

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 22/2009

DPP Ref. No. JPV2008/023

In the matter between:

THE STATE

versus

JABULANI HLENGANI MKHABELA

Accused

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MEYER, J

[1] The accused, Mr. Jabulani Hlengani Mkhabela, has been arraigned for trial on an indictment containing charges of the murder of the late Mr. Owen Mabundla ('the deceased') and of the assault of Mr. Sevha Nuel Mabundla ('Nuel') on 30 August 2008.

[2] The accused pleaded not guilty to both charges. He made a statement in terms of s 115(3) of the Criminal Procedure Act 51 of 1977 in amplification of his plea. He proclaims his innocence. He avers that he was attacked by a group of men, amongst whom the deceased and Nuel. He states his belief that his life and the lives of those in his company were in danger. He denies that he intentionally shot and killed the deceased or that he intentionally assaulted Nuel.

[3] It is undisputed that during the afternoon of 30 August 2008 from about 3:00 pm until about 6:00 pm, a performance of traditional Shangaan dancing took place in

the street at Sphiwe Tavern, Phomolong Section, Tembisa, Kempton Park. The performance was attended by many people, including the deceased and the state witnesses Nuel, who is a cousin of the deceased, Jomo Benmore Tsungu, who is also a cousin of the deceased ('Benmore'), Noza Herbert Mavundla, who is a brother of the deceased ('Herbert'), and Bigboy Valoyi ('Bigboy'). They and many other people remained behind at and in the vicinity of Sphiwe Tavern ('the tavern') once the performance had ended.

[4] Nuel, Benmore, Herbert, and Bigboy each testified that at about 8:20 pm they and the deceased stood in a group next to a red VW Golf motor vehicle ('the Golf') that was parked on the pavement across the street from the tavern. A silver grey Audi motor vehicle ('the Audi') arrived and stopped in front of the Golf close to where they were standing (Benmore and Bigboy testified that the Audi stopped partly on the pavement and partly on the street). The Audi was driven by the accused and had one passenger. The Audi drove off and stopped a short distance away from where they were standing (Nuel estimated the distance at about 10 metres and Benmore and Bigboy at about 3 metres). They considered that the Audi almost collided with them where they were standing at the Golf. Nuel, Benmore and the deceased approached the accused while he was still seated in the driver's seat of the Audi to enquire from him why he drove in the manner as perceived by them. Bigboy and Herbert remained standing at the Golf. Nuel spoke to him. The accused opened the driver's door and got out of the Audi. He slapped Nuel once in the face (Herbert did not see where he was hit). Nuel fell to the ground. The accused pulled out a firearm from his waist. The accused's passenger grabbed or took the firearm from him (Benmore, Herbert and Bigboy testified that the passenger cocked the firearm after

he had taken it from the accused). Benmore and the deceased ran away – Benmore to or in the direction of the Golf (Bigboy did not see where he was running to) and the deceased to the end of the street where it forms a T-junction with Mdaka Street. The accused and his passenger got back into the Audi, made a u-turn and drove down the street towards the T-junction in the same direction in which the deceased had gone. They noted down the registration number of the Audi at the suggestion of a person who approached them (Nuel and Benmore testified that it was Benmore who took down the registration number).

[5] Upon hearing that someone had been shot in the vicinity, they went to that scene, which, according to the undisputed evidence of Herbert and Bigboy, was left at the T-junction at a point along Mdaka Street that was not far from where they had originally stood. They found that the person who had been shot was the deceased. He was shot in the left chest just below the shoulder (Nuel), bleeding on the left side of his chest (Benmore), or bleeding from the left shoulder (Herbert). An ambulance and police officers arrived at the scene. The deceased had already died (Benmore and Bigboy). The emergency personnel at the scene covered the deceased's entire body (Nuel and Herbert).

[6] The accused formally, in terms of s 220 of the Criminal Procedure Act 51 of 1977, admitted the identity of the deceased (exhibit 'A.1'). He further formally admitted that the scene of the crime was at No. 3852 Mdaka Street, Phomolong Section (exhibits 'A.1', 'C', 'M' and 'N'). Travelling along the street in which the tavern is situated on the right hand side, one reaches a stop sign where the street

forms a T-junction with Mdaka Street. The scene of the crime was 75 metres from the stop sign along Mdaka Street to the left.

[7] Ms. Thandiwe Masuku, a crew commander of ambulances and fire engines for the Ekurhuleni Metropolitan Council, testified that she attended at No. 3852 Mdaka Street at about 9:45 pm. Her evidence is to the effect that the person found lying on the ground in blood was no longer alive. The body that she testified about was probably that of the deceased. The accused formally admitted that the deceased died on 30 August 2008 as a result of a single gunshot wound to the chest, which he sustained at Phomolong Section in the district of Kempton Park and that the body of the deceased sustained no further injuries from the time when the wound was inflicted on 30 August 2008 until a *post mortem* examination was conducted by Dr. ECP Nothnagel on 3 September 2008 (exhibit 'A.1', paras 1 – 4).

[8] The correctness of the facts and findings as recorded in the *post mortem* report of Dr. Nothnagel (exhibit 'B') has also been formally admitted. The medical *post-mortem* examination conducted by Dr. Nothnagel revealed that the deceased's death had been caused by a gunshot wound through the chest and abdomen. In terms of his *post mortem* findings the entrance gunshot wound was a 9mm round wound with a 2 mm collar of abrasion on the anterior aspect of the left shoulder. The gunshot wound tract penetrated backwards, downwards and to the right through the muscles of the upper arm, the third rib on the left side, the upper lobe of the left lung, the cardiac sac, the left and right ventricles of the heart, again the cardiac sac, the diaphragm on the left side, the liver, the intestines, the third lumbar vertebra, and to the fourth lumbar vertebra where a spent bullet was found.

[9] The accused formally admitted that Const. Khumalo found a cartridge case at the scene of crime and that Insp. Montjane found a Z88 pistol with serial number TQ 114021 at the residence of the accused. The cartridge case and Z88 pistol were later subjected to ballistic examination by Capt. DSL Pieterse, and the correctness of the facts and findings recorded in his ballistic report were also formally admitted. See: Exhibit 'A.1', paras 7 - 12; exhibit 'C', preamble, key to photographs, photographs 2, 10, and 11; and exhibit 'D'. Capt. Pieterse, through a process of microscopic comparison, ascertained that the cartridge case was fired from the Z88 pistol (exhibit 'D'). This was confirmed by Capt. Pieterse when he testified. The finding of the cartridge case at the scene of the crime and of the Z88 pistol at the residence of the accused accordingly establishes a link between the accused and the death of the deceased.

[10] The unchallenged evidence of Nuel, Benmore, Herbert, and Bigboy is that they attended an identification parade at the Kempton Park SAPS on 16 May 2009 where each one of them individually pointed out the accused. This is corroborated by the unchallenged evidence of Insp. Frans Rapiitsoa, who arranged and conducted the parade. The accused and his brother, Isaac Mkhabele, appeared in the line-up at the identification parade. The accused represented to Insp. Rapiitsoa that his name was that of his brother and his brother represented that his name was that of the accused. This is why Insp. Rapiitsoa recorded their names as such on the identification parade form (exhibit 'K').

[11] At the close of the State case an application in terms of s 174 of the Criminal Procedure Act 51 of 1977 was made for the discharge of the accused on both counts, which are the counts of murder and of assault. This application was evidently without merit and was refused. The undisputed evidence of Nuel, Benmore, Herbert, and Bigboy is that Nuel, followed by Benmore and the deceased, approached the accused while he was still seated in the driver's seat of the Audi; that the accused opened the driver's door and got out of the Audi; that he slapped Nuel once; that Nuel fell to the ground; that the accused pulled out a firearm; that the accused's passenger took the firearm from the accused; that Benmore and the deceased ran away; that the accused and his passenger got back into the Audi, made a u-turn, and drove down the street in the same direction in which the deceased was running; and that shortly thereafter the deceased was found shot in the nearby vicinity. Ballistic examination linked the cartridge case found at the scene of the crime to the Z88 pistol found at the residence of the accused. Cross-examination of the state witnesses Herbert and Bigboy yielded the informal admission by the accused of his presence at the scene where the deceased was found shot and dead. See: *S v W* 1963 (3) SA 516 (A), at p 523 C-F; *S v Magubane* 1975 (3) SA 288 (N), at p 291 G – H; *S v Mathlare* 2000 (2) SACR 515 (SCA), paras [9] – [11]; *S v Maleka* 2005 (2) SACR 284 (SCA), para [16]; *S v Maleka* (2) 2005 (2) SACR 692 (SCA).

[12] The accused testified that he, accompanied by Ms. Mavis Kekane ('Mavis'), Mr. Frederick Moremane ('Freddy'), Ms. Barbara Rasemphe, and her child, Anzane Rasemphe were *en route* to Ivory Park when he, at the request of Freddy, stopped along the way to buy liquor at the tavern. They were travelling in the Audi, which

was driven by the accused. Two vehicles blocked the entrance to the street (in which the tavern is situated) at the T-junction (at points 'X1' and 'X2' indicated on exhibit 'N') and it was not possible for the accused to drive into the street. Nuel appeared (at point 'X3' indicated on exhibit 'N', which is at the T-junction) and told him that he should reverse so that one of the vehicles which was blocking the way could reverse and get out of the way. The accused added that Nuel 'asked me what kind of a stupid person I am and where do I come from.' The accused replied that he could not reverse since the suspension of his car was too low. Under cross-examination he testified that Nuel approached him in an aggressive manner and the accused was frightened by him. I refer to these events as the events at the T-junction. The accused drove past the obstacle by partly driving onto the pavement, which is the one on the side of the tavern. On the furthest side of the tavern, as the accused was travelling, is a butchery and spaza shop. The accused drove up to a point just beyond the butchery and spaza shop (point 'X4' indicated on exhibit 'N').

[13] Freddy, who was seated in the left rear of the Audi, alighted to buy alcohol while the accused and his other passengers remained seated. Nuel, followed by Benmore and the deceased, approached the accused. Nuel asked him why he did not reverse when they told him to do so. The accused ignored him. Nuel then poked the accused with a bottle while saying to him 'who do you think you are.' The accused opened the driver's door quickly. Nuel took one step backward and threw his bottle at the accused. The accused succeeded in evading the bottle. He slapped Nuel with his open hand. Nuel fell down. Benmore and the deceased then also each threw a bottle from which they were drinking alcohol at the accused. He bent and was able to avoid being hit by the bottles. As he rose from that position, the

accused noticed that Freddy was pulling out the firearm that was tucked away at the accused's waist. The accused got back into the Audi. Freddy went around the Audi. One of the two persons who accompanied Nuel went around the Audi to the side where Freddy was and grabbed the firearm from Freddy. Freddy got back into the Audi and told the accused that the firearm had been snatched from him. I refer to these events as the events at the Audi.

[14] The accused noticed in his rear view mirror that the deceased was running to the stop sign at the T-junction, and that he turned left into Mdaka Street. He also noticed that Benmore ran to a point across the road from the tavern (point 'X5' on exhibit 'N'), which point is about where the state witnesses testified the Golf was parked. The accused made a u-turn and drove in the direction in which the deceased was running. The accused also turned left at the T-junction into Mdaka Street. When the accused noticed the deceased about fifty metres away from the T-junction (point 'X7' on exhibit 'N'), he 'quickly stopped' and got out of the Audi. The accused held his two hands together with his index fingers pointing horizontally forward and his thumbs upward thereby simulating that he was holding a firearm, and he shouted: 'I'll shoot you!' Drop the firearm you have! The accused 'quickly went up to him and grabbed him.' A tussle or struggle for the possession of the firearm ensued until the accused succeeded in grabbing the firearm out of the hands of the deceased. The accused walked away while the deceased was still standing. A gunshot was fired during the struggle before the accused gained the possession of the firearm. The accused did not see whether or not the gunshot hit the deceased.

[15] The accused is employed by the Department of Correctional Services. His duties entail the tracing of people who have absconded. He testified that because he is a law enforcement officer he is permitted to carry a loaded firearm at all times. The firearm which he had in his possession at the time of the incident under consideration was his service pistol that belonged to the State.

[16] The accused called Mavis and Freddy as witnesses in his defence. Freddy turned out to have been the person to whom the state witnesses referred as the accused's only passenger. Mavis and Freddy testified that there was not only one passenger in the Audi at the time of the incident, but that Mavis, who is the accused's girlfriend, Freddy, who is Mavis's uncle, and Ms. Barbara Rasemphe, who is Freddy's wife, and their child, Anzane Rasemphe, were also passengers in the Audi. They both testified about events at the T-junction; events at the Audi when bottles were thrown at the accused and his firearm snatched from Freddy; and the chasing after the deceased by the accused to recover his firearm from the deceased. I elaborate more on their evidence later.

[17] Counsel, Ms. Surrendra for the state and Mr. Mgiba for the accused, agreed with me that Dr. Nothnagel should be recalled as a witness after the accused's case had been closed. In considering his initial and later evidence, we are concerned that the opinions expressed by Dr. Nothnagel are influenced by his view that the deceased was shot at a distance further than 50 cm. Such view is based on the absence of evidence of soot deposition or tattooing which he observed when he conducted the *post-mortem* examination on the body of the deceased. The absence of soot deposition or tattooing, however, is inconclusive in the determination of the

range at which a person was shot without reliable evidence relating to the nature of the clothing that covered the area of an entrance wound and the results of an examination of such clothing, which evidence is absent in this case. We also consider his opinion on whether the deceased could have remained standing upright and for the struggle to have continued for a while after the deceased had been shot, given the injuries which the deceased had sustained, as non-definitive.

[18] It is convenient to first consider the charge of assault. That the accused slapped Nuel in the face during the events at the Audi is common cause. What is in issue is whether or not the state has proved beyond reasonable doubt that he did so unlawfully and intentionally.

[19] The accused's testimony about Nuel's initial approach at the T-junction and the aggression that he at that time displayed towards the accused were not foreshadowed in the cross-examination of Nuel. Neither was his testimony that Nuel confronted him with what had happened at the T-junction when Nuel, followed by Benmore and the deceased, confronted him a little later foreshadowed in the cross-examination of Nuel or Benmore. The evidence of Mavis and that of Freddy also contradicts the accused's evidence that Nuel approached him or that he displayed any form of aggression towards the accused at that stage of the events.

[20] The accused testified that he noticed that Nuel, Benmore, and the deceased each had a bottle in their hands from which they were drinking alcohol when they approached him. Nuel was cross-examined on whether he had consumed alcohol, but it was not suggested to him, or to Benmore, that the accused had seen them

drinking alcohol. The accused's evidence that Nuel poked him with a bottle was also not put to Nuel. His evidence that Nuel threw a bottle at him when the accused got out of the Audi and that Benmore and the deceased each threw a bottle at him once Nuel had fallen after the accused had slapped him, is in conflict with the version of the accused that was foreshadowed in their cross-examination. It was put to Nuel that he and his friends were very aggressive, that they 'threw an assortment of beer bottles at the accused' when they approached him, that Nuel asked him who he thought he was, and that the accused got out of the Audi to question them as to why they were acting aggressively. It was put to Benmore that the accused stopped the Audi at a point beyond the tavern (next to point 5 depicted on exhibit 'G'), that Nuel, Benmore and the deceased approached the accused in an aggressive manner, and that they, upon their arrival, threw beer bottles at the Audi and at the accused.

[21] When cross-examined, the accused testified that he alighted from the Audi, because he was angered by Nuel poking him with the bottle. He was able to avoid Nuel earlier on at the T-junction by driving away, but he was no longer able to avoid him. He slapped Nuel without saying anything. I have mentioned that Nuel was not confronted with the alleged incident at the T-junction. It was put to Nuel that the accused got out of his vehicle to question them as to why they were acting aggressively and that he slapped Nuel in order to protect his property (presumably his car).

[22] The accused testified that he did not produce his firearm at any stage during the events at the Audi. His evidence in this regard is in total contradiction with his version that was put to the state witnesses. It was pertinently put to Nuel and to

Herbert that, upon realising that Nuel was not alone or that there was more than one assailant (this was after he had hit Nuel), the accused produced his firearm. The reason why the accused produced his firearm that was put to Nuel and to Benmore is also contradicted by the accused's evidence. He testified that he had noticed Nuel, Benmore and the deceased at the stage when they were approaching the Audi.

[23] The accused testified that he noticed that Freddy was pulling out the firearm that was tucked away at the accused's waist after the bottles had been thrown at him. Again, this evidence contradicts his version that was foreshadowed in the cross-examination of the state witnesses. It was put to Nuel that the accused produced his firearm and that his passenger took the firearm from him as Nuel 'correctly put it' in his evidence. What Nuel so 'correctly' said is that the accused's passenger grabbed the firearm from the accused's hand. It was also put to Herbert that, after the accused had produced his firearm, his passenger returned and disarmed the accused.

[24] The evidence of the accused, Mavis and Freddy about the events at the Audi is materially contradictory. The undisputed evidence of Nuel, Benmore, Herbert, and Bigboy is that Nuel, followed by Benmore and the deceased, approached the accused at this point in time. This is also the evidence of the accused. It is also common cause that the accused is a tall man of 1,8 metres in height and that Nuel is also a tall man of about the same height. Yet, Mavis testified that a 'short gentleman' of about 1, 5 metres tall, who was followed by four men, approached the accused while he was seated in the Audi. The short man, who had a bottle in his hand, asked

the accused 'who do you think you are'; he poked the accused with his finger on the forehead; and he hit the accused with the bottle on his head. The accused got out of the car; he grabbed this short man; he asked him 'what are you doing'; he slapped him across the face; and the short man fell. Thereafter the four others ran towards the accused and they threw bottles at him. Under cross-examination she testified that the short gentleman was followed by three men, who did not have bottles in their possession when they were approaching the accused. They picked up the bottles from the ground and threw them at the accused. The three were followed by another man who had three bottles in his possession.

[25] Freddy testified that, upon his return from the tavern, he noticed a commotion at the Audi. The accused was standing close to the driver's door on the right hand side of the Audi and 'more than five' people were throwing bottles at him. Freddy's evidence is to the effect that bottles were thrown continuously at the accused from the time that he returned from the tavern until after he had taken the accused's firearm. In this regard he said the following when he was cross-examined: 'They were still throwing bottles, but there were not as many as I saw at the time when I came out of the tavern.' His evidence in this regard is obviously contradictory to that of the accused who testified that only three bottles were thrown at him. Freddy also contradicted himself on whether it was dark or whether the area was well lit and why he was unable to say what type of bottles were thrown at the accused.

[26] It is common cause that Freddy took a firearm from the accused. The only issue is whether he grabbed the firearm from the accused after the accused had produced it, which is the unchallenged evidence of the state witnesses, or whether

he took it from the accused's waist, which is the evidence of the accused, Mavis, and Freddy. Freddy testified that, upon realising that there were people throwing bottles at the accused and upon seeing the firearm tucked in at the hip of the accused, he went to the accused and took the firearm from him in order to keep it safe inside the Audi. We find it improbable that Freddy would have disarmed the accused had he indeed been under attack by a group of more than five men. His firearm was probably the only weapon with which he could have defended himself against the alleged attack. Freddy testified that he took the firearm from the accused because he was worried that the accused's assailants might end up taking it. It is improbable that Freddy, in such circumstances, would have tried to safeguard the firearm by intending to put it in the Audi where his wife and child were seated and thereby placing them at risk by attracting the assailants to where they were seated. It is common cause that the events at the Audi came to an end once or soon after the firearm had been taken from the accused.

[27] To sum up thus far, the accused, Mavis, and Freddy contradict each other in material respects insofar as their evidence relevant to the charge of assault is concerned. There are material contradictions between the evidence of the accused and his version that was put by his counsel to state witnesses. Certain material aspects of the accused's evidence were not foreshadowed in the cross-examination of the state witnesses. The accused and his counsel were afforded whatever time they required for consultations when it was indicated that he wished to consult with his counsel or when his counsel wished to take instructions from him. The evidence of Mavis on material issues is at odds with the common cause facts and rather corroborates the evidence of the state witnesses that there was only one passenger

in the Audi. The exculpatory version put forward by the accused, insofar as the charge of assault is concerned, and the evidence of his witnesses on the disputed issues, are, on the totality of the evidence, in every respect palpably false.

[28] There are unsatisfactory features to the evidence of Nuel. Notably, his testimony that the Audi almost collided with them when it initially stopped in front of the Golf where they were standing. They had to move once it stopped and that is why Nuel believed it almost collided with them. The evidence of Benmore, Herbert, and Bigboy, contradicts his evidence on this issue. Their evidence is that the Audi almost collided with them once it proceeded further after it had initially stopped in front of the Golf where they were standing. Their evidence on this issue is on the totality of the evidence accepted.

[29] Nuel contradicted himself on a few aspects, such as: whether or not there were vehicles present in the street at the time of the incident other than the Golf and the Audi; the positions in which they stood at the Golf (in a circle or in a line); and the direction that they or each one of them were facing. There are also contradictions between the evidence of Nuel and a police statement which he had made later on during the evening in question (exhibit 'F'), but such contradictions are, in our view, to be ascribed to communication problems between him and the officer who took down his statement in English (Nuel spoke Sepedi, the officer Setsonga, and the statement was written in English) and his emotional state at the time when he made the statement. His evidence, insofar as it is relevant to the charge of assault, is in almost all its material respects corroborated by that of Benmore, Herbert, and Bigboy. Nuel is, we are satisfied, not a lying witness. His

recollection on a few aspects is imperfect. The unsatisfactory features in his evidence, on the totality of the evidence, do not impair his credibility as a witness or the reliability of his evidence on the many other material aspects relevant to the assault charge, particularly those that are corroborated by the evidence of Benmore, Herbert and Bigboy.

[30] Contrary to his evidence that the firearm was not pointed at anyone, it is stated in Benmore's police statement (exhibit 'H'), which was made later on during the evening in question, that he called the police to report the pointing of a firearm since the accused pointed the firearm at the deceased. Benmore denied that he said this to the police. Again, different languages were used between him and the officer who took his statement, Benmore was still in shock at that time, and we accept that he could have missed the error made in his statement when it was read back to him. Not one witness for the state or for the defence suggested that the accused pointed a firearm at the deceased at that stage of the events. Benmore was also criticised for not having mentioned in his statement his evidence that when Nuel, Benmore, and the deceased arrived at the Audi, Nuel greeted the accused and asked him whether he wanted to collide with them. This omission too, in our view, does not detract from his credibility as a witness and his reliability on the other issues which he testified about insofar as the charge of assault against the accused is concerned.

[31] Bigboy and particularly Herbert were hardly cross-examined. Their evidence, insofar as it pertains to the charge of assault against the accused, is coherent, satisfactory in all material respects, and reliable in the light of all the evidence. They

corroborated each other on most of the material aspects. Each one's evidence is also in most of the material respects corroborated by that of Nuel and Benmore.

[32] The inability of the state witnesses - Nuel, Benmore, Herbert and Bigboy - to give accurate accounts on matters, such as where precisely each one in their group stood on the pavement at the Golf (besides their evidence that Herbert and Bigboy leaned against or stood in a position with the Golf immediately behind them), whom of them the Audi almost collided with, who moved away after it had happened, and their differing accounts on matters, such as whether the Audi paused next to them after it had left the point where it first stopped and before it reached the point where the assault took place (Benmore testified that the Audi briefly stopped next to them at which stage Nuel asked the accused whether he wanted to collide with them, and Herbert testified that Nuel at that stage asked him why he did not hoot for them so that they could give way), whether the accused said anything to Nuel when he was approached by Nuel, Benmore, and the deceased (Benmore and Herbert testified that the accused said to them 'what were you saying'), what precisely Nuel said to the accused (Nuel testified that he only greeted him; Benmore testified that Nuel greeted him and asked whether he wanted to collide with them; Herbert testified that he did not hear the conversation between the accused and Nuel; and Bigboy was not asked about the conversation), whether the accused stepped on Nuel once he had fallen (Benmore said he put his foot on Nuel's chest, and Bigboy said he put his foot on Nuel's head), whether the deceased also spoke to the accused (Nuel and Benmore testified that the deceased also apologised to the accused), are by and large to be expected in circumstances where various eyewitnesses recount their observations in regard to events which took place eighteen months previously. The

differences which emerge upon a comparison of the evidence of Nuel, Benmore, Herbert, and Bigboy, in our judgment, are by and large immaterial and insignificant as far as such differences pertain to the charge of assault.

[33] We are satisfied that the totality of the evidence proves beyond reasonable doubt that the accused did not have bottles thrown at him and was not assaulted. Upon being confronted – rightly or wrongly – with the manner in which he drove, the accused assaulted Nuel by slapping him in the face and the accused thereupon pulled out his firearm. The only reasonable inference, on the totality of the evidence, is that the accused's passenger, Freddy, grabbed the firearm from the accused, because the accused was acting irrationally. When this happened the events at the Audi ended. It has, we are satisfied, been proved beyond reasonable doubt that the accused unlawfully and intentionally assaulted Nuel.

[34] I now turn to a consideration of the charge of murder. It is common cause that after the accused's firearm had been taken by his passenger, Freddy, at the time of the events at the Audi, the deceased ran away to the T-junction and left into Mdaka Street. The accused and Freddy got back into the Audi. The accused drove in the same direction in which the deceased had run. The accused testified that he did this, because, upon entering the Audi, Freddy told him that the deceased had snatched the firearm from him when he was about to enter the car. Freddy testified that he had gone around the front of the Audi to the left rear passenger door after he had taken the firearm from the accused. When he was about to open the door to get in, somebody came from behind him and snatched the firearm from his right hand in which he held it. Freddy saw the person running down the street to the stop sign at

the T-junction and he told the accused about the snatching when he, Freddy, got into the Audi. The accused testified that he turned left into Mdaka Street and drove in the direction in which the deceased had run.

[35] The accused travelled for a distance of about 50 metres along Mdaka Street when he 'spotted' the deceased. Freddy confirmed to him that that person was the person who had taken the firearm. The deceased was coming out of one of the houses or properties. Upon seeing them, the deceased turned and tried to hide. The firearm was tucked inside the front part of the deceased's pants. The accused got out of his vehicle, he held his two hands together simulating that he was holding a firearm, and he shouted: 'I'll shoot you! Drop the firearm you have!' The accused ran to the deceased and he grabbed him. A tussle ensued for the possession of the firearm. A shot was fired at a stage of the struggle when their arms were raised above their heads. The deceased was holding onto the butt of the firearm with both his hands while he was pulling it away from the accused in a downward direction. The accused's left hand was clutching onto the hands of the deceased and his right hand holding onto the barrel of the firearm while he was struggling to pull the firearm out of the deceased's hands by pulling the barrel upwards.

[36] It is common cause that the deceased was fatally wounded by a bullet that was fired from the accused's service pistol. The defence raised by the accused is that he defended himself against the deceased's act of theft of his service pistol and that the fatal shot was fired during the struggle between the accused and the deceased for possession of the firearm. Mr. Mgiba, on behalf of the accused, submitted that the killing of the deceased was therefore not unlawful. He also

submitted that the accused did not have the legally required intention to bring about the death of the deceased.

[37] The evidence of the accused and of Freddy and that of Mavis are contradictory on aspects relating to the events which immediately preceded the shooting of the deceased. Mavis testified that after the firearm had been snatch from him, Freddy went to the accused, who at that stage was standing on the right hand side of the Audi and about to enter it, and he told him that the firearm had been taken. I have mentioned that the evidence of the accused and of Freddy is that Freddy told the accused about the snatching of the firearm once Freddy got back into the Audi. It is further common cause that only the deceased ran down the street towards the T-junction and that Benmore ran to or in the direction of the Golf, which was parked only a few metres away from where the events took place at the Audi. Mavis, contrary to the evidence of the accused and of Freddy, testified that Freddy pointed out the 'youngster' who had taken the firearm while they were still driving towards the stop sign in the street in which the tavern is situated. He, according to Mavis, stood with someone next to the street not far away from the stop sign and he ran away when he was pointed out. The accused stopped and got out of the car. The 'youngster' was running away and the accused ran after him, chasing him. The deceased ran to a house and the chasing continued into that house. Mavis estimated the distance that the accused was chasing the 'youngster' at about 40 metres. The accused later returned with a firearm in his hand. It is common cause that the incident took place at No. 3852 Mdaka Street, which is in a different street from the one where Mavis testified that the accused stopped and started to give chase to the deceased. She evidently testified about events that she would not

have been able to see from where she was allegedly sitting in the front passenger seat of the Audi. We, on the totality of the evidence, do not consider Mavis to be a credible witness. Her evidence is not reliable, and it is rejected in its entirety.

[38] There are also material contradictions between the evidence of Freddy and that of the accused. Freddy testified that the accused did not turn left at the T-junction into Mdaka Street in order to follow the deceased, but to go home. He testified that they were not going to search for the 'youngster' who had taken the firearm. They realised nothing could be done. They did not see which direction the youngster had taken when they reached the stop sign and it was merely a coincidence that the accused had taken the same direction. They drove for a short distance – about 100 metres – along Mdaka Street, when Freddy 'spotted the youngster'. Freddy identified him by the colour of his clothing and by his height. He was standing with somebody else. Freddy told the accused that that person was the one who took the firearm from him. The accused stopped and alighted from the Audi. The 'youngster' started to run away when he saw the car. The accused ran after and gave chase to him into a nearby house. The Audi was stopped on the road surface and Freddy parked it on the side of the street. After a short while the accused returned to the vehicle with the firearm.

[39] The accused's evidence relating to these events is also not without contradiction. A few examples suffice. In his evidence in chief the accused testified that the deceased took out the firearm while he was facing in the direction of the house from which he had come immediately before the accused approached him, and, when he was cross-examined, the accused testified that the firearm came out

from the front of the deceased's trousers once the tussle had ensued between them for possession of the firearm. It was put to Nuel that one of his friends had taken the firearm from the accused's passenger and that the accused got back into his car in an attempt to get away from this scene in order 'to avoid a situation where the gun that was taken away was used to harm other people.' This version is contradicted by the accused's evidence that he did not see where Freddy had gone after he had taken the firearm from the accused or that he did not see the deceased taking the firearm from Freddy. The snatching of the firearm was only reported to him once Freddy got back into the Audi.

[40] It is, however, trite that lies in themselves or improbabilities in an accused's version do not establish the guilt of an accused person. See: *S v Steynberg* 1983 (3) SA 140 (A), at p 146A - E; *S v Mtsweni* 1985 (1) SA 590 (A); *S v Shackell* 2001 (2) SACR 185 (SCA). The question is whether the state has discharged the burden upon it of proving his or her guilt beyond a reasonable doubt.

[41] The accused alone is able to give evidence about the circumstances in which the deceased received the fatal gunshot wound. Freddy testified that he did not witness the struggle or firing of the shot. Mavis also did not claim to have witnessed that. The state witnesses - Nuel, Benmore, Herbert, and Bigboy - testified that they did not witness that part of the incident. The accused's exculpatory evidence and his explanation about the struggle between him and the deceased for the possession of the firearm are in material respects unsatisfactory. We accept that much of the accused's elaborate step by step account of the struggle that occurred about eighteen months ago and what must have been a fast moving incident is perhaps

hypothesis - elicited from him in cross-examination or given in answer to my questioning - in an attempt to furnish a plausible account of an event that is not necessarily capable of a precise, coherent, and reliable explanation. We, to use the words of Greenberg, JA in *Goodrich v Goodrich* 1946 AD 390, at p 396, ‘... guard against the intrusion of any idea that a party should lose his case as a penalty for perjury’ and we bear in mind what Feetham, J said in *Maharaj v Parandaya* 1939 NPD 239, at p 243:

‘Some innocent people meet accusations by simply telling the truth. Others, who may be equally innocent of the accusation, take refuge in some invented story, because they are not satisfied that the truth alone would be sufficient to carry conviction.’

[42] We, of necessity, must do without the aid of a reliable account of the struggle. See: *S v Steynberg* 1983 (3) SA 140 (AD), at p 148C-D; *S v Coetzer* 2000 (2) SACR 169 (WLD), at pp 171 i – 172 d. The fatal gunshot wound and its tract through the muscles of the left upper arm, backwards, downwards and to the fourth lumbar vertebra, although not consistent with the account of the struggle given by the accused, is logically not inconsistent with a shot that was fired somewhat wildly during the course of a struggle.

[43] It would not, in all the circumstances, have been unlawful for the accused to have followed the deceased, to have grabbed him, and to have wrestled with him in defence against the deceased’s act of theft of the accused’s service pistol if it was indeed snatched by the deceased. Refer generally to *Ex parte Die Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (A) and *S v Texeira* 1980 (3) SA 755 (AD), at p 765 A – C, and in particular to *S v Mogohlwane* 1982 (2) SA 587 (T). Such

acts, if they were acts of recovery, were resorted to and followed through *instante* or forthwith and formed part of the *res gestae* of the snatching of his service pistol by the deceased, if it was snatched by him. See: *S v Mogohlwane (supra)*, at pp 590G – 593G. The accused, if his version is reasonably possibly true, approached the deceased unarmed. It is not suggested that the deceased was known to the accused. The state has in such event not proved that there was a less dangerous and effective method reasonably available to the accused to defend himself against the theft of his service pistol. See: *Ex parte Die Minister van Justise (supra)*, at pp 497H – 498C and p 501D –E and *S v Mogohlwane (supra)*, at p 594B – C. If it is reasonably possibly true that the gunshot, which fatally wounded the deceased, went off during the struggle for the possession of the firearm between the deceased and the accused, then it follows, in all the circumstances of this case, that the state has failed to prove beyond any reasonable doubt that the accused had acted unlawfully or intentionally or with a lesser form of *mens rea*.

[44] When all the elements which point to the guilt of the accused are weighed against all those which are indicative of his innocence, we find ourselves unable to conclude that ‘... the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.’ See: *S v Chabalala* 2003 (1) SACR 134 (SCA), para [15]. What is decisive for us is the issue of the alleged snatching by the deceased of the accused’s service pistol from the accused’s passenger, Freddy, at the time of the events at the Audi.

[45] The evidence of the state witnesses - Nuel, Benmore Herbert, and Bigboy - is materially contradictory on the issue in whose possession the firearm was at the time

when the accused and his passenger got back into the Audi once the events at the Audi had ended. Nuel, Herbert, and Bigboy testified that Benmore and the deceased ran away immediately after the accused's passenger had disarmed the accused. They did not suggest that the accused had taken back his firearm from his passenger before he and his passenger got back into the Audi. Benmore testified that he retreated in the direction of the Golf and that the deceased ran away after the accused had taken back his firearm from his passenger. Benmore did not suggest that the accused's passenger had taken back or had been given the firearm before the accused and his passenger got back into the Audi. Bigboy pertinently testified that the accused's passenger still had the firearm in his hand when he and the accused got back into the Audi. This contradiction in itself proves only that one or more or all of the state witnesses are erroneous on the issue in whose possession the firearm was at the time when the accused and his passenger got back into the Audi and left. We are unable to find that the evidence of Nuel, Herbert, and Bigboy is to be believed in preference to that of Benmore on this contradictory and material issue. We can only conclude that their evidence on this issue is not reliable and does not rebut that of the accused and of Freddy beyond a reasonable doubt.

[46] The evidence of the accused and of Freddy that the deceased had snatched the firearm from Freddy before he ran away cannot, on the totality of the evidence, be held not to be reasonably possibly true. It is common cause that the deceased, unlike Benmore and Nuel, did not return to their group of friends at the Golf. Instead, the deceased ran away to the T-junction and left into Mdaka Street. The accused did not chase after Nuel or Benmore. He chased after the deceased. One of a few inferences which may reasonably be drawn from these proven facts, in the light of

the unreliable state evidence on the question of who had the possession of the firearm at the time when the accused and Freddy got back into the Audi, is that the deceased ran away, because he had snatched the accused's service pistol, and that the accused followed the deceased in defence against the theft. It cannot, from the proven facts, be inferred beyond reasonable doubt that the deceased ran away for a reason of his own, such as that he was frightened, and that the accused followed or approached him with evil intent.

[47] The inevitable conclusion is that it cannot, from the proven facts, be found beyond reasonable doubt that the accused unlawfully and intentionally brought about the deceased's death or that he acted with any lesser form of *mens rea*.

[48] In the result, the accused is found:

- a. not guilty and he is discharged on count 1, which is the charge of the murder of the late Mr. Owen Mabundla; and
- b. guilty as charged on count 2, which is the charge of assault upon upon Mr. Sevha Nuel Mabundla.

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P.A. MEYER

JUDGE OF THE HIGH COURT

10 May 2010