

SOUTH AFRICA / JUDGMENT

# Bader v S (A122/2020) [2021] ZAGPPHC 633 (17 September 2021)

[2021] ZAGPPHC 633

## COURT

North Gauteng High Court, Pretoria

## BEFORE

N V Khumalo, T V Raikane

## CASE / FILE NUMBER

A122/2020

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## Source record

IN

THE REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: A122/2020

In

the matter between:

BADER,  
BRIAN Appellant  
and  
THE  
STATE Respondent  
DATE

OF HEARING: This matter was enrolled for hearing on 19 APRIL 2021, but was dealt with or determined on the basis of the papers or record and written arguments filed on behalf of the parties, without appearance and oral argument.

DATE

OF JUDGMENT: This judgment was handed down electronically by circulation on 17 SEPTEMBER 2021.

**JUDGMENT**

N V KHUMALO J (RAIKANE, AJ concurring)

**INTRODUCTION**

[1] This is an appeal against the conviction of the Appellant by the Springs Regional Court on 3 October 2019 on the following charges:

1.1. Pointing a firearm (s 120 (6) (a) of the Firearms Control Act 60 of 2000); a sentence of one (1) year imprisonment imposed, wholly suspended for

(5) five years;

1.2. Assault with the intent to do grievous bodily harm; a sentence of (1) one- year imprisonment impose wholly n suspended for (5) five years;

1.3 Reckless endangerment to person or property (s 120 (3) (b)); a sentence of (3) three years imprisonment imposed, wholly suspended for (5) five years;

1.4 Pointing a firearm (s 120 (6) (a) of the Firearms Control Act 60 of 2000); a sentence of (1) one- year imprisonment imposed, wholly suspended for

(5) five years.

[2] The sentences were ordered to run concurrently therefore Appellant effectively sentenced to five (5) years imprisonment, which sentences were wholly suspended for five (5) years on conditions. The appeal is with leave of this court granted on petition to the Judge President.

[3] The charges arose from an incident that took place on 17 November 2016 in a room that the Appellant rented to Ms Jacqueline Makgamata (the 1st Complainant”). The Appellant whilst forcing his entry into the 1st Complainant’s room, pointed a firearm at the 1st Complainant and allegedly at another tenant, namely Chantelle Keena (“2nd Complainant”) whose room was next to that of the 1st Complainant. The Appellant is alleged to have also assaulted the 1st Complainant with the intention to cause her grievous bodily harm by hitting her with a firearm and to have discharged his firearm in the 1st Complainant’s room allegedly causing reckless endangerment to the 1st Complainant and her property.

[4] The Appellant was legally represented and had pleaded not guilty to all the charges. He elected to remain silent and not tender a plea explanation. He continues to receive legal assistance from Legal Aid South Africa.

[5] The trial court returned a verdict of guilty based on the evidence that was led by three state witnesses, to wit, the two Complainants and Dr Skosana, a medical practitioner who examined the 1st Complainant after the incident. Their evidence found to be credible, the State was found to have proven Appellant’s guilt beyond reasonable doubt on all the charges.

- [6] On the other hand the version of the Appellant and his witnesses, namely David Mabizela (Mabizela), Constantia Mogale (an official police photographer and draftsman) and Busisiwe Chonco (Busisiwe) was rejected on the ground that it was unreliable and lacking credibility. However, the expert's report of Dr Steyn was without criticism.
- [7] The Appellant alleges that the court a quo erred when it found that the state proved the Appellant's guilt beyond reasonable doubt and that;
- [7.1] the evidence of the state witnesses was reliable, credible, indicative of corroborating their respective version and their accumulative contradictions not material.
- [7.2] by not adequately considering the improbabilities inherent in the respective versions of the state witnesses viewed holistically;
- [7.3] by not properly applying the cautionary rule applicable to the evidence of the Complainants;
- [7.4] by not affording adequate consideration to the concession made by Dr Skosana, that the injuries sustained by the 1st Complainant on her arm, could possibly have been caused by hitting her arm against the door, and expecting an explanation from the Applicant as to how the Complainant was injured;
- [7.5] by finding that the evidence of Dr Steyn served as corroboration for the evidence of the Complainant when Dr Steyn's evidence only related to the injuries sustained by the Appellant;
- [7.6] by not considering the discrepancies between the viva voce evidence of the 2nd Complainant and a written statement she made to the police on the day of the incident more especially as there is no mention in her evidence of being pointed with a firearm;
- [7.7] By not considering the concession made by the 2nd Complainant that she was not in a position to say whether the firearm was pointed at her and that she made no mention of being pointed with a firearm in her written statement of events to the police on the day of the incident;
- [7.8] in not giving any consideration to the contradictory contents of the 2nd Complainant's written account made to the police on the day of the incident;
- [7.9] by rejecting the evidence of the Appellant as being unreasonable, improbable and not possibly true, utilising a stricter standard in evaluation of the version of the Applicant as opposed to that of the state and not properly considering the fact that the Appellant's version did not contain any inherent or material contradictions;
- [7.10] by rejecting the evidence of the defence witness Mabizela as not being credible and that of Busisiwe Chonco as being false and fabricated.

#### The state's evidence

- [8] The 1st Complainant testified that the Appellant and three of his workers arrived at her door in the early hours of the morning on 17 November 2016, just after she received a call warning her that the Appellant was coming to remove doors and windows from her room.

She opened the door and the Appellant roughly grabbed her with her gown. She reached for the door handle, to try and close the door whilst the Appellant was also trying to reach for the door handle from outside to keep the door open. The Appellant entered her room holding two hammers. She grabbed both hammers and threw them under her bed. She wrestled for the door with the Appellant who wouldn't let go. The Appellant pulled out a firearm from his jacket, cocked and pointed it at her whilst still grappling for the door. He then hit her hand with the firearm three to four times upon which she let go of the door handle and retreated backwards as she was in pain and her hand had started to swell. The Appellant fired a shot to the ground, due to their proximity she was bleeding from her leg. A sport on her leg was observed by the prosecutor where the blood was supposed to come out. She also saw a hole on the floor where the shot was fired. The Appellant took a hammer from one of his workers, leaned down and started removing the lower hinges from the door. She at that time noticed that the Appellant's firearm was lying on the floor between the chest of drawers and the Appellant. She picked up the firearm, pushed the Appellant aside and ran down the passage with an intention to go to the police. She found the main door locked. The Appellant emerged, walking very fast towards her. He was very angry, so she threw the firearm back to him. Appellant picked up the firearm and walked into one of the empty rooms. There were a lot of people who had gathered outside, watching what was happening. As all the hinges of her door were removed the Appellant put the door against the wall, and proceeded to remove the door from the 2nd Complainant's room, that is next to her room. He then used the hammer to break their windows. He ordered his workers to carry the doors away. They left through the sliding door. The Appellant then said to her that "If you want everything between us to be fine you must come to my offices in Brakpan." One of the spectators used a big brick to break the door so that she can exit the building otherwise they were trapped inside. She went to hospital and no bullet was found. She also went for x-rays to check if she had a fracture and was told the bullet only scratched her and therefore had a spark. Her room was very small, four

(4) by four paces big.

[9] Under cross examination she indicated that an amount of R300 was stolen from her top-drawer. It was put to her that in her police statement she said the amount taken was R380, did not mention that she was pointed with a firearm and that she picked up the firearm from the floor, ran into the passage and slid it back to the Appellant. She explained that when the Appellant cocked the firearm it was pointing at her. She dictated the statement to the police officer who wrote it down. The photo album was admitted provisionally into evidence, including any evidence about it. On the second statement it was pointed out that even though she confirms that her arm was hit with the gun, in the statement it says her hand was. She indicated that the Appellant hit her three times on her arm, upon which it was put to her that she said three or four times. Also the statement said her right foot was injured but the Dr's report recorded that it was the lower left leg that was injured. She confirmed that the firearm

was discharged directed towards her legs. It was her left leg that was injured.

[10] The Appellant's version that was put to the 1st Complainant is that he gave notice to both Complainants in July 2016 for them to vacate the rooms and they threatened him. He came

specifically to remove the windows and the doors because they refused to pay arrear rental for the time that they stayed in the rooms. Also because of complains he received from the neighbours about their noise parties and disturbances. They had refused to vacate the rooms even after receiving notice on 15 July 2016. The 1st Complainant denied that saying actually the Appellant asked them to write Affidavits stating that they have been paying rental money to Busisiwe. It was also put to her that the Appellant arrived and found her already waiting for him. He brought a catch pole to remove the door and a hammer. She assaulted the Appellant in her room. There was a male person who was hiding under the bed who came out with a knife. As a result, the Appellant took out his firearm, pointed it at the person and shot at him to ward off the attack. The person stopped and put down the knife. That is when the Appellant also put the firearm down because the situation had calmed down. The 1st Complainant took the firearm and ran down the passage. Appellant went up to her and she pointed it to the Appellant. It was also put to the 1st Complainant that on the date of the incident she went to the Appellant's office accompanied by an Investigating Officer (IO) demanding her money back and the Appellant chased her away. She denied all that and said she was in the company of the IO when she came to their offices who asked her to go with him so that she can point out the Appellant.

[11] The 2nd Complainant testimony was that she was in her room when she heard noises from outside in the passage. She came out of her room and saw the Appellant and three of his workers. The workers were standing on the side, whilst the Appellant was trying to remove

the door from the 1st Complainant's room at the same time fighting with the 1st Complainant. She asked the Appellant what was going on and he did not answer. She tried to pull the Appellant away but he then pushed her aside. She noticed that he was holding a firearm. She was afraid to go back to him. The 1st Complainant asked the Appellant if he wanted to shoot her and dared him to shoot her. That is when they heard the gunshot. It had shot the Complainant on the foot and Appellant continued to try and remove the 1st Complainant's door. He thereafter went and removed her door, including the roofing. The Appellant refused to tell them why he was removing these things and just pushed her aside. Her phone that was on the bed disappeared. However, they managed to phone the police who took the 1st Complainant to hospital. The Appellant took both doors to the storeroom. The firearm was directed to her direction and was also pointed down but as soon as she touched the Appellant, he turned the firearm to her direction. She cannot tell if it was pointed at her because there were other people who were standing.

[12] The evidence of the 2nd Complainant under cross examination was that she does not remember when she moved in at the Fraser Building and has never signed an agreement with the Appellant. She personally paid rent of R800 per month directly to Busisiwe. She did ask for receipts and Busisiwe always told her that she will bring the receipts and never did.

Things have changed since she has not been staying there. After they have been given an account into which they were to pay the rental amounts, they started paying into the account number and were no longer paying to Busisiwe. She also has proof of payment into the account. The deposit slips are inside the files that

they handed to the police. In 2016 she stayed with her ex- boyfriend whilst attending a course. She left her belongings at Fraser Building and was still contributing towards rent each and every month. On the day of the incident there were people outside their rooms standing in the passage. The 1st Complainant was inside her room holding the handle of the door whilst the Appellant was holding the handle from outside. She asked the Appellant what was happening and nobody answered her, that is when she pulled the Appellant and realised that he was holding a firearm. The Appellant pushed her away. She saw the firearm after the Appellant has pushed her away. He had his firearm pointing on the ground. She remained standing outside. From outside she could not see what was happening in 1st Complainant's room. She heard the Appellant saying "shoot me" and a shot went off. She and the people standing outside ran away to her door. The Appellant also came to her room and removed the door. She went back to 1st Complainant's room and realised that the 1st Complainant's foot was bleeding. She went to get her phone from her room to phone the police and she could not find it. They called the police using some gentleman's phone. At that time the Appellant and his workers had left. She did not see the 1st Complainant running down the passage with the Complainant's firearm but could also not deny that it happened as there was a lot of commotion. She did not know if the firearm was ever pointed at her as there were a lot of other people, but it was pointed to her direction at her forehead as the Appellant was waving it. He approached the Appellant from his left hand side. It was only after he has pushed her using his shoulder that she saw the gun, At the time when she tried pulling him away she had not realised that he was holding a firearm.

[13] The 2nd Complainant denied that in her police statement she said the Appellant stole her cellphone. She further denied that she saw the Appellant firing a shot at the 1st Complainant but only saw 1st Complainant's leg bleeding. She also saw 1st Complainant when she came back from hospital, she had a bandage on her leg and hand. She is not sure on which hand or leg. She never saw any men and any other person inside the 1st Complainant's room. The statement was admitted into evidence provisionally. The signs for payment of rent into a bank account were placed on the buildings after they had already left. Appellant told them that he never received any money from them for rent. However, the Appellant knew even before that they were staying at that place. He used to come and fix toilet pipes. He only came to evict them because he had evicted Busi from the premises. She denied that the signs to pay the rental into an account were put long before they came to the building but only after the Appellant had asked Busi to vacate. The 1st Complainant was told when she went to Appellant's office to register their rooms. The 1st Complainant did not bring back a contract but a paper to show that she was there at the Appellant's offices. She was unemployed at the time and could not provide proof of address.

- [14] Dr Pumelelo Skhosana's confirmed that he examined the 1st Complainant on 17 November 2016 and signed off the J88 report. He had noted in the report that he found a superficial abrasion on the 1st Complainant's left lower leg unitarily, and a 10 x10 centimetre bruise of the right forearm with all her organic systems normal. The 1st Complainant reported to him that she was shot on her leg and hit with a firearm on her forearm. The abrasion on the lower leg is a scratch which is a skin defect caused by a rough surface or some kind of trauma to the skin. He confirmed that a bullet that ricochet from the floor can cause such an abrasion. The injuries are all superficial injuries with no fractures or deep injuries, mainly being soft skin and tissues.

#### The defence's evidence

- [15] The Appellant indicated that he owns a Close Corporation called "Pambheka CC" that deals in rental properties. He takes care of the administration and owns the Fraser Building in Springs, where the 1st and 2nd Complainant resided. On 16 July 2016 he discovered that the 1st and 2nd Complainant were occupying rooms at Fraser Building illegally. He does not remember what he did that day. He would have followed standard procedure and sent documentation requesting the Complainants as illegal tenants to bring their identification to them and to write on a paper the period they have been staying in the building and how they got in, who assisted them and how much they paid. He agreed that he enters into a lease agreement with every tenant that stays in his properties. He indicated that the Complainants occupied rooms FB16 and FB 17. He identified a letter dated 12 August 2016 directed to FB17 which was prepared by his secretary and approved by him, indicating the account where the deposit of rent was to be paid and the deposit slip sent and also penalties payable on non-compliance. The letter also prohibited payment to agents. The Appellant identified letters written and dated 18 July 2021, 19 September 2016, 17 October 2016 and 31 October 2016 whereupon he notifies the 1st and 2nd Complainant of their occupation of the property since August 2015, without a lease agreement and their allegation to have been paying to Busisiwe when the policy has been always to pay into an account of Pambheka, calling upon them to bring proof of employment and IDs, pay the deposit and bring rent arrears up to date. He alleged to have personally delivered the letters by hand to the 1st Complainant. For the reason that the 1st Complainant was always aggressive there was no acknowledgment of receipt and she would not have signed it anyway. The letters were left in the room under the door and he could not remember if the Complainant was there or not. He however would usually go to the tenant's room, knock and if the tenant answers will try and explain the letter. He does not recall if he delivered it to the person or to the room. He however remembers the deliveries with trepidation because he was abused by the 1st Complainant. On 1 November 2016 he wrote a letter addressed to room FB17's occupant, the 1st Complainant, giving her one-month notice to vacate the room, which was to be by 30 November 2016. The letter was also sms'd to a number he does not know. On 1 December 2016, he wrote another letter to FB16 and 17 addressed to the 1st Complainant. In the letter he mentioned the Complainants' failure to pay the deposit, bring rental arrears up to date, proof of credible personal information and being a constant nuisance to other tenants as the

1st Complainant ran a shebeen, played loud music to loud guests, maliciously damaged property and assaulted his staff members. He directed her to vacate the premises immediately. The two Complainants eventually vacated the premises and does not know when. The two rooms owed R17 000.00. He confirmed that the Complainants paid rental to Busisiwe, a caretaker at Fraser Building and Busisiwe appropriated the monies.

- [16] The reason why he went to their rooms on 17 November 2016 accompanied by his staff, Amos, Pheria, Daniel and Happiness was because the two Complainants continued to occupy the two rooms, notwithstanding the notices. His aim was to go and make the rooms uninhabitable by removing the doors and glass from the windows. After they gained access to Fraser Building when he tried to get access to room 7, he found the 1st Complainant already waiting for him as she knew he was coming. She tried to stop him from opening the door to her room. The door was not locked but the 1st Complainant was pushing it to prevent him from opening the door, yelling and screaming at him. He eventually managed to open the door sufficiently for him to sort of step into the doorway. There was a man in the room who has been on the bed, that is the only place that he could have been because he could not see the bed fully as it was behind the door. The man jumped up, picked up the mattress and reached under it to take something. He had no idea what, but considering that he has been threatened many times with death when he went to his building in Springs, he went for his firearm as soon as he saw the man lifting the mattress. He turned around, removed his gun and cocked it. When he turned around to the left, the guy was trying to attack him with a knife, telling him that he was going to kill him, he better get out of the room. The man was coming for him. He felt he was not going to let it happen and pointed the firearm at the man. The 1st Complainant was at the time behind the door, she and the man were shouting at him saying "shoot, shoot". His staff was just behind him. They entered the building through a fire escape at the end of the passage which has something like a burglar proof door which is one step from the door of room 7. They could only be behind him or a couple of steps back in the fire escape. He told the man he will shoot him and the man was holding the knife above his head and threatening to kill him. The man did not hesitate and was still advancing to him. So he realised that to stop him, he will have to shoot him. He pointed the gun to the ground and fired a shot to the ground next to his right foot and everything went quiet. The guy stopped advancing. The 1st complainant came around. He had dropped the tools for removing the door when he pulled out the gun. So the 1st Complainant picked up both tools and threw them into the room. Everybody got a fright because of the gun shot but the 1st Complainant tried to attack him again, yelling and screaming, pushing against the door trying not to let him in the room. He realised that he cannot put the gun on his person as the Complainant was trying to take away anything he had in his hands, the hammers, catspaw or any weapon he had. She was now trying to get the firearm. He put it on the floor and opened the door to go into the room to try and retrieve the catspan and the hammer so as to remove the door. The Complainant picked up the firearm and tried to run to the other end of the passage to escape, but he had already locked that door. He stood there without a weapon and walked slowly towards the 1st

Complainant looking her right in the eye and asked her to give him the gun. She walked back towards him holding the gun with two hands and pointing it at him. He told her to put the gun down or give it to him. They met in the middle of the passage and when he was about a distance to grab the weapon from her, she was almost in the doorway. She pointed the firearm towards the ground and

sort of almost fell, going down on one knee, that is when he managed to take the gun from her. He did not see the 2nd Complainant all that time. He went back to room 7 and removed the door by kicking it off its hinges. He then went to room 6 and did the same. He also broke the windows and left the premises with the doors.

[17] He alleged to have also sustained injuries on his right foot from the gun shot and had to undergo medical treatment where upon foreign bodies were removed from his wound. It was pieces of slug from the bullet. He tried to hand over a photograph of his foot which he alleged to have taken after the operation. He proceeded to explain that after he put the gun down the male person in the room retreated to the far right hand corner of the room and put the knife down. The reason he put the firearm down was because he wanted to retrieve the tools to remove the door not because the man has put the knife down. After he fired the shot the man got a big fright and he was no longer a threat anymore. He could see the fear in the man's eyes. The gun had to go off to show them that he meant business, the door was going to be removed and they must not attack him or something was

going to happen. He told the man to put the knife down and the man put it on the bed. He holds a licence for the firearm.

[18] The Appellant's testimony under cross examination was that on 17 November 2016 he was carrying a firearm because he felt threatened, having been threatened to be killed by Nyaope guys or Nigerians. It was therefore for self-defence as he was for the past 24 years threatened. He carried the gun to defend himself against the threats by the 1st Complainant to kill him or burn him or use the Nyaope guys or Nigerians and all the other unimaginable threats, he could not remember. It did not occur to him to report the threats to the police because of the many previous experiences he had with the police. The 1st Complainant was known by all the police at the police station. So he would be wasting his time going to the police with an issue like that. He actually had received little assistance from the police in this country in every matter he was involved in. So he has been either forced to run away from what he has been doing for 24 years or attempt to find his own way. However, being a person who is not familiar with all this as a carpenter, he did not know if he was breaking the law or not. On the 1st Complainant's matter he simply decided to take things into his own hands because he does not trust the law enforcement agencies. On the day in question he went to remove the doors to prevent the Complainants from staying in the rooms. He did not see the man when he arrived there, the only logical conclusion is that the man was lying on the bed behind the door. He only noticed the man when the man picked up the mattress and was retrieving something under it. At the time he was at the doorway. The 1st Complainant was on the other side of the door. He pulled out his gun when the man took out

the knife, raising it above his head and advancing and threatening to stab him. The 1st Complainant was still behind the door encouraging the gentleman to kill him. He pulled his gun as he did not know what the man was taking under the bed. He was not going to wait to see until the man presents arms to defend himself. He had his jacket open because he anticipated all the threats he received that someone was going to kill him. He did not see the knife as soon as he saw the man going for under the mattress he thought that the man was going to hurt him. He realised that the man was not aware that he might die, and pointed the gun down being aware that he might shoot himself. He released only one shot to the ground whilst standing on the doorway near the door frame. The door was halfway open. At that time everybody went quite. He disputed that the 1st Complainant was injured by the shot, alleging that it was maybe when she was trying to attack him. Actually not sure if she was injured at all as he did not look to see if she was injured. The 1st Complainant was trying to get the hummer and cat spoiler out of his hands and also hold the door closed whilst being behind the door, yelling and screaming. She also was trying to strike him around the door. He heard that she was injured but does not understand how. He was in a tricky situation. He fired the shot when the man was advancing with a knife held above his head. The man backed off because he looked him straight in the eye and he realised he meant business. He then put the gun down and tried to retrieve the tools. It did not occur to him that the 1st Complainant would reach around the door and get the firearm as she did. The gentleman sat at the corner whilst the 1st Complainant ran away with the firearm. He does not believe it is an offence to point a firearm at a person whom he believes is a threat, to defend himself. He believes he did not commit an offence in trying to defend himself pointing a firearm. He also did not lay a charge against the 1st Complainant that she pointed a firearm at him because he knew because of previous experience that nothing was going to happen. He was concentrating on his gun and did not know what the man was doing after the 1st Complainant took his gun. The man did not however come after him with the knife instead he put it away because the guy was bluffed. He was not going to attack him. He proceeded to remove the doors from the 2 rooms. He confirmed that Busisiwe ran away the day they had an inspection in July 2016. She ran her own private business. Rental was supposed to be paid in the business. He confirmed that he got threats that he is a racist and must be killed by 31 December 2016.

- [20] The defence called Mr Daniel Mabizela, one of the employees who accompanied the Appellants to the Complainants' rooms. According to Mabizela they started at the office in the morning where they were to be given instructions by the Appellant. He was with Mpumi and Amos. The Appellant told them that they were going to Fraiser Building in Springs to remove some doors and him and the other two employees were going to look after the Appellant. At Fraiser Building they did not gain entry through the normal doors used by everyone but went through the windows using a ladder to climb in. Once inside the building they followed the Appellant to the Complainant's room. The 1st Complainant was coming out of a room but as soon as she saw the Appellant she quickly closed the door, not realising that Appellant's foot was already in the doorstep to block the door from closing. Appellant

and the 1st Complainant started fighting over the door, Appellant was pushing the door to open it further whilst the 1st Complainant was trying to close it. As they did not know where and why they were brought there, they just stood there and watched the incident. He took his position to look after the other people. He then realised that there was a woman inside and actually there were two people in the room where they were meant to remove the door. The one standing was a male and the one pushing the door was a lady (the 1st Complainant). The Appellant and the 1st Complainant were pushing the door in and out. He then heard the 1st Complainant shouting saying 'call the police'. What then followed was a sound of a gunshot. Everyone who was standing in the passage ran away. His colleagues also wanted to run away but they stood there. Seeing his colleagues not running away he also did not run. When he looked inside the room the 1st Complainant was still there but he could not see the man. He does not know at what point the man left the room. The Appellant removed the door from the hinges. His colleagues took the door and left with it. He was concentrating on the people who were standing in the passage. The Appellant then moved from the first doorway to the next door to be taken out. He assisted the Appellant to remove the second door who was experiencing problems doing so and decided to sit down so that he can position himself. He saw the 1st Complainant walking towards them and thought she was coming to ask for forgiveness from the Appellant. He was surprised when the 1st Complainant picked something near the Appellant and walked back to the passage, walking away. She came out from the crowd standing in the passage. The Appellant immediately stood up and followed the 1st Complainant. He only heard the word 'back'. The 1st Complainant reached the front of the passage, turned and handed the Appellant whatever it was she picked from the floor. The Appellant

came back, lifted up his clothing and placed a firearm, that is when he realised that it was a firearm that was about to be taken by the 1st Complainant. The Appellant then continued to remove the door, whilst he was observing the people in the passage holding onto the door. The Appellant left the door with him, standing on the passage, when he was left alone he carried the door on his back. The

people in the passage remained there. They moved away so that he can pass with the door. He was afraid that they might assault him but they respected him and let him pass through until he met his colleagues who were walking back to the building. After some days they made statements to the police. The interview was in Zulu. The police officer asked him if it was the truth that he has written down and when he confirmed he asked him to sign the statement. The statement was never read back to him and he did tell the police officer that the Appellant was in possession of the firearm during the incident. He told the police that after seeing the conduct of the 1st Complainant, the Appellant placed a firearm on his waist. He does not know if the person who was in the room had anything or objects with him.

[21] Under cross- examination he said he was not sure that he saw everything as they were very scared and standing one step from the room that the Appellant was going to remove the door. From the position he was, he was not able to see what was happening inside. He could

only see the back of the Appellant who was standing in front of him. When they arrived there the Appellant went straight to the door of the 1st Complainant's room, so he was not sure whether they were still proceeding to walk through the passage or whether the Appellant had already arrived where he was going, so that is how he managed to see that there were two people, one was opening the door. When he retreated backwards he could not see what was inside the room. So the Appellant told them that a person was about to go out. The door was being opened wide and these people were like they were coming out of the room. The person who was about to come out of the room realised that the Appellant was already there that is when she tried to push the door closed. He then again said the door was never opened wide but slightly opened and demonstrated that the door was half open not wide like he did before. He said the man was then standing next to the 1st Complainant. He did not see the man jumping out of bed. The man's hands were up to his chest and he did not see anything that the man was holding. There was the pushing of the door by the Appellant and the 1st Complainant who was shouting that "call the police." He also heard the 1st complainant saying "shoot me Brian". He was standing in the passage where there was a lot of people and the police were also there. The last time he saw the man, he was still inside the room. A shot was fired and people ran away. He does not know how the Appellant removed the door he just saw his colleagues carrying the door away. He did not see who fired the shot but what came to his mind was that it was the Appellant. After the shot was fired, it was so quiet and the next thing the door was out. His colleagues carried it out. He followed the Appellant to the next room. The Appellant started shaking and removing the door. He assisted the Appellant by holding the door so that he can be able to remove it. The 1st Complainant emerged from the crowd and picked something from the floor were the Appellant was and turned back. The Appellant stood up and followed the 1st Complainant. The Appellant shouted at her saying "bring back that" and the 1st Complainant gave the Appellant something hand to hand. He did not see the 1st Complainant pointing the firearm at the Appellant. He did not see the man charging at the Appellant or taking something under the bed. He confirmed that he made a statement to the police. He agreed on everything in the statement except the fact that he saw the firearm. The statement was admitted in evidence provisionally with the intention of proving it later by opening the state's

case. He denied telling the police that there was another person as he was not asked about the number of people in the room. He told the police officer that at the second room there is something that the 1st Complainant picked up. He did not see at what stage the 1st Complainant left the room or hear the man saying he would kill the Appellant. He did not pay attention to the person in the room but only to the people in the passage.

[22] The photographer gave evidence and denied that there were bullet holes on the floor that were pointed out to her and therefore did not record any holes.

- [23] Busisiwe Chonco, the erstwhile caretaker of Fraser Building who had to leave in July 2016 for having taking rental money for herself testified on 24 June 2019. She was rehired by the Appellant on April 2019. Her testimony was that she first met the 1st Complainant at Fraser Building, when 1st Complainant was looking for a place to stay, The 1st Complainant told her she was a hawker.. She was aware of Pambheka's rental procedure of placing tenants but did not follow it when she allowed the 1st Complainant to stay at Fraser without submitting the required information. The 1st Complainant paid her the rental for the two rooms. She misappropriated the money. On the 17 November 2016 the 1st Complainant phoned her to tell her that the Appellant was at her rooms and he removed the doors. The 1st Complainant said at the time she was with her boyfriend who was lying on the bed. The boyfriend woke up, took a knife and wanted to stab and stop the Appellant from breaking the door and the windows. The Appellant fired a shot to the ground. The 1st Complainant was not hit by the bullet but it scratched her. She then realised that the Complainant was wearing a bandage. She saw the bandage as after she phoned her they met at the Corner Tavern on the same day at the suggestion of the 1st Complainant made during the phone call. They met again in November 2017 when the 1st Complainant asked her to phone the Pambheka office and look for Happiness. She could not find Happiness. The 1st Complainant told her the reason she wanted to speak to Happiness is that Appellant has been shot. She again phoned Happiness to tell her what has happened, she never answered the phone. She continued to phone the office and at last Happiness answered the phone. When she asked Happiness where the Appellant was, she hung up the phone.
- [24] She admitted that she knows a police officer known as Korma through the 1st Complainant. According to her the officer called her two weeks after the incident in November 2016 and it was after the 1st Complainant was shot, and she had received a call from the 1st Complainant. She believed Korma got her numbers from the 1st Complainant. Korma invited her to his office asked her if she knew the Appellant, if she realised that there were a lot of cases against the Appellant and advised her to also open a case against the Appellant. She told Korma she had nothing to report as the Appellant never did anything wrong to her, actually she is the one who wronged the Appellant. She confirmed to have gone back to the employ of Pambheka since April 2019 and denied having been fired from her position at there. She alleged that the reason she left which has made her go back was because she wanted to pay back the money she took. On or about 27 or 28 May 2019, she told the Appellant about the report which was made by the 1st Complainant to her as there was something that was bothering her. She reported to the Appellant that the 1st Complainant and Happy were fighting over something even though the two were friends. What would happen is that if the Appellant was going to visit the building Happiness would quickly send an sms to the 1st Complainant as the Complainant did not have the Appellant's permission to be in the building. The 1st Complainant used to call and update her of what is happening because she is the one who caused her to stay at Fraser Building. She became friends with the 1st Complainant when she came to stay at Fraser Building. After she left Fraser the 1st Complainant came to see her at the place where she moved in at the Brixton Building or

Graystone Mansions to ask her for repayment of her deposit. What made her inform the Appellant about the 1st Complainant after she has gone back to work is because she has tried several times to talk to him, and tell him about the day of the incident that the 1st Complainant told her that her boyfriend was there. She kept on phoning Happiness who told her that the Appellant does not want to talk to her. She said the 1st Complainant told her that the Appellant shot her and therefore he must pay. Also that she has people she knows in the name of Korma. That is all the 1st Complainant said. She was asked to tell the court what she knew about an attempt to poison the Appellant. She said Happiness told her that she wanted to poison the Appellant.

- [25] Under cross examination she said she testified about the 1st Complainant's boyfriend being in the room because the Appellant has never used a firearm. It was for the first time he did, he therefore must have been provoked, that is why she felt the need to indicate that the 1st Complainant was with her boyfriend who tried to stab the Appellant hence he used the gun. The 1st Complainant moved in at Fraser in October 2013 when she started working there. When she left in July 2016, the 1st Complainant has been staying at the premises for a period of two years. They have not been friends but the 1st Complainant confided in her on anything. When the 1st Complainant phoned her after the incident it was because she had caused her to live there so the 1st Complainant wanted her to go and talk to the Appellant. She informed the Appellant a month after she went back to work about all these, as they have been busy at the office. The 1st Complainant phoned her and asked that they meet at the Corner Tarvern where 1st Complainant told her that she was shot by the Appellant when he wanted them to leave and they were not yet prepared to leave. The Appellant arrived and kicked their doors and the windows. She went to the door and opened it. The boyfriend took a knife to stop the Appellant from kicking the door and breaking the windows, that is when the Appellant fired the shot on the ground. He is not sure on which leg the 1st Complainant had a bandage on, whether it was the right leg or the left leg. She then told her that Brian must pay and when asked in what way the 1st Complainant said she has a connection she knew people.
- [26] On being questioned by the court she said she stole from the Appellant and had left the place because her boyfriend had bought a place at Graystone Mansions. She did not know about the Appellant having reported her for having stolen money to the police as there was no stage she was being pursued by the police. She went back to the Appellant as she wanted to pay back the money. When she approached the Appellant he kept on rejecting her but she persisted. She also wanted to inform the Appellant that the 1st Complainant's boyfriend was there, even if the Appellant was there and aware of what was happening, but because the 1st Complainant had told her what has happened in court and that she did not want to get her boyfriend involved. She is paying back the money she stole to the Appellant in an amount of R25 per day.

- [27] Dr N V Steyn, an Orthopaedic Surgeon, examined the Appellant on 18 November 2016 with a wound to his right foot following a gunshot incident. He reported that he under anaesthetic debrided the wound and removed the bullet fragments. Appellant was taken to theatre on 23 November 2016. The wound was cleaned and bullet fragments removed. What he saw was consistent with the evidence that a shot was fired to the ground next to his foot. Fragments are shrapnel. They used a mobile x-ray machine in theatre to locate any foreign fragments. On the X ray report it showed that he had three pieces of shrapnel done by the X –ray department.
- [28] The 1st Complainant was recalled due to the testimony of Busisiwe Chonco. According to her it was Busisiwe who came to her and asked her about the incident with the Appellant, alleging to have heard about it. It was on the same day when she came back from hospital. Busisiwe who was staying at another flat by then met her at the gate of Fraser Building. She did not tell her anything. She actually refused to talk to Busisiwe and told her that she was in trouble because of her and left her. Busisiwe lied about her telling her about the kicking of the door and breaking of windows and of the boyfriend being in her room. She only knew about Happiness who became the caretaker at the building after the Appellant and Busisiwe fought. It was not Happiness who warned her about the Appellant

coming to the building but a tenant at Fraser Building who heard from Happiness that Brian will be coming.

## Legal framework

The test on appeal on the finding of facts

- [29] A court hearing an appeal purely on the finding of facts is cautioned not to overlook that the trial judge has advantages that the appeal court cannot have- in seeing and hearing the witnesses and being steeped in the atmosphere of the trial. Not only has the trial judge had the opportunity of observing their demeanour, but also their appearance and whole personality; see *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705-706.
- [30] Even in drawing conclusions and or inferences the trial judge is regarded to may be in a better position than the appeal court, in that the trial judge may be more able to estimate what is probable or improbable in relation to the particular witnesses whom have been observed during the trial. Consequently, the appeal court would be reluctant to upset the findings of the trial court. In *Koopman v S* ALL SA 2005 (1) ALL 539 (SCA) at 539: Headnote: the following is said;
- " In the absence of demonstrable and material misdirection by the trial court its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong"
- [31] In *S v Francis* 1991 (1) SACR 198 (A) at 204c-e; (see too *S v Hadebe & others* 1998 (1) SACR 422 (SCA) at 426a-c), Smalberger JA explained the test to be as follows:

‘This Court’s powers to interfere on appeal with the findings of fact of a trial Court are limited. Accused No 5’s complaint is that the trial Court failed to evaluate D’s evidence properly. It is not suggested that the Court misdirected itself in any respect. In the absence of any misdirection the trial Court’s conclusion, including its acceptance of D’s evidence, is presumed to be correct. In order to succeed on appeal accused No 5 must therefore convince us on adequate grounds that the trial Court was wrong in accepting D’s evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court’s evaluation of oral testimony.’

[32] The test imposes a high threshold for permissible interference by a court of appeal with a trial court’s factual findings. It is on the basis of these principles, inter alia, as stated in the abovementioned authorities that I consider this appeal.

[33] It is highly instructive what is regarded as a starting point by Hogan's English Supreme Court decision in *Hay v O'Grady*, in which it was held that;

*“If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings”.(2) that this emphasised “the importance of a clear statement... by the trial judge of his findings of primary fact, the inferences to be drawn and the conclusion that follows”.*

[34] Hogan further noted the established jurisprudence regarding jury trials that issues of fact and the inferences drawn from them should not be disturbed if there is evidence to support them. However, in the context of trial by judge alone, he felt that the appeal court may, in certain circumstances, review an inference of fact by a trial judge. Hogan also referenced Clarke's observation that:

"part of the function of an appellate court is to ascertain whether there may have been significant and material error(s) in the way in which the trial judge reached a conclusion as to the facts. It is important to distinguish between a case where there is such an error, on the one hand, and a case where the trial judge simply was called on to prefer one piece of evidence to another and does so for a stated and credible reason. In the latter case it is no function of this court to seek to second-guess the trial judge's view." (my emphasis)

Findings of the court a quo.

[35] The court a quo rightfully took into consideration the common cause facts in order to set apart what was in dispute and therefore to be established in order to prove the Appellant’s guilt beyond reasonable doubt. All the common cause facts considered being correct.

[36] Considering that it was common cause that the Appellant pointed the firearm and discharged it in the 1st Complainant’s room, the issues that were to be decided were:

[36.1] Whether there was justification for the Appellant to (i) point (ii) and discharge his firearm (which involved an assessment of evidence to establish whether the Appellant pointed his firearm to the 1st Complainant or to the 1st Applicant's boyfriend alleged to have been in the room and had placed the Appellant's life in imminent danger by advancing towards him with a knife)

[36.2] Whether the state proved that the injuries sustained by the 1st Complainant on her arm was as a result of the assault with the firearm by the Appellant intending to cause grievous bodily harm.

[36.3] Whether there was indeed a "pointing at" with a firearm in respect of the 2nd Complainant.

[37] As the Appellant was pleading self- defence in the 1st and 3rd count, he carried the burden to prove that he was justified to point and discharge his firearm the way he did. On the other hand the state had to prove beyond reasonable doubt that the Appellant assaulted the 1st Complainant intending to cause grievous bodily harm and to have also pointed the firearm to the 1st Complainant and 2nd Complainant and recklessly discharged it without any justification to have done so.

[38] It is further accurate that overall, the court has got to be satisfied that Appellant's guilt to all the charges has been proven beyond reasonable doubt before it can return a guilty verdict on each of the charges.

[39] Taking into consideration the provisions of s 120 (6) and s 120 (3) (a) and

(b) of the Firearms Control Act on pointing of a firearm and the discharge of a firearm in public places and considering the totality of the evidence led, the court a quo found:

[39.1] On Count 1: that even though the 1st Complainant was a single witness, she made a favourable impression to the court when she was testifying. She was corroborated in her evidence by the 2nd Complainant. There was no other person in her room and that Appellant had an intention to point the 1st Complainant with a firearm as he wanted to stop her from resisting his attempt to open the door. The Appellant needed to be inside to be able to remove the door. On the other hand, the Appellant's version of a man that was trying to attack him to whom he allegedly pointed the firearm was rejected as improbable. The Appellant's version was contradicted by his witness Mabizela, who according to him the man was standing next to the Complainant doing nothing and not armed with a knife. He also had said the man was going out with the 1st Complainant when they arrived at the rooms and was never ever seen again. The court found Mabizela also not to be an honest witness. He later denied having seen anything although he was standing right behind the Appellant all this time. The court had correctly regarded the allegations that the mysterious man who had just tried to kill the Appellant was still in the room and just standing at the corner when Appellant put the gun down at the door. Also that the man did nothing because he was frightened by the Appellant's look, leaving it to the 1st Complainant to be the brave one to get the firearm, as highly improbable. The man would be expected under normal circumstances to have assisted to close the door. But it seems the scuffle was between the 1st Complainant and the Appellant. No further mention is made as to what

happened to the man after the 1st Complainant had taken the Appellant's firearm.

[39.1.1] Busisiwe's evidence was also correctly found to be hearsay and rejected by the court. It did not make sense that the 1st Complainant would volunteer information to her when she is blaming her of her woes with the Appellant. It was also ironic that of all the information Busisiwe alleges to have been told by the 1st Complainant that she would feel the need to come and tell the court only about a person who was also in the Complainant's room. The evidence is also suspect and self-serving coming out after Busisiwe's re-employment by the Appellant. It is therefore

evident that there was no dangerous situation, the only person that was in the room was the Complainant whom the Appellant pointed with the firearm to stop her from resisting his attempt to open the door.

. [39.2] On Count 2:- The court found it probable as alleged by the 1st Complainant that as she continued to resist the Appellant's attempt to open the door even after being pointed at with a firearm, the Appellant then hit her arm three to four times with the firearm upon which she let go of the handle. Her arm was indeed found to have sustained injuries that are consistent with an injury caused by a blunt object like the butt of the firearm. The Appellant agreed that the 1st Complainant sustained the injuries during the clash but disputed that they were caused by him hitting her with the butt of the gun saying it was because of her yelling and screaming whilst attacking him which does not make sense. His version was correctly found by the court to be improbable.

[39.2.1] The Appellant argues that the superficial injuries indicate the lack of intention to cause grievous bodily harm. The court a quo correctly found that the fact that he not only used the firearm once but several times until the 1st Complainant removed her hand due to pain inflicted indicate the Appellant's deliberate intention to cause grievous bodily harm. The 10 x 10 cm scar is attestation to that. I therefore agree with the court a quo's findings.

[39.3] On Count 3: it being common cause that a shot was discharged in the small room and in the presence of the 1st Complainant. It also being common cause that the shot was discharged from the firearm facing the ground. The court took into consideration that it was the 1st Complainant testimony that the shot was discharged near her left leg and soon thereafter she was bleeding from her left leg. The medical expert report indicated that she had abrasions that were consistent with being scratched by a bullet. Also corroborated

by the 2nd Complainant that the 1st Complainant was bleeding and came back thereafter from hospital in a bandage. The trial court found all that to prove that the Appellant was reckless in discharging the firearm the way he did in a small room. I would add that in the presence of a person. Also that the injuries the Appellant sustained as confirmed by Dr Steyn's report corroborates the recklessness of the conduct of the Appellant of discharging the firearm, endangering life and security of the 1st Complainant, her property and himself. There evidently cannot be a misdirection on those facts, considering what are the elements of the offence.

[39.4] On Count 4: The court a quo found on the 2nd Complainant's evidence that she walked to the 1st Complainant's room and spoke to the Appellant who was at the door holding a firearm that was pointing down. She tried to pull the Appellant away from the door but Appellant pushed her and pointed the firearm to their direction. She is not sure if the firearm was pointed at her directly but it was pointed to their direction where she was standing with the group of spectators. The court concluded that the fact that the firearm was pointed at their direction is evidence from which an inference can be drawn that the firearm was pointed, seeing that it was directed at their fourheads. Which is all that requires to be proved that there was a pointing of a firearm.

[39.5] Section 120 (6) of the FCA reads:

It is an offence to point—

- (a) any firearm, an antique firearm or an airgun, whether or not it is loaded or capable of being discharged, at any other person, without good reason to do so; or
- (b) anything which is likely to lead a person to believe that it is a firearm, an antique firearm or an airgun at any other person, without good reason to do so.

[39.6] The court a quo proceeded and found that the fact that the firearm was pointed in a general direction of a person, is merely evidence from which an inference can be drawn that the firearm was pointed at. It noted that it was at the time when the 2nd Complainant was pulling the Appellant that the latter pointed the firearm, the Appellant therefore had an intention and motive that was expressed when he pushed her and then pointed the firearm to the direction where she was. The court referred to *S v Hans* 1998 (2) SACR 406e where the court held that:

*“holding the barrel of a firearm in the general direction of a person or a group of persons, thereby creating the possibility that anyone of them might be hit if that firearm was discharged will also create the offence.”*

[39.7] Noting that the prohibition is intended to protect the public and in answering the question “if the firearm was discharged will it hit the 2nd Complainant? the court said based on her testimony the answer would be yes. According to 2nd Complainant's evidence the Appellant was waving the firearm on the position of their forehead. The Appellant disagrees and had stated in its heads of argument that ‘this by no means suggest that it was done deliberately and that such an answer is extremely vague’ when the 2nd Complainant had initially said it was not pointed at her.

[39.8] The argument is centred on what constitutes the pointing of a firearm for purposes of establishing the offence of pointing a firearm. More specifically, the proper construction and interpretation of the definitional element of “pointing.” In the matter of *Xabendlini v State* (608/10) [2011] ZASCA 86 the SCA when interpreting the definitional element of the offence for that purpose, dissected what is referred to as the narrow vis a vis the broader interpretation of the ‘pointing at’ concept (as per (Criminal Law Snyman 5th edition (2012) at 488; to establish its manifestation. The interrogation was whether the concept should be amenable to a narrow or a broader interpretation. The narrow interpretation means that an individual will be guilty of the

offence if he or she pointed a firearm at another person in such a way that, if discharged, the bullet would actually hit the person or victim (Snyman 5th edition (2008) 467; S v Van Zyl 1993 1 SACR 338 (C); at 340g). If interpreted within its broader ambit, it would mean that an individual will be guilty of pointing a firearm if the firearm was directed at another person in such a way that if it were discharged, the bullet would either strike the victim or pass in his or her immediate vicinity; see (Snyman (2012) 488; Snyman (2008) 467; R v Humphries 1957 2 SA 233 (N) at 234d–g; S v Hans 1998 2 SACR 406 (E) at 411–412) whereupon Erasmus J found that it was irrelevant for the purposes of section 39(1)(i) whether the weapon, if discharged, would have injured any person. He reasoned that it was not necessary to introduce, such a requirement in assessing the meaning of the section (411H–412A). The court a quo in casu found on that principle that the offence was established. In Humphries, Selke J opined that the phrase “pointing” a firearm was less precise than aiming a firearm. The judge held that “pointing

a firearm” did not mean the deliberate and careful taking of aim with the idea of hitting a person with the shot if one was fired, but rather “embraces the notion of directing the firearm towards a person in such a way that, if it were discharged, the bullet would either strike that person or pass in his immediate (234F–G).

[39.9] The SCA confirmed in Xabendlini that the wider interpretation of the word “point” is preferable, stating the following three reasons for finding in favour of the broader interpretation:

*“First, it accords with the intention of the legislature which is to protect the public from the dangers associated with the handling and use of firearms and the resultant fear induced in the mind of the person at whom the firearm is pointing that he would or could be struck; C R Snyman Criminal Law 5ed*

(2008) p 467. It is trite that the words of a statute must be given its ordinary, grammatical meaning having regard to the text as a whole. The offending conduct, in terms of s 39(1)(i), is the pointing of a firearm. As was noted in Hans, it is not necessary that the weapon is cocked or loaded, or even that it is capable of discharging ammunition. The mere pointing of a firearm, at another person, constitutes the offence. The current formulation of the relevant section confirms this position. Act 75 of 1969 was repealed in its entirety and replaced by the Firearms Control Act 60 of 2000”

*“Second, on the narrow interpretation it would not always be possible, to prove that the bullet, if discharged, would have struck the person at whom the firearm was pointed. Erasmus J in Hans, at 411D–G. recognised the impracticality of this approach:”*

‘This interpretation will severely limit the impact of the section. First: it limits the theoretical effect of the section in a manner which the Legislature, to my mind, could never have intended. On this interpretation a person who aimed at a target but then missed or would have missed the target if he had pulled the trigger, would never have “pointed” his firearm “at” the target. – even if he was an expert marksman who had taken careful aim. Common sense dictates that such a result would go against the intention of the Legislature as expressed in the wording of s 39(1)(i). Second: the meaning ascribed to the term “pointed at” in Van Zyl would seriously limit the

application of the section.

Evidentiary problems would, in practical terms, limit the prohibition to incidences where a person was hit by a bullet fired directly at him, or where the firearm was pointed at point-blank range. In all other situations it would be virtually impossible to prove that the bullet would have struck the person if it had been fired, or, where the firearm had not been loaded, that an imaginary bullet would have struck the person had it been fired. This extremely narrow interpretation of the section would, in my mind, frustrate the intention of the Legislature.’

*“Third I endorse the view espoused by Snyman that the specific harm sought to be combated by the legislature, which relates to the inducing of fear in the mind of the person at whom the firearm is directed, would exist irrespective of proof that the bullet, if discharged, would have struck or missed him or her (Snyman (2012) 487–489; Snyman*

*(2002) 467).”*

[39.10] In Hans on the second reason it is stated that to require proof that the bullet, if discharged, would in actual fact have struck the victim, would place an onerous and impossible burden on the prosecution inadvertently rendering the offence of pointing a firearm of mere theoretical and academic nature as it would be virtually impossible to secure a conviction based on this offence due to the fact that it would be extremely difficult to prove that the bullet, if discharged, would in actual fact have struck the victim. It would,

in addition, as noted by the court, be contrary to the purpose of the Act. If one further considers that section 120(6)(b) of Act 60 of 2000 currently also criminalises the act of pointing “anything which is likely to lead a person to believe that it is a firearm, antique firearm or an airgun”, it is clear that the legislature intended the criminalisation of “pointing” a firearm at someone else regardless of whether such firearm is loaded, cocked or capable of discharging ammunition. As such it is the “pointing” of a firearm which is criminalised, and not the eventual result as to whether the bullet, if discharged, would have struck the victim. The broader interpretation, it is submitted, thus accords with the intention of the legislature.

[39.11] Evidently the court a quo correctly, as confirmed in the Xabendlini matter, found on the broader interpretation that the firearm was pointed at the 2nd Complainant. The stated view strongly supported, as it would lead to absurd consequences to require that the firearm, if discharged, would have struck the victim. It would defeat the aim of the offence which is to criminalise the act of pointing a firearm at another person.

[39.12] On the other hand it is necessary to review the circumstances that are brought by the fact that the state had initially sought a conviction on the basis of a charge sheet specifically stating that the firearm was allegedly pointed at namely, the 2nd Complainant. However, from the record it is apparent that the State in argument only sought a conviction on Count 1, 2 and 3 and not on Count 4 whilst conceding that the 2nd Complainants’ evidence was that the firearm was not pointed at her, notwithstanding that there was no formal withdrawal of the charge by the state. Now with the state not proceeding to seek a conviction on count 4, it brings to question if the

court can still proceed to make a finding on that charge based on its assessment of the evidence and interpretation of the offence notwithstanding the stance taken by the state.

[39.13] In terms of s 92 (1) (a) of the CPA, the omission of an averment of something which does not have to be proved does not render the charge invalid. This concession does not, however, apply to the averment of an element of the offence that, because of the operation of a presumption, does not have to be proved by the state. The omission by the 2nd Complainant that the firearm was pointed directly to her does not render the charge invalid. The court can therefore still pronounce upon such a charge, seeing the jurisdictional interpretation of the offence.

[39.14] Finally, the apparent alleged contradictions between the evidence of the 1st Complainant and that of the 2nd Complainant with regard to what transpired between the Appellant and the 2nd Complainant having been regarded to be of no consequence by the court a quo. It had mentioned that the two witnesses were seeing the developments from different sides one being inside the room with the door slightly open and the other one being outside. The situation can therefore not lead to the rejection of evidence of either of them. The court had rightly not found their versions on the incident to be contradictory, for the reason that 1st Complainant did not controvert the allegations by the 2nd Complainant but had just said that she did not see the outside interaction of the 2nd Complainant and the Appellant. That part of their evidence was therefore not contradictory but rather not collaborative of each other's evidence. The allegation that it was also riddled with improbabilities as alleged by the Appellant is unfounded.

[39.15] I therefore find the conviction of the Appellant to have been justified on the basis of the state having proven his guilt on all the offences he has been charged with, beyond reasonable doubt.

It is therefore ordered, that:

1. The Appeal is dismissed

N V KHUMALO

Judge of the High Court

Gauteng Division, Pretoria

I agree

T.V. RAIKANE

Acting Judge of the High Court

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**CASE PAGE**              <https://chat.esheria.ai/case-law/south-africa/bader-v-s-unknown-topic-agpphc-2021>

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