

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: SS53/2023

- (1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No
(3) REVISED: Yes / No

WJ du Plessis
Date: 29 November 2023

WJ du Plessis

In the matter between:

THE STATE

and

NOCANDA, BRAIN MAKHOSONKE

ACCUSED

JUDGMENT: CONVICTION

DU PLESSIS AJ

- [1] On 28 January 2023, Mr Brian Nocanda, a police officer, assaulted Ms Tinyiko Nkanyane outside a pub called "The Joint", and half an hour or so later, he returned to the pub, drew his firearm, and fired a few shots. One of the bullets hit and fatally wounded the owner, Mr Mlungisi Nelso Mthi ("Mr Mthi"), while one of the bullets hit the bouncer, Mr Chima Goodnews, also known as "Prince". This much is common cause.

- [2] The State is charging him with the murder of Mr Mthi, attempted murder of Mr Chima Goodnews, assault with the intent to do grievous bodily harm to Ms Tinyiko Nkanyane, and discharging a firearm in public. Mr Nocanda pleaded not guilty to all charges and offered no plea explanation.
- [3] To succeed with the charges, the State must prove, for count 1, that Mr Nocanda caused the death of another human being unlawfully with the intention to do so. What is in dispute is whether he acted unlawfully and with intent. It is also in dispute whether the murder was premeditated.
- [4] For count 2, the State must prove that he intended to kill Prince but was unsuccessful. What is in dispute is whether he intentionally attempted to kill Prince and whether his actions and whether he had a lawful justification for his actions.
- [5] For count 3, the State must prove the unlawful and intentional application of force with the intention to cause grievous bodily harm. What is in dispute is that he had the intent to cause grievous bodily harm. Mr Nocanda states it was common assault, which only requires the unlawful and intentional application of force.
- [6] For count 4, the question is whether he acted lawfully when he discharged the firearm in a pub full of people.
- [7] The State called three witnesses.

"Prince" Chima Goodness

- [8] The first state witness was "Prince", a bouncer employed at the pub, who testified that he was on duty on 28 January 2023. Around 10 to 11 pm, he was called outside by a customer who informed him that there was an assault happening outside. Upon getting outside, he saw Mr Nocanda beating a woman, Ms Nkanyane, in the parking lot. The woman was on the ground when he arrived.
- [9] The visibility was good; there was enough light. Prince asked Mr Nocanda why he was beating the woman, and he replied that he just wanted to talk to her, to which

Prince replied that what he was doing was not talking but beating. At this stage, he was no longer violent; he was calm.

- [10] Ms Nkanyane was terrified after Mr Nocanda threatened to kill her. She then informed Prince that she had arrived with a friend. The friend emerged, and they proceeded to her car to leave the pub. At that point, Mr Nocando pursued her again and attempted to force the car door open. Prince intervened again as Mr Nocando beat on the passenger side window.
- [11] Mr Nocando asked Prince why he was doing this; he should be supporting men, not women. Prince said he was keeping the peace and making sure everyone was happy. Prince then returned to the pub and informed the other bouncers, Nomvula and Jo, about the rules and that Mr Nocanda may not return that night because of his violent behaviour. When Mr Nocanda wanted to come inside, stating that he was a DJ, Prince asked a certain Mr Pela if this was so, but Mr Pela denied it. He told Mr Nocanda to go home for the night.
- [12] Mr Nocanda then started to threaten Prince, saying that this was not his father's house, that he could not tell him what to do, and that if he saw him outside, he would go out in a body bag. Prince understood this to mean that he would kill him but did not make much of the intimidation; it often happens.
- [13] Mr Nocanda then left, and Prince went outside to ensure he was gone. About 45 minutes to an hour later, Mr Nocanda came back. Nomvula called Prince to the gate, and as he approached, Prince saw Mr Nocanda there. Mr Nocanda then slipped through under Jo's arms. Suddenly, Mr Nocanda pulled a firearm from his waist. Prince bent down as the firearm was pointed at his head. Mr Nocanda fired the first shot. Nomvula turned around and ran inside to take cover.
- [14] The music was loud, and people were oblivious to what was happening until the DJ stopped the music and turned on the lights. Mr Nocanda followed Prince, firing more shots. Prince ran up the stairs behind the couch, where the owner, Mr Mthi, was seated. Mr Mthi attempted to get up, but a bullet struck him. This bullet eventually killed him.

- [15] When Prince heard the bullets had stopped, he realised he had been shot in the left thumb, hip, and leg. He went down and saw that Mr Mthi was injured and bleeding. He then went to the hospital, where he was treated and given pain medication.
- [16] During cross-examination, Prince was questioned if he was aware Mr Nocanda was a DJ. He didn't know that. He was then told that a certain Thabang (as later immersed is also known as Mr Pela) was in charge of the DJs and that he confirmed that Mr Nocanda was a DJ, but Prince did not know Thabang, so he could not respond.
- [17] Prince said that the only people outside during the assault were him, Mr Nocanda, and Ms Nkanyane. Her friend arrived later. He recalls Ms Nkanyane having bruises all over her body and bleeding when she got up. He just held Mr Nocanda from behind to keep him from abusing Ms Nkanyane, not to assault him.
- [18] For the rest of the cross-examination, he essentially confirmed what he said in the examination in chief. When Mr Nocando's version was put to him, he said he was lying.
- [19] When questioned about his statement and why certain information was not contained in it – such as that he would leave the pub in a body bag - he said that he told the police, but that they did not complete the statement, they did not write everything down.

Nomvula Mkwanazi

- [20] During the examination in chief, Nomvula, a bouncer at the pub, testified that on 28 January 2023, she witnessed a fight between Mr Nocanda and a woman, later identified as Ms Nkanyane. She described Mr Nocanda assaulting Ms Nkanyane by pulling her and pushing her against a wall. They went down the street. A customer then called Prince, and he tried to intervene in this assault. After that, Mr Nocanda was barred from re-entering the establishment. However, Mr Nocanda tried to re-enter. She did not allow him. He told her he was a DJ and on the lineup. Thabang

(Pela), who organised the DJs, was called; he said Mr Nocanda was not on the lineup.

- [21] Mr Nocanda then left and came back about 30 to 45 minutes later. He asked for forgiveness from her and Jo. He asked to enter, and they said no. He said he wanted to ask Prince for forgiveness. She went to call Prince on request. When she returned, Mr Nocanda was with Jo. He managed to slip into the pub and drew a firearm. He then pointed a firearm at Prince, who ducked. He fired shots when he drew the firearm, and several after that. She did not see the shot as she looked for a hiding place. She heard that he said that they would find Prince in a body bag in the morning. Mr Nocanda then got into a car and drove away.
- [22] During cross-examination, Nomvula confirmed Prince's version that he tried to separate Mr Nocanda and Ms Nkanyane during the assault as he was insulting her with a fist. There was a discrepancy between her testimony and Prince's regarding Ms Nkanyane's position – Prince claimed they were on the ground, while Nomvula stated they were standing. She did not comment on that. She did say that Prince only pulled Mr Nocanda off Ms Nkanyane in an attempt to separate them. But she only saw the first part of the fight, not the second.
- [23] Nomvula confirmed that Mr Nocanda was absent for 30-45 minutes before returning to the pub but could not confirm his claim of sitting on the pavement, as there was limited visibility in the street, and the street is long.
- [24] She explained that her statement was a summary and defended the omission of specific details on that basis.
- [25] Regarding Mr Nocanda's version, Nomvula could not comment on his assertion of slapping Tinyiko "only" twice but insisted he did not have injuries. She maintained that Mr Nocanda returned to the pub to seek forgiveness and denied that Prince made any threats. She denies that Mr Nocanda cocked the firearm when Prince threatened him, and contested Mr Nocanda's account of pointing the firearm at the floor, asserting it was directed at Prince. She questioned why there would be damage to the window and the wall if the shots were only fired to the ground.

Tinyiko Nkanyane

- [26] Ms Nkanyane and her friend arrived at "the Joint" pub and were met by two bouncers, Prince and Nomvula. Once inside, Ms Nkanyane and her friend went outside to a hubbly section within the yard. Ms Nkanyane encountered Mr Nocanda there, whom she had known for approximately eight years due to their prior romantic relationship. Despite a history, Ms Nkanyane did not wish to engage with Mr Nocanda, finding his presence distasteful.
- [27] Mr Nocanda attempted to initiate a conversation with Ms Nkanyane, but she ignored him. However, he persisted and grabbed her left wrist, pulling her towards him. Ms Nkanyane explained her discomfort due to a muscle pull on her right side. As Mr Nocanda continued to pull her, they moved outside "The Joint" and reached the street.
- [28] At this point, Mr Nocanda verbally confronted Ms Nkanyane, claiming to be smarter than her and demanding her attention. When she remained silent, he said she did not tell him she was coming to the Joint and that she was making a fool of him. He then started slapping her on the left side of her face with an open hand (twice), causing her to feel dizzy.
- [29] Mr Nocanda then proceeded to assault Ms Nkanyane physically, hitting her repeatedly with a clenched fist and kicking her. The assault left her breasts exposed as her clothing shifted. Mr Nocanda's violent actions continued as he kicked her in various areas of her body, including her head and ribs, leaving her lying on the ground.
- [30] During the assault, Prince, one of the bouncers, intervened as she was lying on the ground and attempted to restrain Mr Nocanda, who continued to kick Ms Nkanyane. He told her that if he could not have her, no one else would. Prince restrained Mr Nocanda by grabbing him from behind, hands across the body when a car stopped with four men alighting to help Prince. They successfully halted Mr Nocanda's attack.

[31] Following the intervention, Ms Nkanyane managed to reach a car with the help of her friend, who did not see the assault. Mr Nocanda followed her as she got into the car. She locked the doors, and he attempted to gain access to the vehicle, but Ms Nkanyane and her friend locked the car doors to prevent his entry. He banged on the window.

[32] As a result of the assault, Ms Nkanyane sustained injuries, including a black eye, a bump on her forehead, head injuries, bruises on her back and hip, and a bruise on her left thigh. She sought medical attention from Dr. Bathobatho in Kagiso. A medical report confirmed the injuries.

[33] During cross-examination, she was asked about discrepancies in her written statement, about her not stating that Mr Nocanda grabbed her by the wrist. She stated that it was just a summary of what happened. She does not know why Prince did not testify about the four men. She rejects Mr Nocanda's version and specifically states that Prince did not twist his hand.

[34] After this, the State closed its case.

Brian Nocanda

[35] Mr Nocanda started his testimony with an apology to all the people whom he hurt with his actions, especially the family of the deceased.

[36] He then testified that he is a sergeant in the SAPS with 17 years of service, who DJs in his spare time. He went to the pub to assist Thabang, who was DJing. He arrived around 21:20 after receiving a call from Thabang. He took over DJ duties at 22:00. His girlfriend, Tinyiko, arrived with a friend. They were outside the pub in the yard; he waved to her until she noticed; she came to him, and then they held hands and went outside.

[37] In the parking lot, an argument ensued between them about him not calling her and her not replying to his texts, eventually leading to her telling him that he was full of sh*t. This made him angry, and he slapped her twice with an open hand in the face. She went backwards, slipped over the pavement, and fell on her buttocks. She then

got up and moved to the other side of the vehicle. He did not notice any injuries on her face. He did not check; it was dark, and she moved away from him after he slapped her.

- [38] Afterwards, she asked him why he hit her, but he did not answer. Another car arrived that stopped, with two guys coming out, questioning why they were fighting. At this time, Prince intervened, grabbing him from behind and twisting his hands and arms.
- [39] Ms Nkanyane, at this stage, was standing on the other side of the vehicle until her friend came. They got into the car. Prince was still holding his arms, twisting it, pulling his t-shirt. That is when he grabbed the handle of the car. He also hit the window as they were about to reverse into him, and he wanted to alert them of his presence.
- [40] He denies that they were no longer in a relationship, that he kicked and punched her, and that maybe her injuries were because she fell. Prince only came once they were standing.
- [41] The accused claimed Prince assaulted him by punching him in the left eye and the chin, causing him to feel dizzy and unconscious. He walked to the island in the middle of the road to sit down. He was bleeding from the nose and the mouth. After some time, he returned to the gate, where he saw a male and female bouncer. He told them he wanted his belongings, but they refused entry.
- [42] Prince then approached him, walking fast and telling him that if he comes back, he will f*ck him up. He then panicked and drew his firearm, the service pistol that he carries with him. He cocked it. Still, Prince approached, and he cocked it for a second time. Two live rounds went out in consecutive rounds while the firearm was pointed to the ground.
- [43] Prince then turned and ran away, and he continued firing it while walking towards the direction Prince was running, while, as he explained, his firearm was busy firing. There were people inside the pub when he fired the other four shots. He did not notice if anyone was injured. He did not know that Mr Mthi had been killed. He was aiming at the floor to minimise the threats.

- [44] He wanted to report the assault by Prince and the shootings at the Kagiso police station, but they told him he must come back when he was sober and received medical attention. He walked home with this service pistol on his waist, nursed himself, and slept. He was arrested later that morning. He did not at that time know about Prince's injuries or that someone was killed.
- [45] In cross-examination, Mr Nocanda admitted assaulting Ms Nkanyane and cocking his firearm multiple times. He acknowledged the risk of ricochet but claimed not to consider it during the incident. The accused said he fired to scare Prince, unaware that people were inside the pub. He admitted that his actions resulted in Mr Mthi's death. He insisted that he shot towards the ground.
- [46] As for the assault on Ms Nkanyane, he admitted again to slapping her twice with a flat hand in the face. The other injuries she perhaps sustained were because she fell afterwards, not from the hitting. When it was put to him that she fell because he hit her, he was only willing to agree that she perhaps fell because she was running away from him or feeling dizzy. He changed his version of the sequence of events – he no longer felt dizzy right after Prince assaulted him at the car, but rather after he had been at the gate to ask the bouncer why Prince assaulted him.
- [47] During re-examination, the accused mentioned calling witnesses, including a bouncer named Jo, Thabang the DJ, and William Mawela, to corroborate parts of his testimony. Only Thabang testified at the end, after which the defence closed its case.
- [48] However, the case was reopened at the next sitting, with Mr Nocanda back on the stand. He resumed his testimony during the examination-in-chief, recounting an alleged assault by Prince that left him with injuries, including bruises on both elbows, a swollen eye, and a bump on the back of his head. He repeated that he bled through the mouth and nose. The J88 medical report was presented, indicating treatment received at Loreto Hospital with a Kagiso SAPS stamp, although Mr Nocanda clarified that he did not personally collect the document. A photograph depicting him playing music at the Joint pub was introduced, and he claimed it was taken on either January 27th or 28th, obtained from witness Tabang. The acceptance of Section

3(1)(c) of the Law of Amendment Act was confirmed, and the J88 and the photograph were marked as Exhibits J and K, respectively.

[49] During cross-examination, the focus shifted to the J88's corroboration of injuries. It was noted that certain injuries were not documented on the form, and Mr Nocanda explained the absence by stating that he could not have blood on him for two days. Questions arose about the photograph's purpose, and doubts about its location and capture date were raised. Not much turns on this.

[50] In re-examination, the accused attempted to introduce a phone with a date to support the presented evidence.

Thabang Moses Pela

[51] Mr Thabang Moses Pela was then called to the stand. During the examination-in-chief, the witness, familiar with the accused through a musical DJ academy, recounted the incident on 28 January 2023 at the Joint. The witness was seemingly discontent with testifying.

[52] Having been at home earlier, the witness arrived at the Joint around 8 pm and asked to play as a DJ by William Maboe. Mr Nocanda also performed as a DJ, allegedly playing for an hour, though Thabang did not know the specific start and end times. He confirmed that Mr Nocanda was not on the list of DJs, as he was assisting Thabang in his slot – a personal arrangement.

[53] A picture was handed up, and he identified Mr Nocanda in the picture. It was taken on that day. The State warned that this was hearsay evidence, as his brother took the photo.

[54] During cross-examination, Thabang testified that he knew of a shooting on 28 January 2023, resulting in injuries to Prince and the death of Mr Mthi. Mr Nocanda was identified as the shooter, and Thabang described observing him entering with a gunshot sound. When questioned about Mr Nocanda's actions, he claimed to see him walking with a firearm, pointing at a 60-degree angle. Discrepancies emerged during somewhat aggressive questioning, with Thabang testifying about variations

in the angles the gun was pointing, ranging from a 60-degree angle to the ground to a straight arm pointing upwards.

[55] When responding to a question from the court, confusion arose regarding the gun position during the shooting, with the witness initially indicating a 60-degree angle but later affirming a 180-degree straight arm.

Evaluation of evidence

[56] The burden is on the State to prove the accused's guilt beyond reasonable doubt. If the accused's version is reasonably possibly true, then the matter must be decided on the accused's version.

[57] This determination is based on the evidence as a whole. In other words, an accused's version is evaluated in the context of the entire case rather than in isolation.¹ The test is not whether the court believes him subjectively or not, nor whether the State's case must be rejected. The emphasis is on the reasonable possibility that his evidence is correct. If so, then he must be acquitted on those grounds.² It is not weighing competing versions and making probabilistic decisions.

[58] It is thus necessary for me to consider the evidence holistically.

[59] Prince was a confident witness who largely stuck to his version during cross-examination, sure of his facts. He testified that he pulled Mr Nocanda away from Ms Nkanyane and how he restrained him when he wanted to go to the car. A man of big build, it is possible that during this altercation, he did injure Mr Nocanda. I am not convinced that he assaulted him.

¹ *R v Hlongwane* 1959 (3) SA 337 (A).

² *S v Kubeka* 1982 (1) SA 534 (W) at 537F- H.

[60] He did not see the car with four men (according to Ms Nkanyane) or the two men (according to Mr Nocanda) who also stopped. I am not convinced that this makes him unreliable or the State's version false.

[61] During cross-examination, much was made about the police statement that did not detail what was testified in court. In *S v Mahlangu*,³ the court noted that:

'[t]here will have to be indications other than a mere lack of detail in the witness's statement to conclude that what the witness said in court was unsatisfactory or untruthful'.

[62] That is something I agree with. Ultimately, the court will consider the evidence as a whole to determine which aspects of the witnesses' testimony should be accepted and which should be rejected. The question is whether the differences were significant:

'always bearing in mind that a witness's testimony in court will almost without exception be more detailed than what the witness said in his written statement'.⁴

[63] Deviations that are not material will not discredit the witness. The court held in *S v Mafaladiso*⁵ that the judge's final task was to weigh the previous statement against viva voce evidence, to consider all the evidence and decide whether it was reliable and whether the truth was told, despite any shortcomings. This means the court must evaluate the evidence to determine whether the truth has been revealed.

[64] As for Prince's evidence, I am satisfied that the lack of detail in his statement does not make his testimony in court untruthful. His version of the shooting is corroborated by the fact that he ran upstairs with his left side exposed to the door. The bullets hit him on the left. Mr Mthi was also sitting to his left. It corroborates that Mr Nocanda aimed at and followed him as he tried to flee.

³ [2012] ZAGPJHC 114.

⁴ *S v Bruiners* 1998 (2) SACR 432 (SE) at 437E-F; *S v Mafaladiso* 2003 (1) SACR 583 (SCA) at 593E.

⁵ 2003 (1) SACR 583 (SCA).

- [65] Nomvula was not the best witness, but not purposely so. Her evidence differed from that of the other state witnesses in some ways. For example, she testified that Mr Nocanda had pushed Ms Nkanyane against the wall while no one else did.
- [66] She also did not see the entire altercation between Mr Nocanda and Ms Nkanyane, which may explain why she claimed that when Prince approached the pair, Ms Nkanyane was on her feet, but he testified that she was lying down. The defence argues that due to her lack of credibility, the court should find the accused guilty of common assault rather than assault with the intent to cause grievous bodily harm. I disagree; the distinction between the two is based on the level of violence and the injuries caused, not whether she witnessed the assault or not. Mr Nocanda, Ms Nkanyane, and Prince all testified about the assault, and there is a medical report indicating that there is enough data to form the necessary findings.
- [67] She confirmed that she heard the threat of Prince going home in the body bag, and she stated that Mr Nocanda wanted to see Prince to apologise, not to fetch his belongings. I don't think much turns on this. It is clear that Mr Nocanda was barred from entering the Joint due to his violent behaviour and would not have been admitted inside regardless of his explanation.
- [68] The defence states that she is a single witness in respect of the conversation she had with Mr Nocanda before Prince came to the gate and that Mr Nocanda slipped through the arms of Jo, the other bouncer, drawing a firearm and pointing it at Prince. This, however, is corroborated by Prince's testimony and injuries.
- [69] Ms Nkanyane testified to the assault and that she sustained injuries on the forehead bruises on the left thigh, ribs and the back and the head, as depicted in Exhibit D, the medical report handed up. She was confident and adamant. There is no reason for the court to reject her testimony.
- [70] Mr Nocanda was a witness with many explanations. He does not deny hitting Ms Nkanyane and killing Mr Mthi. His testimony focussed mainly on justifying his shooting and downplaying the assault. In the process, however, he confirmed most of the charges. He insisted that Thabang be called to testify and confirm that he is a

DJ, but then opened the door for Thabang to be cross-examined. The two are acquaintances, and Thabang was placed in a difficult position of having to give damning testimony against Mr Nocanda, often contradicting Mr Nocanda on material aspects and, in the end, himself.

[71] The greatest unclarity in his testimony still being the exact angle of Mr Nocanda's arm when he pulled the trigger – 60 degrees acute, or pointing straight at Prince. The totality of the evidence considered, Mr Nocanda's version that he only shot all six bullets to the ground to mitigate the impact, is rejected for reasons already stated above. But even if the court were to accept that he indeed did not aim at Prince at any stage and only shot to the ground, a reasonable police officer should have foreseen the possibility of the bullets ricocheting and fatally wounding a patron in the pub.

[72] The discrepancies in the State's version that Mr Nocanda left the premises (presumably to fetch his firearm) and then returned to the pub and Mr Nocanda's version that he took some time out 20 m across the road on the island are not material. Both versions indicate that after the assault on Ms Nkanyane and the altercation with Prince, Mr Nocanda took time out to gather his thoughts and contemplate what he wanted to do.

Assault with the intent to do grievous bodily harm

[73] Unlike common assault that Mr Nocanda admits to, assault with the intent to do grievous bodily harm involves serious physical injury and requires actual force. What amounts to grievous bodily harm is a point of debate. In the *S v Mbelu*,⁶ the court laid down a flexible test as assault where the intention is at least clear that the intent was to inflict more than the casual superficial injuries which ordinarily follow upon an assault.

⁶ 2010 (1) SACR 310 (O).

[74] A punch in the face does not per se lead to an inference that the intention is to inflict grievous bodily harm, but it can, in certain instances. A punch near the eye indeed shows an intent to cause serious injury, as does kicking in the ribs. The medical report indicated bruising on the right temple, under the left eye on the left thigh and on the left lower back.

[75] Violence, where people stand in a trust relationship and where one person is vulnerable, is aggravating.⁷ On Ms Nkanyane's version, it accompanied a death threat. This cannot be ignored, especially not in light of the scourge of Gender Based Violence and the prevalence of femicide in the country.

[76] In *Rabako v S*,⁸ the court, after a discussion of the authorities and looking comparatively at the term "grievous bodily harm", stated

[7] There is nothing in the Act or Schedule that indicates that the words should be interpreted restrictively or widely. In my judgment the words should be given their ordinary, natural meaning. I agree with the words of Viscount Kilmuir L.C. that they only mean really serious. The words "really serious" should be illuminated lest it leads to confusion or overemphasis. The New Shorter Oxford English Dictionary: Lesley Brown (Ed) 1993 defines the word "really" as "In a real manner; in reality; actually. Used to emphasise the truth or correctness of an epithet or statement: positively, decidedly' assuredly." The word therefore does not indicate degree of seriousness. In this context it only serves to emphasise that the harm inflicted must actually be serious. In essence then if the injury inflicted by the accused on the body of the rape survivor is serious then it involves the infliction of grievous bodily harm. A serious injury at one extreme may mean an injury so serious as to endanger life, necessitate hospitalisation or to result in permanent loss of bodily or mental faculty at the other; it may include a wound that heals rapidly. It should not be a trivial or insignificant injury. A serious injury therefore need not necessarily be an injury that is permanent, life threatening, dangerous, or disabling. Whether the injuries were life-threatening, necessitated hospitalisation or immediate medical attention will generally be relevant to determine the degree of seriousness but not necessarily the seriousness itself. Whether an injury is serious will depend on the facts and circumstances of every case.

[77] I am satisfied that the State has made out a proper case of assault with the intent to do grievous bodily harm.

⁷ Burchell *Principles of criminal law* (4th ed) p 602.

⁸ [2007] ZAFSHC 47.

The law regarding intent

- [78] Culpability for murder requires intention in the form of either *dolus directus*, *dolus indirectus* or *dolus eventualis*. *Dolus directus* refers to the actual intention of the accused. In contrast, *dolus eventualis* refers to the situation where the commission of the crime was not the accused's actual aim or objective. Still, he foresaw it as a possible consequence of achieving that objective and persisted anyway. Any form of *dolus*, as a rule, will suffice for criminal liability.⁹
- [79] Intention is an imperfect translation from the Latin term *dolus*, and might create the impression that an accused must have meant or wanted to commit a crime. But intent can also include an accused's conscious acceptance of the risks of unlawful conduct he foresees while pursuing another aim. It also requires conscious wrongdoing – the wrongdoer must know the conduct is a crime.¹⁰
- [80] It is not only determined by what the accused say they intended but also from drawing inferences from the circumstances of the assault, the weapon used, and the extent of injuries inflicted. All this, of course, is taken into account holistically. As was set out in *Humphreys v S*,¹¹

On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.

- [81] *Dolus eventualis*, in the context of murder, deals with a situation where a perpetrator foresees the risk of death occurring but nevertheless continues to act, accepting that

⁹ *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204 para 25 onwards.

¹⁰ Shelley Walker et al (2022). *Criminal Law in South Africa*. Fourth edition. Oxford University Press Southern Africa.

¹¹ [2013] ZASCA 20.

death may well occur. The Supreme Court of Appeal *Director of Public Prosecutions, Gauteng v Pistorius*¹² stated that

It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act 'reckless as to the consequences' (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been 'reconciled' with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. *It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.* (own emphasis)

[82] The State submits that once Mr Nocanda started shooting, Prince began to running in the opposite direction, and Mr Nocanda continued to shoot him. He was pursuing him with direct intent. In aiming at Prince in a pub full of people, one of the bullets hit Mr Mthi, fulfilling the requirement of *dolus eventualis*. I agree. A police officer, trained in weapons would foresee the possibility of death by firing a gun in a crowded place.

Private defence

[83] Mr Nocanda relies on private defence for firing the gun that led to the death of Mr Mthi and the injury of Prince. The killing of people is always *prima facie* unlawful. If the accused wishes to rely on the defence of private defence, it must lay an evidentiary foundation for it. If the accused admits to injuring or killing another person, he has the evidentiary burden to explain or justify his conduct. This is not an onus of proof – the onus remains on the State to prove beyond reasonable doubt the elements of criminal liability, including unlawfulness. It means that the accused cannot merely allege that he acted in private defence and leave the rest up to the State to prove.¹³

[84] In general, the law prohibits private individuals from using force against others to protect their legal interests; instead, they must use State agencies to do so. Because this is not always possible, the law allows a person to use force if necessary to

¹² [2015] ZASCA 204 para 26.

¹³ *S v Ngomane* 1979 (3) SA 859.

defend himself or others from an unlawful attack by another person. There are, however, strict rules governing this.

[85] As far as the attack is concerned, there must be an unlawful attack or a threat of such an attack,¹⁴ and the attack must threaten some legally protected interest, such as life or physical integrity. The attack must be in progress or imminent; it cannot yet be over, and a person may not continue to use force after the attack is over, as this would amount to mere retaliation.

[86] The defender's response must be necessary to avert the attack through force – in other words, there must be no other practical way of averting the attack. In general, the law will expect a person to retreat or flee if possible¹⁵ rather than use force, but a person is not expected to flee if it is not a practical solution, for instance, when doing so would expose him to more danger.¹⁶ This is not an absolute rule, but one of the issues to consider in assessing whether the defensive act was allowed by law.¹⁷

[87] The use of force must be reasonable and proportionate to the attack¹⁸ – in other words, for the defender to protect himself against the aggressor's unlawful attack. A defence that uses more force than is necessary is not justified.

[88] In some cases, the courts employ the test of whether the accused had reasonable grounds for believing that they are in danger – in other words if a reasonable person

¹⁴ Shelley Walker et al (2022). *Criminal Law in South Africa*. Fourth edition. Oxford University Press Southern Africa.

¹⁵ Burchell *Principles of criminal law* (4th ed) p 126.

¹⁶ *R v Zikalala* 1953 2 SA 568 (A), *S v Steyn* 2010 (1) SACR 411 (SCA).

¹⁷ *S v Mnguni* 1966 (3) SA 776 (T) 779A.

¹⁸ *S v Trainor* 2003 (1) SACR 35 (SCA) states that 'there should be a reasonable relationship between the attack and the defensive act, in the light of the particular circumstances in which the events take place'. For an explanation of this requirement, see Walker S "Determining reasonable force in cases of private defence: A comment on the approach in *S v Steyn* 2010 (1) SACR 411 (SCA)" 2012 SACJ 84.

in the same circumstances would have thought the same.¹⁹ The defender is entitled to use lethal force, even where his life is not necessarily in danger, as long as the threat is sufficiently serious to warrant the use of such force, and such force is reasonably necessary in the circumstances to ward off the the attack or threatened attack, and less drastic means are not available.²⁰ A person, faced with a choice of alternatives in the critical moment, should not be judged as though they had the time and the opportunity to weigh up all the pros and cons.²¹

[89] This defence does not allow for excessive force – in other words, force more than is reasonably necessary. This is an objective test. Lastly, the response must be directed against the unlawful attacker only. It will not be private defence when an innocent third person is harmed.

[90] This turns on a factual dispute, namely why Prince went to the front of the pub. Mr Nocanda states that Prince approached him fast and furiously when he tried to gain entry to fetch his belongings. Prince and Nomvula's testimony states that Prince was called to the front because Mr Nocanda wanted to apologise. Even if I accept that Prince assaulted Mr Nocanda in the parking lot when he tried to prevent him from assaulting Ms Nkanyane, Mr Nocanda left the premises and returned a while later. There was thus no longer an imminent threat. If Prince indeed verbally threatened him, Mr Nocanda's problem is the proportionality of the force: firing six shots for being verbally insulted. It is also unclear why he did not just turn around and leave. However, on the accepted facts, very little showed that Prince threatened him to the point where he needed to act in private defence.

¹⁹ See for instance, *R v Stephen* 1928 WLD 170 at 172; *R v Attwood* 1946 AD 331 at 340; *R v Hele* 1947 (1) SA 272 (E) at 275,

²⁰ Shelley Walker et al (2022). *Criminal Law in South Africa*. Fourth edition. Oxford University Press Southern Africa. Para 7.2.1.2.2.

²¹ *R v Patel* 1959 (3) SA 121 (A).

Putative private defense

- [91] Putative private defence is concerned about the mental State of the accused, which can be raised if the accused can show that he lacked the intention to murder because he acted defensively in the honest but erroneous belief that his life was in danger.
- [92] A person's genuine but mistaken belief that he was acting in private defence when this was not the case because he was not under attack or threat will not make his conduct *lawful*. Such a person may, however, escape criminal liability because he lacked the *intention* to act unlawfully (where intention is required). There is thus an exclusion of *dolus* (where intention is a requirement).
- [93] The test for putative private defence, where intention is required, focuses on the person's thoughts. *S v Olivier*²² stated the test as follows:

The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way. In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus* in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide.

- [94] Thus, the court stated an erroneous belief excludes *dolus*. However, it seems from the introduction passage that the court partly used an objective test to determine the *dolus* (as opposed to negligence).
- [95] Whether the erroneous belief is reasonable is not the question, as it is a subjective test. It must only be *bona fide*. Because the test is subjective, it is allowed to take into account the accused's unique characteristics, intelligence and background.²³ This was also confirmed in *S v Naidoo*.²⁴ In *Director of Public Prosecutions, Gauteng*

²² 1993 (3) SACR 59 (A).

²³ Botha, R. (2017) "Putatiewe noodweer as verweer in die Suid-Afrikaanse strafreg: 'n Kritiese oorsig van die onseker pad tot by Pistorius en daarna." *Litnet Akademies: 'n Joernaal vir die Geesteswetenskappe, Natuurwetenskappe, Regte en Godsdienswetenskappe* 14(2), 837.

²⁴ 1997 (1) SACR 62 (T).

*v Pistorius*²⁵ the Supreme Court of Appeal referenced the *De Oliveira* case to determine whether the accused had *dolus*. The court then focussed on his erroneous belief that he was entitled to shoot, finding that it *was not rational* (test for negligence) to exclude his defence of putative private defence (based on *dolus*).

[96] In this case, Mr Nocanda is a trained policeman with many years of experience. He had firearm training, and he knew the dangers of firearms. Mr Nocanda testified that Prince approached him aggressively and swore at him at the door. Even if Mr Nocanda had been scared, a rational person would not believe that they are entitled to fire at this unarmed person with a firearm, especially when this person turned around to run away. Very few facts support his contention that he was scared, with most facts pointing to him returning to the Joint to seek confrontation.

[97] Even if I accepted Mr Nocanda's version that he fired shots at the floor, he did not disturb the natural inference that he intended the probable consequences of his actions. He had to lay the factual foundation to establish that he genuinely believed there was an imminent attack upon him that endangered his life when he fired the shots. He didn't.

Premeditated murder

[98] Lastly, the question is if the form of murder is premeditated murder. Premeditation is not an element of murder. Where the *dolus* requirement deals with intention, it should not be confused with premeditation. Premeditation refers to the decision, *in advance*, to commit the murder—a deliberate, reasoned and weighed decision.

[99] This should be distinguished from intention, which concerns the perpetrator's State of mind. Premeditation speaks to the accused's moral blameworthiness and

²⁵ [2015] ZASCA 204 para 26.

aggravation in relation to a sentence.²⁶ It is also one of the grounds to place a murder under the realm of s 51(1) of the Criminal Law Amendment Act.²⁷

[100] Thinking or planning long in advance is not a requirement.²⁸ It requires a consideration of each case's factual matrix to establish the State of the perpetrator's mind before the crime was committed.²⁹

[101] Arguably the difference between intent and premeditation is easier to establish when dealing with *dolus directus* – the planning or thinking (premeditation) of, and the murdering with a clear intent (*dolus*) of a person. With *dolus eventualis*, it is not always so clear cut. Roelofse AJ recently set out the difference neatly in *S v Ratau*.³⁰

[45] The concepts of premeditation and intention are different. Premeditation involves a thought process that contemplates a certain outcome and the means to achieve that outcome. Intention in all of its forms (*dolus directus*, *dolus indirectus* and *dolus eventualis*) involves the perpetrator's State of mind before and while the criminal act is being committed.

[102] In this case, on the facts, it is evident that Mr Nocando, after assaulting his girlfriend, took a break to clean up and contemplate his next move. There is nothing on the facts that suggests that the withdrawal of the firearm, the cocking of the firearm, the two consecutive shots, and the four after that, was "spur of the moment". He returned to the pub after assaulting his girlfriend, after the altercation with Prince, and, importantly, after having had time to process what happened. Still, he decided to approach the pub, armed, knowing there was a high possibility of confrontation. When Prince approached, he had an opportunity to turn around and leave the establishment, but he chose to remain and draw his firearm. As a policeman, he knows that in shooting a firearm in a crowded place, even if aiming at the ground, there is a possibility that someone might be injured. Still, he took that gamble,

²⁶ Shelley Walker et al (2022). *Criminal Law in South Africa*. Fourth edition. Oxford University Press Southern Africa. Para 19.3.1.

²⁷ 105 of 1997.

²⁸ *Kekana v S* [2014] ZASCA 158.

²⁹ *S v Raath* 2009 (2) SACR 46 (C).

³⁰ [2022] ZAMPMBHC 64.

resulting in the injuries of Prince, and the death of Mr Mthi. I am thus satisfied that the State has proven the count of murder, and that it was premediated murder.

Discharging a firearm in public

[103] The fourth charge relates to the discharge of a firearm in public. The intent, as set out above, of discharging the firearm, relates to charges 1 and 2: the *dolus* to commit murder and attempted murder. Therefore, I believe that if convicted on charge four, it would be a duplication of convictions.

Order

[104] I, therefore, make the following order:

1. The accused is found guilty of count 1, murder, count 2, attempted murder, and count 3, assault with the intent to do grievous bodily harm.
2. He is acquitted from count 4, discharging a firearm in public, as it would amount to a duplication of convictions.



WJ DU PLESSIS

Acting Judge of the High Court

Counsel for the State:

Mr Phaladi

Counsel for the respondent:

Mr Bovu

Instructed by:

Legal Aid South Africa

Date of the hearing:

23 and 25 October, 2 and 16 November
2023

Date of judgment:

29 November 2023