

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 15/2019

In the matter between:

**THE STATE**

and

**MARIO FRANCOIS MENSAH**

**ACCUSED**

**Neutral citation:** *S v Mensah* (CC 15/2018) [2020] NAHCMD 236  
(19 June 2020)

**Coram:** LIEBENBERG J

**Heard:** 15 June 2020

**Delivered:** 19 June 2020

**Flynote:** Criminal law – Murder – Attempted murder – Private Defence – Accused indicated that assailant(s) attacked and/or advanced towards him – Evaluation and credibility – Accused version self-contradicting – Contradiction between plea statement, s 220 statement and testimony of accused – State leading direct, credible and corroborative evidence showing that

circumstances of private defence did not exist, beyond a reasonable doubt – Private defence rejected – Murder with direct intent proved.

Criminal law – Theft – Charge relates to where accused picks up a firearm knowing it may belong to another person – *Res Nullius* not alleged – Duty to take reasonable steps to ascertain owner and safeguard the firearm rests on the finder of a thing – Accused failing to do so – Accused actions ensuing after taking possession of the firearm assumed and exercised the rights of an owner of the firearm with intent to permanently deprive owner thereof.

Criminal law – Pointing of a firearm (c/s 38(1) of Act 7 of 1996) – Accused raised Private Defence – Accused version self-contradicting – Accused conceding that assailants were not advancing towards him and posed no imminent threat at the time but that he merely felt pressurized – Accused version rejected as false.

**Summary:** The accused, charged with Murder, Assault with intent to do grievous bodily harm, Pointing of a firearm (c/s 38(1) of Act 7 of 1996), Possession of a firearm without a licence (c/s 2 of Act 7 of 1996), unlawful Possession of ammunition (c/s 33 of Act 7 of 1996), Theft, Attempted murder Alternatively, Negligent discharge or handling of a firearm (c/s 38(1) (l) of Act 7 of 1996) and Discharging a firearm in a public place (c/s 38(1)(o) of Act 7 of 1996), handed up a statement prepared in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (CPA) pleading guilty to the charges of Assault with intent to cause grievous bodily harm, Possession of a firearm without a licence, Unlawful possession of ammunition, Discharging a firearm in a public place and the alternative charge to Attempted murder, Negligent discharge of a fire-arm. He pleaded not guilty to the remainder of the charges and duly handed up a section 115 statement in terms of his pleas of not guilty. The state only accepted the pleas of guilty in respect of the charges of Assault with intent to do grievous bodily harm and Discharging of a firearm in a public place. In respect of the remaining counts, the court entered pleas of not guilty in respect of section 113 of the CPA. The court was satisfied that the accused admitted the elements of the former offences and found the guilty as charged.

In the early hours of 23 December 2017, the accused, armed with a 9mm pistol which he picked up, pointed the said firearm towards the head of a major male complainant and discharged one round, fortunately delivering a near miss to the complainant's head. The accused later fired a further 2 shots into the air within the Donkerhoek residential area. Later that same fateful morning, the accused assaulted another major male complainant with a bottle in the face and moments thereafter shot and killed a major female person, the deceased. The accused raised the defences of private defence and that he did not intend on stealing the firearm, but only unlawfully possessed it and during submissions raised intoxication which caused him diminished criminal capacity as a defence.

*Held*, the accused realised that someone could have lost the firearm and that it was obviously not abandoned where found; thus, not an instance of *res nullius*.

*Held*, on diverse occasions the accused fired several shots with the pistol, from which it could be deduced that he assumed and exercised the rights of an owner of the firearm. The only reasonable conclusion to come to is that the accused unlawfully appropriated the pistol with intent to permanently deprive the lawful owner of his property.

*Held*, in respect of the charge of attempted murder there is material deviations from accused's defence of having acted in private defence and the reason for discharging the firearm. It also differs markedly from his earlier statement and inevitably will adversely impact on his credibility.

*Held*, the offence of assault with intent to do grievous bodily harm, to which the accused pleaded guilty, is closely related in time and place to the two subsequent offences of pointing of a firearm and murder, which followed in quick succession.

*Held*, the only evidence about the accused's loss of memory during the pointing of the firearm immediately before discharging the firearm, is the accused's mere say-so. In the absence of persuasive evidence in support of the accused's claim of lacking criminal capacity, based on intoxication when he so acted, his explanation in light of all the evidence, does not appear to be reasonably possible.

*Held*, the belated defence of intoxication raised only in the end, is clearly an afterthought and a direct consequence of the accused's poor performance under cross-examination when giving conflicting evidence.

*Held*, the lack of additional factors placed before court, render the significance of the blood alcohol results ambiguous and, standing alone, diminutive.

*Held*, in respect of the pointing of a firearm and murder charges, the testimony of the accused is neither clear nor consistent with earlier statements he made at the earlier stage of pleading. Not only was he uncertain as to the number of persons who were present, he undoubtedly fabricated evidence about him having been attacked by two young men as stated in his plea statement.

*Held*, the accused's version of his intention to fire warning shots into the air in both instances, are not merely improbable, but without a doubt false and falls to be rejected where in conflict with other credible evidence.

*Held*, it can safely be accepted that the accused acted with direct intent to kill.

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**ORDER**

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- Count 1: Murder – Guilty (with direct intent)
- Count 2: Assault with intent to do grievous bodily harm – Guilty
- Count 3: Pointing of a firearm (c/s 38(1) of Act 7 of 1996) – Guilty
- Count 4: Theft – Guilty
- Count 5: Possession of a firearm without a licence (c/s 2 of Act 7 of 1996) – Guilty
- Count 6: Possession of ammunition (c/s 33 of Act 7 of 1996) – Guilty
- Count 7: Attempted murder – Guilty  
*Alternatively*, Negligent discharge or handling of a firearm (c/s 38(1) (l) of Act 7 of 1996) – Not guilty and discharged
- Count 8: Discharging a firearm in a public place (c/s 38(1) (o) of Act 7 of 1996) – Guilty.
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**JUDGMENT**

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LIEBENBERG J:

Introduction

[1] The accused, an adult male, is charged with the following counts:

- Count 1: Murder
- Count 2: Assault with intent to do grievous bodily harm
- Count 3: Pointing of a firearm (c/s 38(1) of Act 7 of 1996)
- Count 4: Theft
- Count 5: Possession of a firearm without a licence (c/s 2 of Act 7 of 1996)

- Count 6: Possession of ammunition (c/s 33 of Act 7 of 1996)
- Count 7: Attempted murder,  
*Alternatively*, Negligent discharge or handling of a firearm (c/s 38(1) (l) of Act 7 of 1996)
- Count 8: Discharging a firearm in a public place (c/s 38(1) (o) of Act 7 of 1996).

[2] Ms *Gebhardt* (instructed by Legal Aid) represents the accused and Mr *Lutibezi* appears for the state.

[3] The accused pleaded guilty to the charges set out in counts 2, 5, 6, the alternative to count 7, and count 8, respectively. A statement prepared in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA) was handed up, setting out the basis on which the pleas of guilty are tendered.<sup>1</sup> The state however only accepted the pleas set out in counts 2 and 8 and not in respect of the remaining counts in which the state would lead evidence. Regarding the latter, pleas of not guilty were noted in terms of s 113 of the CPA. On counts 2 and 8 the court was satisfied that the accused admits the elements of the respective offences charged.

[4] A statement setting out the accused's plea explanation and defence, as required by s 115 of the CPA, was read into the record by counsel and confirmed by the accused to be correct and in accordance with his instructions.<sup>2</sup> There appears to be no need at this stage to capture the explanation advanced by the accused, as I will do so when discussing the accused's *viva voce* evidence. Suffice to say that the accused made admissions recorded in terms of s 220 of the CPA in amplification of the s 115 statement,<sup>3</sup> thereby admitting the following:

- On 23 December 2017 he was in unlawful possession of a 9mm CZ pistol with serial number F2493; that he did not have a

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<sup>1</sup> Exhibit 'A'.

<sup>2</sup> Exhibit 'B'.

<sup>3</sup> Exhibit 'C'.

licence to possess such firearm and neither disputes Gideon Hamukwaya to be the lawful owner thereof;

- On the mentioned date the accused had approximately four 9mm live rounds of ammunition in his possession without being in lawful possession of a firearm capable of firing such ammunition;
- On the same day he unlawfully and negligently discharged the firearm once into the air (the latter contested by the state);
  
- Later that same evening near the cemetery in Donkerhoek, Mariental, he unlawfully and intentionally discharged the firearm twice into the air without any legal justification to do so;
  
- The identity of the deceased being Christina Martha Adams, who died as a result of a gunshot wound to her head; the transportation of the body without infliction of further injuries or wounds in the process; and the content of the post-mortem report;
- That he assaulted the complainant Bennedin Elriko Adams by hitting him once in the face with a bottle with intent to do him grievous bodily harm; and lastly,
- That a blood alcohol test was conducted on him, the results depicting a blood alcohol concentration of 0.12g/100ml of blood.<sup>4</sup>

[5] With the commencement of trial proceedings and specifically aimed at curtailing the trial, the accused also admitted the admissibility and content of a number of documents handed into evidence by agreement. I will revert to these documents during the judgment where applicable.

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<sup>4</sup> Exhibit 'J'.

[6] Consequential to an autopsy performed by Dr Refanus Kooper on 28 December 2017, he issued a Medico-Legal Post Mortem Examination Report<sup>5</sup> in which the following findings are being made:

- i. The main findings is an open wound on the skull entrance located on the right frontal region with brain tissue protruding in size 3x2cm and the exit wound located on the occipital region in size 4x2cm.
- ii. No tattooing of gun powder found around the wounds which translates that the distance from which the gunshot was fired, was more than 10cm away.
- iii. The skull was fractured around the wounds.

The cause of death was given as *Shooting – Head Injury*.

#### The state case

[7] The state led the evidence of a total of six witnesses whose evidence, in summary, amount to the following:

Angelo Amamub (hereinafter 'Angelo'), aged 28 years, is the complainant in count 7. This count relates to a charge of attempted murder in the main, alternatively, the negligent discharge of a firearm. It is common ground that Angelo and the accused knew each other since childhood, but did not consider themselves to be friends. During the early hours of 23 December 2017 at around 03h00 Angelo and his cousin Stanley left the club and went to Stanley's house where they would smoke a 'bubbly pipe',<sup>6</sup> a flavoured tobacco substance. At some point he went home (just across the street of Stanley's place) to fetch some flavoured tobacco for the pipe when he met with the accused on the street. After greeting, the accused patted with his hand on his own cheek saying 'Jol my', which Angelo interpreted to mean that he must give the accused a 'French kiss'. I pause here to observe that during cross-examination it became clear that Angelo, if his evidence on this score

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<sup>5</sup> Exhibit 'L'.

<sup>6</sup> Hookah Pipe.

were to be accepted, misinterpreted the gesture and accompanying words the accused, according to him, uttered.

[8] This notwithstanding, he said the accused came into his personal space and this prompted him to slap the accused once in the face. The accused then pulled out a gun that was tucked in under his trousers and with his arm stretched out in front of him took aim at Angelo and fired one shot. According to Angelo it was a near miss as he felt the heat of the discharge and the bullet grazing his cheek. He fled the scene and hid himself in a dark spot near the church. The accused gave chase but ran past him and was then joined by a person known to him as Kondja. Only when they proceeded going in the direction of Takarania did he come out of hiding. He met up with the others from where he went to sleep. In the morning he noticed a thin red line on his cheek where grazed by the bullet. Under cross-examination he admitted consuming beer that night but denied having been under the influence of alcohol. Despite this close encounter he did not lay charges, but before he could do so, he was intercepted by the police who obtained a statement from him as to his encounter with the accused. He disputed the accused's assertion about him having asked the accused for a cigarette and when refused, it resulted in an argument between them during which he slapped the accused.

[9] The testimony of witness Innocent Willemse is that he stood outside his house at around 03h00 when he heard a commotion down the street. He moved closer and stood at the corner of his house when he observed the accused and Angelo standing in the street. He saw Angelo slap the accused upon which the accused took out a gun, pointed it at Angelo and fired one shot. Angelo ran away. He saw the accused and Kondja running down the street following Angelo. He overheard Kondja saying to the accused that they should go home, to which the accused responded by saying 'If you don't stop me, then no one else will stop me'. They dispersed and the witness retired to bed. In the morning he met with Angelo and observed a reddish mark, like a 'line scratch', on his cheek. This must have been the same graze mark testified about by Angelo.

[10] It is not in dispute that the accused, after parting ways with Kondja, entered the yard of the Adams family where he found Bennedin Adams ('Benno') sitting in the yard next to the fire. In the absence of evidence led by the state as to what transpired between the accused and Benno which gave rise to the latter being hit in the face with a bottle by the accused, the court is bound to accept the accused's version on this score as set out in his plea explanation. The gist thereof is that Benno helped himself to the accused's whisky when he went to relieve himself. The force of the blow was such that it knocked Benno over, rendering him unconscious. Clearly woken by the commotion, the first person coming from her room was the deceased who then raised the alarm about Benno having been assaulted.

[11] According to the witness Ella Adams ('Ella'), the sister of the deceased, it was around 06h30 when she heard the deceased screaming, saying that Benno was hit on the head with a bottle by someone. She and her son, Ashwin, came out of their house and was shortly thereafter joined by her mother, Maria Adams. They moved to the side of Benno's room and found an unknown person seated on a brick. She identified him as the accused. Benno was unconscious and leaning against a drum. The next moment the accused stood up and pulled out a firearm tucked under his trouser and, with his arm stretched out in front of him, pointed the firearm individually at each of them. They then ran into Benno's room and once inside, Ella realised that the deceased had not followed them. She moved up to the door and when she looked outside, saw the accused standing with the deceased while pointing the firearm at her head at a distance of about 20cm. He then fired one shot, hitting her in the head. When she fell down, he started walking out of the yard, still holding the firearm. The witness made these observations at a distance of approximately 4 – 5m from where the deceased and the accused stood.

[12] Under cross-examination Ella disputed the defence counsel's assertion that the accused came under attack by a group of persons at the time of the shooting incident. She was adamant that there was no one else except her family; neither did they surround the accused or push and pull him on his

clothes as alleged. She said, upon their arrival at the scene, the accused pulled out the firearm and when pointed at them, this prompted them to flee and find cover in Benno's room. It was put to the witness that the accused cannot recall having pointed them with a firearm; she was however adamant that he did.

[13] Maria Adams, aged 63 years, is the mother to the deceased and Ella. She confirmed having awoken to the deceased's screams and went outside where she saw a man seated next to the fire. She asked him what he was doing in her yard but got no response. When she picked up a wine bottle lying next to the fire, the man jumped up, took out a firearm and said it was his wine whilst pointing the firearm at her and the others, one after the other. She put the bottle down and ran into Benno's room, followed by the rest, except for the deceased who remained outside. She confirmed that Ella was at the door when a shot rang out. When moving outside, she saw the deceased lying in a pool of blood. Under cross-examination she equally disputed that the accused was attacked by a group of persons who pulled and pushed him on his vest he was wearing; or that he fired a warning shot. According to her there was no fighting prior to the shooting of the deceased.

[14] The evidence of state witness Gideon Hamukwaya only turns on the ownership of the firearm fired by the accused on the night in question. He identified the CZ pistol with serial number F2493 to be his and said it was stolen from his vehicle in Windhoek on 04 January 2014. The incident was reported to the police where after the whereabouts of his firearm was unknown to him, until it surfaced during the police investigation in this matter.

[15] As for the last witness called by the state, Kalipus Sem, he is a ballistics expert employed by the National Science Forensic Institute and he examined the CZ pistol in question. The only aspect of his evidence relevant to this case is that, once the pistol is cocked, it reloads automatically after

each shot fired (semi-automatic) and that it would only discharge when the trigger is manually pulled.

[16] That is as far as the evidence led by the state goes. The accused was the only witness testifying in his defence.

#### The defence case

[17] The accused testified that on 22 December 2017 he had a quarrel with his girlfriend with whom he had been cohabitating and decided to have a night out with his friend Kondja. From Kondja's house they went to Robert's Bar where a friend of Kondja joined them in drinking until the bar closed at midnight. From there they went to a club in Tsaraxaibes belonging to the accused's father which only closed at 02h00, to get more drinks. Kondja's wife and cousin joined them before they left for the club. While the others entered through the club's main entrance, the accused decided to enter through the back door, normally utilised for deliveries and staff. He justified his decision to do so by saying that is where he usually entered. However, there seems to have been no reason why he had to use the rear entrance on this occasion if the sole purpose of the visit was to fetch drinks. Whilst outside waiting at the security door for the bar lady to open, he saw a paper bag next to the rubbish bin and as he touched it with his foot, he found a pistol underneath the bag. He picked it up and inspected it, finding live bullets in the magazine. When the bar lady approached he quickly tucked it in under his belt at the front of his trousers. He entered and after collecting some liquor from the club he again met up with the others and proceeded to Kondja's place for a braai.

[18] Whilst still on their way, he met Angelo whom he only knew by sight. He expressed his displeasure when Angelo asked him for a cigarette and this started an argument. The next moment Angelo slapped him once in the face where after they grabbed one another and started scuffling. The accused then

took a step back and pulled out the pistol. He said he was a bit drunk and emotionally upset, intending to defend himself. He cocked the pistol and fired one shot into the air, causing Angelo to run away. He confirmed that he and Kondja gave chase in order to find Angelo and beat him up. Although Kondja appeared to be shocked to see the accused having a firearm, he cannot recall that Kondja told him to rather go home. They proceeded to Kondja's place where they had a braai and indulged in drinking.

[19] At some point the accused moved to a spot across Kondja's house to relieve himself when he received a phone call from his girlfriend, telling him that she was ending their relationship. After putting the phone back he took out the pistol and fired two shots into the air which, he says, was 'to release steam'. This upset those in whose company he was and Kondja's wife asked him to rather leave. He apologised, took the bottle of whisky along and started walking home. He passed one house and asked a guy sitting by the fire whether he could join him. This person turned out to be Benno and had been sitting outside on his own by a fire, listening to music. Earlier I alluded to the events which led up to the accused hitting Benno in the face with the whisky bottle, rendering him unconscious and need not repeat the accused's evidence in this respect.

[20] From that point onwards, the deceased came from one of the rooms asking/screaming to the accused as to what happened to Benno, while at the same time calling for the other family to come outside and see for themselves. Some ladies and a young boy came and formed a semi-circle around him while pointing at him asking questions and started arguing with him. Although he claims that the deceased and Ella were pulling on his vest and tearing it, he said there was no physical contact between them. He described the incident as them pulling and shoving him around which confused him, as he was very drunk. At this stage they were standing at the fence while he had his back facing the gate. He conceded in cross-examination that he could have left if he wanted, but for some reason did not. He said he became nervous, stepped back and pulled out the pistol. He cocked it and in the proses of raising his arm, a shot went off. The lady standing in front of him was hit by

the bullet and she dropped to the ground. According to him, only at this stage did the others disperse and entered their rooms. He took the bottle of whisky and walked home. He eventually struggled to gain access into the room and at some point called his girlfriend from the landlord's phone. He used force to open the door and once inside, he sat down on the bed and passed out. He only woke up in the police cells.

[21] On a more personal level, the accused said he battled with anger control in the past for which he received counselling in 2011. In 2016 he again went into rehabilitation for drug and alcohol abuse. Earlier in the day of 22 December he smoked cannabis and, during the afternoon, took a Valium tablet to relax as there was some tension at work between him and his father.

[22] In cross-examination the accused said his intention was to hand over the firearm to his father as he would know what to do, being a former police officer. He initially went on to say that there was a safe at his father's bar in which the firearm could be placed for safekeeping, but later changed course by saying that the safe was taken to another business of his dad at Kalkrand. Not only did the accused contradict himself as to the possibility of placing the firearm at a place where it was safe upon its discovery, he made no mention of such intention during his evidence in chief. In light of the manner in which the accused assumed control over the firearm and using it on diverse occasions shortly thereafter, tells a different story – clearly not that of a person whose primary intention was to keep it safe until he could hand it over to his father. Therefore, his explanation to this end has a hollow ring to it.

[23] A further contradiction in his evidence was pointed out in cross-examination in that the accused in his s 112 statement stated that he and Angelo wrestled after the slapping. However, in court he said that he merely held onto Angelo in anticipation of a second blow – which was never thrown – and pushed him away. He justified the discharging of the pistol to stop the

attack and to scare off his attacker, in which he succeeded when the latter ran off. When asked why he gave chase, he explained that he felt pain and wanted to take revenge. He however disputed having pointed the firearm directly at Angelo, or that he had the intention to injure him.

[24] With regards to the assault on Benno, the accused admitted that he was the aggressor. Under cross examination, as for the pointing of the firearm to those present at the time, the accused said he cannot recall it ever happening, but cannot dispute evidence to the contrary. When further questioned about the number of persons present at the time, the accused (for the first time in cross-examination) made mention about an unknown man and a woman who were asleep in Benno's room. I find this peculiar simply because there would have been no reason for Benno to show a stranger around their home for no reason at all, a person who had just walked into their yard apparently in need of company and someone he was willing to share his liquor with. The presence or otherwise of these persons is in any event of no significance as they, on the accused's version, feature nowhere in the events leading up to him discharging the firearm. The accused further conceded that the s 112(2) statement is wrong where it reads that he was attacked by two young men prior to the shooting. He went on to concede that he was never assaulted by these persons and only felt pressurized by their presence. Before firing, he stepped back and by then, no one touched him. When raising his arm, his finger was on the trigger and he merely wanted to fire a warning shot into the air. However, in the process and whilst the pistol was pointed at the deceased, it accidentally fired. He admitted having squeezed the trigger too early, before his arm was raised vertically in order to shoot into the air. He denies having had the intention to shoot the deceased. This is a material deviation from his defence of having acted in private defence, the initial reason for discharging the firearm. It also differs markedly from his earlier statement and inevitably will adversely impact on his credibility.

[25] The accused testified he was familiar with the functioning of a pistol, as his father had taught him. Moreover that the firearm in question's functioning is semi-automatic in that it reloads automatically after firing the first shot.

When asked why he did not call his father upon discovery of the pistol to inform him about the firearm found on the premises of his business, the accused was unable to advance any reason.

### Private defence

[26] In light of the accused's testimony that he acted in self-defence in counts 1 and 7 when firing shots intended to scare off Angelo and later, a group of persons at the Adams home, it seems necessary to briefly state the requirements of private defence. This court occasioned to say the following in *S v Shaningua*<sup>7</sup> at para 44:

'In respect of the attack, it is required that the attack must be unlawful upon a legal interest which had commenced or was imminent, while the defensive act must be directed against the attacker and necessary to avert the attack. It is further required that the means used must be necessary in the circumstances.<sup>8</sup> Private defence is not a means of exercising vengeance or retaliation and there would be no defensive act where the unlawful attack had already passed. A further requirement for a defensive act is that the attacked person must be aware of the fact that he or she is acting in private defence, meaning, that the attacked person subjectively genuinely believed that he or she was acting in self-defence. A person therefore cannot accidentally act in self-defence as it requires an act of will. The onus is on the State to prove beyond reasonable doubt that the requirements for self-defence did not exist, or that the bounds of self-defence had been exceeded.'

(Emphasis provided)

### Evaluation of evidence

[27] I do not intend discussing the respective counts set out in numerical order in the indictment, but rather to deal with the events on that fateful night in chronological order by which I hope to have a better understanding of the development of the accused's actions and reasoning for acting in the manner he did. Further, in light of the ongoing consumption of alcohol throughout the

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<sup>7</sup> *S v Shaningua* (CC 09/2016) [2017] NAHCMD 224 (14 August 2017).

<sup>8</sup> *S v Naftali* 1992 NR 299 (HC).

night, one might be able to deduce from the evidence his level of intoxication at different stages and whether or not it impacted on his criminal capacity.

[28] At the outset it should be noted that, although the accused's evidence is that he had been using drugs during that week and earlier in the day, as well as consuming alcohol prior to the commission of the alleged offences, he did not raise the defence of non-pathological criminal incapacity during the trial. This defence, however, for the first time surfaced in defence counsel's heads of argument and during oral submissions when submitting that the extent of the accused's intoxication is central to his defence as he 'acted with diminished responsibility caused by non-pathological incapacity when he committed the murder and the pointing of a firearm'. I find counsel's submission contradicting in that the accused could not have acted with *diminished criminal capacity* whilst at the same time suffering from *non-pathological incapacity*. The law is clear that where the accused in the former appreciates the wrongfulness of his actions and has the capacity or ability to act in accordance with such appreciation – albeit with diminished appreciation or ability to act accordingly – the accused in the latter completely lacks criminal capacity and is therefore not accountable for his actions. I will return to the question of the accused's criminal capacity *infra*, when considering the evidence adduced on the murder count.

[29] In count 4 the accused denied having stolen the 9mm CZ pistol referred to earlier and claims to have picked it up. He made no enquiry at the club as to how the pistol got there or who the owner could be, despite conceding that he suspected the owner to have been inside the bar. Neither did he contact his father to inform him and seek advice as to what should be done with the pistol, contrary to his testimony that he intended handing it over to his father. As the founder of a firearm at the club where there was a gathering of patrons, the accused had an obligation to take reasonable steps in the circumstances to acquaint the true owner of the finding and present whereabouts of the pistol or, at least, to keep it safe until he was in a position to do so. On the strength of his conduct in the circumstances, he clearly

harboured no such intention and the assertion that he wanted to hand it over to his father, has the hallmarks of an afterthought.

[30] The accused said he hid the pistol on his person as he did not want it to be seen and realised that he was not the owner thereof. Such conduct is consistent with a person having a guilty mind. If the accused harboured no intention to keep the firearm for himself, there would be no reason to conceal it. Moreover, he realised that someone could have lost it and that it was obviously not abandoned where found; thus, not an instance of *res nullius*.<sup>9</sup> Thereafter and on diverse occasions that night he fired several shots with the pistol, from which it could be deduced that he assumed and exercised the rights of an owner of the firearm. In these circumstances the only reasonable conclusion to come to is that the accused unlawfully appropriated the pistol with intent to permanently deprive the lawful owner of his property. To this end, the elements of the offence of theft has been established and the accused stands to be convicted on count 4 of theft of a CZ pistol with serial number F2493.

[31] Next I turn to the main charge in count 7 to wit, attempted murder where the accused's defence is one of private defence.

[32] It is common ground that the accused and Angelo met on the street and during an altercation, Angelo slapped the accused once on the cheek. It is further not disputed that the accused pulled out the pistol and fired one shot. Their respective versions differ only as far as the nature of the altercation (which is of little significance) and the accused's reaction to being slapped. According to Angelo he slapped the accused for having come too close to him and did not intend assaulting him any further. This much the accused admitted when saying in cross-examination that he first touched his cheek and then reached out and grabbed Angelo on the sleeve of his T-shirt, pushed him away, staggering backwards. He then took a step back and took out the pistol. This is a clear diversion from his evidence in chief when he said they grabbed each other using both hands, ensuing in a scuffle when he

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<sup>9</sup> *Diergaardt v S* (CA 99/2016 [2016] NAHCMD 102 (31 March 2017)).

pulled out the firearm. He explained this by saying that he anticipated a further attack and therefore grabbed onto Angelo. This explanation further contradicts his s 112(2) plea explanation where he said that they were 'wrestling', clearly not being the case. I find his explanation that 'physical contact' also means 'scuffle' and 'wrestling' would include to push someone away from you, unconvincing, as there is a material difference between these actions.

[33] From the foregoing it is evident that the extent of Angelo's assault on the accused was nothing more than a slap on the cheek whereupon the accused retreated, at which point, there was no imminent threat of any ensuing attack. He immediately pulled out the firearm and with an outstretched arm, pointed it directly at his opponent and fired one shot. On the accused's version, it was he who went into attack by grabbing Angelo on the shirt and pushing him away, while pulling out the pistol and firing. His immediate reaction to pursue the fleeing Angelo with the intention to fight him supports the conclusion that he became the attacker after the initial assault on him had ended. This includes him resorting to the firearm.

[34] Turning to the conflicting versions and whether or not the accused acted in private defence, the court follows a holistic approach. The accused's version on this score is contradicted not only by the evidence of Angelo, but also by that of Innocent Willem. Angelo said that the pistol was pointed at him when the accused fired at a time when there was no threat for the accused as the assault (slap) had ended. He therefore disputed the accused's version of having fired one shot into the air to scare him off. As for Innocent, his evidence in material respects corroborates that of Angelo in that he saw Angelo slapping the accused whereupon the accused took out a gun, pointed it at Angelo and fired a shot. He further confirmed having seen a red line on Angelo's cheek the next day.

[35] What is clear from the accused's version on this score is that it is self-contradicting as to the events leading up to him firing the shot and is further contradicted by two witnesses corroborating one another in material respects. In addition thereto the accused admitting that he was a bit drunk by then,

having imbibed 2 litres of Tassenberg wine. The accused's evidence stands alone opposed to that of the state witnesses whose evidence had not been refuted in any form or manner.

[36] In the evidence adduced there is no room for a finding that the accused acted in private defence when he fired at his attacker. The attack (slap) had ended and there was nothing in Angelo's conduct that could possibly suggest that he wanted to continue fighting the accused. The accused's immediate reaction was to pull out the firearm and fire one shot directly at Angelo. The proposed action executed in private defence is not only disproportionate and exceeding the bounds of private defence but reeks of retaliation as opposed to a defence. Private defence is not a means of exercising vengeance or punishment. And for the accused to have fired at Angelo under these circumstances was an act of retaliation for having been slapped and thus constituted an unlawful attack, as the attack on him was already something of the past. The evidence furthermore establish beyond reasonable doubt that the firearm was directly aimed at the head of Angelo when the accused fired, and not into the air. Consequently, the accused's evidence on this point is rejected as false and his defence on count 7 found to be unmeritorious.

[37] In deciding whether the accused had acted with intent to kill, one should look at the surrounding circumstances when the accused discharged the firearm. In this instance Angelo was in close proximity of the accused when the firearm was pointed directly at his head and discharged. He felt the heat of the discharge and the bullet grazed his cheek. On strength thereof and when applying the test set out in *R v Blom*<sup>10</sup> it can safely be inferred from the proved facts that the accused, when he so fired the pistol, acted with intent to kill. Consequently, I am satisfied that count 7, the main count of attempted murder, had been proved beyond reasonable doubt. On the alternative count the accused stands to be acquitted.

[38] Despite the state's rejection of the accused's pleas of guilty on counts 5 and 6 pertaining to charges of possession of a firearm and ammunition, the

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<sup>10</sup> *R v Blom* 1939 AD 188 at 202-3.

evidence before court duly established the accused's unlawful possession of both a 9mm CZ pistol and ammunition. The circumstances under which the accused took possession of the arm and ammunition has already been stated, which was found to constitute the offence of theft. The accused admitted his unlawful possession of the firearm and ammunition and accordingly stands to be convicted on these two counts. This includes count 8 to which the accused pleaded guilty on a charge of discharging a firearm in a public place, contravening section 38(1) (o) of Act 7 of 1996. On this count he admitted the intentional discharge of the pistol by firing two shots into the air at or near Donkerhoek, a residential area in Mariental. This came about when he learnt that his girlfriend ended their relationship and moved out of the common home. He said he spontaneously fired these shots in order to vent his anger and disappointment.

[39] The remaining counts of murder (count 1), assault with intent to cause grievous bodily harm (count 2) and the pointing of a firearm (count 3), are closely linked in time and place, in that they relate to events that occurred at the Adam home during the early hours of the morning of 23 December 2017.

[40] With regards to the charge of assault with intent to do grievous bodily harm, the accused pleaded guilty and his narrative of events leading up to the assault (*supra*) was accepted by the state. With an admission of guilt on this charge the accused admits having had the specific intent to cause grievous bodily harm to the victim i.e. having foreseen the consequence of his act and associating himself with the ensuing result. He thereby admits having acted with criminal intent when he so acted. The accused's conviction on count 2 would thus be consequential to his plea of guilty.

[41] It is noteworthy to remark that the offence of assault with intent to do grievous bodily harm, to which the accused pleaded guilty, is closely related in time and place to the two subsequent offences of pointing of a firearm and murder, which followed in quick succession. It is in respect of the latter counts that counsel claims the accused lacked criminal capacity when he acted. Surprisingly, the same defence was not invoked by the accused in the former,

where he admitted acting with specific intent to do grievous bodily harm to the victim and which took place shortly before he drew the firearm.

[42] Although it is not in dispute that the accused seemed to have been on a drug and liquor binge during the week and earlier that day and, the result of a blood sample taken from the accused subsequent to his arrest showing a reading of 0.12g ethyl alcohol per 100ml of blood, the accused did not make it clear that it was part of his defence that intoxication played a substantial role in the commission of any of the offences charged. In order to show that it in fact did, evidence had to be adduced to show the extent of intoxication and the effect it may have had on him or, that it was such that the accused lacked criminal capacity when pointing the firearm at different persons and when discharging the weapon.

[43] On this score it was argued on the accused's behalf that evidence had been presented about the accused having taken drugs during the week; that he consumed alcohol on the night in question (as borne out by the blood alcohol result); that the witness Maria Adams said the accused appeared to be drunk; and lastly, that he was later found passed-out on the bed at home.

[44] Counsel for the defence relied on *S v Ilukena*<sup>11</sup> in support of the contention that the accused acted with 'diminished criminal responsibility caused by non-pathological incapacity', the exact finding made in that case. These findings were based on the accused's intoxication and the findings of a psychologist that the accused's actions at the time were 'voluntary but compromised or diminished', which the court then found to have resulted in 'substantial weakening of the accused's appreciation of wrongfulness'. The court in *Ilukena* subsequently granted leave to the state to appeal against the court's finding of diminished criminal responsibility at the time, the appeal still pending. Besides my respectful disagreement with the findings made in that case, I do not believe that it would at this stage be prudent to follow the *dictum* enunciated in the *Ilukela* matter. I accordingly decline to do so.

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<sup>11</sup> *S v Ilukena* (CC 06/2013) [2017] NAHCNLD 113 (17 November 2017) at para 59.

[45] The question as to whether or not the accused acted with diminished responsibility is provided for in s 78(7) of the CPA and reads:

'If the court finds that the accused at the time of the commission of the act was criminally responsible for the act, but that his capacity to appreciate its wrongfulness or to act in accordance with such appreciation was diminished by reason of *mental illness or mental defect*, the court may take such diminished capacity into account *when sentencing the accused*.'

In the present instance there is no suggestion or evidence that the accused at the relevant time suffered from mental illness or mental defect. Diminished criminal capacity thus finds no application to the present circumstances.

[46] It was further submitted that the accused was intoxicated to the extent that he lacked criminal capacity at the time when he pointed the firearm and discharged it, killing the deceased. The leading case on intoxication as a defence is *S v Chretien*<sup>12</sup> from which it is apparent that intoxication could have one of the following consequences:

- a. The accused is intoxicated to the extent where he does not commit a voluntary *act* and cannot be convicted of any crime.
- b. The accused performs a voluntary act, but due to intoxication lacks *criminal capacity* in that he does not appreciate the wrongfulness of the act or where his inhibitions have substantially integrated. He cannot be convicted of any crime.
- c. The accused could perform a voluntary act and has the required criminal capacity but the intoxication might result in his lacking the required *intention*, in which case he may be convicted of a lesser crime requiring culpability in the form of negligence and not intent.
- d. Where the accused's intoxication does not have any of the above effects, he stands to be convicted but the extent of intoxication may serve as a *mitigating factor* at sentencing.<sup>13</sup>

[47] Next I turn to apply these principles to the facts at hand.

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<sup>12</sup> *S v Chretien* 1981 (1) SA 1097 (A).

<sup>13</sup> *CR Snyman: Criminal Law* (6<sup>th</sup> Ed.) at 221.

[48] The belated reliance on intoxication as a possible defence is of no assistance to the accused in the absence of any evidence in support thereof. It is settled law that a proper basis must be established on the evidence as a whole before this defence can be considered. The mere taking of alcohol and/or drugs plus a positive blood alcohol reading does not *per se* equate to a level of intoxication that excludes criminal capacity.<sup>14</sup> In this instance the accused relies on the blood alcohol results in support of the contention that he lacked criminal capacity without having adduced evidence through an appropriately qualified witness on the significance of the amount; the time at which it was taken; and the effect thereof (if any) on the criminal capacity of the accused person. This would normally be done through an expert witness who is in a position to place such medical evidence on record. Bearing in mind that the blood sample was taken some hours after the alleged commission of the crimes, the lack of these factors placed before court, render the significance of these results ambiguous and, standing alone, diminutive. Moreover, when considered against the accused's evidence with regards to his memory which would appear to have been clear as to his observations made of his surroundings and the behaviour of a number of persons in his presence; his orientation of time, place and direction when leaving the scene and the presence of mind and ability to operate a phone when calling his girlfriend shortly thereafter.

[49] It seems apposite to mention what the court in *Hangué* said on high blood-alcohol concentrations at para 42 namely,

'...that different people under different circumstances respond differently to such high concentrations of alcohol in the bloodstream. The correlation between different persons' blood-alcohol concentrations and their conduct do not seem to be direct, uniform or universal.'

As borne out by the evidence, the accused's conduct immediately before the pointing and discharging of the firearm was quite purposeful and goal

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<sup>14</sup> *Hangué v The State* (SA 29/2003) [2015] NASC (15 December 2015).

directed. The only evidence about his loss of memory during the pointing of the firearm immediately before discharging same, is his mere say-so. In the absence of persuasive evidence in support of the accused's claim of lacking criminal capacity, based on intoxication when he so acted, his explanation in light of all the evidence, does not appear to be reasonably possible. Not only was the accused physically capable of using force against another rendering his victim unconscious, he also handled a firearm by cocking it and applied force to the trigger in order to discharge it. He was clearly mentally able to appreciate what he was doing, including the consequences of his deeds. In light of the foregoing, the belated defence of intoxication raised only in the end, is clearly an afterthought and a direct consequence of the accused's poor performance under cross-examination when giving conflicting evidence.

[50] The state's case, with regards to the charges of murder and the pointing of a firearm, entirely rests on the evidence of the witnesses Ella and Maria Adams, mother and daughter. Both gave detailed accounts of what transpired when they followed the deceased's screams outside. Maria said what prompted the accused to pull out a firearm was when she picked up a bottle lying next to the fire and the accused telling her to put it down as it was his. Maria and Ella corroborate one another as regards the individual pointing of the firearm by the accused at those present and them running into Benno's room – except for the deceased. Neither of the two witnesses were discredited during their testimony, thus rendering their respective versions reliable. The pinnacle of their evidence is that neither they nor anyone else physically assaulted, pulled or pushed the accused, which might have required of him to defend himself against his attackers. In cross-examination the accused conceded that it is possible things could have happened as testified by the witnesses, as he has no clear recollection of such incident. The concession seems to have been made *in lieu* of his lack of sobriety. In these circumstances there would have been good reason for those present to seek cover from the accused when producing a firearm; explaining them entering Benno's room already then and not only *after* the firing of the shot as testified by the accused. To this end the words of Ella has a ring of truth to it

when she said her elderly mother and herself were no match for the accused who was armed with a pistol.

[51] The accused's concession that it is possible that he could have pointed those persons present with the firearm already at an earlier stage, obviously negates evidence about him only resorting to the firearm at the time he was physically being shoved around. On the strength of the concession, he had already drawn the firearm even before the alleged assault.

[52] From the court's summary of the accused's evidence *supra*, it is evident that his testimony is neither clear nor consistent with statements he made at the earlier stage of pleading. Not only was he uncertain as to the number of persons who were present, he undoubtedly fabricated evidence about him having been attacked by two young men as stated in his plea explanation. When questioned about the presence of other male persons (besides Ella's young boy), he mentioned about a man and wife he had seen earlier lying on a bed in Benno's room. This is clearly invented evidence by the accused whilst on the stand because, had these persons been there, then Ella and Maria would have found them inside upon entering the room; neither was the presence or involvement of these persons in an ensuing scuffle with the accused put to the witnesses for explanation when on the stand. Such duty is evident from *President of the Republic of South Africa v South African Rugby Football Union (SARFU)*,<sup>15</sup> a case often cited with approval in this Jurisdiction, where it is stated thus:

'(T)hat the institution of cross-examination not only constituted a right, it also imposed certain obligations. As a general rule it was essential, when it was intended to suggest that a witness was not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation was intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending her or his character. If a point in dispute was left unchallenged in cross-examination, the party calling the witness was entitled to assume that the

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<sup>15</sup> *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* 2000(1) SA 1 (CC).

unchallenged witness's testimony was accepted as correct. ... This was so because the witness had to be given an opportunity to deny the challenge, to call corroborative evidence ...' (Emphasis provided) (Headnote)

[53] In my earlier summary of the accused's evidence I alluded to the accused having shifted the goalposts of his defence from one of private defence to that of accidentally firing the fatal shot that killed the deceased. His defence of having fired the shot during an attack on him to scare off his attackers lost steam during cross-examination and was diluted to a version where he was never assaulted, but felt he was under pressure due to their presence. This concession corroborates the evidence of the state witnesses, namely, that there was no attack on the accused prior to the shooting. It further supports evidence that, except for the deceased remaining outside standing in front of the accused, there was no one else in their immediate vicinity. The only conclusion to come to on the totality of established facts is that the accused's evidence of him firing one shot during an ensuing attack, is false and must be rejected.

[54] The last incident involves the actual firing of the shot that hit the deceased in the head. Ella's evidence about her having witnessed the actual shooting when peeping outside was corroborated in material respects by her mother, Maria. Ella is adamant that she saw the accused standing in front of the deceased when raising his arm holding the firearm and firing one shot that felled her. The accused's version on this score supports Ella's evidence, adding that his finger was on the trigger when he raised his arm. According to him that was the time when he *accidentally* squeezed the trigger too early as he had not intended shooting the deceased. Though not disputing firing the fatal shot, the accused during his testimony denied having done so intentionally.

[55] In a recently delivered matter the Supreme Court in *S v Barnard*<sup>16</sup> cited with approval two cases *infra* in which certain guidelines are laid down when the court considers the version of the accused in criminal proceedings, in which the following was said at para 1 and 2:

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<sup>16</sup> *S v Barnard* SA 59-2018 [2020] NASC (7 May 2020).

'The accused's evidence forms part of the body of evidence to be evaluated and the test is whether in the light of all the evidence, it is reasonably possibly true. Obviously, the weaker the state case the stronger the possibility of the accused's version being reasonably true.

.....

"The question that must be answered is whether the State's case has been proved beyond reasonable doubt when measured against the accused's conflicting version or - putting it differently - is the accused's version reasonably possibly true even if the court does not believe him? Is there a reasonable possibility that it may be substantially true? (*S v Jaffer* 1988 (2) SA 84 (C); *S v Kubeka* 1982 (1) SA 534 (W).)

Whilst guarding against 'compartmentalisation' of evidentiary considerations the court must - as stated above - measure the totality of the evidence, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides, the balance weighs so heavily in favour of the State, that it excludes any reasonable doubt about the accused's guilt in one's mind."

[56] Whereas the evidence of the accused has already been found to be false in respect of the shooting incident involving Angelo and his evidence on the last incident displaying elements of self-contradiction, partly fabricated evidence and being contradicted by the corroborated evidence of two state witnesses, it seems inevitable to conclude that the accused's version of his intention to fire warning shots into the air in both these instances, are not merely improbable, but without a doubt false and falls to be rejected where in conflict with other credible evidence. The accused's earlier words to Kondja that if he did not stop the accused that night, then no one will, is indicative of the accused's aggressive mind-set to take revenge when hard done by. These words unfortunately rang true when he shortly thereafter killed the deceased when shooting her in the head.

[57] Next I turn to decide whether the accused, upon firing the fatal shot that killed the deceased, acted with direct intent. It appears to me necessary to take a holistic view of the accused's behaviour at different stages during that night – from the time he armed himself with the pistol and his readiness to resort to the use thereof, up to the firing of the final shot that killed the deceased. The common factor present during the respective shooting incidents is that, when confronted about his behaviour, the accused gave free reign to his emotions by becoming angry and found comfort in resorting to the pistol and randomly firing the weapon at any person who accosted him. Similarly, when his girlfriend phoned to say that she terminated their relationship and had moved out of the room they were sharing, he fired shots into the air 'to let off steam'. To those in his company his actions were obviously irrational to the extent that they no longer wanted to be with him and told him to leave. The pattern of aggressive behaviour displayed by the accused that evening then extended when he struck Benno with a bottle in the face and again resorted to the firearm when confronted by the occupants of the house when pointing them with the firearm. As earlier, with Angelo he pointed the firearm directly at the deceased and fired, this time not missing his target.

[58] In the court's endeavour to determine the intent of the accused when he so acted, the direct evidence of the witness Ella is condemning and proves beyond reasonable doubt that the firearm was pointed directly at the deceased's head when fired. The accused's evidence that he pressed the trigger too soon counts for nothing in circumstances where his explanation, for having firing the shot in the first place, was rejected by the court as false. He was familiar with the functioning of the firearm he was handling and sure to have appreciated that the pulling of the trigger required the application of deliberate force. Force he applied when the firearm was pointed at the deceased's head. Also that a gunshot to the head would likely be fatal. Against this backdrop, it can safely be accepted that the accused acted with direct intent to kill.

[59] In the result, the court finds as follows:

