IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 66/23

In the matter between:

SONWABO DANIEL BOMVANA **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: Durban Regional Court:

1. The appeal is dismissed.
2. The sentence imposed by the court a quo is confirmed.

JUDGMENT

Madonsela AJ (Nako AJ concurring)

Introduction

[1] This appeal addresses the tragic consequences of road rage, which often leads to fatal outcomes. In this case, the victim's life was tragically lost as a result of such rage, while the appellant's actions culminated in a conviction for murder and a subsequent sentence of ten years' imprisonment. The appellant seeks to challenge both the conviction and the sentence, with leave to appeal having been granted by the trial court.

[2] The incident, which is the focus of this matter, occurred on 9 April 2017, along Esther Roberts Road, at Umbilo, in Durban. The appellant, a policeman of some 13 years' experience at the time, was driving around with his family in a Volkswagen Polo Vivo ('Polo'). The deceased was driving alone in a white Nissan bakkie.

[3] According to the appellant, the initial confrontation with the deceased occurred at Noble Road, in an area around Berea, Durban. The deceased's vehicle was stationary and obstructing the flow of traffic. After some maneuvering, the appellant managed to pass the deceased's stationary vehicle. As he was passing through, the appellant opened the window of his vehicle and exchanged some words with the deceased, leading to a brief altercation. Thereafter, the deceased pursued the appellant, ultimately blocking the latter's vehicle along Esther Roberts Road. The deceased, whose vehicle was now stationary in front of the appellant's, exited his vehicle and took several steps towards the appellant's vehicle. As he was approaching the appellant's vehicle, the appellant opened fire, discharging no less than five gunshots, which he said he had fired in the general direction of the

deceased. As a result, the deceased was fatally wounded by an entry gunshot wound on the upper back.

[4] In seeking to justify the killing, the appellant relied on self-defence. He contended that the deceased was armed with a firearm as he approached the appellant's vehicle. For this reason, the appellant maintained that, under the belief that he was being threatened with an attack and/or the possibility of a hijacking, he acted in self-defence.

The findings of the court a quo (trial court)

[5] The court *a quo* rejected the appellant's version of events, specifically his claim that he acted in self-defence in killing the deceased. Consequently, the court a quo convicted the appellant of murder and sentenced him to ten years' imprisonment.

[6] In convicting the appellant, the court a quo predicated its judgment on the version proffered by the main state witness, Mr Thusini ('Thusini'). The court found Thusini's version to be 'credible', 'reliable' and a 'satisfactory account' of the events. Additionally, it found that Thusini's evidence was supported by the evidence of two other witnesses, Mr Brian Dickens, a policeman who later searched the deceased's motor vehicle and found no firearms or any weapons in it; and Dr Ziphozethu Hina ('Dr Hina'), a medical doctor and trainee forensic pathologist, who conducted a post-mortem examination on the deceased's body and determined that the fatal wound which caused the demise of the deceased, was caused by a gunshot fired into the deceased's back.

[7] The court a quo accepted Thusini's evidence that the deceased was not in possession of a firearm when he approached the appellant's vehicle. This conclusion was supported by the undisputed evidence of Mr Brian Dickens, who, as previously noted, searched the deceased's vehicle shortly after the incident and found no firearms or weapons.

[8] The court a quo therefore held that the deceased posed no threat to the appellant when he was fatally wounded. It was common cause that when approaching the appellant, at no stage did the deceased ever raise his hand in a manner indicating an intent to attack. Therefore, the court rejected the appellant's claim as fabrication.

[9] The court a quo further accepted Thusini's evidence that the appellant fired one or more warning shots while still inside his vehicle. It therefore held, by implication, that the remaining gunshots, at least three, were fired by the appellant when he was outside his vehicle. Although the court a quo noted the discrepancy in Thusini's evidence regarding the number of warning shots were fired whilst the appellant was still inside his vehicle. Regardless, the court a quo found that this inconsistency to be immaterial to the central issues of the case.

[10] Based on the evidence of Thusini, the court a quo underscored that the appellant had shot at the deceased after the latter had turned and was returning to his vehicle. This, held the court a quo, did not deter the appellant from firing several shots at the deceased. This finding was consistent with the evidence of Dr Hina, who conclusively found that the wound, which brought about the deceased's death, was inflicted from behind, consistent with the appellant having fired from that direction.

[11] By contrast, the court a quo found the version of the appellant, that he acted in self-defence, to be improbable. It rejected that defence as false beyond reasonable doubt. Furthermore, it concluded that the evidence of the appellant, on its own, was unsatisfactory on many fronts.

[12] The court a quo primarily concluded that the appellant 'grappled at straws' in attempting to identify the unlawful action or attack on the part of the deceased that would justify the appellant firing at the deceased in the manner he did. It observed that in giving evidence the appellant was non-committal and evasive, failing to provide a definitive account of the direction in which he fired. It found that the appellant wavered between firing in the general direction of the deceased, to firing in the general direction of the deceased's vehicle, and ultimately disputing having fired at the deceased at all, even though he (the appellant) on his own version considered

the deceased to have been a danger to him and his family. Furthermore, the court a quo observed that the appellant struggled to explain the several shots he fired at the deceased when the latter had turned and was returning to his vehicle.

[13] The court a quo emphasised the consistent evidence of both the appellant and Ms Khumalo, the deceased's sister-in-law, regarding the deceased's alleged firearm, specifically that the deceased had always pointed the firearm toward the ground. In light of this, the court a quo found the appellant's conduct of registering a criminal complaint or charge of 'pointing a firearm' against the deceased as self-serving and contrived. Consequently, the court a quo found that the appellant was unable to establish any form of unlawful attack or imminent threat posed by the deceased which warranted him to act in self-defence.

[14] In the final analysis, the court a quo attached significant weight to the fact that the appellant was a seasoned police officer who should have known how to respond to the situation he found himself in. It was questioned why, if at all the appellant fired any warning shot, he continued to fire more shots at the deceased thus fatally wounding him through a shot fired at the deceased's back.

[15] Consequently, the court a quo accepted that the appellant had continued to fire shots at the deceased at the time when the latter had turned back and made his way to his car. For this reason, the court a quo held that if there was any threat to the appellant, perceived or real, such threat had in any event ceased when the deceased turned his back to the appellant. In those circumstances, the court a quo held that when the appellant continued to shoot at the deceased, he exceeded the bounds or limits of justification.

The parties' submissions

[16] In written argument, the appellant contended that the court a quo erred in failing to apply caution when assessing the evidence of the main State witness, Thusini, since his eyewitness evidence was that of a single witness. He argued that, in essence, the court a quo should have rejected Thusini's evidence as it did not pass the scrutiny demanded by cautionary rules applicable to evidence of a single

witness. However, in oral argument, Mr *Naidoo*, who appeared for the appellant, did not persist in this argument. That was hardly surprising.

[17] The reason for this is illustrated in *Maila v S*,[1] at paragraphs 17 and 18, where the Supreme Court Appeal clarified the proper approach to be adopted in assessing evidence of a single witness and the applicable cautionary rules, albeit in the context of child rape victims.[2] The Supreme Court of Appeal has unequivocally held that the number of witnesses is not a determining factor. Rather, it is the quality of the evidence provided by a witness or witnesses that is crucial. If the evidence of a single witness is credible and meets the necessary threshold of trustworthiness, when considered in light of the totality of the evidence presented by the opposing party, it may suffice to discharge the burden of proof. Such evidence should not be rejected merely due to the fact that it is the evidence of a single witness. The weight of the evidence is determined not by the number of witnesses, but by the quality and reliability of the evidence provided.

[18] In view of the difficulties in challenging the court a quo's findings with respect of the of appellant's private defence, Mr *Naidoo* sought refuge in 'putative' self defence, even though such defence was never raised before the court a quo.

[19] Mr *Naidoo* argued that the facts and circumstances under which the appellant killed the deceased sustained the defence based on 'putative' self-defence. The predicate for this contention was the appellant's acceptance that the court a quo was correct in finding that the deceased was not in possession of the firearm when the appellant shot and killed him. Nevertheless, the factual premise for the appellant's belief, so went the argument, was the manner in which the deceased had pursued the appellant and ultimately stopped his (the appellant's) car by blocking it in the middle of the road.

[20] The appellant maintained that under the prevailing circumstances, he should never have been convicted of murder, as he held a reasonable and honest belief that his life, and that of his family members, was in imminent danger. The appellant

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[1] *Maila v S* [2023] ZASCA 3.
[2] *Sithole v S* [2024] ZAKZPHC 51.

further contended that, at most, his conduct amounted to negligence in causing the death of the deceased, and that he should have been convicted of culpable homicide.

[21] Regarding sentencing, the appellant contends that, even if the appeal on the merits were unsuccessful, this court should nonetheless exercise its discretion to interfere with the sentence imposed by the court a quo. In this regard, the appellant argued that he had no premeditated reason to kill the deceased, as the deceased's aggressive behaviour led to the incident, and was thus killed in a classical 'road rage' situation. Therefore, he argued that the sentence should have been reduced drastically, and Mr *Naidoo* ventured to suggest that the sentence be halved, with the remaining term of direct imprisonment sentence wholly suspended.

The issues to be decided

[22] The main issue before this court is no longer what the court a quo grappled with: namely: whether the appellant acted in self or private defence. The issue now raised for the first on appeal is whether the appellant acted in circumstances that would give rise to a claim of putative private or self-defence.

[23] That question, in turn, involves an assessment of whether the appellant genuinely and reasonably believed that the deceased posed a threat or danger to him, thereby negating the intent to shoot and kill the deceased in the manner that he did, in putative self-defence.

[24] If the appeal against conviction fails, the issue is whether this court should exercise its discretion to interfere with the sentence imposed by the court a quo.

The legal distinction between private defence and putative defence

[25] As previously stated, before the court a quo, the appellant relied on self or private defence as a justification for killing the deceased. However, on appeal, he changed tack and sought reliance upon putative self or private defence. In view of this change, it is necessary to remind oneself of the legal distinction between the two

defences. I believe that distinction will conduce to better appreciation of the issues which arise for determination.

[26] As a matter of legal classification, private or self-defence is conceptually distinct and is treated differently from 'putative' or supposed self or private defence. The former is an incidence of unlawfulness which is mainly concerned with the presence or absence of justification for conduct; and, the latter raises questions of culpability which is concerned with ascertaining the existence or absence of either intention (*mens rea*) or negligence (*culpa*) to commit a crime.

[27] Private or self-defence is available to any person who is a victim of unlawful attack (or threat of an attack) but uses force to repel such attack. That person is said to have acted in self or private defence.[3] His or her action, of repelling an unlawful attack by use of force, is therefore lawful provided the defensive act is necessary to protect the threatened interest or is directed against the attacker and is reasonably proportionate to the attack.[4] Putative self or private defence, on the other hand, occurs where a person genuinely believes that he is acting lawfully, whereas he or she is not, or he or she genuinely believes that he/she is acting within the bounds of a legitimate defence, whereas he is not.[5] If he or she acts in circumstances where mistaken belief is honest and genuine, he/she is not at fault in the sense that he or she would lack intention (*mens rea*) to commit a crime; or, if the mistake was also reasonable, would lack negligence (*culpa*).[6]

[28] Whilst private or self-defence is determined objectively (in the sense that the act is judged in accordance with a generally applied criterion),[7] by contrast putative defence is a subjective inquiry (which must be determined by examining the state of mind of the accused, especially his perceptions and beliefs relating to the attack and his defence).[8] If the accused kills another person on a genuine belief that the attack was unlawful, or that his life was in danger (when it was not), or that he was using reasonable means to avert the attack (when the means employed were in fact not),

[3] J Burchell *Principles of Criminal Law* 5 ed (2016) at 61.
[4] C R Snyman *Criminal Law* 7 ed (2020) at 85. See also Burchell ibid at 121.
[5] Ibid.
[6] Burchell above fn 3 at 61.
[7] Snyman above fn 3 at 84.
[8] Burchell above fn 3 at 515.

he should escape liability for a crime requiring intention on the grounds that he did not intend his conduct to be unlawful.[9] Similarly, if he also acted reasonably, he or she would escape liability for the crime requiring negligence.[10]

[29] As Snyman observes,[11] unlawfulness (within which private defence falls) may be described as a judgment or an evaluation of the act; and culpability (within which putative private defence falls) is a judgment or evaluation of the perpetrator'.[12]

[30] This distinction, between private defence and putative private defence, was made pellucid by Smalberger JA in *S v De Oliveira*[13] in the following terms:
'From a juristic point of view the difference between these two defences is significant. A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective - would a reasonable man in the position of the accused have acted in the same way *(S v Ntuli* 1975 (1) SA 429 (A) at 436E). 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.'

[31] The distinction between the two defences is therefore clear and well-defined. To successfully escape criminal liability for murder on the grounds of 'putative private or self defence', the law requires an accused person to place facts establishing his/her state of mind at the time of the incident and to demonstrate the existence of genuine and honest (though erroneous) belief that his/her life was in danger as to manifestly excluded the presence of an intention to kill.

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[9] Ibid at 515-516.
[10] Ibid.
[11] Snyman above fn 3 at 84.
[12] Ibid.
[13] *S v De Oliveira* [1993] ZASCA 62; [1993] 2 All SA 415 (A).

Overview of evidence

[32] On behalf of the appellant, it was contended that the facts presented before the trial court demonstrated that the appellant acted in a genuine and honest (but mistaken) belief that he was in imminent danger at the time of killing the deceased. In order to address this contention, it is necessary to examine in some detail the evidence which was placed before the trial court.

[33] The events which culminated in the fatal shooting of the deceased were given, in the main, by three witnesses: Thusini, an eyewitness who gave evidence for the State; and the appellant, along with Ms Khumalo (the appellant's sister-in-law), who gave evidence in support of the appellant. Additionally, I also reflect on the evidence of two other witnesses who testified on behalf of the State, Mr Clive Dickens (a policeman) and Dr Hina (a medical doctor), whose evidence, I believe, provides some important and clarifying insights.

Evidence of Thusini

[34] According to Mr Thusini, during the afternoon of 9 April 2017, around 06.30 pm, he was at the friend's place at: [...] E[...] R[...] Road, Umbilo, Durban. His car was parked on the roadside of the friend's house. As he approached his car, a white Nissan bakkie driven by the deceased coming to a stop and also a Polo (the appellant's vehicle) stopping behind the Nissan bakkie.

[35] The deceased exited his vehicle and took a few steps towards the appellant's vehicle. However, before reaching the Polo, whilst the appellant was still inside his vehicle, he heard the sound of two gunshots emanating from inside the appellant's car. At that point, the deceased went back towards his vehicle. The appellant then exited his vehicle and fired more shots in the direction of the appellant. Fearing for his life, Thusini took cover and fled momentarily in order to avoid being hit by stray

bullets. As he returned to the scene, he saw the deceased, who was now inside the vehicle, driving away.

[36] As the bakkie was driving away, Thusini approached the area where the appellant was located. At that moment, a vehicle with security guards arrived at the scene. In his presence, the security guards enquired from the appellant as to what had happened. The appellant responded by stating that he was being hijacked. As they were talking, police officers from Umbilo Police Station arrived. They too spoke to the appellant. Shortly thereafter, another police van, with Cato Manor police officers, arrived at the scene.

[37] In cross-examination, Thusini was questioned about the part of the deceased's body which he was able to see, given his position in relation to the deceased. He explained that he was able to see the deceased's torso and arms from the elbows upwards. He conceded that he could not see the deceased's hands. Ultimately, it was put to him that the deceased was armed with a firearm when he approached the appellant. He disputed this assertion.

The appellant's evidence

[38] The appellant testified that he was driving his Polo vehicle on his way home. He said he was in the company of his wife and another lady named Mbali, the fiancée of his wife's brother and two minor children.

[39] While driving along Noble Road, she was obstructed by a Nissan bakkie which was stationary in the middle of that road. The driver of the Nissan bakkie, the deceased, had stopped because he was busy talking to a group of males who were standing on the side of the road. After failed attempts to overtake the deceased's vehicle, due to oncoming traffic, he finally got a chance to pass. At the point when his vehicle was parallel to that of the deceased, he opened a window and confronted the deceased, asking him why he was blocking the road. The deceased responded, he said, by lifting up a knobkierrie, saying: "Do you eat this in your place?"

[40] From the deceased's response and his strong body build, he surmised that the deceased must be one of the taxi drivers or owners.

[41] At that point, he took off and proceeded to drive away in the direction of his home. The path he took towards home necessitated him to turn in and out of back roads: first into Che Guevara Road, formerly known as Moore Road, secondly into Brand Road, third, into Clark Road and then into Esther Roberts Road.

[42] As the appellant was driving down Moore Road, he observed from his rearview mirror that the deceased's car was closely following him. He signalled to turn right into Brand Road. The deceased's vehicle made the same signal. So, he decided not to turn into Brand Road. He proceeded down Moore Road and turned right into another road, Crart Avenue which joins Clark Road. He followed that road into Clark Road and joined Esther Roberts Road. Throughout this route, the deceased's vehicle was following him in close pursuit, flickering lights and signalling him to stop.

[43] At some point along Esther Roberts Road, the appellant passed through a traffic light displaying a cautionary sign. The deceased and his vehicle followed suit. As this moment, the appellant began to suspect that the deceased might be attempting to hijack his car. This was based on his knowledge from the days when he was a member of the Provincial Task Team – an elite police force in KwaZulu-Natal – he had known the Umbilo area where he was driving along as a notorious for hijackings.

[44] The appellant had a two-way radio issued to him by the State in his capacity as a policeman. At that point, he thought of alerting the police using the two-way radio, but, after some reflection, he abandoned the idea because, he feared that such an alert would raise alarm and hysteria among the passengers in his vehicle. He decided, rather, to drive straight to Umbilo Police Station. Suddenly, the deceased's car overtook his vehicle from the left-hand side and abruptly made a dead stop in front of him, in the middle of the road. He noticed that the vehicle was that of the deceased.

[45] The deceased opened his (the driver's) door, got out of the car and approached the appellant.

[46] At this point, the appellant stated, he noticed that the deceased was carrying a firearm with his right hand. He demonstrated the position in which the deceased held the firearm. The court a quo noted that the position indicated by the appellant was that the deceased held the firearm with his hand slightly bent at the elbow in front of the body, but pointing downward. He said the colour of the firearm he saw was black.

[47] At that moment, the appellant exited his vehicle and fired five gunshots in the direction of the deceased's vehicle. He stopped firing, he stated: 'after I saw him getting into the car'. Thereafter, he stated, the deceased drove off in his vehicle.

[48] Reflecting on his state of mind at the time, the appellant stated that he fired gunshots because he perceived the deceased was a danger to him and his family. He further explained that his concern was heightened by the fact that the deceased was approaching him while carrying a firearm. Added to that was the fact that the deceased had been closely and persistently pursuing him for, a period he estimated to be, about five minutes (from Noble Road to Esther Roberts Road).

[49] Shortly thereafter, police officers from Umbilo Police Station arrived at the scene and made enquiries into the event that had occurred.

[50] After his discussions with the police, he requested permission to transport his family i.e. his wife and children, to his flat. His flat was within a walking distance from the scene. The police agreed. However, the family members walked home. Later he drove his vehicle from the scene, parked it at his flat, and, accompanied by the police, proceeded to Umbilo Police Station.

[51] Upon arriving at the police station, he noticed that the deceased's car was parked inside the premises of the Umbilo Police Station. It was surrounded by a number of people, including the police officers. Shortly thereafter, police photographers arrived and a duty officer, Captain Dlamini.

[52] At this point, the appellant stated that he tried to file a charge of 'pointing a fire arm' with Captain Dlamini against the deceased as a result of the incident. However, Captain Dlamini refused to register that complaint as he considered the complaint to be false. Instead, Captain Dlamini insisted that if the appellant wanted to pursue the matter, he should process that complaint by himself utilising the stationery at the police station and opening a charge on his own. However, he did not proceed with this course of action on the same day, as he was not in a proper state of mind.

[53] The following day, on 10 April 2017, the appellant went to the SAPS headquarters at Durban Central Police Station. There, he retrieved appropriate paperwork, compiled the docket about the incident and opened a charge of 'point a firearm' against the deceased. He then took the docket which he had opened at the police headquarters and sought to register it at Umbilo Police Station. However, nothing became of the charge because the suspect (i.e. the deceased) had died as a result of the incident.

The evidence of appellant sister-in-law (Ms Khumalo)

[54] Ms Mbalenhle Innocentia Khumalo, the appellant's sister-in-law, was seated in the appellant's motor vehicle together with the appellant's wife and their children. She and the appellant's wife were seated on the backseat. The appellant's wife was seated directly behind the appellant's seat (that is, immediately behind the driver's seat) and she was seated on the left rear seat.

[55] She recounted the incident involving the altercation between the appellant and the deceased at Berea. She explained that the deceased's bakkie had obstructed the road and the appellant confronted the deceased about his conduct. She mentioned that during the course of the altercation, the deceased produced a knobkierie. However, she did not focus much on the altercation because she was tending to her child. She testified about the Esther Roberts Road incident, where that the deceased's vehicle blocked the appellant's vehicle.

[56] She then observed the deceased exiting his vehicle carrying a firearm. In response, the appellant immediately exited his vehicle and she heard gunshots. At the time the gunshots were fired, she instinctively grabbed her child and hid between the car seats.

[57] She testified that she could see the firearm because the visibility was good. In other words, although the incident took place in the early evening of that day, there was light and it was adequate enough for her to observe the events clearly.

[58] She noticed that the firearm was black and estimated its length to be around 20cm. According to her, the deceased was holding the firearm with his right hand and the firearm was pointing it downwards to the ground.

[59] After the shooting had stopped, she noticed the deceased going back to his motor vehicle and driving off. Thereafter, the appellant called for police assistance through his two-way radio.

[60] Under cross-examination, she was questioned about her written statement and about the extent to which she observed the deceased as he alighted from the bakkie. She stated that she could see the deceased's whole body. She explained that she had a clear view because the bakkie stopped at a particular angle, with its right side of the bakkie facing the front of the Polo. It was pointed out that this description of how the vehicles ended up was inconsistent with the description given by the appellant.

Evidence of Mr Clive Dickens (the police officer)

[61] Mr Clive Dickens, a member of the South African Police Services, was stationed at Umbilo Police Station at the time. He was on duty on 9 April 2017 performing patrolling duties together with his crew, Constable Shelembe. He responded to a radio control request for a backup from the appellant. When he arrived at Esther Roberts Road, another Policeman, Sergeant Mkhize, was already on site. He interviewed the appellant and enquired what had happened. The appellant told him that someone, referring to the deceased, tried to hijack him and, in

response, he shot at him. The scene was not cordoned off when he arrived and the passing vehicles were driving through cartridges on the road. He decided to collect the cartridges and went to Umbilo Police Station.

[62] On arrival at the police station, he noticed that there was an ambulance already treating the deceased. The deceased's vehicle was also there. The appellant arrived shortly thereafter. He noticed that the deceased's vehicle had bullet holes. He was requested by the Duty Officer, Captain Dlamini, to search the deceased's vehicle for any weapons. Upon searching the vehicle, he found no firearms or any other weapon.

[63] Police photographers were called in; they took photographs of the deceased's vehicle. The photo album, depicting the deceased's vehicle was handed in as evidence, by consent. The photographs in the album depict some damages to the deceased's vehicle, allegedly caused by the bullets: two bullet holes on the right wheel arc near the right rear wheel of the vehicle, a bullet hole on the right rear window of the vehicle (immediately behind the driver's seat), and another bullet hole in the middle of the windscreen.

The evidence of Dr Hina

[64] Dr Hina, a Trainee Forensic Pathologist and a medical doctor at the time, conducted a post-mortem examination of the deceased's body and prepared a report.

[65] She described the injuries on the deceased's body. She noted that the fatal wound which caused the deceased's demise was an entry gunshot wound on the upper back along the midline and an exit wound on the left upper arm of the deceased's body.

Evaluation of appellant's arguments

[66] Against the above factual backdrop, the appellant pegged his case for putative self-defence on the fact that the deceased had pursued him from Noble road until he was ultimately jammed at Robert Ester road. He contended that this series of

events led him to form a genuine and honest belief that he was being hijacked, referencing his prior experience as a member of the SAPS Provincial Task Team. He argued that, based on his knowledge of the area, particularly that the Umbilo area (where Esther Roberts Road is located) was known for hijacking. However, as I will explain shortly, this fact represents only one aspect of the overall factual context and does not fully account for all the evidence presented by the appellant.

[67] It is indeed correct that at some point, the appellant did entertain the thought that he was being hijacked. However, this thought occurred when the car chase was ongoing. The appellant's account did not end there. He further explained that at the time when the deceased maneuvered to stop his vehicle, by overtaking from the left-hand side of the road and jamming him, he immediately noticed that the vehicle which was pursuing him was the same Nissan bakkie driven by the deceased, with whom he had previously had an altercation with on Nobel Road. The Nissan bakkie was still being driven by the deceased, who was alone in the vehicle.

[68] At this point, it would, in my judgment, have been clear to the appellant that the deceased's actions were not indicative of an attempt to hijack him. Rather, the pursuit was likely a continuation of the animosity that had begun earlier on Noble Road. The appellant could not reasonably have believed that the deceased was attempting a hijacking, particularly given that the deceased was alone in his vehicle. It is implausible to suggest that the deceased could have been attempting to hijack the appellant's vehicle while simultaneously driving his own vehicle with no passengers. Would the deceased have hijacked the appellant's Polo and left his own Nissan bakkie unattended on the road? I find this highly unlikely, and in my view, the appellant would have had no reasonable basis to think otherwise.

[69] Therefore, in my view, the probability that the appellant contemplated that the appellant was about to hijack his car was too farfetched as to be fanciful. The court a quo was therefore correct in rejecting that version as it did, particularly in the context of rejecting the feigned justification based on private defence. The appellant's version, in this regard, must also fail in the present case, even in the context of and for the purposes of determining the sustainability of putative self-defence.

[70] The appellant's other assertion that he genuinely and honestly believed that he was in danger of attack by or imminent harm from the deceased is also without merit. The appellant found this belief based on the claim that the deceased carried a firearm when he approached the appellant's vehicle. I have already explained that the appellant (through his counsel) did not persist on with this claim. In fact, appellant's counsel expressly disavowed any reliance on this version in advancing the arguments in support of putative self-defence. This concession was entirely appropriate, as the evidence clearly undermines the appellant's assertion.

[71] It is well-established that, after the shooting incident, the deceased drove his vehicle to Umbilo Police Station, which was not far away from the scene. The distance between Esther Robert Road (the place where the shooting took place) and the police station was estimated to be about two minutes' drive. Whilst at the police station, Mr Dickens conducted a search on the deceased vehicle and found no weapons. It was not, nor could it be, contended that the deceased disposed of the firearm on his way to the police station. Nor could it be suggested that someone at the police station took it away – as it were – to assist the deceased from escaping any liability which could arise from the presence firearm in his car. On the contrary, when the appellant sought to make this claim for the first time, captain Dlamini – the duty office at Umbilo Police Station - flatly rejected the claim on the spot and refused to register a charge of 'pointing a firearm' against the deceased, contending that the claim was a fabrication. The court a quo came to the same conclusion.

[72] Therefore, the unassailable findings of the court a quo (now conceded to by the appellant) – which involve a belated acceptance that the deceased was not armed with a firearm – redound entirely upon the appellant's claim that he acted in putative private/self defence. This is so because the fulcrum of appellant's entire defence - whether putative or private defence – must necessarily turn on that the factual correctness of whether the deceased was armed with a firearm when he approached his vehicle. If he was not (as was correctly found by the court a quo), then the basis of the appellant's shooting was neither honest nor genuine. It was vacuous regardless of whether one approaches the matter from the milieu of self defence or the plateau of 'putative' private defence. The result must be the same on both fronts.

[73] It therefore seems to me that the appellant's invocation of putative self-defence in these circumstances is reminiscent of arguments which were once raised in, but roundly rejected by, the Supreme Court of Appeal in *Director of Public Prosecutions, Gauteng v Pistorius*.[14] The basis upon which Mr Pistorius feigned putative self-defence in that case bears striking resemblance to the refuge sought by the appellant in the present appeal. For this reason, it is necessary to quote extensively from what Leach JA said when repudiating the invocation of putative self defence in the circumstances of that case:

'[52] As a final counter to the State's case, it was argued that although the accused had not acted in private or so called 'self-defence' ─ there had in fact been no attack upon him that he had acted to ward off ─ he had genuinely but erroneously believed that his life was in danger when he fired the fatal shots. As opposed to what is commonly known as self-defence, this is so-called 'putative' private or self-defence. The principles relevant to these two defences were authoritatively dealt with by this court in *De Oliveira*, and were explained by Smalberger JA 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 (S v Ntuli 1975 (1) SA 429 (A) at 436E). 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.

On appeal the unlawfulness of the appellant's conduct was not in issue. Accordingly the only issue was whether the State had proved beyond all reasonable doubt that the appellant subjectively had the necessary intent to commit the crimes of which he was convicted, in other words, that he did not entertain an honest belief that he was entitled to act in private defence…"

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[14] *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA); 2016 (1) SACR 431 (SCA) paras 52-54.

[53] The immediate difficulty that I have with the accused's reliance upon putative private defence is that when he testified, he stated that *he had not intended to shoot the person* whom he felt was an intruder. This immediately placed himself beyond the ambit of the defence, although as I have said, *his evidence is so contradictory that one does just not know his true explanation for firing the weapon*. His counsel argued that it had to be inferred that he must have viewed whoever was in the toilet as a danger. But as was pointed out in *De Oliviera*, the defence of putative private defence implies *rational but mistaken thought*. Even if the accused believed that there was someone else in the toilet, his expressed fear that such a person was a danger to his life was not the product of any rational thought. The person concerned was behind a door and although the accused stated that he had heard a noise which he thought might be caused by the door being opened, it did not open. Thus not only did he not know who was behind the door, he did not know whether that person in fact constituted any threat to him. In these circumstances, although he may have been anxious, *it is inconceivable that a rational person could have believed he was entitled to fire at this person with a heavy calibre firearm, without taking even that most elementary precaution of firing a warning shot* (which the accused said he elected not to fire as he thought the ricochet might harm him). This constituted prima facie proof that the accused did not entertain an honest and genuine belief that he was acting lawfully, which was in no way disturbed by his vacillating and untruthful evidence in regard to his state of mind when he fired his weapon.

[54] In order to disturb the natural inference that a person intends the probable consequences of his actions, the accused was required to *establish at least a factual foundation for his alleged genuine belief of an imminent attack upon him*. This the accused did not do. Consequently, although frightened, the accused armed himself to shoot if there was someone in the bathroom and when there was, he did. In doing so he must have foreseen, and therefore did foresee that the person he was firing at behind the door might be fatally injured, yet he fired without having a rational or genuine fear that his life was in danger. The defence of putative private or self-defence cannot be sustained and is no bar to a finding that he acted with *dolus eventualis* in causing the death of the deceased.' (My emphasis)

[74] If the evidence of the appellant, namely, that he shot at the deceased because the deceased was carrying a firearm when approaching him – is to be

dismissed (as it must), there is nothing else left to explain why the appellant shot five gunshots at the deceased and in the process killing him. This is irrespective of whether one approaches the matter from the perspective of private or putative defence.

[75] Relevant to the test for putative private defence, there is no credible evidence demonstrating that the appellant entertained a rational, honest and genuine belief (even if mistaken) that he was entitled to shoot, let alone kill the deceased, as it were in putative private defence. In the absence of that evidence, the ineluctable conclusion is that he shot and killed the deceased for inexplicable reason. This is to say, the appellant failed to demonstrate the existence of genuine and honest belief that his or her life was in danger when he shot and killed the deceased as to exclude the presence of the requisite intention (*mens rea*) to kill.

[76] Even if the appellant had some reason to shoot at the deceased, the evidence of Mr Dickens, the photo album which was entered on the record by consent and the evidence of Dr Hina - was that the appellant shot at the deceased five times and that the fatal wound was inflicted from behind (i.e. the deceased back). No explanation whatsoever was given in an attempt to demonstrate that every one of the gunshots were fired in the genuine belief that the appellant was acting within the legitimate bounds of defence – be it private or putative. As the court a quo found, the appellant did not take the court into his confidence by giving a straightforward explanation of why he fired several shots in the general direction of the deceased. Instead, like in *Pistorius*,[15] the appellant prevaricated. His evidence was noncommittal, and consisted of mere denials.

[77] At the end the appellant contended that he fired aimlessly in the general direction of the deceased and the deceased vehicle. On this score, the court a quo found, albeit in the context of private defence, that there was no attack – present or imminent – when the appellant fired at the deceased. It also held that the appellant had in any event exceeded the limits of private defence. This finding is true for purposes of putative self defence too. On his own version, the appellant maintained

[15] Ibid.

that he did not fire any warning shot(s), even though Thusini asserted that he did. It is thus based on this (his own) version that his reliance upon putative defence must fail. This is not to say that he would have been better off if Thusini's evidence of warning shots were to be the basis. The bottom line is that the appellant failed to show that he genuinely and honestly believed that he acted within the legitimate bounds of self-defence.

[78] There is another reason why the appellant's claim to putative defence should fail. The appellant was no ordinary citizen. He was an experienced policeman of some 13 years at the time and a former member of the elite and specialised group of policemen in KwaZulu-Natal (the KZN Provincial Task Team). The court a quo held, with reference to this personal aptitude as a seasoned policeman, that he must be held to a higher standard. Although, once again, this finding was made in the context of private defence,[16] it is acutely apposite to the determination of the appellant's state of mind.[17] The court a quo ultimately held that, in firing the several shots and failing to explain why he did so, the appellant must have foreseen and indeed did foresee that he could kill the deceased. He nevertheless continued to do. In other words, he reconciled himself with the possibility that the gunshots he fired would kill someone, especially the deceased, in whose direction he was firing. This finding is, in my view, unassailable. Therefore, in my view, the appellant had the necessary intention (*dolus eventualis*) to kill the deceased. If he had *dolus eventualis*, then he was rightly convicted of murder.

[79] Accordingly, there is no evidence upon which this court could conclude that the appellant held a genuine and honest belief that the deceased was unlawfully attacking him. Nor is there any evidence to suggest that the appellant believed the deceased posed an imminent threat to his life or the lives of his family. Furthermore, the appellant failed to offer any explanation as to why he believed that firing five shots in the general direction of the deceased was both necessary and reasonable to prevent any attack.

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[16] It is indeed doubtful whether the court a quo ought to have taken the appellant's individual characteristics and aptitudes in the context of determining whether or the appellant's conduct was unlawful (See Snyman above fn 3 at 84). For purposes of this case, this is neither here or there.
[17] Ibid at 84.

[80] If his conduct was also unreasonable, as I find it was, it surpasses the threshold for negligence applicable to culpable homicide.

Concluding remarks

[81] As this case demonstrates, in assessing the merits or demerits of putative self-defence or private defence, the findings of the trial court regarding the accused's state of mind are generally relevant, if not decisive, to the evaluation of the defence. While the difference between the two approaches to evidence may appear subtle, it is, in fact, a critical distinction. The key difference lies in the focus of each inquiry. In private or self-defence, the inquiry is primarily objective, concerned with the general criteria by which the accused's actions are assessed. In contrast, putative self-defence focuses on the accused's state of mind in specific circumstances, particularly their honesty and genuineness in believing that their actions were lawful, which is a subjective inquiry. Although it may not always be easy to distinctly separate these two inquiries due to their inherent overlap, the established jurisprudence of our courts emphasises the need to recognise their intrinsic differences, as illustrated by the cases cited in this judgment.

[82] On the facts of this case, the appellant's valiant efforts to fit the facts underpinning his justification for killing of the deceased into the facts which may also exclude his culpability, are unavailing. The defence he raised was one that fall between two stools. It was neither private or self-defence nor putative self-defence.

[83] The facts simply do not sustain a defence based on putative private or self-defence. In the result, the appeal on the merits must fail.

Appeal against sentence

[84] The appeal is also against the sentence.

[85] The offence for which the appellant was convicted carries a prescribed minimum sentence of 15 years' imprisonment, as set out in s 51(2) of the Criminal Law Amendment Act 105 of 1997. However, the court a quo found the existence of substantial and compelling circumstances that warranted a departure from the

prescribed minimum sentence. Consequently, the court imposed a sentence of ten years' direct imprisonment. In reaching this decision, the court a quo applied the triad of considerations set out in *S v Zinn*,[18] which include the personal circumstances of the appellant, the nature of the offence, and the interests of society.

[86] It is thus clear that the imposition of the ten-year sentence was as a result of the exercise of true discretion by the court a quo.

[87] In an appeal against sentence, the law is clear that the Appeal Court's ability to interfere with the sentence imposed is very circumscribed. In *S v Hewitt*[19] at paragraph 8, Maya DP held that:

'It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. So, interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed. And in such instances the trial court's discretion is regarded as having been unreasonably exercised.'

[88] In argument, I did not understand Mr *Naidoo* to be saying that the court a quo committed a misdirection, failed to exercise its sentencing discretion at all, or exercised it improperly or unreasonably. The core of his argument was that the court a quo should have imposed a significantly more lenient sentence than the one it ultimately imposed, despite considering the same factors that influenced the sentence it did impose.

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[18] *S v Zinn* 1969 (2) SA 537 (A).
[19] *Hewitt v S* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA).

[89] Regrettably, that argument is unavailing as it does not meet the test for an appellate court to interfere in discretionary decisions of the lower courts. If the test is not met, then the appeal must fail. Indeed, I do not consider that the sentence imposed was ‘startling’ or ‘strikingly inappropriate’ in the circumstances of this matter.

[90] The appeal against sentence must also be dismissed.

Order

[91] In the result, I would make the following order:

1. The appeal is dismissed.
2. The sentence imposed by the court a quo is confirmed.

MADONSELA AJ

I agree.

NAKO AJ

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