

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED. <i>OK</i>
<i>16/03/2017</i>	
DATE	<i>[Signature]</i>
	SIGNATURE

Case no. A429/15

16/3/2017.

In the matter between:

The State

and

T.E. MNGOMEZULU

JUDGMENT

RABIE, J

1. By leave granted on petition by this court the appellant appeals against his conviction and sentence imposed upon him on 19 June 2013 by the Regional Court of Nelspruit in respect of one count of murder and one count of attempted murder.

2. The background to the matter is briefly the following. On 15 January 2010 the appellant visited his friend Mr Pinkie Sindephi to borrow some money. According to Mr Sindephi they had to wait until his wife returned home. In the meantime Mr Sindephi decided to visit the local tavern situated in a building which had been built as a double garage. It is not clear how long they spend there but eventually the appellant decided that he wanted to play pool on the only pool table in the establishment. It appears that persons who wanted to play would put a R2,00 coin on the table and await his turn.
3. At some point an argument broke out between the appellant and the deceased. Apparently the deceased told the appellant that he should wait his turn and in any event that the money on the table was his and not that of the accused. It seems that the deceased got extremely angry and took a pool cue and started to hit the appellant with it on the head and shoulder area. The force was such that the pool cue broke in two but the deceased kept on assaulting the appellant with it.
4. The appellant, who had his licensed firearm with him, took out the firearm and fired two warning shots into the ground. This did not deter the deceased who kept on moving in on the appellant and beating the appellant with the pool cue. According to the appellant he was bleeding profusely from his head and he feared for his life. He thereupon fired shots at the appellant which struck him in the head and chest. The appellant was taken to hospital but he did not survive. The appellant went straight to the nearest police station, reported the matter and handed his firearm licence to the police.

5. During the shooting Mr Pinkie Sindephe was struck in the left thigh by a bullet fired by the appellant. According to Mr Sindephe he ducked away when the shooting started and only later realised that he had been shot. According to the appellant he had no reason to shoot his friend and was not even aware that he had done so.
6. In convicting the appellant the Magistrate found that he did not believe the appellant's version, that he did not regard the differences in the evidence of the state witnesses as of any import and that he accepted the evidence of the owner of the tavern, Mr Clifton Mkhabela. According to the Magistrate the version of Mr Mkhabela was that the deceased had hit the appellant once on the head with a pool cue after which he settled the dispute. Thereafter the argument flared up again and the appellant shot the deceased. It was further found that the appellant exaggerated his version and that it was improbable that the assault on him could have been so extensive without the patrons in the tavern coming to his rescue.
7. Firstly, as far as the evidence of Mr Sindephe is concerned it appears that he can throw little light on the topic except to confirm that sometime after the deceased arrived, an argument broke out between him and the appellant. After some time he heard the appellant breeching his pistol and then he ducked under a table trying to get out of the way. He saw nothing of what occurred further.
8. Mr Mkhabela confirmed that the dispute was about the R2,00 coin for the game of pool. He confirmed that the deceased hit the accused with a pool cue and he said that the accused then left the tavern. Later he came back and then he heard a gunshot. The evidence of Mr Mkhabela was contradictory. On the one hand he testified that the deceased assaulted the appellant and kept on moving towards

the appellant while the appellant was shooting his firearm, but on the other hand he denied that he saw the assault. He also testified that the appellant shot that the deceased while he was lying on the ground but according to his statement the appellant did not shoot at the deceased while he was on the ground.

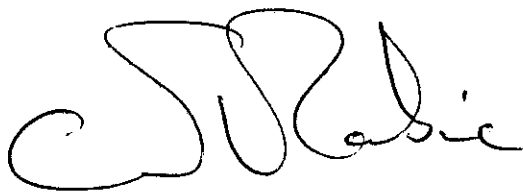
9. It is not necessary to refer to the evidence of Mr Mkhabela in detail and it would suffice to say that it is not possible to construct a single and acceptable version of events from his evidence.
10. The only other witness who testified about the incident was Constable T. Mahlalela who was also present in the shebeen. He confirmed that the deceased hit the appellant on the head with a pool cue. Importantly he denied that the deceased ever left the tavern and returned to it as testified by Mr Mkhabela. According to his later evidence Const Mahlalela saw very little of the incident as he was on the outside of the tavern at the time.
11. According to the appellant the deceased initially prevented him from playing pool as he was not a permanent resident of the area. The appellant did not make a scene and allowed the deceased to play with his friends. After the game was finished the appellant approach the table to play but was again prevented to play by the deceased who then also started to fight with him. According to the appellant the deceased hit him over the head with a pool cue until the cue broke. He said it was extremely painful and the first time he had ever been assaulted with a stick on the head. The appellant stated that he tried to move backwards while facing the deceased and that the deceased kept on coming at him. He fired two warning shots in the ground but the deceased kept on coming and was still

assaulting him. By this time he was wiping the blood from his face so that he could see and then fired shots at the deceased who was still assaulting him.

12. After the shots were fired the appellant fled the scene and was chased by friends of the deceased. The appellant went to a police station and reported the matter.
13. The appellant testified that he never saw Mr Sindephi during the attack on him and while he was discharging his firearm. He had a good relationship with Mr Sindephi and had had no intention to shoot or kill him.
14. A consideration of the evidence on behalf of the State shows that all three of the witnesses had different versions of the event and there were a number of crucial contradictions. Mr Mhabela, on whose evidence the Magistrate relied, differed from the other two witnesses, inter alia, in respect of the appellant's movements prior to the attack on him and the shooting as well as the alleged shooting of the deceased while he was on the ground. His evidence was also at variance with the evidence contained in his statement to the police regarding these crucial issues. Apart from contradicting each other, these witnesses contradicted themselves and in my view the Magistrate erred in relying on any of the versions as being truthful and reliable beyond a reasonable doubt.
15. On the other hand, the appellant gave a version in which he never contradicted himself and which was not in any way inherently improbable. He withstood his cross-examination very well and remained with his version. The Magistrate stated that he did not believe the appellant but that is not the relevant test. In my view the Magistrate erred in not finding that the appellant's version was reasonably possibly true. The appellant was attacked with vicious blows to his head and

neck area with a pool cue. The ferocity were such that the pool cue broke in two. Thereafter, the deceased continued with the remaining part still in his hand. He kept on coming at the deceased and hit him despite the warning shots and despite the shots at his body. This fact was confirmed during cross-examination by both Mr Mkhabela and Mr Mahlalela. There can be no doubt that anyone blow to the head by an instrument such as was used by the deceased, can be fatal.

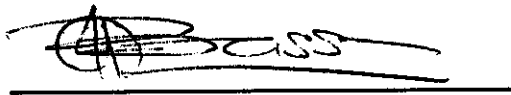
16. Consequently, in my view, the appellant did not act unlawfully but in defence of his own life and did not exceed the bounds of self defence. The State did not prove the charges against the appellant beyond a reasonable doubt and consequently he should not have been convicted.
17. In the result the appeal should succeed and the convictions and sentences should be set aside.
18. Consequently, the following order is made:
 1. The appeal succeeds and the convictions and sentences are set aside and replaced with the following order: "The accused is found not guilty on all charges".

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C.P. RABIE

JUDGE OF THE HIGH COURT

I agree

A handwritten signature in black ink, appearing to read 'A. Basson', is written over a horizontal line.

A. BASSON

JUDGE OF THE HIGH COURT