



Reportable	YES / NO
Circulate to Judges	YES / NO
Circulate to Magistrates	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]**

CASE No: 16/2012

19 February 2013

THE STATE

AND

MCHELI MTSHALI

ACCUSED

JUDGMENT

PAKATI J:

1. The accused, Mcheli Mtshali, appears before me on ten charges. They are as follows:
 - 1.1 Count 1: Assault common: The accused is alleged to have assaulted Ms Josephine Lallie, also known as Zom, by assaulting her with an open hand.
 - 1.2 Counts 2, 3, 4 and 7: Attempted Murder: These counts relate to Mr Petrus McKay also known as Pana ("McKay"), Mr Raymond Philemon Kaweng ("Kaweng"), Mr Willem Baboa also known as T-man ("Baboa") and Mr Charles Kammies ("Charles"). The accused is alleged to have fired shots at them with the intention to kill them.

1.3 Count 5: Murder read with s 51(1) of the Criminal Law Amendment Act, 105 of 1997: The State alleges that the accused killed Ms Rebecca Modise also known as Maggie by shooting her with a firearm.

1.4 Count 6: The accused is alleged to have contravened the provisions of s 120(3) (b) read with secs 1, 103, 120 (1) (a) and 121 of the Firearms Control Act, 60 of 2000, by handling a firearm in such a manner that it created a risk to the safety of Mr Moses Kammies also known as Man ("Kammies"), Ms Brenda Magada and Ms Josephine Lallie also known as Zom. In the alternative the State alleges that the accused contravened s 120 (3) (a) read with secs 1, 103, 120(1)(a) and 121 of the Firearms Control Act, 60 of 2000 in that he handled the firearm negligently.

1.5 Count 8 relates to possession of unlawful firearm in contravention of s 3 read with secs 1, 103, 120 (1)(a) and 121 of Act 60 of 2000 read with s 250 of the Criminal Procedure Act, 51 of 1997 in that the accused had in his possession an unlicensed firearm.

1.6 Count 9: Unlawful Possession of Ammunition in contravention of s 90 read with secs 1, 103, 120(1) (a) and 121 of Act 60 of 2000; and,

1.7 Count 10: The accused is alleged to have acted in contravention of the provisions of s 5 (b) read with secs 1, 13, 17 to 25 and 64 of Act 140 of 1992 in that he dealt in a substance producing drug to wit mandrax tablets alternatively that he contravened the provisions of s 4 (b) read with secs 1, 13, 17 to 25 and 64 of Act 140 of 1992 in that he was found in possession of mandrax tablets.

Counts 1 to 9 are alleged to have taken place on 05 August 2011 at about 23h00 at Diamant Park Shanties, Greenpoint, in the district of Kimberley.

2. The accused, a male aged 40 years, was represented by Mr Nagel on the instructions of the Legal Aid Board. He pleaded not guilty to all counts. In his plea explanation he admitted his presence at the scene at about 20h00 in search of his friend, Mr Sqiko Mavundla ("Mavundla"). He denied being

present at the scene when the shooting took place. He also denied dealing in mandrax tablets. He alleged that the arresting officer informed other police officers that he confiscated from him a plastic bag which contained mandrax tablets. The contents of the plastic bag were neither shown to him nor were the tablets counted in his presence. They were also not sealed in his presence. He further denied being in possession of an unlicensed firearm and ammunition. The firearm and the ammunition were never recovered.

3. In the early evening of Friday 05 August 2011, Kammies was seated at home at the fire playing music in front of the verandah. He was in the company of his cousin, Baboa, Kaweng and his brother, Charles, consuming alcohol. The accused and Mavundla joined them. Charles went to the tuck shop. At a later stage Ms Brenda Magada, McKay and Ms Lallie arrived. Kammies occasionally went inside the shack. Whilst still inside the shack Brenda came and asked him to reprimand the accused who was bothering Ms Lallie outside. Kammies and Brenda went out of the shack. While they were at the verandah Kammies saw the accused leaving through the gate. He immediately turned and fired shots towards the shack where they were. Kammies pulled Ms Magada and Ms Lallie inside the shack. At that stage he noticed that someone was lying on the ground. Further shots were fired one of which hit the door of the shack. When everything was quiet Charles knocked on the door and Kammies opened for him. Kammies, his wife, Ms Violet Kammies, Charles and others went out to investigate. They saw McKay, Kaweng and the deceased lying on the ground. The Police arrived shortly thereafter.
4. Visibility was good according to Kammies. The high mast light and a light in front of his gate provided the light. The flames from the fire also enhanced the light. Kammies denied that he reprimanded the accused not to touch Ms Lallie.

5. On 12 August 2011, a Wednesday, between 11h00 and 12h00, Kammies was busy cleaning his yard when he picked up one cartridge outside the yard. He handed it over to the investigating officer.
6. Ms Lallie testified that on the day in question she was in the company of Ms Magada and McKay on their way to Kammies' place around 21h50. She gave her child to McKay and started dancing. At that stage the accused held her hand, speaking to her in Afrikaans and touched her on her waist using both hands. She pushed him away. Ms Magada reprimanded the accused. The accused refused to stop. Ms Magada went to call Kammies from the shack to report the conduct of the accused. In the meantime the accused slapped Ms Lallie on her left cheek with an open hand. She slapped him on the chest in retaliation. The accused and Mavundla went to the verandah. They immediately returned and walked towards the gate. The accused turned and started shooting from the gate. Ms Lallie noticed Kammies standing at the verandah as the shots were fired. She wanted to follow the accused but Kammies pulled her into the house.
7. Lallie says further shots were fired whilst they were inside the house. When it was quiet they went outside and noticed that the deceased, McKay and Kaweng were lying on the ground. Two to three weeks before the trial started Charles, Kammies and herself were taken to the scene by the police where photos were taken. Certain points were pointed out by them to the police officer who took photos.
8. McKay and Ms Magada corroborated the evidence of Ms Lallie as to how they got to Kammies' place. McKay testified further that on their arrival he sat on a chair with his back facing the gate whilst Ms Lallie and Ms Magada danced. Suddenly he heard shots being fired. He was struck on the left side of his chest and fell unconscious. He could not tell who fired the shots or

from which direction they were fired.

9. According to Ms Magada when the accused started to touch Ms Lallie, she went to call Kammies from the shack. Kammies came out and reprimanded the accused and went back to the shack. The accused stood up and said “*we will see*”. He walked towards the gate. As the deceased entered the yard the accused was already outside the gate. When she was a short distance away from the gate the accused returned to the yard with his hands under his jacket. He drew a firearm and stood a short distance away from the deceased and pointed it at Baboa who was at that stage sitting down. Baboa told the accused not to scare him with a toy. He then fired at the brazier. Everyone ran for their lives.
10. Ms Magada ran to the verandah and Kammies pulled her to the house. Kammies also pulled Ms Lallie and her child into the house. Whilst they were inside the house further shots were fired. Kammies opened the door and Ms Magada saw the accused running down the street. Mavundla ran in a different direction. Kammies thereafter closed the door. Charles called from outside and requested them to go out to see what had happened.
11. In her initial statement Ms Magada told the police that it was Mavundla who fired the shots that night. She realised later that day that what she told the police officer, Malgraaf, was wrong. On Monday following the incident she made another statement alleging that it was the accused that fired the shots. Her explanation for the conflicting statements is that she was shocked and confused and had not slept. She was also drunk at the time she gave the statement. The evidence shows that at no stage did Mavundla fire any shots. In this regard Ms Magada was clearly wrong.

12. Charles, Kaweng and Baboa corroborated Kammies' evidence that on the day of the incident the accused and Mavundla joined them around the fire place where they were consuming alcohol and listened to music. Kammies sent Charles to the tuck shop. Whilst he was at the tuck shop he heard shots being fired. He returned to Kammies' place. At the gate he met the accused coming out of the gate. He greeted him. The accused's response was to fire shots at him but missed. He turned and ran away. He stood at the corner of the street and observed the accused whilst he walked down the road. Charles returned to Kammies' place. At that stage Kammies was inside the house. He knocked and Kammies opened for him. They went outside to investigate.
13. Kaweng testified that the accused, who had been seated at the fire place, stood up and hit Ms Lallie with an open hand. Thereafter he went towards the gate and suddenly turned. He walked towards Kaweng firing shots until he got to the spot where he was seated. The bullet struck his right shoulder and he fell unconscious as a result. He regained consciousness in hospital.
14. Baboa arrived at Kammies' place around 21h00. After some time Ms Lallie, McKay, Ms Magada and the accused arrived one after the other but Ms Lallie and McKay were the last to enter through the gate. Some of them sat around the fire listening to music and others were dancing. At some stage Baboa went to the toilet situated at the back of the shack. On his return he noticed the accused and Ms Lallie talking to each other but could not hear their conversation. He returned to the brazier. He and McKay went inside the shack. They heard shots being fired. They went outside to investigate. When they were under the verandah Baboa saw the accused carrying a gun and firing shots at McKay who got struck and fell down as a result. The accused was inside the yard, a distance from the gate, walking towards the house. Baboa ran away and jumped over a fence. He went to Frendo's Tuck Shop and remained there for a while. He realised that his woollen hat that

he had on had fallen off as he ran away. He found it behind the toilet in Kammies' yard on his return. He noticed that the little ball on top of the hat was missing. He realised that it was struck by the bullet fired at him as he was running away.

15. According to Baboa, Kammies used his cell phone light to identify the people lying on the ground. A short while later the police arrived. Baboa proceeded home. He related the incident of the hat to his wife and mother. His mother burnt his hat and performed a ritual for him, apparently to thank ancestors that his life was spared.
16. W/O Edwin Collen, attached to the Criminal Record Centre, attended the scene at 00h05 the same night after he received a report from radio control. He took photos. He took other photos on 18 April 2012 at 13h00. He testified that it was dark at the scene such that they had to use flash light and head lights of their vehicle to improve the lighting. My understanding is that for photographic purposes more intense light (focussed or spot-light) is required. The body of the deceased was transported from the scene to the mortuary by Mr Abram Nkadimeng, a forensic pathologist. Nkadimeng visited the scene on the day of the incident around 00h30.
17. On 06 August 2011, a day after the incident, Mr Lucky Mpholo, a police officer stationed in Kimberley, received a report from radio control that there was a murder and attempted murder committed in Greenpoint and that the accused was fleeing. He was in the company of Const Mogorosi and Kammies. They rushed to the taxi rank in Craven Street whereupon Kammies pointed out the accused to them. He arrested the accused and searched him. In one of his pockets he found a Butterfield plastic bag containing 61 mandrax tablets. He also recovered a sum of R370-50 in cash. The accused had a blanket and a bag that contained clothing and tekkies with stains similar to blood on them. He did not find the firearm and

ammunition during the search. At the charge office he counted the tablets and the money in the presence of the accused. He booked them in the SAP13 register. The tablets were sealed and handed to W/O Virtue. They were then sent to Cape Town for forensic testing. Ms Margaret Mogorosi corroborated the evidence of Mpholo as to how the accused was arrested.

18. W/O John Alfred Virtue testified that he was contacted by the Charge Office Commander on 07 August 2011 to countersign for 61 mandrax tablets and R370-50 cash which he did. He locked them in the safe. On Monday 08 August 2011 he sealed them and handed the tablets over to W/O Roos who took them to Cape Town for analysis.

19. Dr Willem Jacobus Grove` testified that on 06 August 2011 he examined McKay at Kimberley Hospital. He had a gunshot wound in the chest. He had developed haemopneumothorax, which means that his lung had collapsed because of the blood and air in it that made it difficult for him to breathe. An intercostal drain was inserted to drain the air and blood so that he could breathe normally. He recorded the clinical findings as follows:

“2 x wound sites - entry and exit wounds;

-Entry wound over the right scapula- about 4cm lateral to spine;

-Exit wound below right clavicle in the mid clavicular line;

-chest x-rays: indicated a right sided haemopneumothorax.”

He concluded that the injury was life threatening.

20. Dr Grove` also examined Kaweng who, at the time, experienced difficulty in breathing. He recorded the following clinical findings:

“(1a) Gunshot wound (entry) left upper arm – outer aspect of arm

(1b) Gunshot wound (exit) left upper arm – inner aspect of arm

- *Clinically no vascular/nerve injury*
- *Instability of humerus*
- *No active bleeding*

(2) Gunshot wound (entry) – left upper quadrant of abdomen, below rib border, anterior-lateral aspect. The patient had a rigid, tender abdomen with no active bleeding. No exit wound.”

He concluded that if the blood vessels running down the arm were damaged Kaweng could have bled to death from the gunshot wound injury on the left arm and abdomen .This injury was life threatening because there could have been a leakage of the bowels causing infection.

21. Dr Adin Don Surtie, who performed the autopsy, recorded the chief post mortem findings on the body of the deceased, Rebecca Modise, as follows:

“Adult female

- 1. 8x8mm bullet wound with smear ring left anterior neck 10mm from midline and 25mm above sterna notch with tract running inferior laterally entering chest above clavicle with seven of left 1st branch of aorta into superior lung and exiting through 4th intercostal space with 10x8mm exit wound in the skin of back. Collapsed left lung with 1000millilitres blood.*
- 2. 12mm laceration left eyelid with swollen eye*
- 3. 8mm incision left ear*
- 4. 30x30mm abrasion left back.”*

Dr Surtie concluded that the cause of death was gunshot neck.

That concluded the evidence for the State.

22. The accused testified that on the day of the incident he went to Kammies' place around 18h00 to look for Mavundla who had gone there to borrow an empty crate. He found Mavundla drunk at Kammies' place. An argument ensued between them. He left him there and returned home around 19h00. He proceeded to Vusi's (his friend's) shack and put up there for the night. Vusi was in the Eastern Cape attending a funeral. The following morning he went to town to board a taxi to Donkerhoek where he wanted to hand over money to a family member for his children in Natal. Whilst he sat in the taxi two police officers arrested him. He denied that he was present at Kammies' place when the incident took place. Neither firearm nor ammunition was found in his possession. He denied further that he dealt in or possessed mandrax tablets. Mavundla was also arrested in this matter but the charges were later dropped.

23. The crisp issue to be determined is the identity of the shooter and whether the accused is the one who fired the shots at Kammies' place that night that killed the deceased and injured and missed others. The accused maintains that he was not present at Kammies' place when the shooting took place. He says he left Mavundla at Kammies' premises earlier that evening. He is therefore pleading an alibi. The witnesses testified that it was him who fired the shots killing the deceased, injuring Kaweng and McKay and handled the firearm in such a manner that put the safety of other people present at the scene in danger.

24. In proving its case the State relies on the evidence of Kammies, Baboa, Ms Lallie and Kaweng. In **S v MTHETHWA 1972 (3) SA 766 (A)** at 768A-C Holmes JA stated the following:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be

tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice build, gait, and dress; the result of the identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities."

25. It may be so that W/O Collen had to use flash lights and head lights of their vehicle in order to view the scene properly but all the witnesses testified that visibility was good. There are street lights in front and at the back of Kammies' yard. There is a high mast light in the street behind the shack. These lights illuminate the back and front of the yard. There was also a brazier burning outside. They all knew the accused before the incident. This was confirmed by the accused that he knew Kammies for a considerable period of time and used to borrow empty crates from him. He further confirmed that he and Charles were known to each other before this incident. These witnesses testified that the accused was seated next to the fence with Mavundla. Kammies testified that when the accused arrived in the company of Mavundla they spoke to him. Ms Lallie also spoke to him just before the incident. If a witness knows the person well or has seen him frequently before, the probability that his identification will be accurate is substantially increased; and questions of identification marks, of facial characteristics, and of clothing are of much less importance. What is important is to test the degree of previous knowledge and the opportunity for a correct identification, regard being had to the circumstances in which it was made. See **R v DLADLA AND OTHERS (1962) (1) SA 307E-F**.

26. Ms Lallie's evidence that she was assaulted by the accused with an open hand whereafter he and Mavundla left through the gate was corroborated by Kaweng. Charles testified that he met the accused at the gate as he returned from the shop. He greeted the accused and said 'Awe Mavus'. At that stage the accused was a few paces away from him. He therefore had the opportunity to observe the accused clearly and at close range. He had been sitting with the accused around the fire before he went to the shop. It is not possible that these witnesses would mistake him for anyone else. The accused's *alibi* falls flat because from 20h00 until the shooting took place he was always in the company of and never out of sight of two or more of the witnesses. He talked to them. He touched Ms Lallie indecently. She rejected his unwelcome attention. He was reprimanded by Ms Magada. All these angered him. That was the motive for the murder and other offences.

27. On a question of a failed alibi See **S v THEBUS AND ANOTHER 2003 (2) SACR 319 (CC)** at 349c – 354b; **S v NKOMO 1966 (1) SA 831 (A)** at 833 C-D. In **S v SHABALALA 1986 (4) SA 734 (A)** at 736C-D the Court held that the "effect of the falseness of an alibi on an accused's case is to place him in a position as if he had never testified at all. See **R v DHLOMO 1961 (1) PH H54**"

28. It would be strange to expect the witnesses to give exactly the same account of what took place especially taking into account that they had consumed alcohol and that the scene was moving. In my view the differences as far as the clothing and failure to describe the firearm are concerned are not sufficiently material to warrant casting a reasonable doubt on the State's version. They are so inconsequential that no purpose can be served by burdening this judgment by itemising them. In **MKOHLE 1990 (1) SACR 95 (A)** Nedstadt JA cited with approval the remarks in **S v OOSTHUIZEN 1982 (3) SA 571 (T)** where Nicholas J held at 576B-C and 576G-H:

“Contradictions per se do not lead to the rejection of a witness’ evidence; they may simply be indicative of an error. Not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on the other parts of the witness’ evidence.”

29. Ms Magada made two contradictory statements as to who fired the shots at Kammies’ place that night. She testified that she was drunk on the day and had not slept. Even though she realised her mistake before she met with anyone the mistake made is material. It goes to the core of the case. Be that as it may, all other witnesses corroborated one another that it was the accused that fired the shots that evening. After the accused left the scene no one saw him again until he was arrested the following day. He therefore had enough opportunity to wash and remove any signs of gunpowder residue from his hands and conceal the firearm.

30. The evidence of the accused’s witness, Mr Vusumzi Botshwa, did not take his case any further. He was not present when the incident took place.

31. In **S v V 2000 (1) SACR 453 453 (SCA)** at 456A-C Zulman had this to say:

“It is trite that there is no obligation upon an accused person, where the State bears the onus, ‘to convince the court’. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused’s version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in

many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true."

32. The evidence of the accused is a bare denial. There is overwhelming evidence against him. He was a poor witness. He was very evasive in answering simple questions. He confirmed that Mavundla and Kammies knew each other after several attempts by the Prosecutor to establish their relationship. He contradicted himself on numerous occasions. During cross-examination he could not explain the time when he returned from Kammies' place. He admitted being in Kammies' yard before the shooting. He kept adjusting his evidence as the case progressed. He gave different versions in trying to explain why he had to hurry to Donkerhoek. The only reasonable inference that can be drawn is that he was fleeing.

33. The principle to determine what form of intent to murder an accused should be convicted of has been authoritatively formulated in the following terms by Holmes JA in **S v SIGWAHLA 1967 (4) SA 566 (A)** at 569 G-H – 570 A:

*"The next question is whether the State proved beyond reasonable doubt that the appellant intended to kill the deceased. At this stage I use the word intention in the sense of dolus directus, i.e. where the will is directed to compassing the death of the deceased. It is sometimes said that a person is presumed to intend the reasonable and probable consequences of his act. As to that, I had occasion to point out in **R v. Sacco, 1958 (2) SA 349 (N)** at pp. 351H to 353C, that it is simpler to speak of inferences of fact than of presumptions; that the practical approach is to eschew piecemeal processes of reasoning, and to look at all the facts at the end of the case, and from that totality to ascertain whether the inference in question can be drawn; and that inferences do not affect the incidence of the onus of proof - they assist its discharge.*

Stabbing cases are usually a matter of degree, and intention must not be inferred by hindsight from the fact of death. The part of the body injured is relevant, but in the present case the deceased was walking and the appellant jumped forward as he struck. Hence it cannot be inferred beyond reasonable doubt that he actually aimed at the heart, as distinct from the general area of the upper body. Accordingly, the fact that the thrust did land with fatal consequences above the heart does not, in all the circumstances, necessarily give rise to the inevitable inference that the appellant intended to kill, in the sense of directing his will toward the bringing about of the death of the deceased."

34. The accused used a firearm, a dangerous weapon, in shooting the deceased and the complainants. I am satisfied that the evidence shows clearly that the accused had the direct intention to kill the deceased and that his actions were premeditated. He walked towards the gate and suddenly turned and fired shots putting the safety of everyone present there in danger. I am also satisfied that he is guilty of attempted murder in respect of Baboia, Kammies and Charles. He fired shots at them but missed. He had the necessary intention to commit the offences.
35. Having regard to the evidence and analysis set out above I am satisfied that the State proved its case beyond reasonable doubt that the accused was the one who fired the shots that night.
36. I am not satisfied that the State proved its case beyond reasonable doubt as far as count 10 (dealing in mandrax tablets alternatively possession thereof) is concerned. It is clear that W/O Virtue handled the mandrax tablets on Sunday, 07 August 2011, and not the day the accused was arrested, as testified to by Constable Mpholo. Neither the tablets nor the results were exhibited in Court. The results of the forensic test of the alleged mandrax tablets were not presented in Court.

The following verdicts are returned:

1. On count 1 (Assault Common): The accused is found guilty of assault common on Josephine Lallie.
2. On count 2 (Attempted Murder): The accused is found guilty of attempted murder of Petrus McKay.
3. On count 3 (Attempted Murder): The accused is found guilty of attempted murder of Raymond Kaweng.
4. On count 4 (Attempted Murder): The accused is guilty of attempted murder of Willem Baboa.
5. On count 5 (Murder): The accused is guilty of murder of Rebecca Modise with *dolus directus* as a form of intent to cause her death.
6. On count 6 (C/S 120 (3) (b) read with secs 1, 103, 120(1) (a) and 121 of Act 60 of 2000): The accused is guilty of Unlawful handling a firearm in a manner that placed the safety of Moses Kammies, Brenda Magada and Josephine Lallie in danger.
7. On count 7 (Attempted Murder): The accused is found guilty of attempted murder of Charles Kammies.
8. On count 8 (C/S of s3 read with secs 1, 103, 120(1) (a) and 121 of Act 60 of 2000 and read with s250 of the Criminal Procedure Act, 51 of 1977, Possession of unlicensed firearm): The accused is found guilty of possession of unlicensed firearm.
9. On count 9 (C/S 90 read with sections 1, 103, 120(1) (a) and 121 of Act 60 of 2000) Unlawful possession of ammunition: The accused is found guilty of the possession of ammunition without a licensed firearm.
10. On count 10 (C/S 5 (b) read with sections 1, 13 (f), 17 (e) to 25 and 64 of Act 140 of 1992 Dealing in drugs): The accused is found not guilty and discharged.

**BM PAKATI
JUDGE
NORTHERN CAPE HIGH COURT, KIMBERLEY**

**APPEARING FOR THE STATE: ADV J ROSENBERG
APPEARING FOR THE ACCUSED: ADV P NAGEL**