



**CASE NO.: CC 19/2008**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

versus

**JECKONIA DIMBULUKWENI HAMUKOTO**

**CORAM:** NDAUENDAPO, J

Heard on: 4, 5, 8, 9, 10, 15, 16, 18, 22 November 2010

Delivered on: 28 February 2011

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**JUDGMENT:**

**NDAUENDAPO, J.:**[1] The accused is arraigned in this court on 8 charges, namely three counts of murder, 3 counts of attempted murder and in the alternative three counts of negligent discharge or handling of a firearm, one count of pointing a firearm and one count of discharge of firearm in public place or on public road.

The allegations on the murder charges are that on **2 February 2007** and at or near **Katutura** in the district of **Windhoek** the accused did unlawfully and intentionally kill **Erastus Jonas, Erastus Boni Shuudeni** and **Festus Auhwe Eita**, all male adult persons.

The allegations on the attempted murder are that on **2 February 2007** and at or near Katutura in the district of Windhoek the accused did unlawfully assault **Primus Ahispala, Timo Kandjumbwa** and **Joel Hango** by firing shots at them with a firearm with the intend to murder them.

The allegations on the alternative counts are that on or about **2 February 2007** and at or near **Katutura** in the district of **Windhoek** the accused did wrongfully and unlawfully discharge a firearm and did thereby negligently injure or endanger the lives or limbs of **Primus Ashipala, Timo Kandjumbwa** and **Joel Hango** or handled a firearm in a negligent manner.

The allegations on count 7 (pointing of a firearm) are that on or about **2 February 2007** and at or near **Katutura** in the district of **Windhoek** the accused did unlawfully and intentionally point a firearm at **Matheus Shikongo** and/or **Shikalepo Amukondo**.

The allegations in count 8 (discharged of firearm in public place or on public road) are that on or about **2 February 2007** and at or near **Katutura** in the district of **Windhoek** the accused did unlawfully and intentionally discharge a firearm in or on public place or on any public road, or any other place or road to which the public or a part thereof have access, namely **Kondjeni Bottle Store**.

[2] In the summary of the substantial facts, the State alleges that: “During the afternoon of Friday, 2 February 2007, the accused visited the Kondjeni Bottle store in Katutura, where he pointed his licensed 9mm Makarov pistol with serial number MB1012 at the complainants in count 7 of the indictment. The accused also fired a shot through the roof of this bottle store where after he started to shoot randomly at the customers and other people in or near this bottle store. Three of the shots fired by the accused hit the deceased in counts 1 to 3 of the indictment and they died due to injuries sustained from the gun shot wounds. An additional three shots fired by the accused hit the complainants in counts 4 to 6 of the indictment”.

[3] The accused is represented by Mr. Tjituri and the State by Ms. Jacobs.

[4] The accused pleaded not guilty to the 3 counts of murder as well as the attempted murder counts. The basis of his defence was that he acted in private defence when he committed those crimes. He pleaded guilty to the three alternative counts of negligent discharge or handling of a firearm. He denied having pointed a firearm at Matheus Shikongo and or Shikalepo Amukondo. He pleaded not guilty to count 8 (discharge of a firearm in a public place or on a public road).

[5] In terms of section 220, he made the following admissions:

- “1. That on or about 2<sup>nd</sup> day of February 2007 he was in Katutura at Kondjeni Bar.
2. On that day and at Kondjeni Bar he had with him a licensed Makarov pistol s/no 1012.
3. admit the identity of the deceased persons as identified and referred to in counts 1, 2 and 3 and that those persons died as a result of gunshots which emanated from the abovementioned Makaro pistol and that the ballistic results in this regard are also not placed in dispute”.

### **CASE FOR THE STATE**

[6] The State called the following witnesses Zacharia Amakali, Thomas Amunyela, Primus Ashipala, Michael Emvula, Johanna Shikalepo, Stefanus Shigweda, Joao Alfonso, Gamonel Shihuandu, Joel Hango, Gerson Mwatile, Matheus Shikongo, Lukas Gabriel, Linekela Hilundwa.

**Zacharia Amakali**

[7] He testified that he is a 31 year old and an Inspector in the Namibian Police. He is attached to the Serious Crime Unit since 2002 in Windhoek.

[8] On Friday 2<sup>nd</sup> February 2007 at about 13:45 he received a report of an incident at Konjeni Bottle Store. He drove there and on his arrival, he found police officers and members of the public, standing outside the Konjeni Bottle Store. When he entered the bottle store he found a dead person lying on the floor. He saw 3 spent cartridges nearby the body of the deceased as well as two projectiles.

[9] He then spoke to a person who identified himself as Shimwekiya, the bar attendant of the Bottle Store. Shimwekiya related that the Richelieu bottle which was on the counter, belonged to the suspect. Amakali also noticed a bullet hole in the roof of the bottle store. He went outside to the eastern direction and found a dead person lying on the ground. After that a member of the Scene of Crime was called to take photographs.

[10] Another police officer, Constable Shixwandu, gave him a magazine of a makarov pistol with seven rounds live bullets. The scene was photographed and he heard that the suspect was already arrested and was kept in the police van. The firearm was found and given to Sergeant Alfonso.

[11] After the preliminary investigation on the scene, he proceeded to Katutura Police Station where he found the Accused inside the charge office. He saw that the accused was handing over his jacket, a trouser, to a person over the counter. He also observed a Samsung cellphone. He heard that the shooting related to a stolen cellphone. He also testified that the accused person started speaking to him without being asked. He was expressing himself that he (accused) was acting in self-defence and he shot his friend Primus Ashipala. He observed the accused was under the influence of alcohol. He explained his rights to him, he arrested and booked him in the POL 8. After booking him, they booked him out and took him to Katutura State Hospital where his blood was drawn for examination of the alcohol content. He was then brought back to Katutura Police Station where he was further detained. His case was given to Detective Sergeant Hilundwa the investigating officer and he was the one who was involved in the interrogation of the suspect.

### **Thomas Amunyela**

[12] He testified that he is a 38 year old male, employed at the Ministry of Health as a Radiographer and stationed at the Central Hospital. He knows the accused since 1998 when they met in Angola and then went together to Cuba for studies.

[13] On Friday, 2<sup>nd</sup> February 2007 at around 14:00, he was in Katutura at the Pick and Pay Complex. He called the Accused and then when he answered he told him that he was at the police station for shooting somebody. He then went to the police station. When he arrived there he found him talking on the cellphone inside the

charge office. He then related that he shot his friend Primus. Before he was taken to the cells, he undressed and then gave his clothes and cellphone (silver, metallic Samsung) to him. He handed the clothes back to the Police as they were not sure whether to take him to the hospital or the main police station. He was then asked by the accused person to bring his firearm license from the nurses' home. He brought the license and gave it to Mr. Hilundwa.

### **Primus Ashipala**

[14] He testified that he is a 44 year old male and employed at Khomas Regional Council. On 2<sup>nd</sup> February 2007 between 13:00 and 14:00 hours he was at the single quarters, playing cards. He heard a gunshot and he immediately proceeded to Kondjeni bar and saw that it was the accused who was shooting. When he entered the bar he saw the accused with a pistol in his right hand and telling the small "guys", (between sixteen and seventeen years old), to undress, so that he could see whether they have his cellphone on them. He asked the accused why he was pointing the people with a gun to which the accused replied: "they stole my cellphone". He calmed the accused down and he gave the pistol to him. He advised the accused to call the owner of the place or the police. He handed the pistol back to the accused and went outside. The accused then came back from outside and started shooting indiscriminately, he could not remember how many shots were fired, because he was also shot. He was shot in his back and the bullet exited from his chest. During cross-examination it was put to him that "apart from the persons grabbing him from behind there were other people from the front and he was in the middle" the witness

replied by saying: "No, that is a lie". He further testified that he did not see anyone attacking the accused. One of his friends took him to the hospital. Until recently, he had four operations. The nerves in his left leg is damaged, resulting in him not walking properly.

**Michael Emvula**

[15] He testified that he is 46 year old and he is employed as a nurse at the Mental Hospital. On 2 February 2007 he went to pay his debts and then went to the single quarters. He went to a bar called Okarongo and the accused found him there. From there they went to Kondjeni bar. The accused removed a nippy Richelieu from his pocket and they started drinking the brandy. While still drinking, he suddenly saw that the accused had a pistol in his hands and shot through the roof. He also saw that Primus Ashipala was shot through the back and then he ran away. He further testified that he did not hear any other shots being fired as he ran away and left the accused at the bar. He also testified that he did not see anyone grabbing the accused or confronting the accused. He also confirmed that there was nobody who wanted to attack anyone. This witness also corroborated Primus Ashipala's evidence that the accused came from outside and was standing at the door when he started shooting indiscriminately.



**Johanna Shikalepo**

[16] She testified that she is a 30 year old and during February 2007 she was employed at Kondjeni bar. On 2 February 2007 she opened the bar. The accused and Emvula came there. The accused had a nippy Richelieu brandy. She knows the accused as he was a regular visitor at the bar. Emvula gave her a ten dollar note which she exchanged for one dollar coins. Emvula came to her and asked for beer. She testified that she went around the counter and he said he did not want the beer anymore, she must play music. While she was busy with the other customers she heard accused saying that he lost his cellphone. She testified that there were 6 people in the bar and that the accused enquired about his cellphone from them. She saw the accused searching the two boys for his cellphone and she also saw that the accused produced a pistol and placed it on the counter. She saw the accused firing a shot in the roof when he was searching the boys. She further testified that she left the bar as soon as the shot was fired to call the owner. On her way back to collect the charger she saw accused outside and re-entering the bar and again she heard more shots. This corroborates the statements by all the other witnesses that the accused went outside the bar after he fired the warning shot. She further testified that she did not see people charging or about to attack the accused when she was inside the bar. This witness also testified that she did not see Primus Ashipala on that day in the bar. The reason being that after the warning shot was fired, she left the bar immediately and that corroborates the evidence of Ashipala that he only arrived at the bar after the first shot was fired.

**Stefanus Shigwedha**

[17] He testified that he is 46 years old and a constable in Namibian Police. On 2 February 2007 they arrived at the scene of crime and found the accused standing on a white piece of paper between his feet and they found a pistol underneath the paper. They locked him in the van and took him to the police station.

**Joao Alfonso**

[18] He testified that he was 50 years old and a Sergeant in Namibian Police and stationed at serious crime unit, Windhoek. On 2 February 2007 he attended a scene of crime at Kondjeni bar in Katutura. On his arrival he found a dead body lying on the floor inside the bar. He also found spent cartridges and live ammunitions. He also observed a bullet stuck in the roof of the ceiling. He went outside the bar and observed another dead body lying on the southern part of the bar. He found exhibit 1 (pistol) containing a magazine. By that time the accused was already arrested and placed in the police van. He proceeded to the police station and when he asked the accused what had happened. He replied by saying that he does not know.

**Gamonel Fikameni Shihuandu**

[19] He testified that he is a Constable in the Namibian Police and stationed at Katutura. On 2 February 2007 he was in a police van on their way to work. It was around 13h00. They found a lot of people at single quarters. People told him that

there was a shooting incident and they pointed the accused as the person who shot the people. The accused was standing nearby with his hand on the back of his head. He was standing on top of a white piece of paper which was between his legs. Underneath the paper was the pistol. A colleague of his removed the pistol, he searched the accused and he found a magazine in his trouser. The magazine was full of bullets. They also found a silver Samsung cellphone on the accused.

### **Joel Hango**

[20] He testified that he was 28 years old and in February 2007 he was employed at Telecom. On 2 February 2007 between 13h00 and 14h00 he came from work and proceeded to Kondjeni Bar. He entered the bar and was leaning towards the pool table watching somebody who was gambling. The accused came and walked between them and came and stood near the yellow door – he came through the door close to the crates and went to stand at the yellow door. As he was looking at the guy who was gambling, they suddenly fell down – they were shot. Whilst lying on the floor he heard more shots being fired. He saw the accused coming close to him and he closed his eyes. He tried to stand up and ran but he felt outside. He testified that before he was shot, he never spoke to the accused, nor did he see anyone trying to attack the accused. He testified that he was shot through the lower shoulder left side under where the rib stops. He had 3 operations. Before the shooting he never had any health problems and now he cannot lift up heavy things and he is having pains in the stomach. He feels very sad because he cannot do much. He is angry with the accused.

**Gerson Shimweefeleni Mwatile**

[21] He testified that he is 27 years old and employed at the Municipality of Windhoek. On 2 February 2007 he was at single quarters – Kondjeni Bar and 2 men arrived at the bar. He testified that he was in the bar near the counter when the accused and Emvula arrived carrying a nippy Richelieu. After 5 to 6 minutes there were around 10 people in the bar. The accused started searching around his pockets saying we must give his cellphone back. The accused said they must undress all of them so that he could search them for his cellphone. The accused had a pistol in his hand. When the accused said they must take off their clothes he fired a shot in the roof. The accused then went outside the bar through the main door. He stayed for approximately 5 minutes outside the bar and re-entered and as soon as he re-entered he started firing indiscriminately. He testified that he did not see people charging at the accused or trying to attack him.

**Matheus Shikongo**

[22] He testified that he is 26 years old and resides at Koreangabdam. On 2 February 2007 between 13h00 and 14h00 he went to the Kondjeni bar. Inside the bar he met the accused and another person. The accused was holding a N\$10 and in the other hand a nippy Richelieu brandy. He further testified that whilst the accused was standing at the counter, he just started searching for his cellphone and he said: "I want my cellphone". He further testified that he suggested to the accused that he should call his phone to hear whether it was ringing, but the accused pointed

the pistol at him saying: "I need my cellphone and he shot through the ceiling and then went outside. He further testified that after the accused went outside, some of them also left and after a while he heard more shots being fired.

**Lukas Gabriel**

[23] He testified that he was 26 years old and residing at Greenwell Matongo. On 2 February 2007 he was at Kondjeni bar – he was there since morning time. The accused arrived. He initially sat outside and later moved inside the bar. The accused and his friend entered the bar. He further testified that he just saw that the accused was searching inside his pockets for his cellphone. The accused said those who were there must give him his cellphone. He took a pistol and shot through the roof. He testified that the accused said they must take off their trousers and they took it down up to the knees. This was before he fired the shot. After that he tried to cock his gun and he went outside. He testified that he went through the big door and others ran. He met the accused at the door and the accused grabbed him at the collar of his neck and said he must go back into the bar – he hit him at the back between the shoulders. He testified that Mr. Ashipala came and asked what he was doing with the gun. He testified that he ran through the small door and he saw people running away. He went behind the house and one person came running and fell down. He testified that he did not see anybody, before the first shot or after, trying to grab the pistol from him or attack the accused.

**Sergeant Linekela Hilundwa**

[24] He testified that he is a sergeant in the Namibian Police since 1993. He is attached to serious crime unit and the investigating officer in this case. On the date of the incident he was on duty and while in the city centre he was contacted by the commander that there was a shooting incident at Katutura. He proceeded to Kondjeni bottle store – he observed lot of people around Kondjeni bottle store. He testified that he observed one person laying dead and another one a few meters from there. He further testified that he took charge of the scene, collecting evidence, cartridges, etc. From there they went to the hospital to visit the victims. From there they came to the charge office in Katutura. At the charge office he heard the accused talking loud on a Samsung cellphone. He testified that he took the cellphone together with pistol, magazines and licence. 3 magazines were handed over to him. He further testified that he only spoke to the accused when they took him to the hospital. He informed him of his rights and that he is entitled to call his lawyer or private doctor. He further testified that he forwarded the blood sample, spent cartridges, projectiles to the laboratory for further forensic investigations. On 4 February 2007 he booked out the accused where he charged him. He informed him of his rights and he said he understood. He further testified that he took down the warning statement (exhibit “N”). Before taking down the warning statement he explained the accused’s rights to him and when he finished writing the statement he read it back to the accused and thereafter the accused signed it. He further testified that the accused never told him that he acted in self defence when he shot the people.

[25] **Defence case:**

**Jeckonia Dimbulukweni Hamukoto**

[26] He testified that he is 40years old and employed as a registered nurse in the Ministry of Health and Social Services.

[27] On 2 February 2007, he was off-duty. He decided to go to single quarters and Shoprite in Katutura and bought a newspaper. From there he proceeded to Okalonga bar. At the bar he found Emvula outside the bar with his friends. He greeted him and went inside the bar. He arrived at Okalonga bar between 11 and 12 hours, the bar lady gave him a nippy Richelieu brandy and he put it inside his pocket and went outside the bar. Michael Emvula asked him to buy him a beer and he said there were many people who wanted him to buy beer and he suggested that they go to Kondjeni bar. The two of them proceeded to Kondjeni bar. He had a newspaper and cellphone in his left hand. Inside Kondjeni bar they found Johanna Shikalepo and two 'boys'.

[28] They greeted them and he called Johanna Shikalepo. She came and they went to the counter. He took a N\$10 to buy beer for Michael Emvula. At the same time he also took out the nippy Richelieu brandy and put it on the counter and asked Emvula whether he still wanted beer or he wanted to drink brandy. He then told the

bar lady not to bring the beer and she must give them change so that they could play jukebox.

[29] He then asked the Johanna to put in N\$1 in the jukebox. She came from behind the counter and inserted N\$1 in the jukebox. He took glasses from the counter and gave one to Michael and they started drinking the brandy. People started to come in one by one and some played jukebox, some were drinking beer. Emvula took his own money and started to play the jukebox, they were standing there for more than 30 minutes and by that time the brandy was half. He further testified that he left the brandy with Emvula and decided to go outside. He took his newspaper and went outside and left Emvula inside. He left via the main entrance and outside the bar there was a bench and he found people sitting on the bench and he went to sit on that bench. While sitting on the bench he decided to call Tommy Hamunyela but he discovered that he did not have enough credit on his cellphone. He then decided to send a sms but did not succeed because of insufficient funds. He testified that there were 3 boys sitting on the other side of the bench. He continued reading his newspaper and one of the boys asked to read his newspaper. One of the persons who was sitting on the bench was Mathias Shikongo and he was the one who asked to read his newspaper. From there Michael Emvula came and he asked him to buy beer for him. He testified that he stood up, left the newspaper and the cellphone on the table (unintentionally). Before he could asked the beer from Johanna, he realised that he left his cellphone and the newspaper on the table outside.



[30] He returned back and in the door he met Emvula and the 'boys' coming inside. When he looked where he was seated, the cellphone and the newspaper were not there. He immediately returned inside and started asking Emvula and the 'boys' who took his cellphone and nobody answered him (including Emvula). He then decided to ask the specific individuals who were seated with him outside. He then decided to ask the 'boy' who was seated opposite him.

[31] The boy confronted him with anger and asked what he wanted and he answered he only wanted his cellphone. He said he was not saying he (the boy) is the one who took his cellphone, but he asked whether perhaps he (the boy) saw his cellphone. He kept asking him. He testified that he asked all in the bar to be searched by him. There were more than 15 people all of them males except Johanna. Whilst he was talking to him (the boy) was standing in front of him – but he could see that the boy was not concentrating on him but was communicating with somebody behind him from there these people behind him were talking in Oshiwambo saying what did he want? He realised that these people were together and Emvula moved to the side of the other entrance when these people came to confront him and he moved backwards towards the pool and made sure that behind the pool table there was no one behind him. At that moment he did not have his gun in his hand. While standing at the pool table he saw people approaching him from both sides and he took out his revolver and fired a warning shot and at that moment some people moved backward – he was still asking his cellphone – within 2 or 3 minutes he saw Primus Ashipala coming in the bar from the main entrance. Primus

asked him what was going on. Whilst he was speaking to Primus that he lost his cellphone – Primus was standing in front of him and his back facing the pool table – these group of people who were in the surrounding area approached him to grab him from behind. They tried to grab him. He had his gun in his hand and out of fear when he turned the gun went off and from there he turned and a commotion started. Somebody threw the cellphone on the small table and they ran. From there he picked up the cellphone and came out of the bar and he found Primus in front of the main door. He asked him what happened and he said he was struck by the bullet and could not move and he said he will take him to get a transport to take him to hospital. He went to the main entrance 40 meters from the bar and tried to stop a taxi and it did not stop, then the police came - plain clothes officers - they asked him to give the gun and he gave it to them.

[32] He further testified that the gun went off automatically because he could not control the amount of pressure. He was angry and confused.

[33] **Private Defence: The legal position:**

According to Snyman<sup>1</sup>, a person acts in private defence, and his act is therefore lawful, if he uses force to repel an unlawful attack which has commenced or is imminently threatening, upon his or somebody else's life, bodily, integrity, property or other interest which deserves to be protected, provided the defensive act is

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<sup>1</sup> Criminal Law 3<sup>rd</sup> edition at a7

necessary to protect the interest threatened and is directed against the attacker, and is not more harmful than necessary to ward off the attack”.

[34] In *S v Naftali* 1992 NR 299 O’Linn observed (at 303F - 304E, with the concurrence of Frank, J: self defence is more correctly referred to as private defence. The requirement of private defence can be summarized 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 against the attacker and necessary to avert the attack and the means used must be necessary in the circumstances<sup>2</sup>.

[35] When the defence of self defence is raised or apparent, the enquiry is actually twofold. The first leg of 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.

[36] 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 its 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. Here the test is purely subjective and the reasonableness or otherwise of such belief, whether or not it is based on or amount to a mistake of fact or of law or both, is only relevant as one of the factors in the determination whether or not the accused held the aforesaid genuinely belief (see Burchell and Hunt op cit at 164-81 and 320-2); (**S v De Blom 1977(3) SA 513 (A)**)

.....

If the State discharges the onus to prove beyond reasonable doubt that the accused held such genuine belief, then the accused must be convicted of the charge of murder. If the said accused cannot be convicted of murder requiring *mens rea* in the form of *dolus*, but merely *culpa* such an accused can be convicted of culpable homicide". In **S v Jonkers 2006(2) NR 432, SC of 444F-445C**, the Supreme Court quoted the above dictum with approval.

[37] In **S v Engelbrecht 2005(2) SACR 41(w)**, the court held that:

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<sup>2</sup> Burchell and Hunt South African Criminal and Procedure, Vol 1, 2<sup>nd</sup> ed of 323-9

*“an acceptable definition of the ground of ‘private defence’ or ‘self-defence’ is that :*

*A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has been 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 not more harmful than necessary to ward off the attack”.*

The Court indicated in a footnote that the foregoing quotation was taken from Snyman Criminal Law 4 ed at 102 at 103 fifth ed, however, the learned author reframed the proviso thus:

“..... provided the defensive act is necessary to protect the interest threatened, is directed against the attacker and is reasonably proportionate to the attack. The question whether an actor can successfully claim the defence of private defence is determined by examining objectively the nature of the attack and defence to determine whether they conform with the principles of law.....”

[38] This means that each requirement of the attack and of the defence must be judged from an external perspective rather than in terms of the accused’s perception

and his assessment of the position of the time he resorted to private defence for example, the question of whether the attack was imminent is decided by the court's assessment of the evidence of the circumstances of the attack and not according to the defender's belief that he was in imminent danger of being attacked. Nevertheless, in applying this test, our courts have always insisted that they must be careful to avoid the role of armchair critics, wise after the event, weighing the matter in the secluded security of the courtroom. The approach is that in applying these formulations, (the triggering conditions) to flesh and blood facts, the courts adopted a robust attitude, not seeking to measure with nice intellectual calipers the precise bounds of legitimate self-defence. Thus, the test must be applied by the Court putting itself in the position of the accused at the time of the attack. This does not make the test subjective; it simply means that the matter is considered objectively in the particular circumstances of the case". See: **S v Ntuli 1975(1) SA 429 A at 437D-E; S v Motleleni 1976(1) SA 403 (A) at 406G-H.**

[39] Mr. Tjituri on behalf of the accused submitted that 'it is apparent from the outset that the accused person acted in self defence when he initially fired the warning shot in an attempt to avert the attack and that he continued to act in self defence during the shooting. Ms. Jacobs submitted that the accused did not act in private defence. The people in the bar did not attack or try to attack him as he claimed.

[40] How then should a court approach a criminal case where there is a conflict of fact between the evidence of State witnesses and the accused?

In **S v Singh 1975(1) SA 227 at 228E-G**, Leon J stated:

“Because this is not the first time that one has been forced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the state witness and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.”

[41] Applying the law to the facts, the following emerge:

[42] The accused testified that he acted in private defence. The people inside the bar were charging at him or they were about to attack him after he fired a warning shot in the roof (ceiling) inside the bar. On the one hand he testified that the pistol

went off accidentally, meaning that it was unintentional. That is borne out by the following exchanges:

Court: Are you saying that when these (sic) shots went off except the warning shots (sic), the others went off by accident?

Accused: Definitely, just out of fears and so on. Truly, it went out accidentally.”

(Record p 224, lines 21-24)

Defence counsel: And now I am asking you, after you had been grabbed<sup>3</sup>, did all the bullets, were they shot by accident as you explained it or did you perhaps retaliate after you had been grabbed?

Accused: The gun just went off automatically like that. There I can agree that maybe negligently I miss-controlled the weapon.

Court: Say that again.

Accused: ..... it is where I can validate (sic) that because out of fear and so on, I negligently miss-controlled the gun and it went off like that”.

[43] That evidence by the accused does not support or corroborate the case that he acted in private defence. The evidence negate the requirements for private defence. Inherent in the requirements for private defence is that one acts intentionally and not accidentally (or negligently) to thwart of an unlawful attack. The

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<sup>3</sup> The evidence of the accused was that they tried to grab him.



evidence by the state witnesses was that after he fired the warning shot he went outside and when he returned he started firing indiscriminately. That shows that he acted intentionally. Even if the court should accept (which the court rejects) that the accused acted in private defence, the critical question is whether there was an attack on the person of the accused which had commenced or which was imminent, warranting him to act in private defence as he claims? On his evidence he testified that there was an attempt to grab him. The witnesses for the State who were present inside the Kondjeni bar testified that they did not see anyone inside the bar attempting to grab the accused or his pistol. The only witness who testified that he saw people trying to grab the accused is Michael Emvula. This is the witness who came together with the accused to Kondjeni bar and with whom they were drinking [the] brandy. They are friends and having considered the evidence *in toto*, I reject that part of his evidence as false.

[44] According to the accused when he re-entered the bar (after he saw that his cellphone was missing) he started asking about his missing cellphone from the “boys” who were sitting outside on the bench with him. While doing that he realized that these boys were communicating with a group of people who were advancing towards him to grab him ..... “some were coming from this side and some were coming from that side” and then he pulled his pistol out and fired a warning shot and “some of the people just moved, they did not go, they just moved”. The accused was a regular visitor to that bar and I take that those who were there were also regular visitors of the bar. It is difficult to fathom why these people were ganging together to attack the accused person. There was no evidence that he had quarrels with these people on

that day or before that. In fact these people were his friends or well know to him as he told sergeant Hilundwa when he gave his warning statement. His only complaint was about the missing cellphone and the likely people or person(s) who could have taken the cellphone could either be the two boys or Emvula who were with him outside the bar on the bench. How all these people (between 15 and 20 according to the accused) could gang up against him to attack him is difficult to comprehend. He was armed and they were unarmed, it is highly improbable that they would want to attack the accused for no apparent reason. What is more baffling is that by time these people allegedly wanted to attack the accused, the cellphone was already stolen. So on what basis would they want to attack him? When Ms. Jacobs asked him: “why would they now want to attack you? If it was their plan to steal the cellphone they now have it, why would they want to grab you? The accused gave a lengthy nonsensical answer. He said: ‘This is traditional and that was in their own mind, me I cannot think what is in these people’s mind. They are those who planned to come steal my cellphone. I can even say it was intentional to take the cellphone. I can even say it was a planned thing for these people to take my cellphone at the end of the day they came together again to come and attack me (record 270 – 271)”. How these people knew in advance that the accused would be at Kondjeni bar and therefore planned to come and steal his cellphone (and for that matter 15 – 20 of them), is not only highly improbable but fiction of his own imagination.

[45] What is also more highly improbable is the evidence by the accused that after he fired the warning shot “some of the people just moved, they did not go they just moved”. The natural reaction in such a situation will be for people to fear for their lives and try to escape or run away. I accept the evidence of Lukas Gabriel that shortly after the warning shot was fired, he ran out and the accused went outside and as he was approaching the door to exit, the accused returned and grabbed him on his neck.

[46] Having regard to all that, I am satisfied that the witnesses for the State told the truth when then they said that no one attacked or tried to attack the accused person.

[47] **Conduct of the accused after the events:**

Sergeant Hilundwa testified that on the 4 February 2007 he booked out the accused for purposes of taking a warning statement.

According to Sergeant Hilundwa and also as per the (*proforma*) warning statement the following transpired between him and the accused.

Question: What is your choice, do you wish to make a statement or do you only wish to answer the questions, (after consultation with your legal practitioner) or do you remain silent.

Answer: I wish to state that all this happened just because of my cellphone which was stolen by people who I regard as friends or well known to me.

Question: When was your cellphone stolen and where.

Answer: It was stolen at the bar.

Question: Where exactly was it stolen.

Answer: While we were sitting outside the bar, I went inside to buy beer leaving (sic) my cellphone outside at the table and on my return my cellphone was missing.

Question: What type of cellphone was it.

Answer: Samsung cellphone.

Question: When did you discover your cellphone then.

Answer: I discovered it when I fired the first warning shot in the bar.

Question: You did get or saw your cell on the table, but why did you continue shooting.

Answer: I was very angry and could not believe that people that I know are stealing from me or my cellphone.

Question: Are you satisfied that this statement/answers made/given set out correctly your version of events.

Answer: Yes".

[48] Although the accused denied having told sergeant Hilundwa all that, Hilundwa was not present when the incident took place and he could only have obtained that information from the accused. The statement was read back to him and he signed it.

[49] The statement was taken 2 days after the incident and everything was still fresh in his mind. Nowhere in that statement did he mention that he acted in private defence when he shot those people. If he acted in private defence he had an opportunity to say so. The only inference to be drawn from his failure to do that is that he did not act in private defence.

[50] **Evidence during bail application:**

On 2 March 2007 accused applied to be released on bail. He testified under oath and according to the record of the proceedings he testified that:

“It was not my intention that I did it and I never even attacked anyone only because of my cellphone”. (my underlining).

[51] Nowhere during those proceedings did he testified that he acted in private defence.

[52] Section 119 proceedings:

When the accused pleaded, his counsel Boris Isaacks informed the court that: “plea in accordance with his instructions. Accused had no intention to kill anybody only to protect his property”. No reference to private defence to protect his life.

[53] Having regard to all that, I come to the conclusion that the accused did not act in private defence when he fired those shots. Nobody tried to grab him or attack him when he fired those shots. That defence is an afterthought and I reject it as false.

[54] **Count 7 - Pointing of a firearm**

Matheus Shikongo testified that he suggested to the accused that he should call his cellphone so that they can see where it will ring, but the accused pointed the pistol at him and said: I need my cellphone and then shot “through the ceiling and went outside”.

[55] The evidence of the pointing of a firearm was not disputed in cross examination and therefore the court accepts the evidence of Matheus Shikongo that a firearm was pointed at him.

[56] Accordingly the accused is guilty on count 7.

[57] **Count 8 – negligent discharge of a firearm**

On his own version the accused testified that he fired a warning shot in the ceiling/roof of Kondjeni bottle store. I have already rejected the defence of private defence as false and accordingly there was no justification to fire the shot in the ceiling/roof of Kondjeni bar.

[58] The accused pleaded guilty to the alternative counts of attempted murder (that is negligent discharge or handling of firearm). Counsel for the State did not indicate whether that was acceptable or not nor did the court question the accused to make sure that he indeed admitted all the elements of those crimes. I accordingly find him not guilty on those alternative counts.

Consequently the accused is convicted as follows:

[59] **Verdict:**

Accused you are found guilty of:

Count 1: - Murder

Count 2: - Murder

Count 3: - Murder

Count 4: - Attempted murder

Count 5: - Attempted murder

Count 6: - Attempted murder

Count 7: - Pointing of a firearm

Count 8: - Discharge of firearm in public or on road

Not guilty on 3 counts of negligent discharge or handling of firearm.

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**NDAUENDAPO, J**

**ON BEHALF OF STATE:**

Instructed by:

Ms. Jacobs

The Prosecutor General

**ON BEHALF OF RESPONDENT:**

Instructed by:

Mr. Tjituri

Directorate of Legal Aid