all signed. He further testified that the accused never informed him that the deceased and his friends who allegedly had bottles attacked him. He only informed him that which was contained in the warning statement.

[19] Warrant Officer Onesmus Tjitombo testified that he is stationed at Forensic pathology sub-division and one of his duties is to take photographs during post-mortem examinations. On 15 July 2015, he captured photographs during the post-mortem examination of the deceased and compiled a photo plan. He identified the photo plan in court and it was marked as exhibit 'T'.

[20] Doctor Simasiku Kabanje testified that he conducted the post-mortem examination on the deceased's body. His findings were inter alia seven entry gunshot wounds. Three to the head, two to the chest and back and two to the arm. The cause of death was multiple gunshot wounds to the head and to the chest. The doctor further testified that he found five projectiles lodged into the deceased's body. Two were in the skull and three in the chest. Two shots perforated and exited through the body. According to Dr Kabanje's opinion the shots fired at the deceased were fired from a distance of one meter onwards. The doctor further corroborated the version of Warrant Officer Tjitombo that he was capturing photographs during the post-mortem examination and exhibits were collected for purposes of ballistic examination. The post-mortem report was admitted in evidence and marked as exhibit 'H'.

[21] William Onesmus Nambahu, chief forensic scientist at the National Forensic Science Institute, received exhibits from the police in relation to this case for ballistic examination. The laboratory reference no. is 1304/2013. After the exhibits were received from Sergeant. Nghoomoka as per lists contained in the reports, he compiled two reports exhibits 'L' and 'M'.

[22] According to the first report that is admitted in evidence and marked as exhibit 'L' Mr Nambahu analysed the exhibits and made the following findings:

- (a) The examination of the firearm showed that Pistol with serial No.3540 was in working condition.

- (b) Three bullets were test-fired from Pistol S/No. 3540, and the spent cases/projectiles compared with those mentioned in exhibit F-L, and C-E.
- (c) From the calibre breech marks on the spent cases and the grooves on the spent projectiles, he found sufficient agreement of individual and class characteristics.
- (d) This means that all the spent cases and projectiles were fired from Pistol S/No. 3540.
- (e) These facts were established by an examination and process requiring skill in Comparison Microscopy.

[23] In connection with the second report, Mr Nambahu testified that the exhibits were received at the National Forensic Science Institute from Warrant Officer Hamukwaya namely:

one 7.65 mm Pistol S/No. 3540

five 7.65 mm S/Projectiles

two 7.65 mm S/projectiles

His findings were:

- a) The firearm was found to be F N Blowback pistol with thumb and safety hammer bloc and magazine.
- b) The pistol S/No 3540 is semi-automatic.
- c) This means that; in normal circumstances, if you pull the trigger one bullet will be discharged and repeating the process another bullet will be discharged until the magazine is empty.
- d) The muscular effort needed to be applied to the trigger mechanism in order to fire the pistol was found to be 2.97 kg, which is equivalent to 2.097 Newton.

[24] Mr Nambahu further identified two court charts of ballistic identification in court that were admitted in evidence and marked as exhibits 'P' and 'O'. He again

identified a sketch plan depicting a comparison microscope that was admitted in evidence and marked as exhibit 'Q'.

[25] On the other hand, the accused gave evidence under oath and called no witnesses. His testimony can be summarised as follows:

He and the deceased had an argument over N\$164 that was won from the jackpot machine. The deceased was in the company of two friends. When Tjombe Akwenye, the security guard, realised that the accused and the deceased were arguing over the money, he came and took out the money from the gambling machine and gave it to the cashier. However, Akwenye never told the accused that the money will be with the cashier until the owner of the bar comes to resolve the issue. The accused continued with his testimony that after Tjombe took the money, the deceased and his two friends started insulting him using bad words about his mother. Later on, the deceased and his two friends including Tjombe, attacked the accused. The deceased pushed the accused in the chest whilst another friend of the deceased threw an empty bottle at him and it broke. The deceased was about to throw a glass at him whilst three of the deceased person's friends were surrounding the accused. The accused took his pistol and fired the first shot in the air. He again fired the second shot that struck the deceased. When the accused fired the first shot, one of the deceased's friends jumped at him from behind and tried to take the firearm from him. The deceased's friend held the firearm in the middle whilst the accused's finger was on the trigger and as the accused wrestled with him, more shots were fired in the air.

[26] It is further the accused's testimony that he only fired four shots at the deceased in self-defence. One shot struck the deceased on the arm, two struck the deceased on his feet and the other shot was the one fired in the air. The accused testified that the four shots were fired before the deceased's friend grabbed the accused from behind. From there the accused did not fire any shot again whilst the deceased was laying on the floor.

[27] Having dealt with the summary of the State witnesses as well as the accused's version, this court is called upon to determine whether the accused had killed the deceased unlawfully and intentionally. As alluded to earlier on, when the accused pleaded, he did not disclose the basis of his defence. However, as the case

progressed and events of the fateful night unravelled through evidence, it became evident what the accused's defence was. The accused claimed he acted in self-defence after he was allegedly attacked by the deceased and his friends. It is not disputed that the deceased died on that fateful night.

[28] Counsel for the State argued that private defence cannot avail the accused because he was not facing imminent danger. Although the accused claimed that he was attacked by the deceased and his friends, none of the witnesses saw the accused being attacked. Furthermore, when Tjombe testified, it was not put to him that he was one of the deceased's friends who allegedly attacked the accused. Again, the accused during cross-examination disagreed with Mr Nambahu's version that the weapon used to kill the deceased was a semi-automatic in that, if it has to be fired, one would pull the trigger and one bullet goes off and for another bullet to come out again one would have to pull the trigger again. It is further counsel's submission that although the accused is trying to paint a picture that some of the shots were fired in the air or randomly when the accused was allegedly wrestling for the firearm with the deceased's friend, this is not borne out by evidence. Counsel went on to argue that the evidence adduced by the State proves that the accused had an intention to kill the deceased as he was not attacked or about to be attacked and that his life was not under imminent danger at all. In support of her argument counsel argued, amongst others, that if it was true that the accused was acting in self-defence, he was not going to contradict himself in the manner he was attacked. During the bail application, the accused testified that when he fired in the air, the three friends of the accused moved back but the deceased wanted to throw a glass at him. He did not think twice and shot the deceased. It could therefore not be correct that one of the deceased's friends is the one who wrestled him for the gun and fired the shots that killed the deceased.

[29] With regard to the second count of discharging a firearm in public place, counsel argued that when the accused fired the first shot that struck the light fitting, he had committed the offence as he had no justification to do so.

[30] On the other hand, counsel for the accused in support of his proposition that the accused acted in private defence, argued that although witness Tjombe testified in court that he and the deceased crossed paths in the bar and the version that

Amalwa said the money belonged to the deceased, this is not contained in his statement. Furthermore, the witness's version that the accused cocked the firearm that was semi-automatic which need not be cocked, is an indication that the witness is not a credible witness. It is further an indication that although the witness could have been present, he did not observe exactly what happened before and after the shooting.

[31] Again, with regard to the version of State witness Shilimela that the deceased attempted to throw a shoe at the accused, this was not stated in the witness's statement. Therefore, it is an indication that the witness is not a credible witness. It was further counsel's argument that the State failed to tender credible and admissible evidence proving that the accused had committed the offences as charged. Counsel further argued that when evaluating the State's case, the court should take into account that State witnesses did not corroborate each other as to how and what transpired. Furthermore, Dreyer's version that the accused stood with his legs between the deceased as he was shooting at him, was not corroborated by other witnesses. It was counsel's argument that the accused should be acquitted on both counts.

[32] Both counsel referred me to authorities in connection with the requirements of self-defence and I am indebted to them. I will now proceed to discuss the defence of private defence. Private defence is well defined in Snyman on Criminal Law 5<sup>th</sup> ed. at 103 as follows:

'A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced, or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to attack:

[33] To give rise to a situation warranting action in self-defence, there are certain requirements which need to be met, namely;

- (a) The attack must be directed against the attacker.
- (b) The defensive act must be necessary in order to protect the interest threatened.

- (c) There must be a reasonable relationship between the attack and the defensive act. There ought to be a certain balance between the attack and the defence. The nature of the relationship which must exist between the attack and the defence may be determined by the circumstances of each case.
- (d) The person being attacked must be aware of the fact that she is acting in private defence. There cannot be unconscious or accidental private defence.

[34] The test for private defence which is twofold is set out in *S v Naftali* 1992 NR 299 HC at 303:

'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 ...The second leg of the inquiry 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. Here the test is purely subjective...'

[35] Having stated the requirements for private defence, I now proceed to relate the facts of this case to the law. The accused alleged that one of the State witnesses, Tjombe Akwenye, was one of the people who attacked him. However, this version was not put to the witness whilst he was on the witness stand. It is unfair to let a witness go without challenging his testimony and to argue later that his testimony should not be believed. The accused's version that he was attacked by Tjombe together with two others is highly improbable. If this was true, it would only be fair to be put it to the witness through cross-examination. Moreover, none of the other State witnesses testified about this. I therefore reject the accused's version that he was attacked by Tjombe and the deceased's friends. This approach was rightly followed in *S v Kapika and 2 others (2)* 1997 NR 290 at 296 I –J and I have no reason to depart from it.

[36] Counsel for the defence argued that the court should believe the accused's version that he acted in self-defence and the court should reject the State witnesses versions as unreliable and that the witnesses lacked credibility as there are discrepancies in their versions. He singled out the version of Dreyer that contradicted the version of Shatipamba as to where Shatipamba was when the accused fired the first shot. Although there has been discrepancies as to where Shatipamba was at the time when the accused started to shoot, what is clear from the evidence is that Shatipamba observed the accused when the first shot was fired and when the deceased was shot whilst he was laying on the floor. It is also not uncommon for witnesses to differ from one another in minor respects. See *S v Auala* 2008 (1) NR 223 HC at 233 where the court stated that:

'It is not uncommon that witnesses, when testifying, differ from one another in minor respects, instead of relating identical versions to the court. There can be various reasons explaining this phenomenon and does not necessarily mean that deliberate lies were told to the court. Contradictions per se do not lead to the rejection of a witness' evidence, as it may simply be indicative of an error.'

I do associate myself with the above principle and I am of the view that Shatipamba and Dreyer's rest of the evidence cannot be rejected because they contradicted each other. The contradictions are not material.

[37] Furthermore, the accused in his defence persisted to say that he only fired the first shot after he was attacked by the deceased's friends, one of whom threw the bottle at him which broke. The accused further said when he fired the first shot, one of the deceased's friends jumped and tried to take the firearm from him. He even suggested that more shots were fired in the air whilst he and the deceased's friend were wrestling for the fire arm. However, this version is not borne out by objective evidence. According to his evidence, only one shot was fired in the air and this is the shot that had struck the light bulb in the bar. Other shots landed on the deceased and this is supported by medical evidence. Accused further claimed that the deceased was struck on the feet which is not the correct position. The record speaks for itself that there is no single iota of evidence that the deceased was struck on the feet apart from the accused's imagination.

[38] According to the eye witnesses who were at the scene, none of them saw the accused being attacked by the deceased's friends or saw a scuffle between the

accused and another person wrestling over the firearm. The only evidence that comes close to the accused being attacked is that of Dreyer who said that when she heard the gunshot, she observed the deceased moving towards the accused whilst he was having a bottle of wine in his hand. However, there is evidence that the deceased was shot on the arm and he fell down. Even if this court had to accept that the deceased was the aggressor by moving towards the accused whilst he was having a bottle of wine in his hand, the danger ceased when the deceased was struck by the bullet and fell down. There is evidence from four State witnesses who testified that whilst the deceased was laying in a helpless state, the accused went to him and shot him. He did not only inflict gunshot wounds on him once but the deceased was shot seven times.

[39] When he was shooting at the deceased, the accused aimed at the most vulnerable parts of the body namely: the head and chest and these were fatal shots. Although the accused wants to paint a picture that some of the shots went off whilst he was struggling for a gun with the deceased's alleged friend, the accused intentionally directed his shots to the deceased's head and chest when he moved towards the deceased and shot at him after he already disabled him. This is a clear indication that the accused intended to kill the deceased.

[40] Looking at the circumstances of the case as a whole, I agree with counsel for the State that probabilities are that the accused shot the deceased in the manner as described by Dreyer, Shilimela, Shatipamba and Tjombe. Therefore, private defence cannot avail the accused as he does not meet the requirements as mentioned above. Moreover, the accused had also used excessive force by shooting the deceased six times after he initially shot him. He never had a genuine belief that he was acting in self- defence.

[41] Although there were a few contradictions in the State witnesses' testimonies, these contradictions, as pointed out earlier, do not warrant the version of Dreyer and Shatipamba to be rejected as a whole. Again, with regard to the criticisms levelled against State witnesses Tjombe and Shilimela that the omission to mention something either in their statements they gave to the police or in court, does not mean that it did not happen. Furthermore, the fact that the witness had contradicted himself or is contradicted by other witnesses does not show that the witness is a liar



and his evidence should be rejected in its totality. The contradictions per se do not lead to the rejection of the witness' evidence and what the trier of facts has to take into consideration are matters such as the nature of the contradictions, their number and importance and their bearing on other parts of the witness' evidence. These differences could either be immaterial to the charge the accused is facing or bona fide mistakes made by a witness. It must be borne in mind that the trier of facts, when assessing the evidence of witness while rejecting one portion of the sworn testimony of a witness, may accept another portion. *R v Khumalo* 1916 AD 480 at 484.

The court must weight up the previous statement against viva voce evidence and assess evidence as a whole to determine whether it is reliable or not.

[42] Contradictions pointed out by counsel do not per se make those witnesses dishonest or unreliable. Having the advantage of observing them when they were testifying, they were truthful and credible witnesses. Their versions are more probable in the circumstances and the accused's version cannot reasonably possibly be true. I therefore reject the accused's version and accept that of the State witnesses.

[43] Having considered all the evidence in its totality, I am satisfied that the State has proved the first count of murder that the accused had a direct intent to kill the deceased. I convict him accordingly.

[44] With regard to the second count of unlawful discharging a firearm in a public place, it is apparent from the record that the accused shot the deceased whilst he was in a bar. It is evident that the accused discharged the firearm in order to shoot at the deceased. It appears to me that there is a duplication of charges. However, to satisfy myself whether duplication of charges indeed exists, I would like to consider the guidelines as laid down in *S v Makwele* 1994 NR 53(HC).

There are two tests to determine whether there are duplication of convictions, namely the test of single intention and the evidence test:

'The first test would of course only apply to offences with intention as an element. The question to be asked is whether a single intent is required in respect of both offences. On the other hand, when applying the evidence test the following question is usually asked namely: does the evidence which is necessary to establish one of

the charges at the same time confirm the other offence? If the answer is positive it should be only one offence and then the danger of a duplication of convictions does exist. These tests may be applied conjunctively or separately, depending on the circumstances of the particular case. It has also been recognised that in matters where neither of the said two tests produces satisfactory results the court's decision usually rests on basic common sense'.

[45] Applying the above test to the present case, it is clear that when the accused discharged a firearm in a public place, his intention was to kill the deceased. He could not have killed the deceased without him having discharged the firearm in a public place. Therefore, I am of the view that although separate criminal acts were executed, the accused had a single intent. To convict the accused on the second count will lead to a duplication of charges. I therefore find the accused not guilty and acquit him accordingly.

[46] In the result the following verdicts are arrived at:

1<sup>st</sup> Count: Guilty of murder with direct intent.

2<sup>nd</sup> Count: Not guilty and acquitted.

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NN SHIVUTE  
Judge

## APPEARANCES:

THE STATE:

Ms Ndlovu

Of Office of the Prosecutor-General, Windhoek

ACCUSED:

Mr Siyomunji

Instructed by Legal Aid, Windhoek