IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, DURBAN

CASE NO. : CC 3/09

Umlazi CAS 983/12/08

In the matter between :

STATE **STATE**

and

WELCOME MBONGENI HADEBE **ACCUSED**

JUDGMENT

KOOVERJEE AJ

Introduction

[1]On a Friday the 26 December 2008, a day after Christmas, the Deceased was fatally shot in Umlazi. This resulted in the Accused (Hadebe) being indicted with murder (count 1), contravening Section 3 of Act 60 of 2000 (unlawful possession of a fire arm) (count 2), and contravening Section 90 of Act 60 of

2000 (unlawful possession of ammunition) (count 3). The Accused pleaded not guilty to all 3 counts and was legally represented.

[2]The State alleged that, *inter alia*, on 26 December 2008 the accused murdered Sipha Mandla Rasta Eric Mhlongo and that on the same date the accused was in unlawful possession of the murder weapon to wit a 9 mm Norinco pistol and 2 live rounds of ammunition

[3]Following upon his Plea, the Accused handed in a statement in terms of Section 115[1] entitled "Plea and Plea Explanation" (Plea Statement) – Exhibit "A". He also made certain admissions in terms of section 220[2] (s220 Admissions), as recorded in a typed document, - Exhibit "B". Both these exhibits (A & B) were signed by the Accused and his legal representative. The report on a medico-legal post mortem examination of the Deceased, as carried out by Dr Christa Hattingh (Postmortem Report) (Exhibit "C") and an Affidavit by Sergeant Thando Tshazibana, an assistant forensic analyst, with the Ballistics Section of the Forensic Science Laboratory (ballistics report) (Exhibit "D"), were both admitted by the defence under the section 220 admissions and were handed in as annexures to Exhibit "B". On enquiry from the court, the Accused confirmed the correctness of his several admissions.

[4]The ballistics report related to the gun and ammunition referred to in counts 2 & 3 respectively and to a fired bullet which was recovered from the

[1] s 115 of the Criminal Procedure Act, 51 of 1977.
[2] Section 220 of the Criminal Procedure Act, Act 51 of 1977 as amended.

Deceased's body; it was not in dispute that this fired bullet head was fired from the gun and that the gun was in working order.

Evidence of State Witnesses

[5]The State called four witnesses. I deal now, briefly, with the evidence of each.

Andile Lincoln Majozi

[6]He is an adult male. He was a friend of the Deceased. He knew the accused. On the 26th December 2008 at ± 18h30 he was in the vicinity of the Tuck Shop where the incident took place.

[7]He testified that he had seen the Deceased and 2 companions carrying beer and consuming it. At the same time he had also seen the accused and a male companion talking and walking towards the shop.

[8]He had just finished talking to a girl when he heard two shots, looked in that direction and saw Deceased fall to the ground and also observed the accused and his companion leaving the area.

[9]He did not witness a struggle or a fight between the accused and the Deceased.

[10]The witness and a companion conveyed the injured Deceased to hospital where he was declared dead.

Dumisani Mthanthi

[11]He is an 18 year old young man. The accused is his neighbour and he knew the Deceased as a friend.

[12]His evidence was important in that it not only supplied a motive for the killing of the Deceased but also contained a fairly detailed account of the events which led to the fatal incident.

[13]His version is that on the day in question he was walking with Deceased and Dumisani Khuzwayo when they came across the accused and his companion Sikhumbuso Mbambo.

[14]The latter mentioned that the Deceased had assaulted him the previous day.

[15]Deceased apologized, they parted company but later they came across the accused and Sikhumbuso near a tuck shop when a quarrel ensued between Deceased, the accused and Sikhumbuso.

[16]The witness then observed the accused produce a gun and at a distance of ± 4 meters fired one shot at the Deceased's feet, followed by a second shot in the vicinity of Deceased's heart. That shot felled Deceased, whereupon the accused and his companion left the scene on foot.

[17]Accused was carrying the gun.

[18]Under cross-examination he said that the Deceased had blamed the accused of interfering in a quarrel which did not concern him.

[19]Under cross-examination he denied that the Deceased produced the gun and that the accused and the Deceased had struggled for possession. He insisted that he had seen the accused taking it from his left side trouser pocket.

[20]He also denied that he was implicating the accused falsely.

Dumisani Emmanuel Khuzwayo

[21]On 26 December 2008 he was in the company of the Deceased and Dumisani Mathanti. The Deceased had told him of the quarrel with Sikhumbuso the previous day; it did not end properly and Accused had said, that the Deceased should be beaten up.

[22]At ± 5pm, they were in the vicinity of the tuck shop where they came across the accused and Sikhumbuso. An argument ensued between the Deceased and the accused. The Deceased told the accused not to interfere in a matter which does not concern him. Soon after that the accused produced a gun, cocked it and fired a shot at the Deceased's feet. The Deceased stepped backwards and a second shot was fired at his left side – at a distance of ± 2 meters – which felled him. The accused and his companion then left the scene.

[23]He emphatically denied that there had been a struggle for possession of the gun and insisted that the accused had possessed the gun all along.

Thabani Nkwanyana

[24]He was a neighbour of the Deceased. He also knew the accused, who lives in the same neighborhood.

[25]He testified that at the relevant time he and his brother were sitting near the tuck shop when he saw accused and his companion arrive there.

[26]After a while he observed the accused, Sikhumbuso and Deceased involved in a discussion and accused rubbing his hands together. That was followed by 2 shots and Deceased falling to the ground. At that time Deceased was ± 2 and a half meters from the accused. Thereafter the accused and his companion left the scene.

[27]Before the shooting he did not observe a struggle or fight between the parties concerned.

[28]He never saw the gun; he only heard the 2 shots.

[29]He emphatically denied that the accused and Deceased had held onto each other at the relevant time and said that after the first shot the distance between them had actually increased.

Exhibit "E"

[30]Before the State closed its case, it handed in, by consent, the findings as to the blood alcohol count of the Deceased as Exhibit "E". This was an affidavit by Elvis Radamba, a Biotechnologist who examined a blood specimen extracted from the Deceased and found it contained 0, 17 grams per 100 milliliters (0.17).

Evidence of Defence Witnesses

[31]The Accused testified in his own defence and called Sikhumbuso Shepard Mbambo who was with him when the Deceased came to be shot.

[32]As to the Accused's evidence, his Plea Statement on count 1 succinctly encompasses his defence as follows :-

> "The Accused denies that the killing was pre-planned or premeditated. He happened to meet with the Deceased by chance on the road. They had an exchange of words. The Deceased pulled out a fire arm with an intention to shoot the Accused. The Accused grabbed the fire arm. They struggled over the fire arm. In the course of the struggle the fire arm fired fatally injuring the Deceased. "

And on count 2 and 3 :-

> "The Accused denies that he acted unlawfully. He took the firearm and the ammunition for safe keeping and to hand it over to the police"

<u>The Accused, Hadebe's Evidence</u>

[33]The accused elected to testify and confirmed that on the morning of the 26 December 2009 Sikhumbuso Mbambo, two girls and a boy arrived at his home.

Sikhumbuso then told him of the quarrel he had with the Deceased on the previous day.

[34]Afterwards the Deceased arrived there and apologized to Sikhumbuso about that quarrel, but added that the quarrel was not over and *he'll "catch" Sikhumbuso*. The accused then asked him how he could apologize and threaten Sikhumbuso at the same time and told him to leave, which he did.

[35]He confirmed the State's version that later on he and Sikhumbuso had come across the Deceased on a road in the area.

[36]He claims that the Deceased then enquired why he had taken Sikhumbuso's part at their first meeting that morning.

[37]He denied having been partial in favour of Sikhumbuso and they then parted company.

[38]He proceeded to the tuck shop to purchase liquor, where they came across Deceased and Dumisani Khuzwayo. Deceased enquired why they were

following him around and an argument ensued whereupon Deceased pulled out a gun from his clothing and cocked it. The accused then grabbed hold of it and they struggled for its possession. As they continued to struggle two shots were fired and the Deceased fell to the ground.

[39]The accused obtained possession of the gun and they left the scene. The gun and ammunition was thereafter handed to a policeman who lived in his neighborhood.

[40]Under cross-examination by the Prosecutor he admitted that he and the witness, Sikhumbuso were friends.

[41]He insisted that he did not want to get involved in the argument and denied that he had threatened to assault the Deceased

[42]In regard to the shooting, he explained that the Deceased had cocked the gun and he had grabbed hold of it when Deceased pointed it in his direction. During the ensuing struggle both held onto the gun when two shots were fired.

The second shot entered the Deceased's chest, killing him. He claimed that in the struggle it was possible to sustain the chest wound and track as described by Dr. Hattingh in the Post Mortem Report, Exhibit "C".

[43]The Court recalled the accused in terms of Section 167 of the Criminal Procedure Act 51/1077 and he testified that he was right handed. I shall return to this later.

The Defence Witness

Sikhumbuso Shepard Mbambo

[44]He admitted that he had been sitting in court throughout the accused's testimony.

[45]In his testimony he claimed that on 25 December 2008 he had reprimanded Deceased for assaulting two girls.

[46]He confirmed that they had met again on 26 December 2008 and that the Deceased had tendered an insincere apology and said that he will still "catch" him some time in the future.

[47]The accused then told him to leave and he left.

[48]Thereafter they met at the tuck shop where Deceased enquired whether they were following him around. A heated argument ensued, in which the Deceased told the accused to stop interfering and nagging him. They exchanged insults whereupon Deceased produced the gun and cocked it. The accused grabbed hold of it and a struggle ensued. Two shots were fired and Deceased was fatally injured. They then left the scene with the gun.

[49]Under cross-examination he disputed the accused's version that on 26 December 2008 he had arrived at accused's home, accompanied by two girls. He insisted that the Deceased's apology was insincere and that he had threatened to assault him again.

The Witnesses Called by the Court

Dr Christa Hattingh

[50]After the State and the Defence had closed their respective cases the Court decided in terms of Section 167 of the Criminal Procedure Act 51/1977to call Dr. Hattingh to clarify and elaborate on her Post Mortem Report (Exhibit "C"). I shall return to this later.

[51]There was no objection to this from the prosecution or the defence Counsel.

[52]She confirmed the conclusions she had arrived at in the Post Mortem Report and explained that it would have been difficult to find gun powder evidence on dark objects.

[53]She added that there were no signs of burning on the skin and clothing which one would expect to find when a person is shot at close range.

[54]After taking all the factors into consideration she concluded that it was impossible for the Deceased, if he was right handed to have shot himself and

repeated that there was no evidence she could find that the Deceased was shot at close range.

[55]She did not know whether any tests were done to establish if Deceased's hands contained any gun powder residue.

[56]In view of Dr. Hattingh's evidence, it became essential for a just decision of this case to establish whether the Deceased was left or right handed and the Court found it strange that neither the State Advocate nor Defence Attorney had clarified the issue. If he was right handed it would have been virtually impossible for himself to have inflicted the wound described and depicted by Dr. Hattingh in the Post Mortem Report.

[57]However, if he was left handed, such evidence could have favoured the accused.

[58]In order to arrive at a just decision the Court decided to recall the accused and to call the Deceased's father to testify on whether the Deceased was left

or right handed. Such evidence was considered essential to arrive at the correct decision.

[59]The defence counsel surprisingly objected to the accused having been recalled and only well after the accused had concluded his evidence on this recall did he request the court to record a special entry of what he considered to be a gross irregularity in the proceedings. However, after a short adjournment he was apologetic and wisely withdrew his objection and withdrew his request for the special entry to be recorded.

Mpikisa Mhlongo

[60]Mr. Mpikisa Mhlongo testified that the Deceased was his son and was right handed, and that his left hand was functional.

[61]It also became essential for a just decision in this matter to call a Ballistic Expert to clarify certain issues pertaining to the gun and matters such as tattooing and gun powder residue. This was done largely at the behest of the defence to which I shall later return.

Mr. Jacobus Steyl

[62]Mr. Jacobus Steyl was available and duly called to testify.

[63]His qualifications and experience is listed in Exhibit "F" and the Court is satisfied that he is indeed a specialist in the field of Ballistic Science.

[64]He was an impressive witness who gave his evidence well and it soon became apparent that he was fully equipped to assist the Court to arrive at the correct conclusions in regard to matters pertaining to the shooting incident in this trial.

[65]The Court is, however, mindful that it does not have the means of verifying

Mr. Steyl's conclusions and will consequently consider his evidence with caution.

[66]He had access to Dr. Hattingh's Post Mortem Report (Exhibit "C") and corroborated her evidence in several respects.

[67]He, however, considered the two wounds depicted in the Post Mortem Report (Exhibit "C") to be a single injury.

[68]He also explained that there were several factors such as the type of gun, its barrel, the type of bullet and various other factors such as the distance between the barrel and the body of a victim that may have a direct influence on the presence or absence of blackening or tattooing of the victim's skin and clothing.

[69]He added that clothing may prevent the blackening of the skin and that a black garment would not easily show gun powder. Furthermore, if the gun is in contact with the clothing it will tear an irregular hole in the garment.

[70]When it was put to him that some of the evidence tendered was to the effect that the Deceased was shot at a distance of 2 – 3 meters he replied that in such an event the clothing would have absorbed the powder. The absence of powder residue, therefore, suggested that it was a distant shot.

[71]With reference to the suggestion that the Deceased had shot himself he replied that it would have been awkward and unlikely for a right handed

person, such as the Deceased to have inflicted the wound as depicted and described by Dr. Hattingh in Exhibit "C".

[72]Finally he explained in detail the functioning of the gun in question and concluded that if both parties had firmly held onto it simultaneously, as described by the accused, it would not have been possible to eject the spent cartridge to allow a re-load with a fresh one from its' magazine for the second shot to be fired. That statement was extremely significant and virtually destroyed the Accused's defence.

[73]After this witness had concluded his evidence the court enquired whether either of the two parties involved wanted to re-open their respective cases, but both declined the invitation.

The Issues and the Legal Approach to be Adopted

[74]There is clearly substantial common cause between the State and the Defence. The date, time, place and details as to the parties involved and the

gun used, that two shots were fired, and that it appears that the second shot was the fatal shot, as well as the circumstances surrounding the shooting, are all, in the main, not in issue. Also common cause was that the accused did not have a valid license to possess the gun and ammunition which forms the subject matter of counts 2 and 3.

[75]It is also common cause that:

- the Deceased had died of a gunshot wound to the chest involving the abdomen, as described by Dr. Hattingh in the Post Mortem Report – Exhibit "C";
- the gun which was used was the one described in Count 2 and was handed to the police by the accused; and
- that the accused did not tender any evidence to prove that he was in lawful possession of the gun and/or the ammunition mentioned in Counts 2 and 3 (Section 250 of the Criminal Procedure Act 51/1977).

[76]The variance in the versions, between the State and the Defence, in a nutshell relates to how the Deceased came to be shot.

[77]The State's case is that the Accused shot the Deceased whilst standing a short distance away from the Deceased, in circumstances that indicate that the Accused arrived at the scene with a gun, and left with the gun.

[78]The Defence case is that the Deceased arrived at the scene with a gun and when he produced it he cocked it, seemingly with the intention of shooting the Accused; the Accused tried to disarm him, and grappled with the Deceased for possession of the gun; a brief struggle ensued, and in consequence, the gun fired twice, whilst it was still in the possession of the Deceased, thus fatally wounding the Deceased. The Accused then took the gun and handed it to the police, whereupon he was arrested and detained, and subsequently charged.

[79]The parties are *ad idem* that the main issue to be decided is how the Deceased came to be shot. We agree.

[80]The approach to be adopted by a court, when "faced with two conflicting, in some instances, mutually destructive, versions"[3], was dealt with by Van der Marwe J in *S v Zuma*[4].

[3] *S v Zuma* 2006 (2) SACR 191 (W), at p 208 - 209
[4] *supra*

[81]That approach has been consistently followed by this Division. See *S v Singh* 1975 (1) SA 227 (N), where the court discussed the approach to be adopted by the court when there is a conflict of fact. The learned Judge said the following at 228 F-H :-

> "'[I]t would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an Accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the Accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an Accused has been established beyond all reasonable doubt.'"

[82]A more detailed analysis of that approach was elaborately dealt with in *S v Radebe* 1991 (2) SACR 166 (T) at 167j – 168h, where in the head note of the Judgment an extremely helpful summary appears.

[83]The Supreme Court of Appeal has consistently adopted the same approach. In *S v Chabalala* 2003(1) SACR 134 (SCA) at 139i – 140a, the following was said :-

> "The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the Accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the Accused's guilt."

[84]More recently the Supreme Court of Appeal re-endorsed that very approach in

S v Crossberg 2008 (SACR) 317 (SCA), where in paragraph 116 the following was said :-

> "A convenient starting point is the evidence. It is trite that in determining the guilt or innocence of an Accused all the evidence must be taken into account. Cameron JA articulated the correct approach in S v M 2006 (1) SACR 135 (SCA) in para 189 [at 183h - i - Eds] thus:
>
> The point is that the totality of the evidence must be measured, 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 any reasonable doubt about the Accused's guilt is excluded.
>
> See also S v Gentle 2005 (1) SACR 420 (SCA) at 433h - i."

[85]The State undoubtedly, as always, bears the onus of proving the guilt of the Accused beyond any reasonable doubt. This sustains the crucial presumption of the Accused's innocence and obtains a fair trial. See *R v Ndhlovu* 1945 AD 369 at 386 (per Davis AJA). Se also *R v Oakes* (1986) 26 DLR (4^{th}) 200 (SCC) at 212-3, where Dickson CJC affirmed this principle as follows :-

> "'. . . The presumption of innocence is crucial. It ensures that until the State proves an Accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice.'"

This *dicta* was often quoted with approval by our Constitutional Court. See the Judgment by Madala J in *S v Coetzee* 1997 (1) SACR 379 (CC); 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC), para [121].

[86]Against that background, I turn now to evaluate the evidence, with those principles in mind.

Evidence Evaluation

[87]In as much as the evidence of the State, as to how the shooting occurred, is in conflict with the Defence, the witnesses for both the State and Defence, but for a few minor non-material issues, were in the main unchallenged. I shall return to a more detailed consideration of their respective evidence. In the result, a finding in this case will largely be dependant on the probabilities, judged against the available objective evidence, particularly the evidence of the two expert court witnesses .

[88]The testimony of the two expert witnesses, on the overall, stands unassailable. They both impressed the court.

[89]The evidence of all the other witnesses, must be considered against the acceptable aspects of the testimony of these two experts.

[90]The additional objective evidence is the written result of the tests performed on the Deceased's blood, reflecting an alcohol blood-count of 0.17 grams per 100ml; as mentioned this was handed in by consent.

[91]The doctor's evidence was invited by the court, mainly to seek clarity on her injury findings recorded in her report as follows :-

> "**(B) Injuries :** [Refer to Annexure A]
> 1. An abrasion 20x10mm, on the left antero-lateral upper arm in relation to wound no.2.
> 2. An oval defect measuring 15x10mm, surrounded by a collar of abrasion that measured ± 4mm in width. This wound, resembling a distant entry gunshot wound [no firearm discharge residue was evident], was placed on the left anterior axillae, 150mm to the left of the anterior midline and 1350mm above the heel.
>
> - There was no exit gunshot wound.
>
> Radiology : Routine x-rays of the injured part revealed a projectile on the right lateral chest wall and small metal fragments in the right chest.
>
> Wound Tract : The tract entered the body via the left fourth rib laterally, perforated the left lung upper lobe, perforated the heart from the left to the right ventricle, contused the right lung lower lobe, perforated the right diaphragm and caused a penetrating injury to the right superior lobe of the liver, and exited on the right seventh intercostal space laterally where the bullet lodged in the subcutaneous tissue.
>
> Direction : The tract passed from left to right and downwards.
>
> Bullet : A hand gun, deformed, hollow-point bullet with open copper coloured tallons and rifling marks."

[92]It is the second of her findings (B2) that this court sought clarity on.

[93]Her findings record that "No firearm discharge residue was evident" and that the 'entry wound' resembled "a distant entry gunshot wound". She conceded that since the Deceased's outer jacket was black, it would therefore be difficult to easily establish residue from a visual examination alone. No additional tests were carried out to look for residue.

[94]Despite this she maintained that the Deceased could not have been shot in the manner described by the Accused. She harboured no doubt that the Accused's version was inconsistent with her findings.

[95]Even if she discounted her findings on the absence of residue, she said that, having regard to the entry wound (high up near the Deceased's left arm-pit) and given its downwards trajectory, it would be impossible for the Deceased to have been shot by himself holding the gun in his right hand, a view that the Accused and his witness were adamant in maintaining.

[96]The Accused, it must be remembered, demonstrated how he grappled with the Deceased. He said that he used his right hand when he struggled with the Deceased who held the gun in his right hand, and that at some stage, and whilst the Deceased continued to hold the gun in his right hand, the Accused used both his hands to try and wrench the gun away from the Deceased, but that he was unsuccessful in doing so, until the Deceased, having been shot, became limp, and fell backwards into the supporting arms of Thabani Nkwanyana.

[97]Mr. Steyl, the Ballistic Expert, supports the pathologist on this. He demonstrated that it would be near impossible to fire the gun, whilst it is in the Deceased's right hand so as to inflict the fatal wound (in the manner it actually happened).

[98]The possibility of the gun being fired, especially as to the fatal shot, whilst in the left hand of the Deceased, was considered by both expert witnesses. They were both of the view that although it would not be impossible to inflict the fatal wound with the gun in the Deceased's left hand, it would be very difficult to do so.

[99]That evidence of both the experts renders the Defence version inconsistent with it and is sufficient to demonstrate the abject improbability of the Defence version in this regard.

[100]However, there is yet a more compelling reason for such a finding, based on the testimony of the Ballistics Expert. Mr. Steyl said that it would be impossible on the Accused's version for the gun to fire twice, that is for it to have fired the second time, given the hands of both the Accused and Deceased on it, as any such pressure from their hands must have obstructed the free motion of the barrel.

[101]It is common cause, alternatively highly probable on both (the Defence and State's) versions that it is the second shot that killed the Deceased. On this

evidence of Mr. Steyl's, **that** defence of the Accused, stands so challenged, as to be negated.

[102]Judged against the struggle scenario that the Accused presented in defence, Mr. Steyl said that the first shot would then have gone off whilst they both struggled for the gun, and the spent cartridge would then not have exited the gun, thus rendering it impossible for a second bullet to move into the chamber, hence impossible for the second shot to have fired.

[103]The Accused and his witness maintained that when the second shot went off the Deceased became limp. The struggle, in its vigor, persisted after the first shot, and abated only on or shortly after the second shot was fired.

[104]The impossibility, or near impossibility of the second shot does render the Defence version so improbable as to be unacceptable.

[105]The evidence of the possibility (and Mr. Styel put it no higher than this) of the fatal shot being fired by the Deceased's thumb on the trigger with the gun

(in this struggle scenario) being turned towards the Deceased is hence also negated on this reasoning.

[106]Whilst it is clear and common cause that the first shot did not inflict any injury, there is no explanation on the Accused's version, as to what became of the first shot and why (on his version) this shot which was fired shortly before the second, did not cause any harm. If the second shot is excluded on Mr. Steyl's evidence, then it can only be the first shot that caused the Deceased's death, but this is not supported by any evidence, not the States and particularly not the Accuseds.

[107]In any event, both the experts maintained that the objective findings as recorded in the post mortem report, are consistent with the States version and inconsistent with the Defence version.

[108]The relatively inebriated condition of the Deceased as supported by the objective blood reports, a blood-alcohol reading of 0.17, by inference renders him less likely to sustain a strong hold of the gun against a vigorous, forcible struggle to dispossess him thereof by the Accused. This view is strengthened by

the Accused's testimony that the Deceased held the gun with his right hand whilst the Accused, on occasions, used both hands when grappling with the Deceased. When recalled by the Court, he demonstrated how he held the Deceased's right hand (in which was held the gun), with his (Accused's) right hand, and then with both his right and left hands together.

[109]The State submitted that the testimony of Mr. Mbambo, the Defence witness, should be discounted by reason of his having been present in this Courtroom since the inception of the Defence case. That criticism appears weighty. This witness Mbambo, had listened to the evidence of the Accused before he testified. The only explanation the Defence had for this, was the apology by the Defence Counsel that he had omitted to ask the witness to leave the court room when the Accused testified . (see THE STATE v MOLETSANE 1962 (2) SA 182 (E) per De Villiers JP and Wynne J; see also S v Mdali 2009 (1) SACR 259 (C))

[110]In any event, and as will later be seen from the approach adopted by this Court, nothing really turns on whether Mr. Mbambo's evidence is to be discounted or not, as in the final analysis, the Defence version as a whole

viewed against the testimony of the two Expert Witnesses, is inconsistent, improbable and unacceptable.

[111]The reasons adduced by both the Accused and his witness on how the Deceased came to be shot, are so inconsistent with the objective evidence and the testimony of the two experts, that they are regarded as unacceptable.

[112]That does not mean that the States case is therefore acceptable, or probable, or that the State has proven the guilt of the Accused beyond all reasonable doubt. I have yet to consider the States case as I did the Defence case.

[113]Mr. Steyl testified that from his experience and knowledge one may deduce from the nature of the hole in the clothing whether the gun-shot was a close or distant one. If the gun was pressed in contact with the clothing he said, the clothing will tear in a big irregular hole.

[114]The Pathologist, Dr. Hattingh's testimony that the entry wound caused by the fatal shot resembled "a distant entry gun-shot wound", was one she

conceded was consistent with the State's version on how the shooting occurred. She had regard to the hole caused by the bullet in the clothes and on the Deceased's body.

[115]Those State witnesses who did observe the Accused and the Deceased at the time of the fatal shooting, saw them placed 2 – 3 meters apart and facing each other. Dumisani Mathanthi, who spent the day with the Deceased, referred to this distance as 5 meters, but under cross-examination conceded that it may be about 3 meters. Mr. Dumisani Khuzwayo, pitched this distance as 2 – 2.5 meters and Thanbani Nkwanyana, the independent State witness, referred to this distance as being approximately 2 meters. Tempered with caution, when such distance was put to the two Expert Witnesses, it was rounded off at 2 – 3 meters, one they both readily conceded was consistent with the objective evidence.

[116]Dr. Hattingh's deduction that it was a "distant entry gun-shot wound" was also discerned from such objective facts, and not only from her observance of the absence of visible residue. She conceded that she performed no chemical examination on the Deceased's black jacket for residue, and Mr. Steyl testified

that the absence of visible residue, in the absence of such testing, does not *per se* lend itself to the deduction of distant shooting. That apart, Mr. Steyl was convincing in his testimony that given the circumstances in which the Accused says the Deceased was shot, the fatal second shot could not have occurred and conceded that the State case is indeed more consistent with such objective evidence.

[117]Dr. Hattingh testified on the improbability, on occasions the impossibility, of the Deceased having shot himself, whether with his right hand or left hand, especially not with such a downward trajectory and with such an entry wound, given its nature and position on the body. Mr. Steyl had no difficulty in substantially concurring with her in this regard.

[118]Whilst Dr. Hattingh, under cross-examination by Defence Counsel, conceded that she is not a Ballistics Expert, she justified her findings and expertise in this regard on her education and experience in Forensic Ballistics. Mr. Steyl however, as a seasoned and acclaimed Ballistics Expert substantially agreed with her deductions on this aspect.

[119]That troubling improbability is removed, like darkness with the rising sun, when regard is had to the consistent versions of most of the State witnesses

whose versions aligns itself as being consistent with such objective evidence and with the testimony of the two Experts.

[120]The States last witness was credible, impressive and corroborates the States version that there was a "distant fatal shot" rather than a close-shot and his testimony stands opposed to the Defence case that there was a struggle arising from which the gun was fired resulting in the fatal shooting of the Deceased.

[121]Defence Counsel submitted that two of the State witnesses, namely Dumisani Mathanthi and Dumisani Khuzwayo were possibly biased in favour of the Deceased, by reason of their self-avowed friendship with the Deceased. Whilst the potential for bias is clearly evident therefrom, the clear admission as to friendship by these witnesses, in itself echoes a ring of truth about their testimony. They were impressive witnesses, and had opportunities to pad their evidence against the Accused, but did not do so. More importantly, support for the acceptance of their testimony, if support is indeed required, is to be found in the corroboration of their versions by the independent last State witness, Mr. Thabani Nkwanyana, whose testimony in regard to such observations of the

Deceased and the Accused relative to the absence of any struggle, and the distance between them at the time the shooting occurred is largely corroborative of the testimony of Dumisani Mathanthi and Dumisani Khuzwayo.

[122]Defence Counsel submitted that the evidence of Dumisani Mathanthi, who spent the day with the Deceased, must be rejected, principally because he testified that they did not drink. On the contrary, so he argued, the objective blood report demonstrates a blood-alcohol count of 0.17. This is no doubt a clear inconsistency. However this was not put to this witness by the Defence. In any event, this aspect is not material to the crucial question identified by the parties, on which this Court is to decide, namely that relating to how the Deceased came to be shot. Whilst Dumisani Mathanthi may be correctly criticized for this inconsistency, this may well be attributable to his own endeavour to minimize his liquor consumption, but there is no evidence on this. His evidence on the whole was satisfactory, largely consistent with that of the other State witnesses, and he was impressive.

[123]In any event, the State's case viewed without the testimony of Dumisani Mathanthi, in as much as his evidence is not in any way rejected, constitutes sufficient a basis for a finding against the Accused beyond all reasonable doubt.

[124]The State's four eye-witnesses referred to above were present when the shooting took place.

[125]The incident took place at approximately 18h30 and none saw the struggle testified to by the accused and his witness.

[126]Two of these witnesses, namely Dumisani Mathanti and Dumisani Khuzwayo, actually saw the accused produce the gun and fire two shots. Witnesses Andile Majozi and Thabani Nkwanyana did not see the gun and had only heard the shots. If they had intended misleading the court, they could have said that they had seen the accused handling the gun.

[127]The court is aware of the few discrepancies in the evidence of the 4 witnesses, but they are of no real significance and do not relate to what had happened when the shooting took place. They relate mainly to their

consumption of alcohol and other unimportant issues. It was never suggested that they were intoxicated to such an extent that they were unable to make reliable observations.

[128]Exhibit "E" as mentioned was handed in by consent. It relates to the Deceased's blood/alcohol content which was 0, 17 grams per 100mm. The significance of the "blood count" was not explained and the court cannot take judicial notice of such a count.

[129]The totality of the evidence leaves no doubt that the state's version of the events is true and that the accused's version is false.

[130]As indicated earlier in this judgment, the State's evidence is supported by the Pathologist Dr. Hattingh and the Ballistics Expert Mr. Steyl.

[131]They are both independent professional witnesses who have no motive to implicate the accused falsely. To evaluate such evidence the court has to determine whether and to what extent their opinions advanced are founded on

logical reasoning. (**Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001(3) SA 1184 (SCA**)).

[132]Both have found the Accused's version unconvincing / unacceptable.

[133]In the result, the Defence version is rejected as being improbable and inconsistent with the available objective evidence and inconsistent with the testimony of the accepted Experts' evidence. The State's version, on the question of how the Deceased came to be shot, is accepted as being probable, largely consistent with each other, and consistent with the available objective evidence and indeed consistent with the evidence of the two Expert Witnesses and that of the Deceased's father.

[134]It follows that this Court finds that the Accused must be lying about his involvement in the murder. On the accepted evidence of the State, the Accused must have arrived at the scene, armed with a gun, in the company of his witness Mr. Sikhumbuso Mbambo, and when the argument with the Deceased occurred, the Accused removed his gun and fired the two shots, the

second of which caused the fatal injury to the Deceased. Indeed, in the manner that the State witnesses testified.

[135]The Deceased would have had no motive, if motive is necessary, to have wanted to shoot the Accused, as the Deceased's fight was with Sikhumbuso and not with the Accused.

[136]Although the Accused's witness Sikhumbuso was a competent witness it is reasonable to assume that he would support the Accused's version as far as possible since the Accused had intervened on his behalf in the quarrel with the Deceased.

[137]The evidence leaves no doubt that the quarrel between the Deceased and Sikhumbuso did not concern the Accused, yet he clearly and actively sided with Sikhumbuso against the Deceased and eventually shot and killed him.

[138]Whilst this Court accepts that the Accused did not arrive at the scene of the shooting with the pre-conceived desire to shoot and kill the Deceased, when the argument with the Deceased eventually occurred, the Accused in removing his gun, did then intend to kill the Deceased and indeed did so. I find that the requisite *dolus*[5] has been proven. The firing of the two shots by the Accused, one in front of the Deceased, and the other at the Deceased, as

[5] See *S v Sigwahla* 1967 (4) SA 566 (AD); *S v Manyathi* 1967 (1) SA 435 (AD) at 438, and the line of cases since.

testified to by the State witnesses, on evidence that has been accepted, renders the presence of *dolus* inescapable. This is exacerbated by the fact that the Deceased was un-armed. This constitutes murder of the Deceased by the Accused as charged. So we find.

[139]As to count 2 and 3, we reject as unacceptable and untrue, the Defence version that he removed the Deceased's gun so as to hand it over to the Police. If the Deceased had the gun at all stages, even when the last fatal shot was fired, on the Accused's version, triggered by the Deceased, then how and why did the Accused come to be possessed with the gun. Surely on that version, the Deceased would have fallen with his gun in hand, and the Accused would have had no reason to then remove the gun, only to visit the Police with it. That reasoning of the Accused is as improbable as it is unimpressive. It is fallacious and contrived to deceive.

[140]The Accused says that on parting from the Deceased, he went to a Policeman in his neighbourhood, to whom he reported his version and was advised to go to the local Police Station, and that this Policeman later took the Accused to the Police Station where the gun was handed in. If indeed the Accused's version was one of innocence, as per his testimony before this Court, why then were the Police not convinced of the truth of his version, in which case they would simply have taken the gun from him as being that of the Deceased, then investigated the death of the Deceased, and later decided on

whether to charge the Accused or not. On the contrary, on the Accused's own admission, he was immediately arrested, detained, and later charged. Could it be possible that his spontaneous version to the Police was not the version he adduced before this Court? It would have been interesting to hear the evidence of this Policeman to whom the Accused's first report was made. As to why he was not called was not dealt with in this Trial.

[141]In the circumstances we find that the Accused possessed the gun and ammunition, used it to kill the Deceased, then approached the Police and pretended that it was the gun and ammunition of the Deceased, under circumstances that he had testified in this Court, as though he were a good samaritan reporting a death and handing over the available evidence to the Police, when clearly the objective available evidence stands in stark contrast to this version.

[142]The Accused admitted the Ballistics Report and admitted being in possession of the gun and ammunition, which he handed over to the Police. As mentioned, we find that his possession was not as a result of him obtaining same from the Deceased. This latter version was contrived by the Accused to hide his unlawful possession of this unlicensed gun. The presumption contained in s250(1) of the Criminal Procedure Act 51 of 1977 has not been rebutted by the Accused.

[143]In the result we find that the State has proven beyond any reasonable doubt, the guilt of the Accused on all three counts. I shall however briefly deal with the reverse onus embodied in the presumption contained in s 250(1), *supra*.

The Constitutionality of the presumption contained in Section 250(1) (The Reverse Onus Burden)

[144]I turn now to consider the reasoning that s 250(1) placed a **reverse onus** of proving the absence of guilt on the Accused as regards the charge on count 2 (and therefore count 3), and that in so doing it conflicted with the presumption of innocence.

[145]"The effect of this subsection is that if a person would commit an offence if he engaged in any of the activities specified in paras (a)–(d) without being the holder of the 'necessary authority' (as defined) he will, if he is charged with the commission of that offence, be deemed not to have been the holder of such authority unless the contrary is proved. The onus thus rests on the accused to establish on a balance of probabilities that he was the holder of the necessary authority (see S v Makoba 1980 (1) SA 99 (N))." (See Commentary on the Criminal Procedure Act, Juta, Du Toit, Chapter 24 Evidence, s250 Presumption of Lack of Authority.)

[146]In testing the constitutionality of the **'reverse onus'** burden, Cameron J, with whom Mailula J concurred, set out the applicable principles and relevant considerations as follows in *S v Meaker* 1998 (8) BCLR 1038 (W) :-

> "A reverse onus provision was not, however, per se invalid or unconstitutional. Some such provisions would fall within the ambit of the limitations clause and be justified thereby; but such justification in the case of a limitation of the presumption of innocence had to be established "clearly and convincingly" as the Constitutional Court had stated. The standard required had also been described by the Constitutional Court as "compelling justification". Some presumptions might be rational in themselves, requiring only the proof of facts to which the accused had easy access, and which it would be unreasonable to require the prosecution to prove. In some instances the presumption might be necessary in order to prosecute the type of offence effectively because in the nature of things the State could not be expected to produce evidence of the kind contemplated. In the view of the Court, the following considerations could be distilled from Constitutional Court decisions in determining whether a reverse onus provision could survive: Was it in practice impossible or unduly burdensome for the State to discharge the onus of proving the elements of the offence beyond reasonable doubt? Was there a logical connection between the fact proved and the fact presumed, and was the presumed fact something which was more likely than not to arise from the basic fact proved? Did application of the presumption entail such interference with the ordinary processes of inferential reasoning as to create a risk of a conviction despite a reasonable doubt as to guilt in the mind of the trier of fact? Did the application of the common law rule relating to the State's onus cause substantial harm to the administration of justice? Was the presumption in its terms cast to serve only the social need it purported to address, or was it disproportionate in its impact? Having regard to its terms and ambit, what was the extent of the danger that innocent people might be convicted? Could the State adequately achieve its legitimate ends by means which would not be inconsistent with the Constitution in general, and the presumption of innocence in particular?"
>
> (Emphasis added)

[147]These principles and its historic international development have been exhaustively dealt with by Strydom JP and Frank J, in *Freiremar SA v The Prosecutor-General of Namibia and Another* 1994 (6) BCLR 73 (NmH), as follows :-

> "The fact that a reverse onus is placed on an accused does not mean that such reverse onus is unconstitutional in all circumstances. There is a lot of authority concerning reverse onus provisions under the Canadian bill of rights and section 11(3) of the Canadian charter of rights. See Regina v Oakes 26 DLR (4th) 200

(1986). Laskin in his work The Canadian Charter of Rights (annotated (1985)) 16.4-2 summarised the decision in Regina v Oaks (supra) as follows:
"While statutory exceptions to the general rule that an accused has the right to be presumed innocent do not contravene the presumption of innocence if they are reasonable, a statutory exception which is arbitrary or unreasonable does. For a reverse
Page 79 of 1994 (6) BCLR 73 (NmH)
onus clause to be reasonable and hence constitutionally valid, the connection between the proved fact and the presumed fact must at least be such that the existence of the proved fact rationally tends to prove that the presumed fact also exists. The presumed fact must also be one in which it is rationally open to the accused to prove or disprove."
(See also R v Bray 144 DLR (3 ed) at 309; R v Dubois 8 CCC (3 ed) 344 (1983) at 346-7 and R v Frankforth 70 CC (2 ed) 488 (1982) at 451.)
As far as the United States is concerned dealing with the presumption of innocence as embodied in the fifth and fourteenth amendments of that Constitution it was stated in Leary v United States 395 US 6 (1969) at 36 as follows:
"A criminal presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favouring the particular presumption must, of course, weigh heavily."
See also TOT v United States 319 US 463 and United States v Gainey 380 US 63 (1965)."

(Emphasis added)

[148]"If the result involves an intrusion on the Accused's right to silence, this limitation of the right to a fair trial would probably be less severe than a reverse onus affecting the presumption of innocence" (See *S v Baloyi* 2000 (1) BCLR 86 (CC); 2000 (2) SA 425 (CC) at p 87 (of BCLR)), at para 32.

[149]In support of this reasoning, the learned judges of the Constitutional Court in *Baloyi, supra,* relied on the *dicta* of Langa J (as he then was), and in footnote 61 (in paragraph 32 thereof), said the following :-

"The possibility of this Court accepting the constitutionality of an intrusion on the right to silence in order to promote a compelling public purpose, was envisaged by this Court in S v Mbatha; S v Prinsloo 1996 (2) 464 (CC); 1996 (3) BCLR 293 (CC). In that case the issue was the impact not of an inquisitorial procedure on the right to silence, but of a requirement on the accused to

provide sufficient evidence to raise a reasonable doubt as to guilt. The principle, however, was the same. Langa J, at para 26, said:

> "That it might impact on the right of an accused person to remain silent is true; but on the assumption that the rampant criminal abuse of lethal weapons in many parts of our country would justify some measured re-thinking about time-honoured rules and procedures, some limitation on the right to silence might be more defensible than the present one on the presumption of innocence. The accused could of course be exposed to the risk of being convicted if he or she fails to offer an explanation which could reasonably possibly be true, regarding physical association with the weapons; there would however be no legal presumption overriding any doubts that the court might have. At the end of the day and taking into account all the evidence, the court would still have to be convinced beyond a reasonable doubt that the accused was indeed guilty.""

[150]It follows that the reverse onus provision born out of the presumption contained in s250(1) is in the present case "justifiable and therefore constitutionally permissible".[6]

[151]See the *dicta* by Kentridge AJ in *S v Zuma and Others* 1995 (2) SA 642 (CC) (1995 (1) SACR 568; 1995 (4) BCLR 401), at para 41, as follows :-

> "It is important, I believe, to emphasise what this judgment does not decide. It does not decide that all statutory provisions which create presumptions in criminal cases are invalid. This Court recognises the pressing social need for the effective prosecution of crime, and that in some cases the prosecution may require reasonable presumptions to assist it in this task. Presumptions are of different types. Some are no more than evidential presumptions, which give certain prosecution evidence the status of prima facie proof, requiring the accused to do no more than produce credible evidence which casts doubt on the prima facie proof. See, for example, the presumptions in s 212 of the Criminal Procedure Act. This judgment does not relate to such presumptions. Nor does it seek to invalidate every legal presumption reversing the onus of proof. Some may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove. The provisions in s 237 of the Act (evidence on charge of bigamy) may be of this type. Or there may be presumptions which are necessary if certain offences are to be effectively prosecuted, and the State is able to show that for good reason

[6] See *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC) (1996 (1) SACR 371; 1996 (3) BCLR 293) at para 15.

> it cannot be expected to produce the evidence itself. The presumption that a person who habitually consorts with prostitutes is living off the proceeds of prostitution was upheld on that basis in R v Downey (supra) by the Supreme Court of Canada. A similar presumption in a United Kingdom statute was upheld by the European Court of Human Rights in X v United Kingdom (Application 5124/71, Collection of Decisions, ECHR 135)."

[152]The presumption contained in s250(1)[7] does indeed equate to a partial reverse onus, as it does not place the entire onus on the Accused, and is easily rebutable by the Accused with evidence as to his license that is peculiarly within his own knowledge. Consequently the presumption contained in s 250(1) is justifiable and not unconstitutional. (See *S v Fransman*, 2000 (1) SACR 99 (W); *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC) (1996 (1) SACR 371; 1996 (3) BCLR 293).

[153]The Accused admitted to being in possession of the gun and ammunition (the subject matter of counts 2 and 3) albeit in circumstances argued by him as justifiable. This court has rejected his version. It follows that, on an acceptance of the State's version, the Accused was the one who arrived at the murder scene armed, and left the scene, once the Deceased was fatally shot with the gun, this latter aspect being common cause, it being well known that the Accused did in fact return the gun to the police.

[154]The charge alleges his "unlawful possession" in circumstances, *inter alia*, that connotes his lack of a license to so possess it, that is his lack of the

[7] Of the Criminal Procedure Act 51 of 1977

'necessary authority'. All the Accused had to do was confirm his being licensed and produce the authority if indeed he was so licensed. This would naturally have conflicted with the defensive stance adopted by the Accused, and equated to defeating his claim that he obtained the gun from the Deceased. He would not venture such a defence if indeed he was the licensed holder of the gun, unless he was the possessor thereof unlawfully, that is, unlicensed i.e. without the 'necessary authority'.

[155]In any event, he has failed to rebut the obligatory presumption contained in s250(1), and his possession is, as mentioned, not in issue.

[156]We have already found that the State has proven the guilt of the Accused on counts 2 and 3 as indeed on count 1, beyond any reasonable doubt.

The calling of witnesses by the Court

[157]Lastly a quick but necessary note on the Court's calling of the three witnesses.

[158]Mindful of the dictates that a Court should guard itself against interference in a Trial, and guided by the principles enunciated in ***S v Mseleku***

& Others[8]**,** a Judgment by Nicholson J, with whom Theron J and Aboobaker AJ concurred, this Court, was desirous to seek clarity on only one aspect of the Pathologist's Report, as already mentioned, and her testimony led to the need for the Accused's brief recall, and the Court's calling of the Deceased's father and Mr. Steyl, the latter called mainly at the behest of the defence. All these witnesses were called in an effort to arrive at the truth, and in the absence of their testimony, the many lacunae pointed to the potential for a miscarriage of justice. With the benefit of hindsight, and looking back upon the evidence of these witnesses, their testimony, whether to acquit or to convict the Accused, went further than envisaged in shedding light on this case.

[159]I shall now deal briefly with how this ensued.

[160]Given the near impossibility of the Deceased being shot whilst the gun was in his right hand, and whilst grappling with the Accused as per the defence version, the Accused's version judged against the evidence of Dr. Hattingh the Court was pressed, in the interests of justice, and to obtain clarity, to have the Accused recalled. This was done in terms of s 167[9]. The Accused then testified that the Deceased had the gun in his right hand. He did not testify that the Accused had changed hands at any stage.

[8] 2006 (2) SACR 237 (N)
[9] Of the Criminal Procedure Act, Act 51 of 1977

[161]The State then announced the availability of the Deceased's father as a witness, one who was on standby to testify for the State and who is referred to in the list of witnesses annexed to the Indictment. Essential to the just decision of this case, this father was called by the Court in terms of ss 167 and 186[10]. His evidence was brief. He simply confirmed that the Deceased was right handed. Under the very brief cross-examination he conceded that the Deceased's left hand was functional inasmuch as he remained right handed.

[162]Dr. Hattingh and the Deceased's father were called after the Defence had closed its case. Born out of Dr. Hattingh's evidence, and especially the cross-examination of her by Defence Counsel, based largely on a text by Mr. Steyl, the Defence sought leave to now call Mr. Steyl, but since the Accused was on Legal Aid, so he argued, the Defence could not afford Mr. Steyl, and implored the Court to come to the assistance of the Defence, and to call Mr. Steyl as a Court witness.

[163]The Court indicated its willingness to allow the Defence to re-open its case, and enquired on why the Sergeant who prepared the available Ballistics Report was not being called. The Defence insisted on Mr. Steyl as a necessary Expert to be called. After due consideration, the Court acceded to this request, mainly motivated by the need to establish the truth for a just decision in this case. I must hasten to add that the Court had at some stage during the

[10] *Supra*

Trial held the independent view that the calling of a Ballistics Expert would have been advisable.

[164]Mr. Steyl was then called, by consent amongst the parties, as a Court witness in terms of s 186.

Order

[165]The Accused is accordingly found guilty as charged of :-

165.1Murder (count 1);

165.2Unlawful possession of a firearm (count 2);

165.3Unlawful possession of Ammunition (count 3).

"I. N. KOOVERJEE"

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I.N. KOOVERJEE

DATE :

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