IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.:A52/2021

In the matter between:

BULELANI SICUBENI Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 01 DECEMBER 2021

MANGCU-LOCKWOOD *et* KUSEVITSKY, JJ: (concurring) and **THULARE AJ**, (dissenting)

I. INTRODUCTION

[1] This is an appeal against a conviction and sentence imposed against the appellant by a Magistrate in the Hermanus Magistrate's Court. The appeal comes before us with leave from the court *a quo*.

[2] The appellant was charged with unlawfully and intentionally killing the deceased, Miriam May with a firearm. The Magistrate found the appellant guilty of the charge, and imposed upon him a sentence of eight years' direct imprisonment, and

deemed him unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

II. THE FACTS

[3] The evidence led is comprehensively set out in the judgment of the court *a quo*, and, unless relevant, it is not necessary to repeat it in detail.

[4] Most of the moments leading to the fateful shooting are not in dispute. The appellant is a police officer. On the day in question, he and a fellow police officer (*"Constable Mvimbi"*) attended at a house in Stanford where the deceased lived together with her partner, Frikkie Sardine (*"Frikkie"*)[1] and her daughter, Bertoline May (*"Bertie"*). The police officers were investigating a case of a stolen generator which was alleged to be in the possession of Frikkie. They had also gone to warn Frikkie not to go to a local Somalian shop because they had received complaints about his conduct there.

[5] Upon arrival, the police officers did not receive a warm welcome, not least from the family's pit-bull, which is recorded to be *"quite a big dog"* of about 50cm or half a metre in height (*"the dog"*), and was unchained in the yard. In order to gain entry into the yard and ward off the dog, the police officers used steel rods. Even still, Frikkie had to restrain the dog to enable the police officers to gain entry inside the house.

[1] Sometimes referred to in the record as *"Freaky"*.

[6] It is also common ground that upon gaining entry inside the house, the situation between the police officers on the one hand, and the deceased's family on the other, was chaotic and aggressive. Frikkie and family were shouting and swearing at the police officers because the latter sought to search the former's house for the generator. The deceased, who appeared to be doing laundry, was annoyed because she had been released from prison on the previous day; yet there were police officers in her house. She started throwing dirty laundry at the police officers.

[7] According to the police officers they found the generator under the pile of dirty laundry that the deceased appeared to be washing. When the police officers tried to apprehend Frikkie to take him to the police station for further questioning, a more aggressive physical struggle ensued, resulting in some items of the appellant's uniform falling to the ground. Both the deceased and Frikkie were physically pushing the police officers out of their home. Frikkie managed to break free from being apprehended, and ran outside the house, which caused Constable Mvimbi to chase after him. The appellant was left behind with the deceased, and Bertie who, by now, was wielding a stick in her hand.

[8] From this point onwards, there are vast differences between the version of the appellant and Constable Mvimbi on the one hand, and the version of the state witnesses on the other. The Magistrate rejected the evidence led on behalf of the appellant as far-fetched and improbable, and his judgment is based on the evidence led

on behalf of the state. The witnesses called on behalf of the state were Arsene Williams (*"Williams"*), Shireen Julies (*"Ms Julies"*) and Frikkie.

[9] According to all the witnesses who gave evidence on behalf of the state, when Frikkie ran out of the house, he left the yard and ran into the street, and Constable Mvimbi followed him into the street. This left the appellant with the deceased, Bertie and the pit-bull outside the house but still inside the yard. The pit bull was snarling and growling at the appellant, and had to be restrained by the deceased from moving towards the appellant. The appellant started chasing after Frikkie, towards the gate leading outside of the yard. The dog broke loose from the deceased and started running behind the appellant. It was at this point that the appellant turned around, aimed at the dog, and fired two shots in rapid succession. According to both Ms Julies and Mr Williams, when the appellant fired the shots, the dog was approximately 2 to 3 metres behind him, and was also about the same distance in front of the deceased. According to ballistic evidence, the first shot killed the dog, and the second one hit the deceased in the chest and killed her immediately.

[10] The appellant's version, which was corroborated by Constable Mvimbi, was that, when Frikkie escaped from being apprehended by the police officers in the house, he (Frikkie) first untied the dog which had been tied to a door when the police officers gained entry into the house, and 'aimed' or directed the dog to attack the police officers. According to the appellant, Frikkie did not immediately exit the yard but initially ran in a direction opposite the gate. The appellant then stood in such a

way as to block Frikkie from reaching the gate when he decided to do so; whilst Constable Mvimbi was blocking another route, inside the yard, so that Frikkie would not escape in that direction. Next, Frikkie and the dog sprinted in the appellant's direction. When the appellant tried to apprehend Frikkie, the dog jumped and bit the appellant on his left forearm. Thereafter, the appellant walked towards the house, where he had earlier discovered the generator, and was alerted by Constable Mvimbi that the dog was coming after him. This is when he shot the dog.

[11] The appellant further testified that when he shot the dog, the deceased was inside the house and, upon hearing him shoot the dog, she came out brandishing a steel rod, seeking to attack him with it for shooting the dog. When the deceased was approximately 3 meters away from the appellant, Constable Mvimbi intervened to block her from approaching the appellant any further. The deceased, however, was trying to break loose. The appellant was covering his face with his hands for protection because he also saw the deceased trying to throw the steel rod at him. The deceased managed to break free from Constable Mvimbi and started approaching the appellant, and also made a motion indicating that she was about to throw the steel rod at the appellant. That is when the appellant fired a shot at her, in fear for his life.

[12] In the court *a quo* the appellant relied on private defence in order to escape liability, and as a result, a substantial part of the Magistrate's decision dealt with the element of unlawfulness, and in particular the appellant's defence. As I have already indicated, the Magistrate rejected the appellant's version as being far-fetched and

improbable. After dismissing the appellant's defence, the Magistrate considered the element of intention and concluded that the appellant had possessed the form of intention known as *dolus eventualis*, and thus found him guilty of murder.

III. THE APPEAL GROUNDS

[13] According to the notice of appeal, the grounds of appeal against the conviction are that the court *a quo* erred in not finding that the appellant acted out of necessity, private defence, alternatively putative necessity or private defence. However, in the appellant's heads of argument and in the hearing before us the reliance on private defence was abandoned, and the appellant's counsel placed emphasis on the defence of necessity, and in the alternative, it was argued that the appellant lacked the necessary *mens rea* to kill the deceased; and in the further alternative, that the appellant's conduct was not negligent (*"the new defences"*). As regards the sentence imposed, it was argued on behalf of the appellant that the court *a quo* failed to take into account the appellant's circumstances, and ultimately that the sentence is startlingly inappropriate shocking and unreasonable.

[14] The parties were invited by Court Directive to file further submissions regarding the basis on which this Court may determine the appeal based on the new defences raised by the appellant which were not raised in the Magistrate's Court. The state opposes such an approach on the basis that the new defences amount to *"new evidence which the respondent has no power to challenge and disprove"*. No further detail is provided in this regard.

[15] The legal position is that the mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, a court may in the exercise of its discretion consider the point.[2] The legal contention must also raise no new factual issues.[3] Unfairness may arise, for example, if the law point and all its ramifications were not canvassed and investigated at trial.[4]

[16] In addition to the above, the following was stated in *Cole v Government of the Union of South Africa*[5]:

> *"…And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and, there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset."*

[17] It is evident when having regard to the above principles that unfairness will be occasioned upon the respondent if the matter is determined based on the new defences. First, as appears above, the facts were not common cause between the parties. The appellant relied on a version of events which was eventually rejected by the Magistrate. But it now appears that the appellant, in raising the new defences on

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[2] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para [39]. See also *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 44; *Cole v Government of the Union of SA* 1910 AD 263 at 273; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 24-5; and *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 290.

[3] *Alexkor Ltd and Another v The Richtersveld Community and Others at para [44]; Paddock Motors (Pty) Ltd v Igesund* above n 31 at 23G-H.

[4] *Barkhuizen v Napier* para [39].

[5] At 272-3.

appeal, no longer wishes to rely on the version he relied on in the trial court. In fact, during the hearing of this appeal, the appellant's counsel was constrained to concede that he could not persist with reliance upon the appellant's version of events. This is a concession well-made because it is trite that a court of appeal is bound by the factual findings of the trial court except where these findings are wrong or not borne out by the record. This is especially the case when the findings are dependent on the credibility of the witnesses who testified.[6] The consequence is that the version given by the appellant in the trial court cannot be tested against these new defences that are now raised on appeal. In effect, the appellant's new defences appear to be tailored to fit in with the evidence that was upheld by the Magistrate. This is impermissible, and the State is justified in stating that it has no power to challenge and disprove the new defences, which is patently unfair.

[18] Even more perplexing is that the appellant partly relies on his already rejected version as a basis for the new defences in the supplementary heads of argument submitted on his behalf. It is stated that the Magistrate failed to take into account the fact that the pit-bull was so aggressive towards the appellant that it bit him, resulting in bite marks. However, the version that the pit-bull attacked the appellant, causing him to sustain injuries was rejected by the Magistrate. The Magistrate did accept, however that the pit-bull was generally aggressive towards the appellant. The result is that the appellant is now combining the two versions to make his argument. This demonstrates the danger of determining this appeal based on the new defences.

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[6] See *Liesching and others v S* [2018] ZACC 25; 2019 (1) SACR 178 (CC) para 94; See also *Modiga v The State* [2015] ZASCA 94; [2015] 4 All SA 13 (SCA) para 23.

[19] As regards the defence that the appellant did rely upon in the court *a quo,* namely private defence, it is understandable that the appellant no longer wishes to rely on it. According to the version accepted by the Magistrate, the shot that killed the deceased was in fact directed, not at the deceased as the appellant claimed, but at the dog. That being the case, there can be no talk of private defence, because one of the requirements for such a defence is that it must be directed at the attacker. Thus, there was no misdirection by the Magistrate in rejecting this defence. There was furthermore no misdirection in the Magistrate considering that ground, as is now claimed, because it was the appellant who sought to rely on it, and as a result, that ground required examination.

IV. LEGAL PRINCIPLES ON APPEAL

[20] To secure a conviction, the State has to prove all the elements of the crime beyond reasonable doubt. If there is a reasonable possibility that the accused is not guilty, (s)he should be acquitted.[7] The accused should be convicted if the court finds not only that his or her version is improbable, but also that it is false beyond reasonable doubt. It is not necessary for the court to believe an accused person in order to acquit him or her.

[21] The State has to prove its case against an accused beyond reasonable doubt, but in evaluating the evidence, the trial court is entitled to consider the probabilities and

[7] *S v V* 2000 (1) SACR 453 (SCA) para [3].

improbabilities. As stated in *S v Chabalala*[8], *"[t]he correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."*

[22] An accused's version cannot be rejected merely because it appears to be improbable. It must be shown, in light of the totality of the facts, to be so untenable and/or improbable and/or false that it cannot reasonably possibly be true.[9]

[23] In the absence of factual error or misdirection on the part of the trial judge, his or her findings are presumed to be correct.[10] Only where the Court of Appeal is persuaded that the conclusions of the trial judge are incorrect will it be overturned.[11] A Court of Appeal must moreover refrain from speculating about possible explanations which were not even raised by the appellant.[12]

[24] Bearing, the above legal principles in mind, I do not find that there was a misdirection with regards to the factual and credibility findings made by the trial court, except in respect of the application of the principle of *dolus eventualis*, which is discussed below. In fact, in relation to the factual and credibility findings made by the

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[8] *S v Chabalala* 2003 (1) SACR 134 SCA at para [15]. See also: *S v Trainor* 2003 (1) SACR 35 (SCA) at 41B–C.

[9] See *S v Schackell* 2001 (2) SACR 185 (SCA) at para [30]; and *S v V supra*.
[10] *S v Bailey* 2007 (2) SACR 1 (C) at [16].
[11] *S v Ntsele* 1998 (2) SACR 178 (SCA) 182D-H.
[12] *S v Rubenstein* 1964 (3) SA 480 (A) 487H.

Magistrate, it bears repeating that, in argument before us, the appellant's counsel did not persist with reliance upon the appellant's version of events that was relied upon in the trial court. Instead, the grounds of appeal raise new defences which were not raised in the trial court. It cannot be said that the Magistrate misdirected himself in this regard because the appellant did not raise them there.

V. THE *DOLUS EVENTUALIS* FINDING

[25] As I have already indicated, the Magistrate's finding on *dolus eventualis* amounted to a misdirection in my view and requires reconsideration. First, the relevant legal principles.

[26] The test for *dolus eventualis* is two-fold:[13] (a) Did the appellant subjectively foresee the possibility of the death of the deceased ensuing from his conduct; and (b) Did he reconcile himself with that possibility?[14]

[27] As the courts have emphasised, for the first component of *dolus eventualis* it is not enough that the appellant should (objectively) have foreseen the possibility of the deceased's death as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form. Further, one should avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the

[13] *S v Sigwahla 1967(4) SA 566 (A) at 570.*

[14] *See for example S v De Oliveira 1993(2) SACR 59 (A) at 65I - J.*

consequences, it can be concluded that he did. That would conflate the different tests for *dolus* and negligence. As Holmes JA stated in *S v Sigwahla*[15] -

> "*The fact that objectively the accused ought reasonably [to] have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a bonus paterfamilias in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred. The factum probandum is dolus, not culpa. These two different concepts never coincide.*
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> *Subjective foresight, like any other factual issue may be proved by inference. To constitute proof beyond reasonable doubt, the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so."*

[28] The subjective element is a factor that needs careful examination on the facts of this case. It is correct that, at the time of the incident, the appellant was a trained police officer of some eight years. However, on the evidence of the state witnesses, what was foremost on the appellant's mind at the time of the shooting was catching Frikkie. The evidence of both Ms Julies and Mr Williams was that the appellant was running towards the street, where Frikkie had escaped to at the time of the shooting. After all, the appellant and his fellow police officer had attended at the deceased's address on that day on an official visit, and up to that point they had faced resistance but had continued in their quest to investigate and apprehend Frikkie. So serious was their official quest that, after the events of that day, Frikkie was in fact charged for, amongst other things, possession of the stolen generator.

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[15] *S v Sigwahla* 1967 (4) SA 566 (A) at 570B-E.

[29] The appellant and his partner had been thrown with dirty laundry inside the house. There had already been a scuffle which had resulted in some items of the appellant's uniform being ripped to the ground. Yet in all that time, the appellant had restrained himself from resorting to aggression or retaliation. In fact, the evidence of Mr. Williams was that, outside the house, the police officers were trying to bring calm, while the family was aggressive and violent. So, in the absence of evidence to the contrary, it must be accepted that in the moments leading up to the point of the shooting, what was foremost on the appellant's mind was catching Frikkie.

[30] However, the unfolding of events was chaotic because the family was aggressive and shouting and swearing at the police officers, and also because a very big pit-bull was chasing after the appellant. It is not unreasonable to infer that, by shooting at the dog, he thought he could quickly bring calm and remove one obstacle to his official quest. Yet another possible reasonable inference is that he was genuinely scared that the dog would harm him, and he shot it to quell the danger. On either reasonable inference, what is clear is that one cannot come to a conclusion that there is proof beyond reasonable doubt that the only inference that can reasonably be drawn is that he was thinking even remotely about the deceased, let alone shooting her. What is more is that the dog was in motion when the appellant shot it. It is not clear whether the deceased herself was moving at the time, given that the pit-bull had just escaped from her control and that, up to that point she had been trying to restrain it with her leg. In light of all these considerations, it is difficult to conclude that the

appellant subjectively foresaw that the deceased would die as a consequence of his conduct of shooting at the dog.

[31] The application of the second element of *dolus eventualis,* namely whether it was established that the appellant reconciled himself with the consequences of his conduct which he subjectively foresaw, also needs examination. The following was stated in *S v Ngubane*[16] :

> *'A [person] may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, eg by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility . . . . The concept of conscious (advertent) negligence (luxuria) is well known on the Continent and has in recent times often been discussed by our writers'.*
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> *Conscious negligence is not to be equated with dolus eventualis. The distinguishing feature of dolus eventualis is the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain"*
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> *The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible death he subjectively foresaw would not actually occur, the second element of dolus eventualis would not have been established.'*

[32] Here too, there are difficulties with the decision of the Magistrate regarding *dolus eventualis*. From the evidence, there is no indication that the appellant took a bargain and consented to the consequence of the deceased's death, which he had foreseen as a possibility, or that he reconciled himself to it. Instead, the evidence established that this was a moving scene, involving unpredictable characters, including the dog. There is no evidence that the appellant was even taking note of where exactly each of these characters was, at any given point, given that before the

[16] *S v Ngubane* 1985 (3) SA 677 (A) at 685A-F.

shooting he was facing forward and chasing Frikkie. Rather, the accepted evidence was that he turned around in order to shoot at the dog, and all the witnesses agree that this happened very quickly. It is therefore difficult to conclude that he took a bargain in this regard or reconciled himself to the possibility of the deceased's death.

[33] For all these reasons, I am not persuaded that the appellant possessed an intention in the form of *dolus eventualis*. In this regard, I am of the view that the Magistrate misdirected himself.

[34] As a result, I am of the view that the appellant should rather have been found guilty of a lesser charge, namely culpable homicide, being the unlawful, negligent killing of a human being.[17]

[35] The next issue that requires consideration is the appropriate sentence that should be meted out in light of the conclusion that the Magistrate's conviction of murder is to be set aside and replaced with a conviction of culpable homicide.

VI. SENTENCE

[36] Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed.[18]

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[17] See Snyman, *Criminal Law*, 4th ed at p 425; Burchell and Milton, *Principles of Criminal Law*, 2nd ed at p 474; Milton, *South African Criminal Law and Procedure* Vol 11, 3rd ed at p 364.

[18] *S v Anderson* 1964 (3) SA 494 (AD) (*Anderson*) at 495C-H. See also *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA) at para 10.

It can only do so where there has been an irregularity that results in a failure of justice;[19] the court below misdirected itself to such an extent that its decision on sentence is vitiated;[20] or the sentence is so disproportionate or shocking that no reasonable court could have imposed it[21]. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.

[37] As I have stated, in light of the conclusion I have reached regarding conviction, it is necessary to consider the appropriate sentence afresh in light thereof.[22] To reach an appropriate sentence, a court is duty-bound to consider the nature and the seriousness of the offence that the accused has been found guilty of, the personal circumstances of the accused as well as the interests of society - what is often referred to as the triad of considerations.[23]

[38] A court must also take into consideration the main purposes of punishment; namely retribution, deterrence, prevention and rehabilitation. All these must be

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[19] *S v Jaipal* [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC) (*Jaipal*) at para 39 and *R v Solomons* 1959 (2) SA 352 (AD) at 366C.

[20] *Anderson* above n 37 at 495D and Kruger *Hiemstra's Criminal Procedure* Service Issue 5 (LexisNexis, Cape Town, 2012) (Hiemstra) at 30-49 to 30-50 for a full discussion on misdirection.

[21] This standard has been articulated differently in several cases, including whether the sentence was "startlingly" or "disturbingly" inappropriate or whether it "creates a sense of shock". Ultimately, however, the question at which all of these formulations are aimed is whether the court could reasonably have imposed the sentence that it did. See for example *S v Sadler* 2000 (1) SACR 331 (SCA) at para 8 and *S v Bolus and Another* 1966 (4) SA 575 (AD) at 581E-G.

[22] *Bogaards v S* 2013 (1) SACR 1 (CC) para 41.

[23] *S v Zinn* 1969 (2) SA 537 (A) at 540G.

accorded due weight in any sentence. As the SCA has stated in *S v RO and Another*[24] :

> "*Sentencing is about achieving the right balance or in more high-flown terms, proportionality. The elements at play are the crime, the offender, the interests of society with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific, even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions."*

[39] Once again, the court *a quo* has comprehensively set out the personal circumstances of the appellant, and there is no need to repeat them in detail. In this case there were also detailed reports by a probation officer and a correctional officer, which succinctly set out the personal circumstances of the appellant.

[40] At the time of the offence, the appellant was a 37 year-old police officer. He was a first-time offender and had never been convicted of any offence previously. He was reported to be a hard-working individual who performed his duties with diligence and was goal orientated. He enrolled at a police training academy, and eventually graduated as a constable in 2011. Thereafter, he immediately started working as a police officer. He also obtained a Bachelor's Degree in policing from the University of Tshwane.

[41] The appellant has three children, one of whom lives in the Eastern Cape with the appellant's mother. At the time of the offence the appellant lived with his partner and their two children in Stanford, and he was reported to have healthy relationships

[24] *S v RO and Another* 2000 (2) SACR 248 (SCA) at paragraph 30.

with them. The appellant earned a salary of R17 000 per month, and was reported to support his children emotionally and financially.

[42] There was furthermore no doubt during the trial that, even at the scene of the incident, the appellant felt remorse about the death of the deceased. Furthermore, a clinical psychologist recorded that the appellant felt remorse, and harbored guilty feelings regarding the deceased's family and her children. This was confirmed by the probation officer allocated to the appellant. The clinical psychologist further reported that the incident had a negative effect on the appellant, who now has severe insomnia, was anxious and depressed.

[43] There is no doubt that the killing of a human being, even if found to be on a negligent basis, is a very serious offence in the eyes of society. Even though the appellant did not intend to kill the deceased, the sad reality is that the deceased died of his inflicted wound. Even on the day of the incident, the deceased's family was distraught by her shooting. After all, she had just returned from prison on the previous day. There was evidence that Bertie, in particular, who witnessed the incident, was traumatized as a result. There was also evidence that there was unrest in the community of Stanford as a result of this incident, and that the higher leadership of the police had to intervene to quell the unrest.

[44] However, some mitigating factors to be taken into account are firstly that on the day in question, the appellant was on official business, and was conducting his

duties. As I have stated, Frikkie was later charged for being in possession of the stolen generator that the police officers were investigating on that day. Secondly, as I have set out earlier, the circumstances of the official visit that day were chaotic, and it was common cause that the deceased and her family were aggressive and violent towards the police officers. In addition, the evidence established that the pit-bull was also aggressive towards the police officers and specifically the appellant. I also consider the personal circumstances of the appellant summarized above to be a mitigating factors, including the fact that the accused is a first offender, and was remorseful, and was himself negatively affected by the incident.

[45] The interests of society demand that those who commit crimes must be punished and, in deserving cases, that they be punished severely. An appropriate sentence should neither be too light, nor too severe. The former might cause the public to lose confidence in the justice system and people might be tempted to take the law into their own hands. On the other hand, the latter might break the appellant, and the result might be just the opposite of what the punishment set out to do, which ultimately is to rehabilitate the accused and to give him an opportunity, where possible, to become a useful member of society once more.

[46] I have considered all the evidence placed before me, weighed all the relevant factors, the purposes of punishment and all forms of punishment, including restorative justice principles. I have also taken into account the seriousness of the offence which led to the death of the deceased, the personal circumstances of the accused and the

interests of society. I have also taken the particular circumstances of the appellant at the time of the offence into account.

VII. ORDER

[47] In the circumstances, I would make the following order:

46.1 The appeal against the conviction and sentence of the Magistrate's Court is upheld, and the Magistrate's conviction and sentence, including the order declaring the appellant unfit to possess a firearm, are set aside, and substituted with the following:

"46.1.1 The appellant is convicted of culpable homicide;

46.1.2 The appellant is sentenced to 2 years and 6 months' imprisonment, which is wholly suspended for a period of five years on condition that the appellant is not found guilty of the crimes of culpable homicide involving negligent use of a firearm.

46.1.3 The sentence is ante-dated to 17 December 2020."

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N. MANGCU-LOCKWOOD

Judge of the High Court

I agree, and it is so ordered.

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D. KUSEVITSKY

Judge of the High Court

THULARE AJ, dissenting

[1] This is an appeal against both conviction and sentence. The appellant, having pleaded not guilty, was convicted of murder and sentenced to eight years imprisonment in the Regional Court. The full bench could not agree and the Judge President added me to constitute the full court.

[2] The issue on appeal was the law applicable to the facts, and consequently the verdict and sentence. I read the judgment of my sister Mangcu-Lockwood, and I am unable to agree with her on both conviction and sentence.

[3] The appellant was a member of the South African Police Service since 2009 holding the rank of Constable and together with another member, Constable Sikokeli Mvimbi (Mvimbi) attended to the house of the deceased, Miriam May. They were following up on a complaint as well as information from a local Somali shopkeeper. The conduct related to the deceased's boyfriend, Frikkie Sardien (Frikkie), towards the Somali national and the information related to an alleged stolen generator which the shopkeeper alleged that Frikkie attempted to sell.

[4] Frikkie owned a big pit-bull dog, which usually lay at the door of the house. The two policemen carried sticks in their hands in order to ward off the dog if it attacked, when they entered the yard. The police announced the reason for their visit and went into the house. Frikkie, the deceased and her daughter, Bertie, were not happy with that visit and the search for the generator. The deceased had just been released from prison the previous day and expressed her anger that the police were in

her yard the very next day. She wanted them to leave. The three obstructed the police in their search for the generator. Be it as it may, the police found the generator hidden in the laundry in the bathroom, despite the efforts to stop them. Frikkie ran out of the house upon such discovery. Mvimbi gave chase.

[5] Frikkie ran out of the yard and Mvimbi followed him. The appellant also ran out. The deceased also left the house. The dog grunted outside the house. Frikkie called the dog, Ballas, from outside the yard in an effort to evade his arrest and exploit the police officers' fear of the dog. The deceased used her feet to restrain and block the dog from getting involved. She used her leg to trap the dog between her leg and a fence. The appellant threatened to shoot the dog. The deceased was instructing the dog to lie down. She was heard screaming: "Gaan le, Ballas". The dog managed to escape from the deceased and ran towards the direction of the appellant and the gate. The dog was between the appellant and the deceased. The appellant pulled his firearm, aimed it at the direction of the dog and the deceased and shot two bullets in rapid succession. The deceased was about three metres behind the dog. The dog made a sound and dropped.

[6] The deceased was struck by the bullet on the left of her chest. She was in shock and looked deep into the eyes of her neighbour, Arsene Williams (Williams), who was watching standing by the fence nearby. Williams asked the appellant why did he shoot at her. The appellant did not answer. The appellant then stood for a while with both his hands clasping the back of his head. Shereen Julies (Julies), was close to the gate

on the sidewalk just outside the fence in the vicinity of the police van as she was on her way to that house to visit Bertie. She saw the incident unfolding and she saw when the deceased struggled to restrain the dog and when the first bullet hit the dog. After the dog dropped she turned her face away and covered it with her hands. She also heard the second shot and when she looked up she saw the deceased falling down. At the time that the appellant shot both the dog and the deceased, Mvimbi was outside the gate, involved in an argument with Frikkie near the police van. The first shot hit the dog, the second shot hit the deceased.

[7] In *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204; [2016] 1 All SA 346 (SCA); 2016 (2) SA 317 (SCA); 2016 (1) SACR 431 (SCA) (3 December 2015) it was said at para 25 and 26:

> [25] It is necessary to explain certain of the issues that arise for consideration in a murder case. Over the years jurists have developed what has been referred to as the 'grammar of criminal liability'. As already mentioned, murder is the unlawful and intentional killing of another person. In order to prove the guilt of an accused on a charge of murder, the State must therefore establish that the perpetrator committed the act that led to the death of the deceased with the necessary intention to kill, known as *dolus.* Negligence, or *culpa,* on the part of the perpetrator is insufficient.
>
> [26] In cases of murder, there are principally two forms of *dolus* which arise: *dolus directus* and *dolus eventualis.* These terms are nothing more than labels

used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased. *Dolus eventualis,* on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to *dolus directus,* in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act 'reckless as to the consequences' (a phrase that has caused some confusion as some have interpreted it to mean gross negligence), or must have been 'reconciled' with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent."

[8] From the facts, it cannot be said that the appellant had the death of Miriam May as his direct objective. However, the appellant was aware of the grunting dog when he

left the house. The evidence showed that both policemen were afraid of the dog, such that they carried sticks to ward it off in case it attacked them when they entered the yard. Furthermore, when the appellant left the house, because of its grunting, the appellant made a threat that he would shoot the dog. This threat was even heard by Julies who was in the street, at the time that the deceased was restraining the dog. The appellant was concerned about and therefore kept the movements of the dog in check as he left the house and moved towards the gate.

[9] The deceased restrained the dog and was heard calling it to lie down. The appellant saw the dog approach his direction. When the dog left the restraint of the deceased, the appellant was aware that the deceased was directly behind the dog. When the appellant fired the two shots that fatally wounded the dog and the deceased, he was aware that the deceased was in the line of his firing. The appellant foresaw the possible death of the deceased, who was behind the dog and in his line of fire, and reconciled himself with that event. The appellant was correctly convicted of murder with *dolus eventualis,* read with section 51(2) of the Criminal Law Amendment Act, 1977 (Act No. 51 of 1977).

[10] In *S v Vilakazi* 2012 (6) SA 353 (SCA) at para 14 it was said:

> "It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to

the particular offence. The Constitutional Court made it clear that what is meant by the "offence" in that context (and that is the sense in which I will use the term throughout this judgment unless the context indicates otherwise) consists of all the factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and culpability of the offender.

If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That was also made clear in Malgas, which said that the relevant provisions in the Act vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which 'justify' … it."

[11] In *S v Dodo* 2001 (3) SA 382 (CC) at para 37 it was said:

"The concept of proportionality goes to the heart of the enquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue."

In *S v Malgas* 2001 (1) SACR 469 (SCA) at para 25 it was said:

> "If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

[12] The appellant was convicted of a serious offence to which the discretionary minimum sentence prescribed was applicable in terms of section 51 (2) of the Criminal Law Amendment Act 105 of 1997. In the case of a first offender, the regional court, unless it was satisfied that substantial and compelling circumstances existed which justified the imposition of a lesser sentence, had a prescribed sentence for a first offender, imprisonment for a period not less than 15 years.

[13] The deceased and Frikkie had been in conflict with the law before and their address was well-known to the SAPS for that reason. Frikkie and the deceased had tried to mislead the police around the generator. The deceased tried to stop the police from entering the bathroom where it turned out she was doing laundry. As the police went through the laundry under which the generator was hidden, after they entered the bathroom, she threw them with dirty laundry and insulted them. Frikkie tried to physically stop the police from entering the bathroom. The damage to police uniform and any injuries sustained by the police happened during the wrestling and shoving with Frikkie, first when he attempted to stop the search for the generator and then when he resisted arrest after the discovery of the generator. Frikkie broke loose form

the police grip and fled from the house. When he could not outrun Mvimbi, he called the dog, thereby deliberately setting it on the police. The appellant was the closest to the dog as it escaped from the deceased's restraint. This was a moving scene which was also clearly emotional and tense.

[14] The judgment of Mangcu-Lockwood J on sentence dealt with the personal circumstances of the appellant and the impact of the crime on the victims in some detail. He was a first offender and had been a member of the SAPS since 2011. He was 37 years of age, had studied and obtained a Bachelor's Degree in Policing and was due for promotion to the rank of Sergeant. He lived with a partner and had three children. But for the Regulations and Prescripts in the South African Police Service around conditions of employment and promotions, the appellant qualified to be a commissioned officer, and was simply waiting for years to amass experience and vacancies to be available. He had no history of concerns around discipline and commitment. Clearly, he made an error of judgment. Some mistakes, made in a split second, are simply very expensive and not only career-limiting, but can destroy a person, the family and a community.

[15] The deceased's family was distraught and Bertie had been traumatized as she witnessed her mother's killing. The incident led to a community unrest, directed at the SAPS. In my view, the magistrate was correct in holding that the imposition of the minimum sentence of 15 years, under the circumstances, was inappropriate. The

magistrate was also correct, in my view, to hold that three years imprisonment in terms of section 276(1)(h) including house arrest as a condition was in appropriate.

[16] The proper approach to an appeal on sentence has been set out as follows in *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA) at para 10:

> "[10] Mr *Myburgh,* who appeared for the respondents on appeal, submitted that the determination of a proper sentence for an accused person fell primarily within the discretion of the trial Judge and that this Court should not interfere with the exercise of such discretion merely because it would have exercised that discretion differently if it had been sitting as the court of first instance. This submission is undoubtedly correct, but it is clear that:
>
> 'The Court of appeal, after careful considerations of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence.'"

[17] In my view, having regard to the personal circumstances of the appellant and the gravity of the offence and balancing these against the interests of society, the magistrate imposed an appropriate sentence. The actual serious consequence of the offence is that a life was lost. There is an inherent interest as well as a legitimate expectation in South Africa for the justice system, especially the courts, to make their

contribution to turn our SAPS members from a manifestly heavy-handed approach to a constitutional articulation of a culture of human rights. Simply shooting twice, when the second shot was unnecessary, manifested a social conditioning, which in my view is relevant under the circumstances. The Namibian Supreme Court in *S v Van Wyk* 1992 (1) SACR 147 (Nm) at 173c-d said:

> "But there comes a time in the life of a nation, when it must and is able to identify such practices as pathologies and when it seeks consciously, visibly and irreversibly to reject its shameful past. That time for the Namibian nation arrived with its independence. The commitment to build a new nation was then articulated for everybody inside and outside Namibia to understand, to cherish, to share and to further. The appellant must, like other citizens, have been exposed to the force and the significance of this message."

[18] Although the court was speaking on racism, I found the comments equally compelling for the heavy-handed conduct of the police in a transitional period, especially as regards the unnecessary use of a firearm. The court continued at 173e-g:

> "To allow the 'racist-socialisation' of pre-independence Namibia to continue to operate as a mitigating circumstance, after the new Constitution has been publicly adopted, widely disseminated and vigorously debated both in Namibia and the international community, would substantially be to subvert the objectives of the Constitution, to impair the process of national reconciliation and nation-building and to retard the speed with which Namibian society has to recover from the legacy of its colonial past.

> … The sentence imposed should and did, in my view, correctly reflect the determination of the courts to give effect to the constitutional values of the nation and to project a strong message that such criminal manifestations … will not be tolerated by the Courts of the new Namibia."

[19] South Africans and those visiting our country must feel safe when they are in the company of our men, women and mixes in blue, including when the police are armed, and that message should be loud and clear. Mercy, for crimes committed in the line of duty, should not incentivize law enforcement officers to kill innocent members of the public. In this instance, an innocent unarmed woman was shot dead in her own home when she protected the very person who shot her. In an effort to help and restrain the dog, she exposed herself to pay the ultimate price.

[20] For these reasons I would make the following order:

The appeal on both conviction and sentence is dismissed.

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D. M. THULARE

Acting Judge of the High Court

APPEARANCES

For the Appellant	**:**	**Adv S C O'Brien**
For the Respondent	**:**	**Adv T Ntela** **National Director of Public Prosecutions**