IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CRIMINAL APPEAL CASE NO. 15/2017**

In the matter between:

NKOSIVILE GOODWILL LUSHABA **Appellant**

And

Rex **Respondent**

Neutral Citation: Nkosivile Goodwill Lushaba vs Rex (15/2017) [2019] SZSC 55 (22 November 2019)

Coram: **S.B MAPHALALA, JA, J.M. MAVUSO AJA, AND M. J. MANZINI AJA**

Heard: **20 August 2019**

Delivered: **22 November 2019**

Summary: *Criminal Law - appeal against conviction for murder – trial court alleged to have been biased and conducted trial irregularly – principles governing basis on which exception is recusationis is premised discussed - principles governing setting aside of criminal trial on the basis of irregularities discussed – trial court found not to have been*

conducted trial in an irregular manner – appeal on this ground dismissed.

Criminal law – murder – dolus eventualis – correct test – whether trial court applied correct test – onus of proof beyond reasonable doubt – whether appellant's version reasonably possibly true – private putative defence - applicable principles – appellant's version correctly rejected on the basis that it cannot be reconciled with the proved facts - appeal dismissed.

JUDGMENT

M.J. Manzini, AJA

[1] Appellant was found guilty of the crime of murder by the High Court, and sentenced to imprisonment for a period of nine (9) years backdated to the date of his arrest on the 7th June, 2017.

[2] He filed an appeal on several grounds, which will be set out in full shortly. At the commencement of the hearing of the appeal all applications for condonation were granted, enabling the matter to be dealt with on the merits.

[3] This appeal emanates from an incident that occurred on the 26th December 2009 at Dvokolwako area, in the Manzini Region, where the deceased, Bheki Kunene, a young male, was shot and killed by the Appellant, a police officer, using his service pistol. The Appellant was at the time of the incident in the

company of a police colleague, Mfanaleni Mavimbela, who was converted into an accomplice witness because after the shooting, both he and the Appellant staged a false crime scene, in an attempt to cover up their role in the shooting incident. On the night of the shooting the deceased was in the company of a colleague, Mlungisi Simelane, who also gave an account of what transpired on the tragic night.

[4] According to the post mortem report the deceased sustained a gunshot wound on the middle portion of the right side of his back (the entry point); a wound on the middle portion of the right side of his trunk (the exit point); and a sutured wound was present in the middle portion of his abdomen. The cause of death was the injury to his trunk.

[5] At the trial the Appellant's version, which will be dealt with in some detail later on in this judgment, was that he discharged his firearm in self defence believing that his life was in danger. He sought to invoke putative private defence.

[6] The Court *a quo,* per Mamba J, after analyzing all the evidence of the circumstances of the shooting, rejected the Appellant's putative private defence. The Judge *a quo* rejected the Appellant's version that he was attacked and strangled by the deceased at the time of the shooting or at any stage. He held that Appellant's version was a clear fabrication and could not be reasonably true.

[7] The Learned Judge held that in firing at the deceased in the manner that the Appellant did, he realized or appreciated that he might fatally harm the deceased, but nonetheless he persisted in doing so reckless whether death was the ultimate result of his act or not. The Appellant was found guilty of murder and, after pre-sentencing procedures, was sentenced to a period of nine (9) years imprisonment backdated to the date of his arrest.

[8] The Appellant's initial grounds of appeal were as follows:

"1. *The Court a quo erred both in fact and in law by failing to caution itself on the acceptance of the evidence of a witness brought in as an accomplice witness.*

2. *The Court a quo erred both in fact and in law by accepting the evidence of an accomplice witness when the same had not been corroborated.*

3. *The Court a quo erred both in fact and in law by accepting the evidence of PW8 when the evidence in its totality suggests that he could not have been an eye witness in the incident.*

4. *The Court a quo erred both in fact and in law by finding and holding that the appellant ought to have foreseen that his action will or may result in the death of a person.*

5. *The Court a quo wrongly adopted the application of dolus eventualis in the matter.*

6. *The Court a quo erred both in fact and in law by failing to appreciate that when the incident occurred the Appellant was on the line of duty and that it is not uncommon for police officers to be attacked while executing*

their duties and consequently the thought and / or mentality to act first as a precautionary measure always comes to mind.

7. *The Court a quo misdirected itself by failing to appreciate that in the event of any wrong doing on the part of the Appellant only a conviction for Culpable Homicide would have been apposite."*

[9] The Appellant subsequently filed additional grounds of appeal in the following terms:

1. *The learned Judge was not impartial in the conduct of the trial. He curtailed the Appellant's rights to cross-examination, alternatively unduly intervened at crucial stages of cross-examination by posing questions not limited to elucidation or clarification of evidence but meant to favour the state's case. As a result, failed to consider evidence favourable to the defence case and to draw an adverse inference against the state's case, which the defence sought to elicit from the state witnesses. As a result, the Appellant did not have fair trial.*

2. *The learned Judge committed a gross irregularity in making the following remarks, which resulted in the failure of justice.*

   I have been advised by the Crown that you are an accomplice witness, in short, it means you are guilty of this offence as the accused, in other words, in one way or the other, you were involved in the commission of the offence."

3. *The learned Judge erred in failing to consider the defence of "putative private defence" when a basis for same was laid. But instead incorrectly adopted and applied the principle of dolus eventualis.*

4. *The learned Judge erred in simply accepting the viva voice evidence of the accomplice witness as correct and failing to consider the material contradiction with his written statement (evidence).*

5. *The learned Judge failed to apply the necessary caution to the evidence of **PW2** and **PW8**. Caution should have been applied since both are not independent witnesses and the special circumstances of this matter warranted that their evidence be approached with caution. Further their evidence did not corroborate each other on the issues in dispute.*

6. *The Court misdirected itself by heavily relying on inconclusive expert evidence of the pathologist.*

7. *The Court erred in finding that the Appellant's version is not reasonably possible true and further not advancing reasons thereof. But instead convicted the Appellant solely on the basis that the gunshot wound was located on the back of the deceased.*

8. *The Court failed to consider the fact that the events of that fateful night happened so fast, the Appellant could not calmly consider his options."*

[10] In the Heads of Argument the grounds of appeal were summarized into four sub-topics, and argued on that basis. The sub-topics being:

(i) Unfair trial;

(ii) **Putative private defence;**

(iii) **Cautionary rule; and**

(iv) **Whether the court applied the correct standard of proof.**

[11] Unfair trial

The thrust of this ground of appeal is the allegation that the Presiding Judge in the Court *a quo* was biased and not impartial as required by the law. This argument is premised firstly on certain remarks that were made by the Judge *a quo* during the proceedings, and secondly, on his alleged interference in the conduct of the proceedings, particularly during the cross examination of the accomplice witness.

[12] The allegedly offensive remarks were made by the Judge *a quo* during the introduction of the accomplice witness where he said the following:

"I have been advised by the Crown that you are an accomplice witness, in short it means you are guilty of this offence as the accused. In other words, in one way or another, you were involved in the commission of the offence".

[13] Counsel submitted that the offensive part of the statement by the Judge is where he said ***"... in short, you are guilty of this offence as the accused..."***

[14] It was submitted on behalf of the Appellant that these remarks may have been unintended or unfortunate, but to the lay person they created an impression that the Judge *a quo* had already found the Appellant guilty even before the trial was concluded. It was contended that from that point onwards the assumption of bias and partiality could not be extinguished. Counsel argued that any reasonable person who was present at the hearing or who read the record of proceedings would be justified in concluding that the Judge *a quo* was biased and partial. The argument was taken further to say that the allegedly offensive remarks rendered the warning of the accomplice witness irregular, in that he may have been unduly influenced to falsely implicate the Appellant because the Judge *a quo* had already expressed his view that the Appellant was guilty.

[15] The second leg of the argument is that the Judge *a quo* not only made unwarranted remarks, but also unreasonably interfered in the conduct of the trial to the detriment of the Appellant. It is contended that there were exchanges which took place during the cross examination of the accomplice witness, whose evidence was crucial in that he was an eyewitness. The exchanges which are relied upon are as follows:

DC:In your statement to the police, did you not say you saw this boy fight constable Lushaba?

PW2: I did not say that.

DC:I will read to you what wrote in your words and English, you put it this way ... "He tried to catch him, [you are now referring to Lushaba the jay-walker fight Constable Lushaba... ". Did you not use the word "fight"

PW2: I did My Lord.

DC:People who are fighting have to be in physical contact, do you agree?

PW2: That is correct.

JUDGE: Really Mr. Simelane and Mr. Mavimbela?

DC: Shouting and ...sorry My Lord.

JUDGE:Are you sure fighting, there has to be physical contact all the time?

DC:Sorry My Lord, let's leave it at that, we will handle it in arguments.

JUDGE:No, you seem to be in agreement but I am lost.

DC:Fighting ... My Lord, he is the one who used the word, he understood it in that context and let's take it from that.

JUDGE:I have to understand the evidence, I cannot make a decision on something I do not understand.

DC: Ok

JUDGE: Perhaps it is the concept of fighting.

DC: Is there any fighting Your Lordship by exchanging words?

JUDGE: No ... there could, all I asked is are you sure that fighting always has to have physical contact ... just go to Syria you will find out.

DC: Ok, My Lord, let me withdraw that ... if you use a gun to shoot someone 10 meters from you that is fighting, that is physical contact My Lord ... Mr. Mavimbela, I want to put it to you that, when the matter was fresh in your mind, within 1 week of your seeing what happened, you were

properly describing what happened when you said there was a fight between the accused and the jay-waker.

PW2: What I was referring to was at the point where the accused was struggling to get hold of this boy and it was at that point that he fired the shot.

DC: Lushaba instructs me that the firearm went off whilst there was a struggle between him and this young man.

PW2: That is not true.

JUDGE: I just want to get clarity on this Mr. Mavimbela, you said the boy was running away and the accused was chasing after him...

PW2: Yes My Lord

JUDGE: Yet you call that a fight?

PW2: Yes My Lord that it because whilst chasing him, he was trying to get hold of him and the boy continued running and then he fired the shot, so the moment I am talking about is when he was trying to get hold of him.

JUDGE: I have taken your statement, what was read to you, you said the jay-walker, then fought Constable Lushaba. What I am trying to understand, from someone with O'level, you meant the situation where the boy was running away and Lushaba was chasing after him that you meant the boy, the jay-walker was fighting by running away, he was fighting his chaser by running away? Is that what you meant?

PW2: The boy did not retaliate, it was Lushaba who was trying to get hold of him.

JUDGE: I am just asking you a simple thing, that, that is the fight that you refer to. The boy running away and the accused chasing him. You describe that as the boy fighting the chaser? Never mind whether you correctly stated the difficulty in English, I just want to understand whether that is what you meant, or you meant something else?

PW2: I think I put it wrongly, I should have said I saw him running and the accused chasing him, "not the fighting"

[16] It was contended that these exchanges and interventions came at a critical time of cross examination, for two reasons. One, that the crux of the Appellant's defence was that the deceased fought back when he was confronted by the Appellant, and as a result the latter believed that his life was in danger. And second, that defence counsel was at that point in time seeking answers from the witness regarding the discrepancies between his written statement to the police and his oral testimony. It was further contended that it was difficult to understand what clarity was the Judge *a quo* seeking during the exchanges, as the accomplice witness had at that point in time correctly conceded that for people to fight they had to have been in physical contact, regard being had to the facts and context of the matter before the Judge.

[17] Counsel argued that it was clear from these exchanges that the accomplice witness altered his initial interpretation of the word "fight" as being limited to physical contact to a more liberal interpretation "favoured" by the Judge, which did not limit the meaning of the word to physical contact.

[18] It was further contended that the effect of the Judge's allegedly unwarranted interference was two-fold: one, the accomplice witness shifted posts on his earlier interpretation or meaning of the word "fight" and withdrew his concession that it involved physical contact, which position was favourable to the Appellant; and two, defence counsel withdrew the question to the detriment of the Appellant.

[19] It was also argued that even after defence counsel abandoned his question(s) the Judge *a quo* persisted to the extent of posing a leading question to the accomplice witness, in the following terms:

"I am just asking you a simple thing, that, that is the fight that you refer to. The boy running away and the accused chasing him. You describe that as the boy fighting the chaser?..I just want to understand whether that is what you meant, or you meant something else?"

[20] Counsel argued that the cumulative effect of the Judges' allegedly biased remarks and unwarranted questioning or interference resulted in a failure of justice and a breach of the Appellant's right to a fair hearing as guaranteed in Section 21 (1) and (2) (a) of the Constitution of the Kingdom of Eswatini. Counsel urged us to declare the entire proceedings as invalid and set aside the conviction on these grounds alone.

[21] On the other hand, the Crown urged us to reject the contention of an unfair trial leading to a failure of justice. Counsel submitted that there was nothing

untoward with the manner in which the accomplice witness was warned by the Judge. It was contended that the "advice" referred to by the Judge in his allegedly offensive remarks was in fact what was contained in the Indictment. Counsel argued that the Judges' utterances did not warrant the intervention of this Court, because if the Appellant's defence counsel had been gravely concerned at that point in time, he should have approached the Judge in Chambers and asked for his recusal.

[22] The argument that the Judge *a quo* interfered in the cross examination of the accomplice witness to the extent that he induced him to change his evidence was also refuted. Counsel argued that the Judge posed legitimate questions to the accomplice witness with a view to elucidating or seeking clarity, that is, his interventions were not as to suggest that he was partial. It was also contended that where the Judge posed questions of his own he would thereafter invite both parties to ask follow-up questions arising from the responses elicited from the witnesses.

[23] The dictates of fairness in every criminal trial was succinctly stated by Ponnan JA in ***S v Le Grange and Others 2009 (2) SA 434 (SCA) 449*** in the following terms:

> *"[14] A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be 'manifest to all those who are concerned in the trial and its outcome,*

especially the accused'. As far as criminal trials are concerned, the requirement of impartiality is closely linked to the right of an accused person to a fair trial which is guaranteed by S 35 (3) of our Constitution. Criminal trials have to be conducted in accordance with the notions of basic fairness and justice. The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice. The requirement that justice must not only be done, but also seen to be done has been recognized as lying at the heart of the right to a fair trial. The right to a fair trial requires fairness to the accused, as well as the fairness to the public as presented by the State".

[24] I align myself fully with the above statement of the law, which in my view, is equally applicable in our jurisdiction. Every judicial officer has a legal obligation to uphold the law and to dispense justice without fear or favour. Whether or not a judicial officer fails to live up to this standard turns to be determined on the facts of each particular case.

[25] The task facing this Court is to determine whether the Learned Judge was biased, or conducted the trial in a manner that suggested that he was not impartial, as alleged by the Appellant. In describing "bias" Ponnan JA in ***S v Le Grange and Others (supra)* at 459** said-

" In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean 'a departure from

the standard of even – handed justice which the law requires from those who occupy judicial office'. In common usage bias describes 'a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction". Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case".

[26] The test applicable to determine bias on the part of a judicial officer is now well settled. In a well- reasoned and highly persuasive judgment, the Constitutional Court of South Africa in ***President of the Republic of South Africa and Others 1999 (4) SA 147 (CC)*** at paragraph 48 articulated the test in the following terms:

"It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into

account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial".

[27] Clearly the test is an objective one. The hypothetical reasonable man must be viewed as if placed in the circumstances of the litigant raising the *exceptionis recusationis*. The applicant bears the onus of rebutting the presumption of judicial impartiality, which is not easily dislodged. The applicant must show that the apprehension of bias is that of a reasonable person and is based on reasonable grounds. This is by no means an easy task, and consequently, judicial officers should not readily give in to claims of bias.

[28] Concerning the propriety or otherwise of the remarks and interventions made by a judicial officer in the course of a criminal trial I find the proposition made by the Court in ***S v Basson 2007 (3) SA 582 (CC)*** at page 610 to be particularly helpful -

"[41] The State complains effectively of nine interventions by the trial Judge as cumulatively suggesting that the Judge was either subconsciously biased or that the conduct gave rise to a reasonable apprehension of bias. These interventions, which will be described below, can broadly be divided into two categories: those that, the State

argues, suggest that the Judge was hostile towards the State; and, secondly, those that the State argues show that the Judge had prejudged certain issues.

[42] As far as the first category is concerned, this Court should bear in mind that in long criminal trials a Judge may at times make remarks that are inappropriate, or display irritation towards counsel. At times such interventions may arise from attempts at humour. In considering the question of whether such remarks give rise to a reasonable apprehension of bias, a court should not hold a Judge to an ideal standard which would be difficult to achieve. Moreover, a court considering a claim of bias must take into account the presumption of impartiality, mentioned by this Court SARFU. To establish bias, therefore, a complainant would have to show the remarks were of such a number or quality as to go beyond any suggestion of mere irritation by the Judge caused by a long trial, and establish a pattern of conduct sufficient to dislodge the presumption of impartiality and replace it with a reasonable apprehension of bias.

[43] As far as the second category is concerned, that the Judge had prejudged an issue in the case, the remarks of the Courts in Silber and Take and Save Trading are of assistance. Both make it clear that it is rare that a Court will uphold a complaint of bias arising from a Judge's conduct during a trial and affirm that it is not inappropriate for a court to express views about certain aspects of the evidence. They make it clear, as well, that the fact that a Judge may express incorrect views is not sufficient to ground a claim of bias." [Own underlining]

[29 In my considered view not every comment or remark made by a judicial officer during the conduct of a criminal trial will ground a claim of bias. The nature and quality of the comment must be such as to suggest to a reasonable person that the presiding officer had a predisposition towards one side or a particular result. The comments or remarks must not be viewed outside the context of the trial or in isolation. In *casu,* the allegedly offensive remarks were made during the course of introducing an accomplice witness. The record clearly establishes that immediately prior to the remarks the prosecution informed the Learned Judge that the witness who was about to testify was an accomplice. It is trite that an accomplice is a person who is regarded as having committed the same offence as the principal perpetrator and can be indicted and punished in the same manner as the actual perpetrator. Thus, the Learned Judge may have been articulating this general legal principle to the witness before admonishing him (as required by the law). For the above reasons I am not persuaded that a reasonable person duly informed of the legal standing of an accomplice witness and the duty of a presiding officer to admonish such a witness, would have apprehended bias on the part of Mamba J.

[30] Now turning to deal with the manner in which the Presiding Judge is alleged to have conducted the trial. In doing so I shall be guided by the principles enumerated below. First, irregularities vary in nature and degree. As pointed out in ***S v Naidoo 1962 (4) SA 348 (A)*** irregularities fall into two categories. There are irregularities which are of so gross a nature as *per se* to vitiate the trial. In such a case the appellate court sets aside the conviction without reference to the merits. There remains neither a conviction nor an acquittal on the merits, and the accused can be re-tried. On the other hand, there are

irregularities of a lesser nature in which the appellate court is able to separate the bad from the good, and to consider the merits of the case, including any findings as to the credibility of witnesses. If in the result it comes to the conclusion that a reasonable trial court, properly directing itself, would inevitably have convicted, it dismisses the appeal, and the conviction stands on the merits. But if, on the merits, it cannot come to that conclusion, it sets aside the conviction, and this amounts to an acquittal on the merits. In this event, there is no re-trial.

[31] Second, a criminal trial is not a game and a Judge's position is not merely that of an umpire to see to it that the rules of the game are observed by both sides ***(R v Hepworth 1928 AD 265)***. As pointed out in ***S v Rall 1982 (1) SA 828 (A) 831.***

"Inter alia a Judge is therefore entitled and often obliged in the interests of justice to put such additional questions to witnesses, including the accused, as seem to him desirable in order to elicit or elucidate the truth more fully in respect of relevant aspects of the case ... And for that purpose, according to the learned author, he may put the questions in a leading form ... Counsel is prohibited from putting leading questions to his own witnesses because of the risk that the witness may perhaps think that such questions are an invitation, suggestion, or even instruction to him to answer them not unbiasedly or truthfully, but in a way that favors the pasty calling him.... Ordinarily that would not apply to leading questions put by the Judge. Nevertheless, the putting of leading questions by a Judge should, I think, be subject to the limitations about to be mentioned".

[32] The court went on to lay the following fundamental limitations:

"While I think it is difficult and undesirable to attempt to define precisely the limits within which such judicial questioning should be confined, it is possible, I think, to indicate some broad, well-known limitations, relevant here, that should generally be observed ... -

(1) He should therefore conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused... The Judge should consequently refrain from questioning any witnesses or the accused in any way that, because of its frequency, length, timing, from, tone, contents or otherwise, conveys or is likely to convey the opposite impression.

(2) A Judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants.

(3) A Judge should also refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanor or impair his credibility."

[33] The court concluded by saying that:

"Now any serious transgression of the limitations just mentioned will generally constitute an irregularity in the proceedings. Whether or not

this Court will then intervene to grant appropriate relief at the instance of the accused depends upon whether or not the irregularity has resulted in a failure of justice.... That in turn depends upon whether or not the irregularity prejudiced the accused, or possibly whether or not this Court's intervention is required in the interest of public policy. Of course, if the offending questioning of witnesses or the accused by a Judge sustains the inference that in fact he was not open-minded, impartial, or fair during the trial, this Court will intervene and grant appropriate relief... "

[34] As earlier indicated the thrust of the Appellant's argument is that the Presiding Judge's interventions came at a critical time of cross examination and resulted in the accomplice witness adopting a more liberal interpretation of the word "fight" in his statement to the police, and yet he agreed with the Appellant's counsel during the trial that people who are fighting have to be in physical contact. However, the Presiding Judge did not agree with the meaning ascribed to the word "fight" by both the accomplice witness and defence counsel. His view was that the word fight did not necessarily import physical contact. He thereafter asked questions with a view to clarifying what the witness meant when he used the word "fight". In my view the Learned Judge was entitled to put the questions that he did to the accomplice witness, that is, in order to ascertain whether there was any physical contact between the Appellant and the deceased. His questioning did not transgress any of the limitations referred to earlier in this judgment.

[35] Was the Presiding Judge's questioning detrimental or prejudicial to the Appellant? I think not. Defence counsel was not in any way prevented from further probing or posing questions to the accomplice witness. In fact he voluntarily stated that the issue would be addressed in closing arguments, and that was not to be. Furthermore, although an impression was created during argument that there were other instances of interference by the Presiding Judge counsel did not point us to any. It is not for this Court to trawl through the Judgment of the court *a quo* in search for alleged instances of unwarranted questioning or interference.

[36] In the circumstances the first ground of appeal fails.

Whether the trial court applied the correct standard of proof

[37] It is perhaps convenient to deal with the other three grounds of appeal under this head. The initial argument by the Appellant was that the Crown failed to prove beyond reasonable doubt that the Appellant did not act in self- defence and/or that putative private defence was not established. This argument was closely linked to the contention that the trial court committed a fundamental irregularity by failing to apply the correct test for *dolus eventualis*. I intend to deal with the latter argument first.

[38] Counsel referred us to paragraphs [36] and [38] of the judgment and argued that on a plain reading of these it was apparent that the Learned Judge *a quo* applied the wrong test for *dolus eventualis*.

[39] At paragraph [36] the Learned Judge stated the following:

"In firing at the deceased in the manner described above, the accused realized or appreciated that he might fatally harm the deceased, nonetheless he persisted in doing so reckless whether death was the ultimate result of his act or not".

[40] At paragraph [38] the Learned Judge went on to state as follows:

"From the above analysis of the facts and the applicable law, I hold that the Crown has proven beyond reasonable doubt that the accused had the requisite mens rea in the form of indirect intention, in bringing about the death of the deceased. I cannot agree with Counsel for the defence that he is guilty of the lesser crime of Culpable Homicide. The accused did not fail to foresee that which a reasonable person would have foreseen. On the contrary, he realized that his actions might kill the deceased but went ahead and committed such action. The result was the death of the deceased".

[41] Counsel submitted that on a proper analysis these two paragraphs indicated that the Learned Judge confused the requirements for *mens rea* in the form of *dolus eventualis* and those of *culpa* (negligence), and consequently applied the wrong test thereby coming to a wrong conclusion. He argued that the proper approach was for the Learned Judge to have enquired whether on the evidence as a whole did the Appellant foresee the possibility of fatal injury to

the deceased, and whether he reconciled himself with this consequence by discharging his firearm in the manner that he did. He argued that the test for foreseeability is subjective and not objective. He contended that the Learned Judge's statement in paragraph [38] to the effect that *"The accused did not fail to foresee that which a reasonable person could have foreseen"* aptly demonstrated that he confused the tests for *culpa* and *dolus eventualis*. Counsel urged us to follow the Supreme Court of Appeal of South Africa decision in ***Humphrey v The State (424/12) [2013] ZASCA 20 (22 March 2013*** , where a conviction for murder was set aside on account of the trial court having incorrectly concluded that the State had proved *dolus eventualis*.

[42] Thus, the first issue for determination is whether the Learned Judge applied the correct test for *dolus eventualis*. The answer to this question necessitates a brief examination of some landmark decisions in our jurisdiction which deal with the subject. In ***Anna Lokudzinga Mathenjwa v R SLR 1970 – 76*** the Court of Appeal per Schreiner P, at page 27, stated as follows:

> *"The element of intent to kill includes an intention do an act which the doer realises entails a risk to life, coupled with recklessness as to whether death results or not".*

[43] At page 30 the Learned Judge went on to say that:

> *"But the further question must now be considered whether the appellant was rightly convicted of murder. I understand the position to be that if the doer of the unlawful act, the assault which caused the death, realised when he did it that it might cause death, and was*

reckless whether it would do so or not, he committed murder. If he did not realize the risk he did not commit murder but was guilty of culpable homicide, whether or not, as I have already indicated, he ought to have realised the risk, since he killed unlawfully".

[44] In ***Maphikelela v R 1979 + 81 SLR 195 (CA)*** the test adopted and applied in ***Annah Lokudzinga Matsenjwa*** (supra) was confirmed by Dendy – Young JA, at page 197, where he stated the following;

"As I understand the law in Swaziland the South African concept of dolus eventualis has been applied and the test has been stated this way: "If the assailant realises that the attack might cause death and he makes it, not caring whether death occurs or not that constitutes mens rea *or the intention to kill" And the way this test has been applied is whether the assailant must have realised the danger to life and if he must have realised it in the opinion of the court then by inference he did realise it. This way of putting the test has created considerable difficulty in its application because it has been found difficult to distinguish the concept of 'must have realised' from 'ought to have realised'. But the concept of 'ought to have' is of course one relating to negligence which has no place in a crime of murder...A man acts with dolus eventualis if he at least consents to, or approves of, or reconciles himself to, the possibility of death on the part of the deceased as part of the price he is prepared to pay for carrying out his intention; in other words, it becomes part of the bargain he makes for himself".*

[45] In ***Vincent Sipho Mazibuko v R 1982 – 86 SLR 377 (CA)*** Hannah CJ at page 380 said:

> *"The real question before this court, and the question to which Mr. Liebowitz devoted most of his submissions, is whether the only inference properly to be drawn from the evidence was that at the material time the appellant had the intent to kill the deceased. A person intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not".*

[46] In ***Sihlongonyane v Rex (40/47) [1997] SZSC 35 (24 September 1997)*** Tebbutt JA articulated the position as follows:

> *"It will be appreciated that cardinal to the whole concept of dolus eventualis is the element of foresight.*
>
> *It is perhaps this that has caused the greatest confusion in deciding whether the Crown has established dolus eventualis or merely culpa, due, it would seem, to a lack of proper appreciation of the distinction between the two. In the case of dolus eventualis it must be remembered that it is necessary to establish that the accused actually foresaw the possibility that his conduct might cause death. That can be proved directly or by inference, i.e if it can be said from all the circumstances that the accused must have known that his conduct could cause death, it can be inferred that the actually foresaw it. It is here, however, that the trial court must be particularly careful. It must not confuse "must have known" with*

"ought to have known". The latter is the test for culpa. It is an objective one".

[47] The authorities referred to above have been cited and referenced in numerous cases in this jurisdiction, particularly by this court.

[48] From this long line of authorities it is clear that for the Crown to secure a conviction for murder it must prove beyond reasonable doubt (i) subjective foresight of the possibility of death resulting from the doer's unlawful conduct and (ii) recklessness as to whether or not death results. The recklessness required for legal intention to kill means the taking of a conscious risk. The accused foresees the consequence in question as a real possibility and yet persists in his conduct irrespective of whether it results or not. Recklessness in this context does not involve negligence, whether gross or slight.

[49] For so long as a trial court places the correct meaning on the requirement of recklessness the outcome should not be any different than the ***Humphrey's*** case where the second element of the test for *dolus eventualis* was stated as *"reconciliation with the foreseen possibility"* (of death). Moreover, in that case Brand JA was careful to point out, referring to ***S v Ngubane 1985 (3) SA 677 (A)***, that "recklessness" must be understood as meaning *" consenting, reconciling or taking into the bargain... and not the recklessness of the Anglo American systems nor an aggravated degree of negligence."* Thus, in substance there is no material difference whether the question is "did the

accused reconcile himself with the foreseen possibility of death" or "was the accused reckless as to whether or not death results". This much was confirmed by the Supreme Court of Appeal in ***Director of Public Prosecutions, Gauteng v Pistorius (96/2015) [2015] ZASCA 204 (3 December 2015)*** where Leach JA, in commenting on the second element of *dolus eventualis* said –

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

[50] Turning to the facts of the present case. At paragraph [35] Mamba J. concluded that there was *'absolutely no justification for the accused to fire a gun at the fleeing deceased'*. He concluded that *"he surely must have realized that by so doing he might fatally injure the deceased in the process"*. At paragraph [36] he continues to say that *"in firing at the deceased in the manner described above the accused realized or appreciated that he might fatally harm the deceased"*. These statements in my view clearly indicate that the Learned Judge was alive to the first requirement of *dolus eventualis*, that is, subjective foresight. His conclusion that the appellant *"must have realized"* is consistent with the test articulated in the authorities reviewed

earlier in this judgment. The Learned Judge also concluded that *"nonetheless he persisted in doing so reckless whether death was the ultimate result of his act or not"*. Again, this indicates that he was alive to the second requirement of volition or reconciliation to the possibility of death or recklessness as to whether death occurs or not. Thus, I am satisfied that the Learned Judge applied the correct test.

[51] The Learned Judges' statement in paragraph [38] to the effect that the *"accused did not fail to foresee that which a reasonable person could have foreseen"*, although appearing to suggest that he was confusing "must have" with "ought to have", does not detract from the fact that in paragraphs [35] and [36] he referred to and applied the correct test. Had the Learned Judge not done so I would have had no hesitation in concluding that he applied the incorrect test. Put differently, had the statement in paragraph [38] been the only instance at which the Learned Judge interrogated the requirements of *dolus eventualis*, his judgment would be liable to be set aside, and the correct test applied to the facts.

[52] Having established that the correct test for *dolus eventualis* was applied the next issue for determination is whether the Crown discharged the onus of proving beyond reasonable doubt that the Appellant was guilty of the crime of murder, and the Appellant's putative private defence correctly rejected by the trial court. It must be borne in mind that proof of the guilt of an accused beyond reasonable doubt and the question whether an accused's version is reasonably possibly true are not separate and independent tests. A court does

not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond a reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. A holistic approach to all the evidence is required as opposed to a fragmented and compartmentalized approach to the evidence. A court is bound to acquit an accused if there exists a reasonable possibility that his evidence may be true.

[53] The leading authority which sets out the requirements for putative private defence is the case ***S v De Oliviera 1993 (2) SACR 59 (A)*** in which Smalberger JA said:

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

[54] In ***Ngobeni v The State (1041/2017) ZASCA 127 (27 September 2018)***, the court, after setting out the above requirements added:

"Therefore, it must first be determined whether or not an accused acted deliberately or irrationally. In order to gain an impression of an accused's state of mind, consideration must be given to the prevailing circumstances

and the testimony of the witnesses in accordance with the testimony of the accused." In dismissing the appellant's putative private defence the court went on to hold that:

"A further reason why the defence of putative defence was doomed to fail was that in his defence the accused said that he did not know how he came to shoot the deceased. A person can rely on private defence, or putative defence, if they acted with the intention of defending themselves...In other words, a claim that the accused was acting in private defence, whether actual or putative, depends on the accused being aware that they were acting in private defence. As Professor Snyman, supra, 112, correctly says, there is no such thing as unconscious or accidental private defence."

[55] In *casu*, it is common cause that the deceased died from a gunshot wound, and that the bullet which caused the fatal injury entered the right side of his back and exited the front right side of his trunk. The police pathologist testified that the wound showed that *"the person who was shooting was above a meter distance from the person who was shot"*, and he termed it as a *"distant wound"*. He explained that this type of wound was characterized by the absence of burnt particles or ash around the entry point of the bullet, a clear wound he said. He further explained that even though the deceased had been operated upon when he arrived at the hospital, in terms of standard procedure only the wound on his front side would have been cleaned, not the one at the back since they did not intend to operate on it. He conceded, however, that if the bullet entry point was on the front side of the deceased there was a possibility that the operating team would have cleaned and removed the burnt particles or ash coming from the bullet. He further conceded that his

conclusion in this regard was based on assumptions as he was not present when the operation was conducted.

[56] Although the defence counsel was able to win the concessions referred to above the pathologist's conclusion on the distance between the deceased and Appellant when the firearm was discharged remained unchallenged, nor was it put to the pathologist that the distance was much shorter or lesser than as concluded by the pathologist. The only suggestion that it was much shorter or closer came from the Appellant's evidence in chief.

[57] In his evidence in chief the deceased's colleague testified that they (he and the deceased) were walking together on the road near Dvokolwako when the fateful shooting incident occurred. He stated that the Appellant was travelling in a police motor vehicle which stopped at the spot where they were hitch-hiking. The deceased approached the driver's side of the vehicle with the intention of asking for a lift. He said on realizing that the driver's door was being forcefully opened because of the noise generated by the occupant (Appellant) he called upon the deceased to run away. At that point the Appellant alighted and shot at the fleeing deceased. There was no mention of a fight or any physical contact between the deceased and the Appellant. The witness was cross examined at length, but glaringly the Appellant's version that he was attacked and strangled or throttled by the deceased, which is crucial to his defence, was not put to him.

[58] The Appellant's colleague (the accomplice witness) also testified that when the Appellant discharged his firearm the deceased was fleeing, although in his previous statement he said there was a "fight". His initial meaning of the word "fight" involved physical contact, but he later changed to say that what he meant was that the deceased was *"running and the accused chasing him"*. Despite this inconsistency the accomplice witness denied that the firearm went off whilst there was a struggle between the Appellant and the deceased. Again, the Appellants' version that he was attacked and strangled or throttled by the deceased was not put to the accomplice witness.

[59] The evidence of the accomplice witness that the deceased was fleeing when he was shot was accepted by the trial court and found to have been corroborated by the evidence of the police pathologist in this material respect. On this basis the argument that the Learned Judge failed to apply the cautionary rule in dealing with the evidence of the accomplice witness cannot be sustained.

[60] The Appellant's version was that he was attacked and strangled or throttled by the deceased prior to the shooting. In his evidence in chief the Appellant testified that when he alighted from the police vehicle he *"realized somebody was in front of him, having grabbed him"*. He said he *"could feel human hands holding"* him and as a result he had *"difficulty in breathing"*. He said he was getting *"weak"* due to being grabbed. He was asked where the deceased holding him, his response was that he was *"holding me on the neck or had grabbed my neck as if he was squeezing it."* He went on to say that *"I*

was able to take out the gun as this person was not holding my hands, so I took out the gun. And as soon as I took out the gun I fired because I was getting weak". Notably, this detailed altercation of being grabbed by the neck and being throttled was neither put to the accomplice witness nor the deceased's colleague.

[61] When the Appellant was asked by his counsel how far he was when he shot him (the deceased) his response was that he could not be able to estimate because it was very dark but he *"could say that he was close by because at that time I was still feeling the hands that were grabbing me".*

[62] If the Appellant's version that the deceased was *"grabbing"* him at the time the firearm was discharged were to be accepted, then it must be equally accepted that the deceased must have been facing the Appellant at that particular point in time. For it would have been an impossible human feat for the deceased to have been "grabbing" or holding the Appellant "by the neck", whilst facing the opposite direction. Furthermore, if the Appellant's version is correct the bullet would have hit and entered the front side of the deceased's body, not his back. Nowhere does the Appellant nor his evidence explain this glaring anomaly. I also find it improbable and inconceivable that the deceased would have attacked a police officer, alighting from a police vehicle, without saying a word and for no apparent reason. In my view the trial court correctly rejected the Appellant's version.

[63] As was pointed out by Malan JA in ***R v Mlambo 1957 (4) SA 727 (A) 738***

"An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

[64] In ***S v Shackel 2001 (4) SA 1 (SCA)*** Brand AJA stated the following-

"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, that in view of this standard of proof in a criminal case a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true."

[65] In *casu*, the Appellant's version certainly cannot be reconciled with the proved facts. Since it has been established by clear and uncontradicted evidence that the deceased was shot at the back, from a distance of about a metre away from the Appellant, the deceased could not have been grabbing or throttling him at the time the firearm was discharged. And neither could the deceased have been advancing towards the Appellant at that point in time.

This being so, objectively the Appellant was under no threat whatsoever from the deceased. There is no acceptable or objective evidence that the Appellant could have reasonably believed that his life was in imminent danger that required him to draw his firearm and shoot the deceased. A reasonable man in the position of the Appellant, being a trained police officer, would not have drawn a firearm and shot the deceased who was fleeing. The Appellant could not have intended to act in self defence against a person who was fleeing from him.

[66] In the circumstances, the claim to putative private defence must fail. The trial court correctly convicted the Appellant of the crime of murder.

ORDER

[67] The appeal is hereby dismissed, and the High Court Order on conviction confirmed.

M.J. MANZINI AJA

I agree

S.B. MAPHALALA JA

I agree

J.M. MAVUSO AJA

For the Appellant: **Adv. T. Ngwenya (instructed by T.M. Bhembe Attorneys)**

For the Respondent: **T. Mamba**