



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT**

Case no: CA 112/2016

In the matter between:

**JACKSON PANDULENI ABSALOM**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Absalom v S* (CA 112/2016) [2017] NAHCMD 251 (04 September 2017)

**Coram:** NDAUENDAPO J *et* LIEBENBERG J

**Heard:** 07 August 2017

**Delivered:** 04 September 2017

**Flynote:** Criminal procedure – Appeal – Appeal against conviction – Self-defence – State witnesses' evidence contradicting – From experience – Witnesses rarely give identical evidence – Contradictions *per se* do not render evidence unreliable – Nature of contradictions, their number, importance and

bearing on other part of witness' evidence taken into account – Differences not material when considered against totality of evidence.

Criminal procedure – State's failure to call witness – Duty of court to call crucial witness – Evidence of witness favourable to defence – No application to court made to call witness – Availability of witness not determined – Court not faced with evidence of single witness – No duty on court to call said witness.

Criminal procedure – State's failure to put evidence of witnesses to defence witnesses – Evidence of State witnesses already before court – Defence had opportunity to test credibility of witnesses – No obligation on State to put testimony of witnesses to accused during defence case.

Criminal law – Appeal by accused – No counter appeal by State – Application to appeal court to declare appellant unfit to possess an arm – No such application made during trial – Accused not afforded opportunity to oppose – Declaration would be unfair.

Evidence – Evaluation on appeal – Findings of credibility – Falls primarily within the domain of the trial court – No irregularities or misdirection present – Court of appeal normally not rejecting findings by trial court – Court of appeal to proceed on factual basis as found by trial court.

**Summary:** This is an appeal emanating from the Regional Court against conviction on a count of murder, acting with direct intent. The trial court acknowledged contradictions in evidence of witnesses testifying for the State, however, witnesses rarely give identical evidence with reference to the same incident or events. Not every error made by a witness will affect credibility of the witness. During evaluation of evidence the nature of the contradictions, their number and importance and its bearing on other parts of witness' evidence must be taken into account. The court found the differences, considered against the totality of evidence adduced, not material and accepted the version of the State. Based on the State's failure to call one of its witnesses it was asserted that the court had the duty to call the witness who was a crucial witness. The

issue was not raised during the trial and no reason was advanced why the defence could not call the witness; neither was application made at the trial for the court to call the witness. The availability of the witness was unknown and the court was not faced with a situation where it had to rely on the evidence of a single witness. In these circumstances there was no duty on the trial court to call the witness. Regarding the State's failure during cross-examination of the appellant to dispute the appellant's version on the manner in which the events unfolded by not putting the version of their three witnesses to the appellant and his witnesses, this was not relevant to the court's evaluation of the evidence. By the time the appellant testified all State witnesses had already testified and the appellant had the opportunity to test their credibility under cross-examination. On appeal the State implored the court to declare the accused unfit to possess an arm in terms of s 10 (6) of the Arms and Ammunition Act 7 of 1996 as the trial court failed to do so. However, no such application was made during the trial and the accused was therefore never afforded the opportunity to oppose the application. A declaration without hearing the accused would not be fair to him, accordingly the court declined to give such order.

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### **ORDER**

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The appeal against conviction is dismissed

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### **JUDGMENT**

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LIEBENBERG J (NDAUENDAPO J concurring):

[1] This appeal emanates from the appellant's conviction in the Regional Court, Windhoek, on a charge of murder for which he was sentenced to 17 years' imprisonment. The appeal lies against conviction only.

[2] The appellant in his Notice of Appeal tabulated fourteen (14) grounds of appeal which, for purposes of the appeal, can be grouped and truncated into seven (7) grounds of appeal as proposed by Mr *Hinda*, counsel for the appellant. I intend dealing with the grouped grounds as proposed after a brief summary of the facts as testified on by State and defence witnesses.

### The State case

[3] The case for the State is based on the evidence of three witnesses, of whom two claimed to have been eyewitnesses when the appellant shot and killed the deceased. They are David Enghaw (Enghaw) and Eliaser Amunwe (Amunwe) while the third witness is Anna Moya (Moya). They are all members of an organisation going by the name Women and Men Network whose main purpose is to move around at public gatherings and assist in crime prevention. Reference had been made about its members being issued with 'uniforms', however, it seems to be white T-shirts bearing the organisation's logo on it. According to entries made by the pathologist during the autopsy the deceased was wearing a white printed T-shirt, likely to have been that of the Network.<sup>1</sup> On the night in question they were doing duty at a place called *Stop and Shop* or *People's Inn*<sup>2</sup> where there was a large gathering of people who attended a party and where liquor was sold. It is common cause that the accused and some of his friend arrived and partook in the festivity and that the shooting of the deceased took place at the entrance of the premises when they were about to leave at around 23h00. On the State's version the deceased was shot point blanc as they were exiting, while the appellant's evidence is that he acted in self-defence.

[4] State witnesses Enghaw and Amunwe's narrative of the events amounts to the following: They saw the appellant and his two friends running from where they were seated towards the entrance and whilst on the move appellant fired one shot into the air. Upon reaching the spot where the deceased was busy body searching members of the public who wanted to enter, the appellant,

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<sup>1</sup> Record p 356.

<sup>2</sup> The names were used interchangeably.

according to Enghaw, turned the deceased around facing him where after he shot him. Amunwe's evidence differs on this point in that, according to him, appellant shot the deceased whilst running past him without first turning him around. Both witnesses claim to have been in close proximity behind the appellant when he shot the deceased. They further dispute the appellant's assertion that he, immediately prior thereto, was involved in an altercation with a person who allegedly had stolen his cell phone, or the appellant having fired a warning shot when he came under attack. The appellant was apprehended and handed over to the police shortly thereafter. Before the arrival of the police the appellant was asked why he had shot the deceased to which he replied that he did not shoot anyone. He later said that the person had robbed him of N\$5 000 and a cell phone but when taken to where the deceased was, nothing could be found on him. It was further disputed that the appellant was assaulted by members of Women and Men Network whilst awaiting the arrival of the police. It is not disputed that a medical examination conducted by a doctor on the appellant three days later revealed that he had injuries to the face, ear and left forearm.

[5] The testimony of the witness Moya is less coherent as she described an incident during which she, after midnight, found the appellant standing with the deceased at the entrance wanting to enter but refusing to be body searched. When he claimed to be a police officer which fact, according to him, could be verified by a certain Sergeant Kakwambi, she set off looking for him and whilst on their way back, a shot rang out. She was unable to say who had fired the shot and had found the appellant already apprehended and held down on the ground by her fellow members. According to this witness she saw 'a lot of blood' on his chest and he was having a firearm which was taken from him. When asked why he had shot the deceased, he at first denied being the person who shot the deceased and only later admitted it.

[6] A post-mortem examination report compiled by Dr Jaravaza, a forensic pathologist, states the cause of death as a single penetrating gunshot wound to the chest, suggestive of a shot fired at intermediate range. Whereas the report was handed in without the doctor being called to give evidence on the

findings noted in the report, the meaning of the words 'intermediate range' have not been explained. It should accordingly be accorded its ordinary meaning.

### The defence case

[7] Appellant, his cousin Joseph Itana and two childhood friends by the names of Joseph Elago and Albert Theofilus testified for the defence regarding the incident that led to their arrest that night.

[8] On their arrival at the People's Inn the appellant and his friends found themselves a place to sit not far from the entrance. Those in the appellant's company imbibed strong liquor whilst he only had beer shandy. At some stage the appellant's attention, seemingly for no reason, was consumed by the presence of a person wearing a black T-shirt standing at the bar. They later on decided to leave and whilst making their way to the entrance, the appellant was grabbed on the hand by a lady called Maya who apparently did not want him to leave. He felt uncomfortable and when checking his pockets, he realised that his cell phone was missing. When he again saw the man with the black T-shirt now moving away from where they stood, he followed him and grabbed him on his hand as he was about to hand something to another person. He dropped a cell phone in the process which turned out to be that of the appellant. When appellant took back his phone these persons tried to break bottles they were carrying which prompted Elago to go between them whilst appellant retreated. Elago was felled by one of the men with a bottle in the face upon which the appellant drew his firearm and fired one shot into the air. He explained that he became afraid that he would also come under attack when the two persons approached him; this prompted him to fire a warning shot. When people started running he moved in the direction where their vehicle was parked, leaving Elago behind.

[9] Whilst on his way he was grabbed on his shirt from behind and punched in the eye and face. He became weak and whilst held like this by the person stooped over him, he fired a second shot which killed the person. Though appellant had not seen any weapon on his attacker he said he was under threat

as he was continuously hit. He was subsequently apprehended by people of Women and Men Network who forcefully disarmed him. They handcuffed him where after he was seriously assaulted, injuring him on his head and body. He was unable to rule out the possibility that they injured his eye which, according to him, was bleeding profusely. He however disputes having told anyone that the deceased had robbed him of cash in the amount of N\$5 000; also that he fired a shot at the deceased when running past him. Whereas his attacker at the time was unknown to him, he could not rule out the possibility that he was a member of the Women and Men Network.

[10] Elago said they decided to leave the party at around midnight and from where he stood close to the bar looking in the direction of the gate, he saw the appellant surrounded by a group of people. There were ongoing arguments while some were armed with bottles. He went over to the appellant and as he got close he was felled with a bottle by an unknown person. He realised that he was injured, stood up and immediately ran to their vehicle. On his way he heard a single gunshot.

[11] Upon reaching the vehicle he took out his BB gun and told the people from Women and Men Network who had followed him that it was an airgun. This he did because he was instantly accused of having shot the deceased. He was then handcuffed and assaulted. On Elago's version there was only one shot fired and that must have been the fatal shot. His evidence on this point differs markedly from that of the appellant who said that when Elago was struck down and his attackers still approaching, he already fired the first warning shot which then would have been in the presence of Elago.

[12] A disquieting feature of Elago's evidence is that he, from the outset, testified that he did not make his statement to the police out of his own free will and voluntarily, as he was still in pain and bleeding when forced to give a statement. Though he did not say who forced him to make a (witness) statement, he offered this explanation regarding discrepancies pointed out between his testimony in court, and the statement. However, the discrepancies referred to does not appear to me material to the outcome of the trial.

[13] Joseph Mukwayu confirmed having been in the appellant and Elago's company at the party but seemed to have been unaware that it was decided they should leave as testified by the appellant. According to him he and his girlfriend had moved away some distance (5 m) from the others and talking to a friend when he heard a gunshot and saw people chasing after the appellant. He only heard the one shot and is unable to say where it came from. He saw people wanting to fight the appellant and when he went closer to enquire what it was all about, he was informed that the appellant had shot someone. Again this implies that he only heard the second shot and not the first. He was then handcuffed and accused of having started everything. While he was kept to one side, he saw the group taking the appellant and Elago outside to where the cars were parked and upon their return noticed that both were bleeding. It seems surprising that he had not noticed any blood on them before, as both claimed to have come under severe attack from the person wearing a black T-shirt and bled from the eye (appellant) and head (Elago).

[14] A further discrepancy in his evidence is that the appellant when surrounded by people was not near the entrance but close to the bar. Also that the breaking of bottles started only after the shot was fired and not before; and he had not seen Elago at that stage. The testimony of this witness does not sit well with that of the appellant and Elago, each having given different explanations of events they claim to have witnessed prior to the shooting incident.

[15] Albert Theofilus's testimony does not add anything to the defence case except for saying that he heard two shots fired about 15 seconds apart and people surrounding the appellant where after he ran for cover.

#### The grounds of appeal

[16] The first ground turns on the court *a quo*'s finding that the appellant, when shooting the deceased, acted with direct intent. It is argued that the court relied on the evidence of State witnesses Enghaw and Amunwe despite material contradictions in their testimonies, thereby rejecting the appellant's evidence which, it is argued, was corroborated and reasonably possibly true.

[17] Though it is common cause between the State and the appellant that he fired two shots and the second shot killing the deceased, the circumstances preceding the shooting incidents, described by both sides, are irreconcilable. Faced with two mutually opposing versions, the trial court reasoned that it is evident from the evidence of Elago and Mukwayu – each of them having heard only one gunshot – that it had to be the last shot they heard because they were immediately thereafter accused of being involved in murdering the deceased. The court below, on the strength of this evidence, reasoned that they must have heard the second shot, therefore appellant's version as to where he had fired the first (warning) shot cannot be correct, and accepted the State witnesses' version on this point.

[18] Though the appellant's version about the first warning shot i.e. during the attack on Elago, was corroborated by the latter, their evidence differ markedly and the only common feature is the fact that Elago was hit in the head with a bottle. Had the appellant, as he claims, fired the first warning shot shortly after Elago was knock down, this must have happened in his presence and is there no way that he could not have heard it. On Elago's version he was already some distance away where the cars were parked when he heard a gunshot which could only have been the shot that killed the deceased. There is accordingly no corroboration of the appellant's evidence regarding the circumstances under which he fired the first warning shot. Neither does Mukwayu's evidence corroborate the appellant's version on this point.

[19] Mukwayu also heard only one shot – the second one – which took place whilst the appellant was *next to the bar* and not near the entrance as was testified by the appellant and State witnesses. He saw the appellant surrounded by people who were arguing and busy breaking bottles and when he went

closer, they informed him that the appellant had shot someone. This evidence directly contradicts the appellant's evidence as regards the reason why he fired the first shot. On his account he was faced by only two men armed with bottles and after he had fired the shot, people started running in all directions. Appellant's evidence clearly dispels Mukwayu's evidence of people busy arguing and breaking bottles. Furthermore, he was about 5 m from the appellant when all this happened and when he went closer to hear what it was all about, he heard about someone that had been shot. In these circumstances, how could he have missed the first gunshot?

[20] This question the court *a quo* answered by finding that the first shot was not fired in circumstances described by the appellant, but relied on the evidence of State witnesses Enghaw and Amunwe when concluding it to have happened when appellant and his friends were running towards the entrance and him firing one shot into the air. It would also explain why all three were implicated from the beginning and not only the appellant.

[21] Another discrepancy in the evidence of the defence witnesses relates to the alleged injuries sustained by the appellant and Elago. Appellant said that after Elago was hit with a bottle his face was 'full of blood', while the appellant testified that he was bleeding freely from his eye where he was hit with a clenched fist. Had that been true, it seems surprising that Mukwayu could have missed it because he only saw them being injured after people from Women and Men Network returned with them from the car park, not when they were apprehended. Though evidence was presented about injuries the appellant and Elago were having, the trial court found that the possibility cannot be excluded that it was inflicted when they were assaulted by the persons who apprehended them. The assault perpetrated on them afterwards was confirmed and casts further doubt on his and Elago's assertion of having come under attack prior thereto.

[22] I am for the aforesaid reasons satisfied that the conclusion reached by the trial court is supported by the facts. Furthermore, given the irreconcilable differences in the evidence of defence witnesses, the court, in my view, was

entitled to reject the appellant's evidence and accept that of the two State witnesses as to the circumstances under which the appellant used his firearm that night.

[23] Further grounds were raised in which appellant contends that the court *a quo* erroneously rejected the appellant's version of him having acted in self-defence when firing the shot that killed the deceased, and that the onus was on the State to prove the appellant's version false beyond reasonable doubt.

[24] Appellant asserts that the trial court erred by finding that the injuries the appellant sustained during the alleged attack on him by the deceased could possibly have been inflicted when members of the Women and Men Network assaulted him. It is further contended that the appellant never admitted the assault on him by people of Women and Men Network.

[25] The assertion is wrong as the appellant testified in chief that he was handcuffed where after he was assaulted and severely beaten on the head and body with a sjambok, as a result of which the handcuffs got broken. He did not rule out the possibility that he could have sustained the injury to his eye.<sup>3</sup> Defence witnesses Elago<sup>4</sup> and Mukwayu<sup>5</sup> also confirmed the assault perpetrated on the appellant. The evidence of the appellant and his witnesses is clear that they were severely assaulted and as earlier observed, according to Mukwayu he only saw appellant and Elago bleeding *after* they were brought back to the scene. It seems highly unlikely that he would have missed seeing them bleeding from the head and face earlier (when they were together and before appellant and Mukwayu were taken to the parking area) if their injuries were as serious as made out by the appellant.

[26] The court below had no reason in law to disregard evidence presented by the defence witnesses and to rely thereon when finding that the possibility could not be excluded that appellant and Elago's injuries were inflicted during the

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<sup>3</sup> Record p 202 – 203.

<sup>4</sup> Record p 258 line 19.

<sup>5</sup> Record p 266 lines 3 – 10.

subsequent assault by members of Women and Men Network. Counsel's contention that the court erred on the facts is therefore without merit.

[27] Appellant further attacked the court *a quo*'s finding that he had not acted in self-defence when grabbed and punched by the deceased; moreover, in view of the serious attack on his friend Elago.

[28] Whereas the court rejected appellant's evidence about the circumstances under which he fired the first shot – whereby the alleged attack on Elago is equally rejected – the appellant's reasoning that it was a contributory factor during the attack on him, cannot be accorded any weight. The court had further found that Elago and Mukwayu were running together with the appellant towards the entrance when he fired one shot into the air as testified by State witnesses Enghaw and Amunwe. The court found them to be dishonest witnesses and concluded that they were present when the deceased was shot, explaining why they were implicated in the murder.

[29] The trial court was criticised for having attached insufficient weight to the appellant's evidence that he acted in self-defence which, it was said, is reasonably possibly true. In assessing the appellant's evidence regard was had to his version being uncorroborated, opposed to the evidence of the State witnesses who saw him shooting directly at the deceased. This evidence was relied on when finding that the appellant had the intention to shoot the deceased in the chest. Regard was further had to the explanations advanced by the appellant shortly after the incident as to why he had shot the deceased. His explanation to the members of Women and Men Network changed from denying shooting to saying that he was robbed by the deceased. However, when taken to where the deceased was lying and his pockets searched, nothing was found on him.

[30] The court *a quo* was alive to the contradictions in the evidence of Enghaw and Amunwe pertaining to circumstances surrounding the actual shooting of the deceased. Where Enghaw saw the appellant first grab the deceased and turn him around before shooting him, Amunwe said he was shot when the

appellant was running past him. It was submitted on appellant's behalf that this is a material contradiction and the court erred by relying on the evidence of the two witnesses.

[31] Guided by the *dicta* stated in *S v Bruinders en 'n Ander*<sup>6</sup> and *S v Auala (1)*<sup>7</sup> the court reasoned that experience has shown that two or more witnesses rarely give identical evidence with reference to the same incident or events, and that regard must be had to the evidence as a whole in deciding whether or not the contradictions are sufficiently material to warrant the rejection of the State's version; also, that contradictions *per se* do not render evidence unreliable. The court in the end was satisfied that the contradictions referred to by the defence did not affect the credibility of the two witnesses and concluded that, on the totality of evidence adduced, the State had proved beyond reasonable doubt that the deceased was shot in circumstances as testified by State witnesses. Appellant's version and defence accordingly being rejected as false.

[32] I am unable to fault the trial court in its approach when evaluating the conflicting versions before court. In the *Auala (1)* case the court cited with approval a passage from *S v Oosthuizen*<sup>8</sup> where at 576G-H is stated:

'...it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence. ... In my view, no fault can be found with his conclusion that what inconsistencies and differences there were, were "of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction". One could add that, if anything, the contradictions point away from the conspiracy relied on.'

(Emphasis provided)

[33] Though there is merit in counsel's submission that the contradictions in the evidence of the two witnesses is material, these contradictions should not

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<sup>6</sup> 1998 (2) SACR 432 (SEC).

<sup>7</sup> 2008 (1) NR 223 (HC).

<sup>8</sup> 1982 (3) SA 571 (T).

be viewed in isolation and must be considered with the evidence as a whole. Both witnesses had been in close proximity of the appellant when he and his two friends ran towards the entrance. Although their view of the appellant was partly obstructed by Elago and Mukwayo running between them and the appellant, they were adamant that there was no altercation or fighting between the appellant and the deceased prior to the shooting. Sight should not be lost that this was a moving scene and although their attention was drawn to the appellant when he fired the first shot, it seems from the circumstances they found themselves in reasonably possible that one of them made a *bona fide* mistake as to whether the appellant first turned the deceased around before shooting. Judging from the evidence as a whole, we are satisfied that the conclusion reached by the trial court and its rejection of the appellant's defence is justified in the circumstances of the case; also that the court's evaluation of the evidence before court is sound in law. There is accordingly no merit in this ground of appeal.

[34] I will briefly deal with the contention that the State actually regarded the appellant's actions as negligent and that appellant did not intend killing the deceased. The contention emanates from cross-examination by the State in which it was put to him that he was negligent. The argument however loses sight of the fact that it was put to the appellant that 'if we go according to your version you were negligent ...' and clearly does not support the view that the State regarded his actions as negligent.<sup>9</sup> That, in my view, settles this point raised by the appellant.

[35] The next ground turns on the State's failure to call a State witness to testify about what transpired between the deceased and appellant before he was shot. It was submitted that the trial court erred in failing to consider the non-calling of this witness who was 'a crucial witness'. This issue was not raised during the trial after it became clear that the State would not be calling the said witness; neither was application made to the court to have the said witness called if it was not open to the defence to do so, for whatever reason. To now

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<sup>9</sup> Record p 232 line 20.

cry foul at this stage has the making of an afterthought and without showing any prejudice suffered by the appellant. In any event, from a reading of cases cited in support of the contention, it is clear that the court will only be entitled to draw an adverse inference from the State's failure to call a witness if that witness is available, and where it would reflect adversely on the credibility and reliability of the single witness.

[36] In the present matter there is nothing on record showing that the said witness was available or why it was not open to the defence to call him. But most importantly, the court was not faced with the evidence of a single witness as the State relied on the evidence of two eyewitnesses. If this witness' evidence (as per his witness statement) were to assist the appellant in his defence, it is surprising that he was never called by the defence to corroborate the appellant's version. I am therefore unable to find any misdirection committed by the trial court in this regard and the complaint is without substance.

[37] Appellant further took issue with the fact that it would appear that the trial court completely disregarded the evidence of the witness Moya, whose evidence did not support the testimonies of witnesses the court relied on to convict.

[38] Besides summarising the witness Moya's evidence, the court made no further mention thereof and clearly did not rely thereon when convicting. Though true that it did not support the evidence of witnesses Enghaw and Amunwe, it equally did not support the defence case. In fact, the testimony of this witness relates to the stage when the appellant arrived at the party and not hours later when they departed. She had left the party in order to call a police officer when a shot rang out and was clearly in no position to either corroborate or dispute evidence about what transpired during any of the two shooting incidents. The testimony of this witness, in my view, was unreliable. More so, where she disputed the content of her witness statement and said that facts contained therein about her being an eyewitness, were inserted by the person who recorded the statement. Notwithstanding, she earlier confirmed the

statement to have been read back to her and that it reflected what she had told the person who reduced it to writing.

[39] For the aforesaid reasons, the trial court's failure to specifically discuss and decide what weight should be accorded to the evidence of the witness Moya (if any), would not have constituted a misdirection; neither could it have been prejudicial to the appellant's case. Not only was her evidence disconnected to the relevant facts on which the court had to decide the appellant's defence, it was also unreliable and therefore had to be disregarded.

[40] The next ground concerns the State's failure during cross-examination of the appellant to 'dispute the appellant's version on the manner in which the events unfolded by not putting the version of their three witnesses to the appellant and his witnesses'. It is submitted that this was an aspect the court could not have ignored in its evaluation of the evidence.

[41] As authority in support of counsel's contention the cases of *Small v Smith*<sup>10</sup> and *The President of the Republic of South Africa v The President of the South African Rugby Football Union*<sup>11</sup> are cited. The gist of the passages cited is 'to put to each opposing witness so much of his own case or defence as concerns that witness and if need be inform him, if he has not been given notice thereof, that other witnesses will contradict him' (*Smith*). By the time the appellant testified all State witnesses had already testified and the appellant having had the opportunity to test their credibility under cross-examination. In view thereof, I am unable to comprehend why the prosecution had any duty to put the version of the State's three witnesses to appellant and two defence witnesses if that evidence was already on record. I therefore find no logic in counsel's reasoning on this point. As for the evidence given by defence witnesses left unchallenged by the State, this was a fact the court in its assessment of the evidence had to take into account – evidence that in the end was found unreliable

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<sup>10</sup> 1954 (3) SA 433 (SWA) at 438E-F.

<sup>11</sup> 2000 (1) SA 1 (CC) at 36 – 37.

[42] The two remaining grounds relate to alleged discrepancies in the evidence of State witnesses as pointed out in appellant's Heads of Argument, and failure by the court *a quo* to have called essential witnesses. Regarding the latter, appellant did not say which witnesses the court should have called and in what way would the evidence of those witness(es) have been essential for the just decision of the case. It is not for the court of appeal to second-guess what the appellant wants the court to rule on; grounds of appeal are required to be clear and specific. If reference is (again) made to the witness Johannes Hailuna, then there is no need to traverse this point any further.

[43] Turning to the contradictions in the evidence of State witnesses, it is evident from the court *a quo*'s judgment that this was indeed taken into consideration when assessing the credibility of the respective witnesses testifying for the State and the defence. The court *a quo* had found the discrepancies referred to not material and as such had no impact on the credibility of the witnesses. In the end and, after due consideration of all the facts, the court found the evidence of witnesses Enghaw and Amunwe, despite the discrepancies in their testimonies, credible and reliable; whilst by the same token, rejecting the appellant's version of having acted in self-defence, to be false beyond reasonable doubt. The conclusions reached herein are based on proven facts and the trial court, in our view, did not misdirect itself in the assessment of evidence.

[44] Whereas the function to either accept or reject evidence falls primarily within the domain of the trial court, and where no irregularities or misdirections have been proved, the court of appeal will normally not reject findings of credibility by the trial court and will proceed on the factual basis as found by the trial court.<sup>12</sup> In the present case no such irregularity or misdirection is present, there is no basis for this court to upset the credibility findings of the trial court as asserted.

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<sup>12</sup> *S v Slinger* 1994 NR 9 (HC).

[45] Lastly, it was submitted by the respondent that, whereas the appellant was convicted of murder using a firearm and he, by virtue of s 10 (6) of the Arms and Ammunition Act 7 of 1996, is deemed to be declared unfit to possess an arm. The trial court however omitted to apply the said section and respondent implores this court to do so on appeal.

[46] The respondent has not lodged a counter appeal on grounds of the trial court having misdirected itself when failing to declare the appellant unfit to possess an arm, neither has it given notice that it would bring such application. In the absence thereof and where no enquiry into whether or not the appellant is fit to possess an arm was lodged in the trial court; and appellant not having been heard on the issue, it would not be fair to the appellant to decide the matter on appeal without affording him the opportunity to oppose. I accordingly decline to do so.

#### Conclusion

[47] In the result, the appeal against conviction is dismissed.

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JC LIEBENBERG  
JUDGE

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GN NDAUENDAPO  
JUDGE

#### APPEARANCES

APPELLANT

Adv G Hinda

Instructed by G Mugaviri Attorneys,  
Oshakati.

RESPONDENT

H Muhongo  
Of the Office of the Prosecutor-General,  
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