THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case no: 547/07

In the matter between:

JOHANN GRIEBENOW Appellant

and

THE STATE Respondent

Coram: *Navsa, Van Heerden JJA et Mhlantla AJA*

Date of hearing: **18 February 2008**

Date of delivery: **20 March 2008**

Summary: Private defence – appellant claiming he shot and killed deceased in defence of life and limb – held that there had been no such threat and that appellant's actions were unlawful and consequently that he was guilty of murder – sentence of 12 years' imprisonment appropriate.

Neutral citation: *Griebenow v S* (547/2007) [2008] ZASCA 12 (20 March 2008)

NAVSA JA

NAVSA JA:

[1] On 6 August 2002 in the Regional Court for the division of Northern-Transvaal, the appellant, Mr Johann Griebenow, was convicted of the murder of Mr Frederik Christiaan Johannes Watkins (the deceased) and, on 18 October 2002 was sentenced to 12 years' imprisonment.

[2] The appellant unsuccessfully appealed his conviction and sentence to the Pretoria High Court. With the leave of that court he now appeals further to this Court against both his conviction and sentence.

[3] The deceased's tragic and needless death resulted from what, by all accounts, appeared to be a trivial argument that arose whilst the appellant and the deceased were playing pool in a bar in Pretoria-West ─ the two apparently entertained differing opinions concerning the rules that applied to the game. In order properly to consider the circumstances surrounding the appellant's death, it is necessary to start at the beginning.

[4] The deceased, his girlfriend, his brother Mr Daniel Watkins (Daniel) and various other persons decided to spend the night of 6 May 2000 at an establishment called 'Pool Masters'. As its name suggests, it is a pool saloon and is located in a bar. The appellant and the others in his party were intent on relaxing and enjoying themselves. Several of the deceased's friends were present. Alcohol was imbibed and a pleasant time was enjoyed by all.

[5] The appellant made an equally fateful decision. After spending the night in the presence of family, with whom he had consumed a moderate amount of alcohol, he was on his way home at approximately 01h00 the next morning when he drove past Pool Masters and decided to stop there to play pool.

[6] The appellant and three others, including the deceased, formed a party of four in order to play two-a-side pool. The appellant and the deceased were on opposing sides. The consumption of alcohol continued and, at approximately 04h00 an argument broke out between the deceased and the appellant regarding the rules of the game. Tensions arose and the owner of the saloon, recognising the potential for trouble, pushed all the balls into the pockets of the pool table, informed everyone that she was closing the premises and proceeded to lock-up.

[7] It is largely common cause[1] that the appellant left the bar and shortly thereafter the deceased, his brother and other patrons made their way out of the building. There is a dispute about material events thereafter and particularly about the critical moments leading up to the deceased's death. It is unfortunately necessary to deal in some detail with the evidence adduced at the trial.

[8] Mr Stracatox, the first state witness, who had been in the bar at the relevant time and could best be described as the proverbial innocent bystander, testified that Daniel followed the appellant as he made his way to the parking area where his car was parked. Daniel was so intoxicated that he staggered across the street in a 'zig-zag' fashion towards the appellant, shouting as he went along. Daniel then returned from the parking area to the side of the road alongside Pool Masters to summon the deceased, who at the time was already making his way out of the building. The parking area adjoins a business called Maxi-Tyre. It is across the road directly opposite Pool Masters.

[9] The deceased and Daniel together made their way across the road to the parking area. Mr Stracatox heard heated words being exchanged and thereafter heard a shot being discharged from a firearm. He heard a second shot being fired and the deceased fell to the ground. It appeared to Mr Stracatox that at the time immediately before the deceased fell to the ground, he was 'backing off' and

[1] See the evidence to the contrary by the witness referred to in para 20 and the treatment of his evidence as a whole in para 51.

did not seem aggressive. It is unclear from Mr Stracatox's evidence whether he was looking directly at the encounter at the time that the first shot was discharged. It does not appear to be in dispute that the first shot did not strike the deceased.

[10] According to Mr Stracatox, after the deceased fell to the ground the appellant 'just kept shooting him'. I interpose to state that it is common cause that the appellant shot and killed the deceased and that neither the deceased nor Daniel was armed. A total of seven shots were fired. The appellant's version of events was that he had acted in self-defence and that consequently he had not acted unlawfully. I will deal with his version in greater detail later in this judgment.

[11] Mr Stratacox testified that after the appellant had fired a number of shots several bystanders went over to see if they could render assistance. It was too late ─ the deceased was dead. It is common cause that a passing vehicle stopped and that the appellant boarded it and travelled to the police station where he reported the incident.

[12] Importantly, during the trial, counsel for the appellant put it to Mr Stracatox that the appellant was already at his car when Daniel left the building. Mr Stracatox agreed. It was accepted during the trial that the appellant's car was positioned approximately 100 metres away from Pool Masters. The following part of Mr Stracatox's evidence is significant:

'Why wait for the assault? Why not get into your car and go home?'

[13] According to Mr Stracatox the deceased and his brother posed no threat to the appellant at the time that the shots were fired. He saw the appellant shoot the deceased repeatedly from a distance as the deceased lay on the ground.

[14] Mr Stacatox's evidence that Daniel was so intoxicated that he staggered across the street in the manner described above was unchallenged in cross-examination.

[15] Mr Stracatox testified that at the time of the shooting the appellant was standing with his back to his motor vehicle and the left-side of his body towards Pool Masters. This means that the roll-down door alongside the parking area was to the appellant's right (the door features quite prominently in the appellant's evidence) and a wall in which a bullet hole was found would have been directly in front of him.

[16] Daniel also testified in support of the State's case. According to him all the members of their party had consumed 'a little too much' alcohol that night. He testified that when he left the building the appellant shouted at him from across the road and was using foul language. The appellant threatened that he would cause Daniel and the deceased to 'bleed'.

[17] Daniel informed the deceased of this and the latter wanted to confront the appellant about his behaviour. The two brothers then crossed the road and were approximately one to two metres away from the appellant when the latter fired the first shot into the ground. At that stage the deceased repeatedly told the appellant to put the firearm away. The appellant responded by hurling abuse at the deceased, whereupon the deceased told Daniel to make his way back across the road.

[18] Daniel testified that on his way back to Pool Masters he had barely reached the middle of the road when a number of shots were fired. He estimated that seven shots in all, fired only seconds apart, were discharged. According to Daniel, when he looked back as the subsequent shots were being fired, he saw the deceased and the appellant approximately 60 cm apart. Accompanied by his

brother's girlfriend, Daniel hastened to where the deceased lay dead while the appellant walked away.

[19] Daniel denied that he had initially followed the appellant across the road and that he had 'set his brother upon' the appellant.

[20] Mr Dawid Janse van Rensburg was the third State witness. He confirmed that a dispute had arisen concerning pool rules. He testified that the deceased was angry and had put his pool cue down on the table and that the owner, sensing trouble, had stopped the game and told them to take their argument outside. Thereafter Daniel left the building, the appellant leaving shortly afterwards. The deceased remained in the building for a while. He had to find his girlfriend, who apparently had consumed too much alcohol and was in need of assistance. He located her, led her down the stairs outside Pool Masters and caused her to sit down on one of the steps.

[21] Mr Janse van Rensburg's car was parked near the entrance to Pool Masters. When he exited the building he saw Daniel returning from across the road. Daniel was hysterical and informed Mr Janse van Rensburg and the others standing with him that the appellant was in possession of a firearm and was going to shoot the deceased. Mr Janse van Rensburg testified that he saw the deceased and the appellant talking to each other and that there did not appear to be a problem. One of the patrons reassured Daniel that the appellant would not shoot the deceased as the two did not appear to be antagonistic towards each other. However, as the group discussed approaching the appellant and the deceased, the first shot was fired. The group cautiously crossed the road to see what was happening. When Mr Janse van Rensburg and the others reached the deceased they saw that he had been shot and the appellant was standing over him.

[22] Mr Janse van Rensburg was unable to say precisely what had occurred immediately before the appellant started shooting. He did not hear the abusive language testified to by Daniel. He testified that he himself had consumed about five beers before the incident.

[23] In cross-examining Mr Janse van Rensburg the appellant's legal representative clearly accepted that the deceased had first tended to his girlfriend before approaching the appellant. It also appears to have been accepted that at the time that the deceased was taking care of his girlfriend, the confrontation between Daniel and the appellant was taking place.

[24] At the conclusion of the defence case, the magistrate deemed it necessary to call two witnesses he thought might be of assistance to the court. The first was Dr Alida van der Hoven, a forensic pathologist who had performed the autopsy on the body of the deceased. She described the wounds sustained by the deceased. The first entry wound was at the side of the face. The bullet had travelled through to the left side of the head. It appeared to have been fired from the left-hand side in front of the body.

[25] The second entry wound was in the left shoulder. The bullet track appeared to be from that point through the top of the left lung, perforating a major artery that feeds the brain. The perforation of the artery would have resulted in heavy bleeding. The next entry wound was through the left front part of the deceased's chest. The fourth entry wound was through the back of the deceased's neck. It would thus appear that the deceased was at some stage definitely shot from behind twice.

[26] The other witness called by the court was Mr Johan Ewoudt Schoeman, a ballistics expert who had performed tests with the weapon the appellant had used to shoot the deceased. He found that, after shots were fired from the appellant's semi-automatic firearm bullet cartridges were ejected, and on a

cement surface, fell between five to seven metres away (to the right) from the firearm.

[27] Referred to a photograph of the scene Mr Schoeman accepted that the cartridges were fairly widely spread. Provided that the scene had been undisturbed, he placed the appellant five to seven metres to the left of where the cartridges had landed.[2] Mr Schoeman marked an area midway between the appellant's motor vehicle and the abovementioned roll-down shutter door alongside the parking area as the estimated position where the appellant must have been standing when the shots were fired. He concluded that the appellant would have been facing a wall alongside a grass verge with the roll-down door to his right and Pool Masters to his left. As already indicated, a bullet hole was visible on the wall in question.

[28] Under cross-examination Mr Schoeman accepted that, if the appellant had been standing with his back to the roll-down door, some of the cartridges might have struck the door and might have landed in positions shown on the photograph.

[29] Although Mr Schoeman was unable to say precisely how far away from the deceased the appellant was when he discharged any of the shots, he was emphatic that the two could not have been closer to each other than 70 cm.

[30] I turn to deal with the appellant's version of events. According to him, when he first arrived at Pool Masters, he sat at the bar and engaged in conversation with other patrons before being asked to join a two-a-side game of pool. He accepted the invitation. The appellant and the deceased were on opposing sides and an argument later ensued concerning the application of the rules of the game. The appellant became very aggressive and wanted to engage

[2] The police arrived at the scene very soon after the incident. It was never suggested on behalf of the appellant that the scene had in fact been disturbed.

in a physical fight, but was restrained by others in the bar. According to the appellant the deceased threatened in crude terms to beat him to death.

[31] The appellant testified that he was warned by another patron that there was going to be trouble. Under threat and subjected to a torrent of abuse he left the building. He was afraid and wanted to get away as fast as possible. As he made his way to his motor vehicle which was parked approximately 100 metres from Pool Masters, someone was behind him shouting continuously.

[32] According to the appellant, when he got to his motor vehicle his haste was such that he inserted the wrong key into the driver's door. He did not even look over his shoulder at the person hurling abuse at him, his greatest desire being to get away. However, before the appellant knew it there were two people right next to him ─ the deceased and Daniel. The deceased, in particular, was very aggressive and was using abusive language. According to the appellant the deceased then struck him on the forehead, causing him to drop his keys on the ground and retreat towards the roll-down door at Maxi-Tyre. Whilst retreating he drew his firearm and fired a warning shot telling the deceased that he did not want any trouble. Although he asked the deceased to leave him alone and to summon the police, the deceased was undeterred and continued advancing towards him. According to the appellant, he could eventually retreat no further as his back was up against the roll-down door. In cross-examination he described what happened next: [D]ie oorledene [het] my gestorm.' The appellant reacted to this by firing continuously at the deceased from a position with his back against the roll-down door, until all his ammunition was spent.

[33] The appellant was adamant that he did not intend to harm the deceased. According to the appellant he had carried a firearm on his person at all times since being involved in a violent incident in Pretoria a few years earlier.

[34] The appellant was unable to describe the degree of intoxication of either Daniel or the deceased. He did not see Daniel staggering around as described by Mr Stracatox. He admitted that he had himself consumed a quantity of alcohol at Pool Masters that night.

[35] Importantly, the appellant testified that when he first arrived at his motor vehicle, after leaving Pool Masters, he realised that Daniel was the person who had been shouting at him from the time that he had exited the building. Perhaps even more significantly, his evidence was to the effect that whilst he was trying to unlock his car door he heard the shouting from across the street ─ approximately 100 metres away.

[36] The appellant admitted that he had spent some time in the army and had several years of experience in the handling of firearms. In attempting to explain how the deceased could have been shot from the back, the appellant surmised that the deceased might have staggered and turned as he was being shot at. He denied that he had shot the deceased from behind. In response to a question about whether he had aimed at any part of the deceased's body which might have caused less harm he responded by stating that he had simply fired a number of shots at the deceased who was intent on harming him. He did not know whether the deceased had been armed. He was unable to explain how the cartridges were spread as widely as described earlier in this judgment.

[37] In his judgment the magistrate contrasted the appellant's evidence on the one hand ─ namely, that he was followed immediately after he left the building and that the deceased's brother arrived on the scene so quickly that he was unable to get away in time ─ with the one consistent thread of evidence by the first two witnesses for the state ─ namely, that Daniel did not leave the premises immediately after the appellant and that it took some time before the deceased emerged from the building. The magistrate accepted this part of the evidence, which he noted had not been challenged in cross-examination.

[38] The magistrate held that the conclusion was compelling that the appellant chose not to leave the scene, but waited for the further confrontation he must have known would follow. In these circumstances, so the magistrate reasoned, even accepting the appellant's version of how the shooting occurred, the appellant was unable to rely on self-defence. He consequently convicted the appellant of murder.

[39] The magistrate considered that a minimum sentence of 15 years' imprisonment was prescribed for murder in circumstances such as those of the present case,[3] unless there were substantial and compelling circumstances justifying the imposition of a lesser sentence. It appeared from the report of a probation officer that the appellant was 39 years old at the time of the trial. He was married with a child born of that marriage. He and his spouse each had a child from a previous marriage. The appellant and his wife were both in gainful employment. His employer provided a glowing reference — his industry and commitment were commended. He had a previous conviction of assault but this had occurred more than 10 years before the event in question and was disregarded by the magistrate.

[40] The magistrate took into account, in the appellant's favour, that the deceased had been aggressive from the time that the argument arose and that there had thus been a measure of provocation.

[41] As against the appellant, the magistrate noted that there had been a tragic loss of life and that the deceased's two minor children had lost their father and would now have only their mother to maintain and care for them. He also emphasised that murder is a serious offence and that South Africa's recent history showed how readily people resorted to violence to settle their differences. Considering the totality of circumstances, the magistrate concluded that there

[3] See s 51(2) of Act 105 of 1997 — read with Part II of Schedule 2 to that Act.

were substantial and compelling circumstances justifying a departure from the prescribed minimum sentence, but that a period of imprisonment was the only appropriate punishment. He consequently imposed a sentence of 12 years' imprisonment.

[42] In a brief judgment the court below (Ramagaga AJ, De Vos J concurring) was critical of the appellant's version. Ramagaga AJ had regard to the appellant's plea explanation in which he stated that he had been attacked by the deceased and others whilst his evidence was that he had been attacked only by the deceased. The court below also noted that it had been put to witnesses by the appellant's legal representative that the appellant's version was that he had been assaulted by both the deceased and his brother, whilst his evidence was to the effect that he had been assaulted only by the deceased.

[43] The court below held that the magistrate had correctly concluded that the appellant's shooting of the deceased was unlawful and that his conviction on the charge of murder was justified. Furthermore, that the magistrate had carefully considered all the material circumstances relating to sentence and that there was no reason to interfere with the sentence imposed.

[44] The use of force which would ordinarily be criminal is justified if it is necessary to repel an unlawful invasion of person. Modern textbook authors prefer the term 'private defence' to the expression 'self-defence' as the right to employ force in justifiable circumstances extends beyond the defence of life and limb.[4]

[45] In the present case the primary question is whether or not there had been a threat to the appellant's life. In my view, Mr Stracatox, whose sobriety was not challenged, was a satisfactory witness. If anything, he was understated and was

[4] See J M Burchell *South African Law and Procedure – General Principles of Criminal Law* Vol 1 3 ed (1997) p 72 and the authorities there cited.

willing to make concessions when they were justified. Importantly, his evidence is consistent with the objective evidence given by Mr Schoeman as to the positions the deceased and the appellant were in at the time of the shooting.

[46] Mr Stracatox's evidence that Daniel had initially crossed the road before returning to summon the deceased, who thereafter accompanied him back towards the parking area, was not contested during cross-examination. As indicated above, Mr Stracatox's evidence that Daniel had staggered across the road in a 'zig-zag' fashion was also unchallenged. There appears to me to be no basis on which his evidence in this regard should not be accepted. Thus, it can hardly be argued that Daniel on his own posed any kind of threat to the appellant who was armed. This appears to discredit the appellant's claim that he was afraid as Daniel pursued him across the parking area.

[47] If, as stated earlier, Daniel in his highly inebriated state had to cross a rather extensive parking area before covering the same distance again accompanied by his brother, the appellant clearly had more than ample opportunity to drive away. His evidence that he was afraid, panicked and had no time to get away must therefore also be rejected.

[48] The court below rightly noted the variance between the appellant's explanation of plea and his evidence which tends to suggest that the appellant made up the detail of his defence as he went along. This view is strengthened by the fact that material parts of Stracatox's evidence were unchallenged and furthermore, by the fact that the plea explanation was in essence repeated in the cross-examination of State witnesses, but yet not maintained during the appellant's testimony.

[49] The appellant's version of events is at odds with the objective facts. The cartridges were found widely spread indicating that the shooting did not take place as described by the appellant. The concession by Mr Schoeman

concerning the possible deflection of the cartridges by the roll-down door does not explain the wider spread of the other cartridges nor does it explain the bullet hole in the wall alongside the parking area. The objective evidence, however, ties in with the description by Mr Stracatox of how the shooting occurred and of the distance between the deceased and the appellant at the fateful time.

[50] Moreover, the appellant's description of how the deceased continued 'storming' at him, despite the warning shot being fired, is highly unlikely. Mr Stracatox's description that the deceased was retreating after the first shot, is far more probable. All the indications are that the appellant was spoiling for a fight. Once the inevitable confrontation occurred the appellant behaved in a callous and violent manner.

[51] It appears to me that the evidence of Daniel can mainly be disregarded. On his own evidence, he was intoxicated and on Mr Stracatox's version he was so drunk that he staggered from side-to-side. Mr Janse van Rensburg's evidence is not of any real assistance either.

[52] The magistrate erred in assuming in favour of the appellant that his version was reasonably possibly true. In my view, for the reasons alluded to, the appellant's version can safely be rejected.

[53] For all the reasons set out above, the State in my view proved beyond reasonable doubt that the appellant was guilty of the murder of the deceased.

[54] In respect of sentence, Mr Stracatox's evidence that the appellant continued to fire at the deceased who had already fallen to the ground is pertinent. He was armed and was dealing with two persons who were intoxicated and whom he could easily have avoided. On the other hand, it is clear that the appellant and his brother had been aggressive and provocative. This is a mitigating factor in favour of the appellant. In my view, the magistrate properly

took all the appellant's personal circumstances into account and considered all the relevant material, including the unfortunate reality that South Africans readily resort to violence and the use of firearms. This is indeed a plague upon our society and courts are duty bound to send out a message that it will not be tolerated and will be met with the full force of the law.

[55] I agree with the court below that there is no reason to interfere with the sentence imposed.

[56] In light of these conclusions the following order is made:

(a) The appeal against conviction and sentence is dismissed.

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M S NAVSA
JUDGE OF APPEAL

CONCUR:

VAN HEERDEN JA
MHLANTLA AJA