

**IN THE KWAZULU-NATAL HIGH COURT OF SOUTH AFRICA  
PIETERMARITZBURG**

**CASE NO. AR582/09**

In the matter between:

**SIXTUS NHLANHLA MKHIZE**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

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**APPEAL JUDGMENT** delivered on 19 April 2011

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**SWAIN J**

[1] The appellant with the leave of this Court appeals against his conviction on one count of murder and the sentence of twelve years imprisonment imposed by the Regional Court at Ixopo, KwaZulu-Natal. The appellant was acquitted on an additional count of attempted murder.

[2] The appellant admits that he shot and killed Denzil Tatchell, the deceased, but maintains that in doing so, he acted lawfully in self-defence.

[3] Two eye witnesses to the shooting of the deceased, namely

Brenda Tatchell, the wife of the deceased, and Sifiso Mbanjwa, the barman at an action bar in Ixopo, were called by the State.

[4] According to Brenda Tatchell, the events leading up to the fatal shooting were as follows. She, together with the deceased and Dennis Peters, being the deceased's uncle, as well as Lorna Peters, being the sister of Dennis Peters' wife, had been to a wedding when the deceased and Dennis Peters, decided to stop at the Off Saddle Bar in Ixopo. They all entered the bar and Lorna Peters and the witness went to the toilet. On her return to the bar she commented to the barman that the toilets were in a bad condition. They then socialised with the people in the bar, including the appellant. The barman then said that it was time to close and she replied that it must only close when the last person goes. This was at about 01h30. She noticed that Dennis Peters was talking to the appellant, but she could not hear what they were talking about. When she looked again it appeared as if Dennis Peters and the appellant were arguing, and the next minute Dennis Peters was on the floor and the appellant was hitting him. She was unable to say how Dennis Peters had got on to the floor. However, when cross-examined she said that Dennis Peters was pushed on to the floor by the appellant and the appellant was hitting him. Later in her evidence however she said she did not see how Dennis Peters got on the floor. The deceased and the witness then rushed towards them, the deceased pulled the appellant by his collar, lifted the appellant off Dennis Peters, pushed him on to the floor and asked the appellant why he was hitting him. Lorna

Peters then helped Dennis Peters to his feet and according to the witness the altercation was over. Lorna Peters then left the bar, she said to her husband they had better leave, the deceased lit a cigarette and went back to the bar counter. She said she thought the deceased paid the barman and finished his drink, whilst she stood at the entrance to the bar, waiting for the deceased. Whilst standing there she noticed somebody on her left hand side, and saw that it was the appellant pulling out a firearm and aiming towards the deceased. She said the deceased was standing at an angle towards the appellant, with his back towards the appellant. The appellant started firing immediately he pulled out his firearm and he then ran out of the bar. She was not sure, but she thought the appellant fired four or five shots, but did not see the deceased's reaction. According to the witness, when the appellant pulled out his firearm, nobody was threatening the appellant. She later returned to the bar and saw the body of the deceased lying in the road outside the bar.

[5] When cross-examined she admitted that there was a time when the deceased and the security guard at the bar were in some kind of an argument, not a physical fight and she said to them "What's this all about? Stop it".

She couldn't hear what they were saying, but from the expressions on both their faces, she could see it was leading to a serious argument. She then also admitted that she pulled the deceased away from the security guard, but said they were not in a physical fight.

[6] Sifiso Mbanjwa, the barman, said on the evening in question the appellant as well as the security guard were in the bar, when four coloured people entered the bar, two of them were females and two were males. One of them ordered a drink and they sat down. They finished their drink and ordered another, which he supplied to them. He and the security guard then requested that they close the bar after they had finished drinking, because it was late. One of the group said no, because they could stay there until six a.m. The security guard then said they usually close early and it was now late. As he said this one of the males in the group held the security guard next to his shoulders, on his jacket. The security guard then went outside and the other male in the group, not the deceased, went to close the burglar guard on the door, to prevent the security guard from coming inside. The security guard then re-entered the bar at which stage the two males assaulted him with their clenched fists. The appellant then got up and intervened on behalf of the security guard, reprimanding them and removed the security guard from them. The two males then left the security guard and assaulted the appellant with clenched fists. The appellant fell down, but they continued assaulting him and kicked him when he was lying down. The appellant then escaped from them and retreated by taking a few steps towards the pool room, but did not get there. He then heard a gun shot and saw the appellant doing the shooting. He fired more than once towards the people he had been fighting with. When the appellant fired at them, they were still speaking to the appellant, saying that they can still hit him. He saw people running away and saw that one had fallen next to the door and one had fallen outside. The appellant then also left

the bar.

[7] When cross-examined he said he did not hear the deceased saying "let us kill the bastard". Because he was walking away at the time, he was unable to say whether the deceased had his hand in his pocket and likewise was unable to say, whether the deceased turned or was facing the appellant when he fired.

[8] When questioned by the Court he said that after the appellant had freed himself from the attack by the deceased and Dennis Peters, they continued speaking to the appellant and were moving towards the counter where their drinks were. When asked whether they were moving towards, or away from, the appellant, he said he could not recall. He said he was unable to say whether they followed the appellant, because the witness turned and went back to the counter.

[9] When questioned by the prosecutor in regard to the questions put by the Court, he said by reference to the sketch plan, they were in the vicinity of point 'D' on the sketch and were approaching the horizontal portion of the bar, appearing on the sketch where their drinks were. The appellant was in the vicinity of point 'D' on the sketch plan. The deceased and his companion had moved from point 'F', being the point where the appellant was on the ground, to point

'D' on the sketch. When the appellant fired he was, according to the witness, "a bit away" from point 'D' and indicated an area on the sketch, mid-way between the corner of the bar counter and the door to the bar. The witness then indicated that the appellant had moved from point 'F', towards where the words "Action Bar" appear on the sketch, but did not get there. When he fired the shot the appellant was standing near the corner of the bar and repeated what he had said when giving evidence in chief, namely that at this stage the deceased and his companion "were speaking to him saying that if they liked they may still assault him". When asked by the prosecutor if anybody had done anything to the accused during the time of the shooting, whether he would have been in a position to see that he replied

"Because I had turned away and I was returning behind the counter I did not see anything".

The prosecutor then asked

"Will you be able to see when accused was shooting if anybody was doing anything to him?" to which he replied

"I did not see anything".

The prosecutor then responded by asking the following question

"If anyone was doing anything at that stage to the accused would you be in a position to see?"

to which the witness replied "Yes"

The prosecutor then followed with the following question

“Did you say you could not see or you could see if anybody was doing at the stage of the first shot .... (inaudible)” -

to which he replied

“Yes I would have seen although I was running away”

[10] Lorna Peters, although not an eyewitness to the shooting, was called by the State and confirmed that she was in the company of the deceased, Brenda Tatchell and Dennis Peters on the night in question, at the Action Bar. She said that as they walked in they wanted a drink and the security guard said it was too late to order. An argument then ensued between Dennis Peters and the security guard, but the argument then quietened down. A second argument then occurred between Dennis Peters and the security guard, at which stage she walked out of the bar and stood outside by the car they had arrived in. She did not take note what they were arguing about, because the argument had spoilt everything and she was therefore hoping to leave. She then heard gun shots and Brenda Tatchell shouted “Run, Aunty Lorna” and she ran towards the post office.

[11] When cross-examined the witness was asked whether the

deceased's response to the security guard saying it's too late, was to say he was not going to allow the security guard to close. The response was that the deceased could have said "I want to buy a half". When asked whether there could have been any physical handling between the deceased and the security guard she replied

"Well, at that moment it could have been. They could have been physical" to which the further question was put

"But you never witnessed it?" to which she replied

"No, I never witnessed it".

However, when questioned by the Court she was asked whether the deceased had argued with anybody in her presence, she volunteered the following

"Well I think the time when Dennis was on the floor and then – I don't know, as I'm saying, I'm not too sure of these, and late Denzel said 'don't hit an old man' and that's why I'm saying I walked out when it was the second argument. I didn't even want to even hear the thing".

She confirmed that she saw Dennis on the floor, but when asked why he was on the floor she eventually replied that regarding the second argument

"I didn't even wait to see and I just walked out".

[12] The appellant's version of events was as follows. He was

sitting at the bar drinking in the presence of the barman and the security guard, when some coloured people entered, whom he now knew to be the deceased, Dennis, the wife of the deceased Brenda and Lorna. They ordered alcohol and the barman asked if they could all finish quickly, because they wanted to close the bar for the night. The security guard also said they wanted to close because it was quite late. The deceased was angered by this and said they were ready to drink there until the following day. The deceased then jumped at the throat of the security guard and grabbed his sjambok. The appellant then intervened and took the security guard outside to speak to him. The appellant then returned, sat down and finished his alcohol. The security guard then re-entered and Dennis attacked him by delivering blows to his face. The appellant then grabbed Dennis and pulled him away from the security guard. The deceased then attacked the security guard by delivering blows with his fists. The appellant then grabbed Dennis and pulled him to the side and the wife of the deceased went to the deceased and shouted "Stop it". Dennis then got away from the appellant and punched the appellant. The deceased then slipped away from the grasp of his wife and the deceased and Dennis then assaulted the appellant by punching him. The appellant struggled and got away from them, but they continued hitting him until he fell down. While he was on the ground they were stomping on him with their shoes. They were kicking the appellant all over his body including his head. He was covering his face to protect it. They seemed to stop momentarily and that is when the appellant lifted his head and saw the deceased approaching him. He later described it as a "pause". The deceased was in front of him and he

heard the deceased say "Let us kill the bastard" while approaching with his right hand in his pocket. At this stage the deceased was approximately one, to one and a half metres, away and he thought the deceased was taking out a dangerous weapon. He later described what he thought the dangerous weapon to be, namely a knife or a firearm. The appellant then stood up and pulled out his firearm as quickly as possible and then fired quickly without any pause, pointing at the deceased's body. At the time he was shooting at the deceased, the deceased's hand was still in his pocket and he had not taken anything out. He said that when he was firing the shots, he was getting up, was not sure whether he was upright, but was busy standing up. When the deceased turned around to flee he stopped shooting. He agreed that according to the post mortem report the second entry wound was below the left armpit of the deceased and another entry wound was at the back of the deceased. He said it was possible the deceased was shot on his back, when he was turning around because he was shooting rapidly. He did not notice when he was "actually" shot on his back. When asked whether he moved towards the entrance to the pool room after he stood up, he said he was unable to recall. He said he could not recall whether the deceased had taken his hand out of his pocket at any stage, because he kept on shooting. As regards the degree of his intoxication he said

"I cannot say that now I was drunk to such an extent that I could not appreciate what was happening around me".

When asked whether the liquor he had consumed, had played any

role in the shooting he said “No”. He said that when he was first assaulted he was near point ‘F’ on the sketch plan, but when he rose from the floor he was not by point ‘F’. He said he had retreated towards the counter, not the pool room and had retreated because he was being assaulted.

[13] Jacobus Steyl, a ballistics expert was called by the appellant and described the wounds of the deceased. He stated that the one entrance wound was to the left chest laterally under the arm, exiting on the right upper chest wall. Another entrance wound was on the left upper back, just behind the shoulder, exiting on the right upper chest. Another entrance wound was on the left upper thigh, exiting at the back of the thigh. He stated that the wound to the back of the deceased, was a “close” wound, because of the presence of tattooing around the wound. Because this was present even though the deceased was clothed, it indicated the firearm was in close proximity to the deceased. He estimated a distance of ten to twenty centimetres. The other wounds were not “close” wounds, which meant that the firearm was not closer than one metre to the body of the deceased when fired. He was of the view that the wound to the leg of the deceased was probably the first wound, followed by the wound to the left chest laterally and finally the wound to the back of the deceased. He was of the view that the wounds to the leg were consistent with the deceased approaching the appellant and the remaining two wounds were inflicted as the deceased was turning away from the appellant.

[14] What emerges from the evidence is that the only independent account of what occurred is that of Sifiso Mbanjwa, the barman. It is quite apparent that both Brenda Tatchell and Lorna Peters sought to minimise the roll of the deceased and Dennis Peters, in the altercations that preceded the shooting of the deceased. Brenda Tatchell made no mention in her evidence in chief of any altercation between the deceased and the security guard. It was only when cross-examined that she admitted that the deceased and the security guard had an argument, but denied it was a physical fight. She conceded it was a serious argument and that she pulled her husband away. According to Lorna Peters however, the first argument was between Dennis Peters and the security guard and not the deceased and the security guard.

[15] According to Brenda Tatchell the second altercation was between the appellant and Dennis Peters, whereas according to Lorna Peters, this was between Dennis Peters and the security guard. She however maintained that she then left the bar. When asked whether there was any physical confrontation between the deceased and the security guard, she replied this could have been so, but that she never witnessed it. The fact remains however that when questioned by the Court, she then admitted seeing Dennis Peters on the floor and heard the deceased saying "Don't hit an old man". In this regard Brenda Tatchell said when she saw Dennis

Peters on the floor, the appellant was hitting him. Despite initially saying she did not know how Dennis Peters ended up on the floor, she then said the appellant pushed Dennis Peters on to the floor, but then later maintained she did not see how he ended up on the floor. In addition, Brenda Tatchell said that Lorna Peters had in fact helped Dennis Peters to his feet. Due allowance being made for the traumatic nature of the events they both witnessed, as well as the fact that they had both been drinking, the glaring contradictions and inconsistencies in their versions of events, leads to a reasonable inference being drawn that they have not been honest in their account of the events which preceded the shooting.

[16] What is clear however is that there was discord between the barman and the security guard on the one hand, and the deceased's party on the other, because of the barman's expressed wish to close the bar.

[17] On the evidence as a whole, it is clear that this resulted in conflict between the deceased, Dennis Peters and the security guard. On the evidence there is nothing to suggest that either Sifiso Mbanjwa, the barman, or the appellant responded aggressively to the objection raised by the deceased's party, to the closing of the bar.

[18] The version of the barman that there was an initial physical

confrontation, between the security guard and one of the males in the group, is consistent to a degree, with the evidence of Brenda Tatchell that she saw the deceased and the security guard in an argument, and pulled the deceased away. It is also consistent to a degree with the evidence of Lorna Peters that there was an argument between Dennis Peters and the security guard. It is also consistent to a degree with the evidence of the appellant, that there was an initial physical confrontation between the deceased and the security guard in which he intervened. The appellant says the deceased jumped at the throat of the security guard and took his sjambok, whereas the barman says the attack consisted only of one of the males holding the security guard next to his shoulders on his jacket.

[19] According to the barman the security guard then went outside, which is consistent with the version of the appellant that he took the security guard outside to talk to him. The barman however adds that when the security guard went outside Dennis Peters closed “the burglar guard” on the door, to prevent the security guard returning inside. It is clear from photo 2 in Exhibit “1”, that there is a security gate on the entrance to the door. There could be no reason why the barman would fabricate such a detailed piece of evidence, extraneous to the main events of the night.

[20] According to the barman, the security guard then re-entered the bar. I regard it as probable that in the light of the physical

confrontation the security guard had just had with one of the males in the group, as well as the attempt by Dennis Peters to lock him out of the bar, his object in returning must have been to enforce the wish of the barman, to close and this must have been apparent to the deceased and Dennis Peters. At this stage according to the barman, both the deceased and Dennis Peters, attacked the security guard with clenched fists. According to the appellant however, it was only Dennis Peters who attacked the security guard, by delivering blows to his face. According to the barman the appellant then intervened on behalf of the security guard and reprimanded both of them and removed the security guard from them. The appellant's version however was that he intervened by grabbing Dennis Peters and pulling him away from the security guard. The deceased however then attacked the security guard with his fists. The appellant then grabbed Dennis Peters and pulled him to the side, at which stage the wife of the deceased, Brenda Tatchell went to the deceased and shouted "Stop it". According to the appellant it was at this stage that Dennis Peters got away from the appellant and punched the appellant. The evidence of Brenda Tatchell that she saw Dennis Peters and the appellant arguing and the next thing she saw Dennis Peters on the floor, with the appellant hitting him, must have occurred at this stage. Lorna Peters also said that she saw Dennis Peters on the ground. According to Brenda Tatchell she and the deceased then intervened. The deceased then lifted the appellant off Dennis Peters by his collar, pushed him to the floor and asked the appellant why he was hitting him. According to Brenda Tatchell, Lorna Peters then helped Dennis Peters to his feet. Lorna Peters says she then heard

the deceased saying to the appellant "Don't hit an old man".

[21] In my view it is grossly improbable that Dennis Peters would not have strenuously opposed the intervention by the appellant, to assist the security guard. The interaction could not simply have consisted of the appellant grabbing Dennis Peters and pulling him away, Dennis Peters then getting away from him and attacking him. In this context it is far more probable that the appellant forced Dennis Peters to the ground and was hitting him, which caused the appellant to intervene by pulling him off Dennis Peters and telling him not to hit an old man. In my view it is equally improbable, as stated by Brenda Tatchell, that once Lorna Peters had helped Dennis Peters to his feet the altercation was over. It is quite clear that the deceased and Dennis Peters were in a belligerent mood and were not prepared to accept any resistance to their plans to continue drinking in the bar. If the altercation was over, then there would have been no reason for Lorna Peters to leave the bar and to say that she did so, because she did not want to see any more.

[22] In my view, it is far more probable as stated by the barman, that the deceased and Dennis Peters then turned their attention to the appellant and attacked him, knocking him to the ground, as attested to by the barman. According to the barman they continued assaulting the appellant and kicked him on the ground, which is consistent with the appellant's version of events.

[23] It is at this crucial point, that an examination of the appellant's plea of self-defence, must be made. The appellant maintains that his attackers momentarily seemed to stop assaulting him and it was at this stage he lifted his head and saw the deceased approaching with his right hand in his pocket, saying "Let us kill the bastard". According to the barman, the appellant had escaped from the deceased and Dennis Peters and retreated. Later in his evidence, he said the appellant had "freed" himself from the attack. The barman said that both the appellant's attackers continued speaking to the appellant, saying that if they wished they may still assault the appellant, as they were moving towards the counter, where their drinks were. It is clear on a reading of the barman's evidence, that he was unable to specify precisely the movements of the deceased, Dennis Peters and the appellant within the bar, by reference to the sketch plan. What is clear however, is that according to his evidence, the physical attack upon the appellant had ceased, albeit that the deceased and Dennis Peters continued to verbally threaten the appellant, as they were moving towards the bar, where their drinks were.

[24] Evidence which is of vital significance in deciding whether the physical attack upon the appellant had ceased, or whether the deceased continued with the attack, by approaching the appellant with his right hand in his pocket and saying "Let us kill the bastard" is to be found in the evidence of Superintendent Gwala, who arrived on

the scene at three forty a.m. He found the deceased lying face down, not far from the action bar, with three gunshot wounds. He said the deceased had a cigarette in his right hand, between the fore and middle fingers. Under cross examination he said that the cigarette was half burnt, but it was not burning any more. He said there was nothing else in the hands of the deceased. The significance of this lies in the fact that Brenda Tatchell said that after the altercation was over and Lorna Peters left the bar, her husband (the deceased) lit a cigarette and went back towards the bar counter. When asked under cross-examination why she remembered this, she said that because he lit the cigarette "in that manner of relaxness" she thought he wanted them to carry on sitting, so she said to him "No, we had better leave now". The fact that she maintained the altercation was over at an earlier stage, does not affect the reliability of her evidence in this regard, supported as it is by the independent evidence of Superintendent Gwala.

[25] It is quite obvious that the deceased could not have had a lit cigarette in his right hand, during the assault upon the security guard and the appellant, because according to the appellant, the deceased attacked the security guard with his fists and attacked the appellant by punching him. In addition, the deceased could not have had his right hand in his pocket, threatening the deceased and approaching him, with a lit cigarette in his right hand. It is quite obvious that the deceased could not have lit a cigarette, after being shot, because of the severity of his wounds. The inference is therefore irresistible that

the deceased lit the cigarette, after the assault upon the appellant had ceased, whilst walking towards the bar counter.

[26] In this regard it should be noted that Mr. Steyl, the ballistics expert, gave evidence that he had examined the photo (Exhibit "3") of the deceased lying outside the bar. In his report (Exhibit "H"), he says that the deceased was holding a piece of paper in his hand, which crossed over his index finger. In evidence however, he conceded that a person on the scene would have better visibility, than one looking at a picture. He maintained that there was no cigarette visible on the photo, but agreed that it was difficult to dispute the evidence of the eye-witness. He conceded it was very difficult for him to tell the Court that while running the deceased did not have a cigarette, but again maintained that the photo did not illustrate the presence of a cigarette.

[27] It is not clear to me on what basis Mr. Steyl, who was called as a ballistics expert, was qualified to express such a view. Although it does appear from photo Exhibit "3" that the deceased did have what could be a piece of paper in his right hand, there is also what appears to be a cigarette between the fore and middle finger of the deceased's right hand in this photo, as well as photo 14 of Exhibit "1".

[28] In this regard it was never suggested to Superintendent Gwala, by the defence, that he was mistaken in saying that the deceased

had a half burnt cigarette in his right hand, or that the deceased had nothing else in his right hand. Mr. Mbele, who represented the appellant in the Court *a quo* and argued the appeal before us, stated that at the time Superintendent Gwala gave evidence, he did not have the views of Mr. Steyl on this aspect. The fact remains however, that as opposed to the direct evidence of Superintendent Gwala on this issue, all there is to contradict it is the opinion of Mr. Steyl, based as it is on a photo of the deceased. There is no other evidence which casts any doubt upon the credibility, or reliability of Superintendent Gwala's observation. Indeed, the unique and distinctive nature of the observation he made in this regard, on his arrival at the scene, speaks volumes for its reliability.

[29] I am therefore satisfied that the evidence of Brenda Tatchell, that the deceased lit a cigarette after the altercation was over, is corroborated by the evidence of Superintendent Gwala. That this was the only stage at which the deceased could have lit a cigarette, is supported by the evidence of the appellant of the manner in which the deceased assaulted the security guard and himself.

[30] I am therefore satisfied that the State established beyond a reasonable doubt, that at the time the appellant fired the shots at the deceased, the physical assault of the appellant by the deceased and Dennis Peters had ceased and there was no imminent attack upon the appellant. The appellant's version in this regard could not

reasonably possibly be true. The shooting of the deceased by the appellant after the attack had ceased, was retaliatory, rather than defensive and therefore unjustified. In coming to this conclusion, I have not overlooked the opinion of Mr. Steyl that the first shot fired was to the leg of the deceased, inflicted whilst the deceased was facing the appellant. The opinion of this witness as to the sequence of the shots fired, is of course based upon the appellant's version of events. All that may be concluded with any certainty, is that at some stage of the shooting, the deceased was facing the appellant and at another stage, his left side was facing the appellant, with the possibility that at this stage his body was turning. In addition, it is clear that at the stage when the deceased was shot in the back, the appellant fired at close range, which would be consistent with a shot fired in retaliation and not in self-defence.

[31] The appeal against the conviction on the count of murder, accordingly falls to be dismissed.

[32] As regards the sentence imposed, the Magistrate found that substantial and compelling circumstances were present and sentenced the appellant to twelve years' imprisonment. The Magistrate had the benefit of pre-sentencing reports by a social worker and a correctional supervision official, whose reports form part of the record. Although the evidence given in the Court *a quo* in this regard, has not been transcribed, as the discs have been lost, I do

not regard the absence of this evidence as material, to the proper decision of this appeal in regard to the sentence imposed.

[33] I disagree with the submission of Mr. Mbele, who appeared for the appellant, that the Magistrate misdirected himself in imposing the sentence he did. In my view, the Magistrate took into account all relevant factors and the sentence imposed was entirely appropriate in all of the circumstances of the case.

The order I make is the following:

The appeal against conviction and sentence is dismissed.

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**K SWAIN J**

**I agree**

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**GCABA A J**

**Appearances:**

***Appearances /***

**For the Appellant** : Z. O. Mbele (Attorney)

**Instructed by** : Mbele Dube & Partners  
Umzimkhulu

**For the Respondent** : Z. Dyasi (M/s)

**Instructed by** : Director of Public  
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Pietermaritzburg

**Date of hearing** : 14 April 2011

**Date of Judgment** : 19 April 2011