



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: CC 03/2014

In the matter between:

THE STATE

and

JUSTIN MUNSU SIMATAA

ACCUSED

Neutral citation: *S v Simataa* (CC 03 - 2014) [2017] NAHCMD 104 (30 March 2017)

CORAM: NDAUENDAPO J

Heard: 8 December 2016

Delivered: 30 March 2017

Flynote: Criminal Law – Charged with - Murder - Attempted Murder – Alternatively Charged with – Negligent Discharge and Handling of a Firearm – Malicious Damage to Property – Discharge of a Firearm in a Public Place or on a Public Road - Private Defence Raised – Requirements of Private Defence reiterated and Not Satisfied – Accused - Guilty.

Summary: The accused was charged with murder, attempted murder, alternatively negligent discharge and handling of a firearm, malicious damage to property and discharge of a firearm in a public place or on a public road. The accused pleaded not guilty and during the trial raised private defence. On 26 October 2012 at club Image in Khomasdal, the deceased and his friends found the accused seated at the bar counter enjoying his beers. The deceased asked for space from the accused so that he could buy drinks. A quarrel started between the deceased and the accused, whereupon the deceased offered a N\$10 note to the accused to apologize for stepping on his toes. According to the accused, he felt insulted as he had his own money. According to some witnesses, the deceased went outside and was followed by the accused who continued asking him why he offered him N\$10. A fight broke out between the deceased and the accused. According to two witnesses, the deceased and his friends were the aggressors, other witnesses denied that and testified that the accused was the aggressor. The accused was kicked to the ground and had to be assisted by one Golden. The deceased and his friends then got into the motor vehicle and were about to drive away, when the accused approached the vehicle and started shooting at the driver's door and fatally wounding the deceased, who was the driver, and seriously injuring Likando, who was seated in front at the passenger seat. Accused testified that he was fearing for his life when he shot at the vehicle in which the deceased and his friends were passenger. The deceased was shot eight times and Likando five times. Accused testified that he acted in private defence as he feared for his life.

Held, that by the time the accused shot at the motor vehicle, the attack on him had ceased. There was also no imminent danger or attack on him and he could therefore not acted in private defence.

Held, further that even if his life was in danger, which the court rejects, he exceeded the bounds of private defence by shooting the deceased eight times and Mr Likando five times.

Held, further that when he shot at the motor vehicle, he had the intention also to cause damage to the vehicle and is therefore guilty of malicious damage to property.

Held, further that when he shot at the vehicle, he was negligent in the discharge of the firearm and therefore guilty of discharge of a firearm in public.

ORDER

1. Count 1: The accused is found guilty of murder with *dolus directus*.
2. Count 2: The accused is found guilty of attempted murder.
3. Count 3: The accused is found guilty of malicious damage to property.
4. Count 4: The accused is found guilty of discharging a firearm in a public place or on a public road.

JUDGMENT

NDAUENDAPO, J

[1] The accused was arraigned in this Court and charged with one count of murder, attempted murder, alternatively contravening s 38 (1) read with ss 1, 38 (2) and 39 of the Arms and Ammunition Act 7 of 1996 (hereafter the Act)– negligent discharge or handling of an arm; malicious damage to property, contravening s 38 (1) (2) read with ss 1, 38 (2) and s 39 of the Act– discharge of an arm in any public place or any public road.

[2] 2.1 On count 1, the State alleges that upon or about 26 October 2012 and at or near Khomasdal, in the district of Windhoek, the accused did unlawfully and intentionally kill Firmino Fabrice Mael, an adult male person.

2.2 On Count 2, the State alleges that 'upon or about 26 October 2012 and at or near Khomasdal, in the district of Windhoek, the accused did unlawfully and intentionally assault

Millikan Likando by firing shots at him with a firearm, namely a CZ pistol with serial number 138772 with the intent to kill him’.

2.3 The alternative charge to count 2: Contravening s 38 (1) of the Arms and ammunition Act¹. The State alleges that ‘upon or about 26 October 2012 and at or near Khomasdal, in the district of Windhoek, the accused did wrongfully and unlawfully handle or discharge a firearm, namely a CZ pistol with serial number 138772 and did thereby negligently injure and endanger the life of Millikan Likando’.

2.4 Count 3, the State alleges that ‘upon or about 26 October 2012 and at or near Khomasdal, in the district of Windhoek, the accused did wrongfully, unlawfully and maliciously damage a motor vehicle, namely a Volkswagen Golf with registration number N4666SH, by firing shots with a firearm through its windows and doors with the intent to injure Firmino Fabrice Mael and or Norah Helen Bennett in their property’.

2.5 Count 4, contravening section 38 (1) (o) of the Arms and Ammunition Act of 1996.

The State alleges that ‘upon or about 26 October 2012 and at or near Khomasdal, in the district of Windhoek, the accused did unlawfully and intentionally discharge a firearm, namely a CZ pistol with serial number 138772 in or on any public place or on any public road, or any other place or road to which the public or a part thereof has access namely the pedestrian walk way next to Richardine Klopper Street’.

[3] The accused pleaded not guilty to all the charges preferred against him. His legal practitioner, Mr Siyomunji, explained that he will offer no explanation and will remain silent. Ms Moyo appeared for the State.

The summary of the State case is as follows:

[4] Millikan Ricky Likando testified that on 26 October 2012 in the afternoon, his friends, the deceased, Deon and Musialike came and picked him up from his residence.

¹ Arms & Ammunition Act 7 of 1996.

Later they picked Karen Sankandi and they went bar hopping in Katutura and at around 2am they decided to look for a place where they could buy food. They went to Engen service station in Independence Avenue in town and bought food. From there they proceeded to club Image in Khomasdal to go and buy beers. At club Image, they bought beers and on their way out, an argument between the accused and the deceased started because the deceased apparently stepped on the shoes of the accused. The deceased offered the accused N\$10 as an apology for stepping on his shoes and the accused accepted the N\$10. They then went outside the club and got into the motor vehicle and whilst inside the vehicle, the accused came and said that the deceased cannot give him N\$10 as he was also having his own money. The deceased who was inside got out of the vehicle and a physical fight ensued between the deceased and the accused. They also got out of the motor vehicle trying to stop the fight. The accused fell down and he pulled the deceased away from the accused and the fight was stopped. They went back to the motor vehicle and the deceased was about to switch on the motor vehicle, when the accused came towards the motor vehicle and stood at the driver's window, which was closed, and started shooting at the deceased. He heard more than ten shots and he was seated at the passenger front seat and was hit by few bullets which were coming out of the body of the deceased. He was hit by five bullets and only three bullets entered his body. The one bullet penetrated his upper arm and one is still stuck in his lung. The deceased died on the spot and he jumped out of the motor vehicle, but could not move. His uncle came and took him to the hospital. He spent one month in hospital and regarding the bullet in his body, the doctor told him that it was safer not to remove it. He testified that, he still has pain on the side where the bullet is stuck. The other injuries are completely healed. He further testified that during the shooting, the window of the vehicle was damaged.

[5] Dr. Okpolor Charles testified that he examined Ricky Likando on 26 October 2012 at Katutura State hospital. He had multiple gunshot injuries to the chest, the right arm and the thigh. He also testified that a bullet was lodged in his right lung and advised him that they could not remove it as it may pose a risk to his life.

[6] Miliko Caren Sankandi testified that on 26 October 2012 at around 19h00, the deceased, Likando and Deon came to pick her up. They were driving around to figure out where they could buy alcohol. They later went to Engen service station in Independence Avenue where they bought food. From there, they proceeded to club Image in Khomasdal. They all went inside the club. The accused was seated at the counter close to the small opening at the counter. The deceased then asked the accused to shift a bit so that he could place his order. The accused did not say anything and the deceased took out a N\$10 note and offered it to the accused. The accused got angry and said: 'how can you give me money as if I don't have my own money – you found me here'. The deceased then apologized and said I thought if I give you N\$10 you will give me space. The accused did not accept the apology and was talking about the N\$10. The deceased then bought beers, the accused stood up and moved and continued talking about the N\$10. They went outside and the accused followed them and still continued complaining about the N\$10 and the other guys also apologized in Subia on behalf of the deceased. The accused then punched the deceased, who then fell down, he stood up and started fighting with the accused and people tried to stop the fight. The accused fell down and he then stood up and ran inside the bar. They then got into the vehicle. Shortly thereafter, the accused came back to the motor vehicle, stood at the driver's door and started shooting. The ignition of the motor vehicle was on as the shooting was taking place. She further testified that she only had two glasses of beer and the deceased was not drunk, he was just normal as also were Deon and Sinvula.

[7] Mr. Johannes Iyambo a sergeant at Nampol testified that he attended to the scene of crime on 26 October 2012. He testified about his observations at the scene as well as the pointing out made by some of the witnesses. He then compiled the photo plan which was read into the record and admitted into evidence as Exhibits Q, R and S. Mr Iyambo also recovered and bagged physical exhibits in the form of the accused's gun, 10 spent cartridges and four live rounds. Mr. Nambahu, Chief Forensic Scientist, who examined the gun found that it was in good working condition and that all the bullets and spent cartridges recovered at the scene had been discharged from the accused's gun.

[8] Sinvula Musialike testified that on 26 October 2012, the deceased and Likando came to fetch him at his residence at around 19h00. From there, they proceeded to various places, one of which was J & J bar. At J & J Likando bought draught beer, from there they drove to club Image in Khomasdal. He and the deceased went inside the club and he went to talk to Mukena who was seated at the bar. Whilst talking to Mukena, he heard the deceased quarrelling with the accused. He heard the accused saying: 'How can you step on me and how can you give me N\$10, I have my own money.' He also heard the deceased saying: 'Sorry get yourself a drink.' The accused responded: 'you can't give me N\$10 I have my own money.' After the quarrel he saw the deceased going outside and the accused also going outside. He remained inside and he then heard people screaming. He went outside and saw the accused and the deceased fighting, they were throwing punches at each other. They then separated them. Thereafter they all proceeded to and got into the motor vehicle. Shortly thereafter, the accused came to the driver's door and opened the door, the deceased came out and they started fighting again. He saw the accused on the ground and after that, the deceased came to the motor vehicle. He then saw the accused running to where the security guard was standing. He was seated at the left back seat, the accused returned and he then heard gunshots. The accused was one and half to two metres away from the motor vehicle when he was shooting, more than five projectiles were discharged. He got out of the motor vehicle and saw that the deceased was dead. He testified that the State of sobriety of Deon, Karin and the deceased was normal.

[9] Trevor Masule testified that he knows the accused through his elder brother, who is a fire fighter officer and a colleague of the accused. On 26 October 2012 he was at club Image. Whilst inside the club, he received a call and he went outside. Whilst outside he heard people screaming and when he checked he saw the accused fighting, he could recognize that it was the accused on the red vest he was wearing, the accused was on the ground being kicked by more than one person. He testified that he was around fifteen metres away from the scene. He later heard gunshots, non-stop, he then saw the accused walking away from the scene with a gun. He also testified that when one enters club Image, there is a security guard at the entrance who does a body search and he was subjected to a body search on that day.

[10] Genevieve Fisher testified that on 26 October 2012 she was at club Image with her boyfriend, Golden. The accused and Golden had a conversation inside the club, but because the music was loud, they went outside the club. They stood outside and she was two metres away from them. Whilst standing, three to four men came towards the accused and started kicking and punching him. They hit him with fists, kicked and tripped him until he fell to the ground. They then walked away to their vehicle. Golden then went to assist and picked up the accused. Genevieve further testified that she saw the accused walking towards the security guard and she saw that the security guard gave accused something, which turned out to be a gun, she testified, because when the accused returned from the security guard, he had a gun in his hand. He loaded the magazine in the gun and pointed it at the driver and started shooting. She testified that she was shocked and confused and she saw the accused walking away. The shooting lasted between 10 and 15 minutes.

[11] Lee Golden testified that, on 26 October 2012, he and his girlfriend Genevieve Fisher, went to club Image. Before going to the club he had drunk two 750ml beers. Inside the club he met the accused, he did not know him before. He approached the accused and asked him to buy air time for him 'I was to transfer credit to him and he was to give me cash'. As the music was loud inside the club, they proceeded outside with the accused. Whilst standing outside three men came to the accused, quarreled with him and started punching the accused with fists, kicking, hitting and pulled him to the street, he was alone and they were three. After they beat him, the accused was lying on the ground in the street and he went to help him and brought him to the pavement. The accused then said: 'I am going to show them' these men then got into the motor vehicle and were about to drive. He further testified that, he then saw the accused going to the security guard who was seated at the entrance to the club. He then returned to the motor vehicle and as the driver was about to drive the accused started shooting. He was shooting at the driver's side. He further testified that the deceased was one of the men who assaulted the accused.

[12] Mr Tungulu testified that during 2012, he was the owner of club Image. He testified that, there were always security guards at the entrance who would search those entering the club. They would do a full body search. On 22 October 2012 he was at the club before the accused came there. There was a security guard and according to him the accused was searched.

[13] Dr Kabanje testified that he is a Chief Medical Officer at the mortuary, Windhoek. He holds a medical degree and has conducted over 2000 post mortems. He testified that he conducted an autopsy on the deceased, Firmino Fabrice Mael, on 29 October 2012. The chief post mortem findings were: multiple gunshot wounds to the chest and head of various types, perforatory gunshot injury to the head, multiple scale fracture, perforated brain and sub hemotnorax (accumulation of blood in the chest). The cause of death was '*multiple gunshot injuries to the head and chest*'. He testified that there were eight entry wounds to the head. All of the wounds were concentrated at the upper part of the body. He further testified that the bullets were randomly distributed and not focalized. The post mortem report and related documents were marked as Exhibits V; W and X.

[14] Mrs Bennet testified that the deceased was her son. She identified his body at the mortuary. She testified that she examined the vehicle in which he was shot. It had bullet holes two to the lower driver door and one at passenger seat and the window of the driver's door was damaged. She further testified that she submitted a claim to the insurance company and she was paid an amount of N\$11 402.03.

[15] Isak Smit testified that he is employed at Alexander Forbes as an assessor. As an assessor, his duties are to ascertain certain claims, evaluate the damage, determine the correctness of the vehicle and evaluate the vehicle. He testified that, he evaluated the claim submitted by Mrs Bennet in respect of her motor vehicle. He went to the police station where the motor vehicle was and he made the following observations:
The right front door and upholstery were damaged. The right rear door was damaged and the right front window was completely shattered. The total damage to the vehicle was N\$16 100.10 and an amount of N\$11 402.03 less the excess which was

N\$4 700.08 was paid to Mrs Bennet. The claim was submitted in the name of Mrs Bennet's son, the deceased.

[16] Rolin Koekemoer testified that she is employed by Alexander Forbes in the recovery department. She testified that a claim in the amount of N\$16 100 for malicious damage to Mrs Bennet's motor vehicle was submitted. She wrote various letters to the accused, he was listed on ITC and he then came to see her. He told her that he wanted his name to be removed from ITC, but she told him to make arrangements to pay off the money if he wanted his name to be removed, but he left without making such arrangements.

Defence case

[17] The accused testified that he is 31 years old and a constable for 7 years. He testified that on 26 October 2012 he left his home and went to Khomasdal at 18H00. He went to club Image Inn. A certain Denis bought him 750ml beer and left. The accused remained at the club and he continued drinking his beers. He was seated at the counter at 03:00 am when he saw the deceased with his two friends and a lady. One of the guys approached him at the counter to buy something and he stood up to give him space. The deceased took out a bunch of money and offered it to him. He refused to take the money and that angered the deceased. The deceased put the money in his back and said the accused did not know who he was and he 'will fuck him up and that he is stupid mother fucker.' The accused asked the deceased why he wanted to beat him up and told the deceased that he was having his own money. The deceased kept on threatening to beat him up. Another friend, Ricky Likando, joined in and said let us just fuck him. These guys then went out of the club.

[18] The accused further testified that, he remained in the club where he met Lee Golden on the floor. The accused wanted airtime and offered to e-wallet money to Lee Golden, if he would give him airtime. Lee Golden then told the accused that they should go and talk outside. They went outside and continued with their discussion. They were leaning against the wall and continued talking. Whilst there, the deceased pulled him by

his hand and they pulled him towards the direction of the road. Initially it was Ricky Likando and then the deceased and the other guys joined in and continued beating him, they were kicking and beating him all over his body. They were also swearing at him. When he reached the tarred road he fell down to the ground and they continued beating him. He was lying on the tarred road, swearing at him that he is a mother fucker.

[19] I must pause here and say that the savage assault on the accused was not corroborated by the doctor who examined him. Dr. Kabala testified that he examined the accused on 26 October 2012. He had a wound to the head measuring 4cm long and 1cm deep and an ankle that was paining.

[20] The accused testified that they beat him until he passed out. He was unconscious until he was helped by Lee Golden to stand up. He could not see the group of guys who attacked him. Lee Golden helped him to wake up to the pavement and he saw the motor vehicle in which his attackers were driving, was parked there. He had a gun on his body secured in front, on the jeans and covered with the vest, he was bleeding in the head and mouth and he took out the gun and started shooting in the direction of the motor vehicle, he did not see anyone, it was semi-automatic, it just went off. The gun then locked itself and he walked away. When asked 'Why did you shoot in that direction of the car?' The accused responded that, 'I felt my life was threatened and I just shoot in that direction.' After the shooting he walked back home and from there he returned to the scene and he handed the firearm to the police. He was then taken to the hospital and from there he was arrested.

[21] He further denied that the fight started because the deceased stepped on his toes and offered him N\$10 as compensation as testified by Carin Sankandi. That is not what happened. He also denied that it was N\$10 and testified that, it was a bunch of money. He denied pointing a gun at them, he started shooting at them when he realized that the car was there. He was asked by the court the following:

Q: 'Deon testified that you followed the group to the motor vehicle and then the deceased came out of the car, he pushed you and you fell to the ground?'

A: 'I never followed them to the car, the only fight was when they kicked and punched me.'

Q: 'Gennevive testified that you ran towards a security guard and after that you started shooting?'

A: 'That is not true, I did not run towards the security.'

Q: Golden testified that after he helped you, you said 'I am going to show them.' Then you went to the security guard?

A: 'No I did not go to the security guard'

[22] Dr. Kabala testified that on 26 October 2012 he examined the accused and compiled the J88. He saw a wound on the right side of the head. It was four centimeters long and one centimeter deep. He also noted that the accused was complaining about pain to the right ankle. The ankle was not swollen nor strained.

Submissions by counsel

[23] Counsel for the State, in her written heads, argued that the 'alleged fight had terminated when the deceased and his colleagues headed to their car, entered and were about to drive off. There was no reason for the accused to have apprehended any fear to his life. The evidence before court is to the effect that accused walked fast/ran towards the security guard. It is further our contention that, there was no reason for him to have returned if indeed he was in fear for his life. He could have either left for his home or sought refuge with the security guard or proceeded back into the club where it appears Mr Sinchembe was closing the bar according to the witnesses. This shooting could easily have been avoided. However, the accused who had a bruised ego, sought to effect revenge on the deceased Mr. Fabrice Mael and Mr. Likando. This is clear when one considers the statement uttered by the accused to Mr. Lee Golden when he assisted the accused to the pavement that **"I'm going to show them now"** followed by a trip towards where the security guard was seated and then the shooting upon accused's return. Accused was hell burnt on placating his bruised ego. That is the reason why he emptied the whole magazine on the front part of the motor vehicle. The fact that the accused did not stop shooting until he had discharged all the bullets is

confirmed by Ms Caren Sankandi who testified that accused continued shooting even when nothing was coming out of the gun. Accused also corroborates this assertion in his testimony under cross-examination that he discharged the gun until it was empty before he left the scene. It is of paramount importance that accused was in control of the trigger mechanism of the gun and had the power to stop the shooting anytime. He however chose to discharge the whole magazine at the deceased and Mr. Likando who were not armed and sitting in the car. This was an over kill.

[24] Counsel for the State argued that in one vein accused claims that he shot continuously until all the bullets were finished as this is a semi-automatic rifle. The all-important question then is why he proceeded to shoot directly at the motor vehicle after the alleged warning shots without first evaluating the reaction of his alleged assailants to the warning shots? The State further submitted that the warning shots twist was a recent fabrication by the accused. Even Genevieve Fisher and Lee Golden emphatically asserted that after receiving something from the security guard the accused returned and shot directly at the car. They deny that the shooting was random which is further confirmed by the distribution of the bullets on the motor vehicle and the bodies of the deceased and Mr. Likando.

[25] Counsel for the State further submitted that 'How the accused could subjectively believe that the attack on him was still on, whilst all those who allegedly attacked him were in the motor vehicle about to drive away is difficult to fathom. By then the attack had ceased and there was no evidence that his life was in imminent danger at all. It is henceforth the State's contention that, in the light of the evidence and all the admissible evidential material, the accused intended to kill the deceased and Likando, and he did not act in self-defence and he knew it. Alternatively he grossly exceeded the bounds of self-defence and knew it. In the further alternative, he foresaw the reasonable possibility that he was exceeding the bounds of self-defence and proceeded nevertheless—regardless of whether or not he was exceeding the bounds of self-defence. (See *David Silunga v The State*²).

² *David Silunga v The State*, Case No. SA 1/2000

[26] Counsel for the State further argued that after the shooting, the accused claimed to have proceeded to his place where he wanted to 'apparently' change his bloody clothes, but decided otherwise. It is surprising that he instead reloaded his gun with four live rounds which were later recovered with his gun by the police when he returned to the scene. If the accused was in fear for his life, this is not supported by his return to the scene instead of going to report the incident at the nearest police station. If at the time he left the scene he was not aware of the damage he had caused to the occupants of the car and thought they were around somewhere, it boggles the mind why he would expose himself to the alleged danger that he was afraid of in the first place. It makes no sense at all that he would come back to the danger that he ran away from. Furthermore the alleged bloodied clothes were never handed to the police and neither were they produced in court as an Exhibit.

[27] Counsel for the accused relied on the case of *S v Jonkers 2006 (2) NR 432*, where it was held that in self defence a person being attacked does not have to retreat if such action will threaten their life. The defence counsel submitted that, in the present case, the accused was attacked and he had to use whatever means necessary to safeguard his life against an unlawful attack by the deceased and his friends. However, it is clear from the *viva voce* evidence of the witnesses and by the accused's own admission, his assailants were in the motor vehicle when he went towards them and started shooting. They were about to drive away and therefore his life was not in danger or threatened. The attack or assault on him, if any, had ceased by then. 'Jonathan Burchell, the learned author of *Principles of Criminal Law 2 ed*, States the following at 139-140:

"Avoiding the attack

Where the threat is one of personal injury, defence is not necessary if the attack can be avoided by retreat or escape. Indeed some legal systems, concerned about the preservation of human life, impose on the victim of an attack a duty to retreat in so far as this is possible and would not expose the defender to even greater danger. Clearly, if to flee would be to worsen the accused's chances of avoiding the injury, he would be justified in standing his ground and defending himself".³ In *casu*, the shooting could have been easily avoided had the accused

³ *S v Jonkers 2006 (2) NR 432 at 443 E- F.*

'retreated' as that could have exposed the accused to no threat or danger. The above submission by counsel is meritless.

[28] Counsel for the accused further argued that when evaluating the State's case, it is clear that there is no corroboration on how and what transpired, the narration of how events unfolded is not corroborated by other witnesses on what exactly led to the quarrel and fight before the shooting incident. All the key State witnesses contradicted each other on what was the cause of the quarrel and all have different versions on how events unfolded and yet they were all together. Furthermore, that the only conclusion that the Honourable Court should be able to draw is that the key State witnesses were drunk and that they deliberately tried to cover up the fact that they savagely assaulted the accused person and caused grievous bodily harm to his person. The accused person was in pain and shock and when he fired his gun he subjectively believed that the attack on him was still on and thus acted in private defence.

Evaluation of the evidence

[29] At the commencement of the trial, the accused did not disclose the basis of his defence and it was only during the trial that it emerged that he acted in private defence when he shot at the deceased and Mr Likando, for whom he is facing a charge of attempted murder. According to the post mortem report and the testimony of Dr. Kabanje, the deceased was shot eight times and most of the shots were of the upper part of the body. Mr Likando was shot five times.

[30] Snyman⁴ defines private defence as '*Definition: A person acts in private defence, and her act in 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 the attack.*'

⁴ CR Snyman *Criminal Law* 6th ed p 102.

[31] In *Naftali*⁵, the court set out the requirements of private defence as follows: 'Self defence is more correctly referred to as private defence. The requirements 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. When the defence of self-defence is raised or apparent, the enquiry is actually twofold. The first leg of the enquiry is whether the conditions and/or requirements of self-defence have been met, which includes the question whether the bounds of self-defence were exceeded. The test here is objective but the onus is on the State to prove beyond reasonable doubt that the conditions or requirements for self-defence did not exist or that the bounds of self-defence have been exceeded.

When the test of reasonableness and the conduct of the hypothetical reasonable man is applied, the court must put itself in the position of the accused at the time of the attack. If the State does not discharge this onus, then 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 proven 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 amounts to a mistake of fact or of law or both, is only relevant as one of the factors in the determination of whether or not the accused held the aforesaid genuine belief. If the State discharge the onus to prove beyond reasonable doubt that the accused held no such genuine belief, then the accused must not be convicted of the charge of murder. If the said onus is not discharged, then the accused cannot be convicted of murder requiring mens rea in the form of dolus, but can be convicted of a crime not requiring dolus but merely culpa, such as culpable homicide.

Culpable homicide will be a competent verdict where, for example, the accused, although he genuinely believed that he acted in self-defence and within the bounds of self-defence, was not, objectively speaking, acting reasonably in holding the aforesaid belief.'

[32] From the onset, I must point out that the *viva voce* evidence of the accused was littered with contradictions, inconsistencies if regard were to be given to the instructions

⁵ *S v Naftali* 1992 NR 299 (HC) at 303F - 304E.

put to the witnesses by his counsel. The accused testified that whilst inside the club, the deceased stepped on his toes and offered him a bunch of money. This was contrary to what was put to the witnesses, that it was a ten dollar note. He testified that it was Mr Likando who asked for space at the bar counter where he was seated, whereas his counsel put to the witnesses that it was the deceased. According to his counsel, he felt insulted by being given the ten dollar note as he had his own money. He also testified that, the deceased swore at him inside the club however, this too was not put to the witnesses by the defence counsel. The accused further testified that, whilst he was standing outside the club, the deceased and his friends savagely attacked him. They kicked and punched him until he fell to the ground. They continued kicking him whilst he was on the ground until he lost consciousness. That version of the assault and the kicking was corroborated by Mr. Golden and Ms Fisher. In fact those two witnesses testified that the deceased and his friends were the aggressors. The accused further testified that, after he regained consciousness and fearing for his life, he walked towards the motor vehicle which was earlier driven by the deceased and started shooting randomly.

[33] The accused further testified that the gun was concealed on him in such a way that it was not easily visible. This piece of evidence was contradicted by Ms Fisher, Mr. Golden and Sinkandi, who testified that the accused, after being assisted by Golden walked to where the security guard was seated and they saw something, which turned out to be a gun, being handed to him, and then proceeded to the motor vehicle and started shooting. There was testimony from the owner of the bar, Mr Tungulu, that whoever entered the club is thoroughly body searched and if found with a gun or knife, that will be taken away and handed back when the club closes. He also testified that he was at the club when the accused came there on that fateful night and that there was a security guard at the entrance. Accused denied that and testified that there was no security guard and he was not searched. Mr Masule also testified that he was at club Image that fateful evening and that he was also searched by the security guard before he entered the club. The gun which was used is a CZ pistol and to hide it in such a way that it could not be detected is improbable. The security guard was present that night and it is highly probable that the accused was searched before he entered the club and

that the gun was left with the security guard and after the assault on him, he went to the security guard and fetched the gun. That conclusion is corroborated by the evidence of Golden, Fisher and Sankandi, who testified that they saw the accused moving towards the security guard and getting something from him and then moving towards the motor vehicle. If his version that he had the gun on him is true, why was it necessary to walk towards the security guard and then returning to the vehicle and started shooting? He could have gone straight to the motor vehicle, if he had the gun with him, Ms Fisher and Golden testified that the illumination was clear outside and they would not have been mistaken about what they saw. The version of the accused that he had the gun on him is clearly false and I reject it. The gun was with the security guard and after the attack he went and fetched the gun from the security guard. The accused testified that he was fearing for his life and started shooting at the motor vehicle. He testified that, he did not see the occupants of the motor vehicle, but shot at the vehicle because it was earlier driven by the deceased and his friends.

[34] Counsel for the State correctly submitted that by the time the deceased and his friends got into the vehicle, there was no imminent threat to the life of the accused. By then, the attack had ceased. I agree with that submission, because the deceased and his friends were all in the vehicle about to drive, the engine was switched on according to Sankandi, Fisher and Golden, so there was no imminent attack on him, by then the threat or danger had ceased. I therefore, reject his version that he was fearing for his life as false. The conduct of the accused was an act of revenge for the assault on him and to 'placate his bruised ego' as counsel for the State put it. The accused testified that it was initially Ricky Likando and the deceased who attacked him, before the others joined in. It is no coincidence then that, when the accused shot at the vehicle he targeted the deceased and Mr. Likando. One of the requirements of private defence is also that the conduct must be reasonable and proportional to ward off the danger posed. In other words, the bounds of private defence must not be exceeded. In this case, the deceased was shot eight times on the upper part of the body, the most vulnerable part of the human body, and Mr. Likando was shot five times. Shooting the deceased with a weapon eight times was not, in my view, reasonable and proportional to the danger or threat, which I rejected as non-existent at the time of shooting, posed

by the deceased, if any. The same applies to the shooting of Mr Likando who was shot five times. The conduct of the accused in the circumstances exceeded the bounds of private defence.

[35] The witnesses for the State were subjected to lengthy and intense cross examinations. They were accused of having been very drunk and unable to remember what transpired. I agree to a certain extent that there were contradictions and inconsistencies in the *viva voce* evidence of the witnesses. For instance, Caren Sankandi testified that the deceased's friends apologized on behalf of the deceased to the accused person in subia, which they denied. She also testified that bottles were thrown when the accused and the deceased were fighting which was denied by the other witnesses in their *viva voce* evidence and was not reflected in the statements made to the police. However, if one considers the material evidence by the witnesses and also by the accused's own admission and conduct as to when the shooting started, they are *ad idem* that by then the attack on the accused had ceased and the deceased and his friends were in the vehicle about to drive away and there was no imminent danger to his life. What he did by shooting at the deceased and Mr Likando was to take revenge for the assault and to 'placate his bruised ego.

[36] For all those reasons, I come to the conclusion that the accused did not act in private defence when he shot the deceased and Mr Likando. He acted with *dolus directus* to murder the deceased. I am satisfied that the state proved beyond a reasonable doubt the guilt of the accused in respect of murder and attempted murder.

Malicious damage to property

[37] The deceased and his friends were seated in the motor vehicle about to drive off when the accused shot at the deceased and Mr. Likando and in the process caused damage to the vehicle. He knew very well that the bullets discharged were going to cause damage to the motor vehicle and he reconciled himself with such outcome. The quantum of the damage caused to the vehicle was testified about by witnesses, Mrs

Bennet, Mr. Isack Swart and Ms. Rolien Koekemoer. I am satisfied that the State proved beyond a reasonable doubt the guilt of the accused in respect of this count.

[38] As far as contravening section 38(1) (o) read with sections 1, 38 (2) and 31 of the Arms and Ammunition Act 17 of 1996 – discharge of firearm on any public place or on any public place or any public road, it is common cause that the shooting incident took place in front of club Image in a public or road. The accused intentionally discharged the firearm in a public place after his assailants got onto the motor vehicle and were about to speed off. Although he testified that, he discharged the firearm as he feared for his life, by then there was no danger to his life at all as the assailants were about to drive away. The alleged attack on the accused had ceased at the time when he started shooting and therefore he was not acting in private defence. I am satisfied that the State proved the guilt of the accused beyond a reasonable doubt in respect of this count as well.

For all those reasons, I make the following order:

1. Count 1: The accused is found guilty of murder with *dolus directus*.
2. Count 2: The accused is found guilty of attempted murder.
3. Count 3: The accused is found guilty of malicious damage to property.
4. Count 4: The accused is found guilty of discharging a firearm in a public place or on a public road.

G N NDAUENDAPO

Judge

APPEARANCES

FOR THE STATE

Ms. C. Moyo
Of the Office of the Prosecutor General

FOR ACCUSED

Mr. M. Siyomunji
Of Siyomunji Law Chambers