THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 52/06

Reportable

In the matter between

THE DIRECTOR OF PUBLIC PROSECUTIONS TRANSVAAL **Appellant**

and

ERIC PAT MTSHWENI **Respondent**

Coram**:** **FARLAM, CLOETE, LEWIS JJA**

Heard: 17 AUGUST 2006
Delivered: 27 SEPTEMBER 2006

Summary: Where the presiding judge at a trial believes, albeit mistakenly, that the evidence of a witness is essential to the just decision of the case, in terms of s 186 of the Criminal Procedure Act 51 of 1977, and fails to call such witness, he makes an error of law. If the error is one on which the acquittal of an accused turns then there is a grave irregularity in the proceedings and the court of appeal is bound to order a retrial on the same or amended charges. Question of law reserved answered in favour of the State, and institution of retrial ordered.

Neutral citation: This case may be cited as DPP, Transvaal v Mtshweni [2006] SCA 120 (RSA)

JUDGMENT

LEWIS JA

[1] The appellant in this matter, the Director of Public Prosecutions, Transvaal (the State) has reserved a question of law for decision by this court in terms of s 319 of the Criminal Procedure Act 51 of 1977. The respondent, the second accused in the court below, opposes the appeal. The application by the State for the reservation of the question of law was refused by the trial judge, Seriti J, in the Pretoria High Court. The appeal on the question of law reserved lies before this court with its leave. Before setting out the legal issue it is useful to outline the background.

[2] The respondent, Mr Eric Mtshweni, was charged with the murder of Mrs A C Hennop, attempted murder of her husband, Mr Hennop, attempted robbery with aggravating circumstances of the Hennops, unlawful possession of a firearm and unlawful possession of ammunition. He was acquitted on all counts. So too was his co-accused.

[3] The evidence led by the State established that the Hennops lived on a small-holding in the district of Brits. Hennop testified that early in the afternoon of Friday 10 October 2003 he and his wife left their home and travelled towards the town of Brits in a light delivery vehicle. Hennop was driving. While still on the gravel road leading to the road to town the Hennops were ambushed by two men. The vehicle was stopped. One of the men approached the passenger side where Mrs Hennop was sitting. The other, armed with a firearm, approached the driver's side. Hennop, fearing that they would be killed, asked his wife to find his firearm which was

apparently in the vehicle. He had what he called ‘’n klein Browning vuurwapentjie’ (a 6.35mm pistol).

[4] The assailant on Hennop’s side of the vehicle aimed his firearm at Hennop’s head and fired. But as he did so, Hennop leaned his head back and the bullet passed him and struck Mrs Hennop on the right-hand side of her neck. Hennop then shot the assailant twice in the head. The assailant and the other man ran off. They did not take any property from the Hennops. Hennop managed to drive home and his wife was taken to hospital by an ambulance summoned by their children. She died there some six weeks later on 23 November 2003 as a result of the gunshot wound to her neck.

[5] The only factual issue in dispute at the trial was whether the accused were the assailants, since Hennop could not identify them. The State thus relied on circumstantial evidence to prove that the accused were guilty of the offences charged. Both accused denied all knowledge of the crimes, and claimed to have been elsewhere at the time the crimes were committed. Mtshweni testified that he had been in Soshanguve. There, so he said, he had been robbed and shot twice in the head. He had been admitted to the Ga-Rankuwa hospital for treatment of two gunshot wounds to the head on Friday 10 October. On Saturday 11 October, while in hospital, he was placed under arrest by Inspector van Tonder, the officer investigating the crimes committed against the Hennops.

[6] Dr Mchenga, a dentist training at the time to be a maxillo-facial surgeon, gave evidence for the State that he had removed a bullet from Mtshweni’s face on 1

March 2004. X-rays had revealed that there were two bullets lodged in his head, one in the right cheek and one behind the left ear. The latter could not be removed without adversely affecting Mtshweni's health.

[7] Van Tonder testified that the bullet that was extracted and the firearm used by Hennop had been sent to the ballistics unit in Pretoria to determine whether the bullet had been fired by Hennop's firearm. The report from the ballistics expert, testified Van Tonder, stated that no determination could be made in this regard. The State did not lead the evidence of the ballistics expert. This is of crucial importance to the question of law reserved by the State and I shall revert to it. Van Tonder's evidence-in chief in this regard was as follows.

'MNR BROUGHTON [for the State]:Goed, het u 'n verslag ontvang van die ballistiese eenheid aangaande die ontleding van hierdie 6.35 mm pistol van mnr Hennop en die koeëlpunt wat uit die regter wang van beskuldigde nr 2 verwyder is? - - - Dit is korrek, u edele.

Volgens die ballistiese eenheid kon daar bepaal word of die koeëlpunt uit die vuurwapen van mnr Hennop geskiet is? - - - Nee, u edele.'

[8] Counsel for Mtshweni did not object to the admissibility of this evidence. And it was not disputed during the course of the trial that the ballistics report was indeterminate: it neither implicated nor excluded Mtshweni as the person whom Hennop had shot.

[9] The State did not call the ballistics expert, says Mr Broughton, because it appeared during the course of the trial, and prior to argument at the end of the defence case, that it would have been an exercise in futility, adding nothing to the evidence. There was other evidence, in its view, that implicated Mtshweni.

[10] I shall not deal with all the evidence relied on by the State in its attempt to prove that Mtshweni was indeed the assailant who had shot Mrs Hennop. It is in my view sufficient to deal with evidence that the State regarded as conclusive.[1] This was evidence of a DNA match between three samples of blood collected from the place where the shooting took place, on the same day, and blood taken from Mtshweni when in hospital.

[11] The evidence as to the collection of the samples and their testing was not contested by Mtshweni. His response was simply that the conclusion had to be wrong. Sergeant Masilela,the DNA analyst who tested the samples drew up a report which was tendered as an exhibit. Counsel for Mtshweni did not object to the admissibility of the report, which complied with the provisions of ss 212(4)(a) and 212(8)(a) of the Criminal Procedure Act 51 of 1977. The facts in the report were confirmed in evidence by the expert.

[12] The 'chain' evidence relating to the collection, sealing, safekeeping, sending and receipt by the forensic laboratory in Pretoria was not placed in dispute. In brief, the evidence showed that blood was found on three items on the scene of the shooting: on the soil in two places marked as D1 and D2 on a sketch plan drawn by an Inspector Ramongane, and on a can (C2), also marked on the plan. The correctness of the plan was admitted in terms of s 220 of the Act. The samples were sent to the forensic laboratory where they were analysed by Sergeant Masilela.

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[1]Mtshweni's aunt, with whom he lived prior to the shooting, testified as to admissions he had made to her. Her testimony was considered by Seriti J to have been unreliable. His view is not borne out by an examination of the record, but the evidence is not crucial to the State's case and I shall not deal with it. In addition there is the fact that Hennop's undisputed evidence was that he had shot an assailant twice in the head, and that Mtshweni happened to have two bullets lodged in his head.

[13] A sample of blood was drawn by Dr Mabandla from Mtshweni in the presence of Van Tonder. The sample was sealed with a serial number and signed by Mtshweni. It too, marked as 'A', was sent to the laboratory, where it was received by an assistant, Makaya, and was analysed by Masilela. Masilela identified sample A as the same blood found on the soil D1 and D2, and on the can C2.

[14] As I have said, none of this evidence was disputed, Mtshweni simply insisting that the result of the DNA analysis was incorrect. He laid no factual basis for this. The State's argument was thus that there was irrefutable evidence that Mtshweni had been the assailant who had shot Mrs Hennop and whom Hennop had shot twice in the head. It was accordingly not necessary to call the ballistics expert who could do no more than explain that her findings were neutral, and that this did not mean that the bullet extracted from Mtshweni's head had *not* been fired by Hennop's firearm.

[15] In argument at the end of the trial Mr Broughton for the State tried to explain to Seriti J the decision not to call the ballistics expert to give evidence. Regrettably, the trial judge did not understand the argument. It was also made clear that the defence had had sight of the report and had raised no objection to Van Tonder's evidence.

[16] The following extracts from the argument reveal the court's view on the importance of the ballistic evidence that could have been led. The quotation is

preceded by a number of difficulties raised by Seriti J with the State's evidence and then continues:

'COURT: Then the last question, where did accused no 2 [Mtshweni] get injured? Who shot at accused no 2, because according to the ballistic report, the bullet that was removed from his face was not fired from the firearm of Mr Hennop. The big question is, where did he get injured? According to the state evidence, that bullet that they found on accused no 2 was not fired from the firearm of Mr Hennop. If that is the position, then my difficulty is, where did he get injured? If he was not injured at the scene, then it means that he must have been injured at Soshanguve. As far as accused no 2 is concerned, that is my biggest problem. If he was not shot by the firearm that Mr Hennop had, then it means that he must have been shot at Soshanguve. That is the only evidence which is on record. If I am going to accept that the bullet that was found on his cheek, was not fired by Mr Hennop, then the invariable conclusion is that he was shot at Soshanguve. Once I accept that he was shot at Soshanguve, then of course the entire evidence of Martha Motsweni [the aunt] must go down the drain. If you can just address me on those six issues, because when I looked at your heads, they were not coming out that clearly.

MR BROUGHTON: M'Lord, firstly on the last question, I have dealt with the issue in my heads of argument, my written heads of argument. M'Lord, it is important to bear in mind, the evidence was, it could not be determined whether the bullet that was extracted from the face of accused no 2 was fired from Mr Hennop's firearm.

COURT: According to the ballistic report.

MR BROUGHTON: According to the ballistic report, yes. Now, there is a big difference between, it was not fired – a categorical statement that it was not fired from the firearm, and it cannot be determined. There is a big difference between the two.

COURT: It is not a question of – the state has got the bullet, you have got the firearm, the ballistic expert examines it and he cannot tell me that this bullet came from this firearm, and I have got another version this side which says, this bullet here was shot by people at Soshanguve.

MR BROUGHTON: M'Lord, there can be various factors that can lead to the ballistics expert not being able to determine whether a bullet was – or a project[ile] was indeed fired from a certain firearm. The bullet might be so damaged that one cannot determine whether there are sufficient points of – in English it is identifying features, but in Afrikaans we note it as "klaskenmerke". There might be

various reasons why it cannot be established whether a bullet was indeed fired from a firearm. It might be that there were not enough identifying features on the bullet.

COURT: You are speculating that point. I do not have any evidence.

MR BROUGHTON: M'Lord, the evidence is that it could not be determined. There is a difference between, it could not be determined and a categorical statement that the bullet was not fired from the firearm. If it was so that – if it was in fact so that the bullet was not fired from Mr Hennop's firearm, then … (intervenes)

COURT: Let us go to the evidence of the investigating officer as far as that is concerned, unless I am the one who did not understand him.

MR BROUGHTON: M'Lord, his evidence was to the effect that it could not be determined whether the bullet that was extracted from the face of the accused was discharged or fired from Mr Hennop's firearm. His evidence was not that the ballistics expert indicated that the bullet was not fired from Mr Hennop's firearm. The evidence was, it could not be determined. Now, it is my respectful submission that on the probabilities, if it could be determined whether or not the bullet was fired from Mr Hennop's firearm and it turned out that the bullet was in fact not fired from Mr Hennop's firearm, then surely it would have been indicated as such by the ballistics expert.

COURT: Let me tell you what I have in my notes, unless there is something wrong with my notes. Ballistic report was received and it says that bullet removed from the cheek of no 2 was not fired from the gun of Mr Hennop.

MR BROUGHTON: M'Lord, my evidence – my notes reflect, and I think my learned friend will confirm this, my notes clearly show that the evidence of the inspector was, it could not be determined whether the bullet was fired from the firearm of Mr Hennop. Now, that is what my notes reflect. I specifically remember his evidence being to that effect. It is my respectful submission that there is a difference between a categorical statement that is was not fired and it could not be determined. If it was in fact not fired, if it could be established that the bullet was not fired from Mr Hennop's firearm, then the ballistics expert would have indicated as much that the bullet was in fact not fired from the firearm of Mr Hennop. There is a major difference between, cannot be determined and not fired. There are various factors that can lead to that. The evidence of Inspector van Tonder was clear in this regard. He clearly stated, the ballistics expert could not determine whether the bullet was fired. Now, surely, if it could be determined whether or not the bullet was fired from the firearm of Mr Hennop, and it turned

out, according to the ballistics tests that the bullet was in fact not fired from the firearm, then the ballistics expert would have mentioned that the bullet was in fact not fired from the firearm.

COURT: But then we are speculating, and the state did not even give me that report. The only evidence that I have is from Inspector van Tonder

MR BROUGHTON: M'Lord, Inspector van Tonder is in possession of – he was the investigating officer of the case. He had insight into the document. He was therefore in a position to state that it could not be determined that the bullet was not fired – that it could not be determined that the bullet was fired. He was in a position to testify, being the investigating officer and having insight into the document.

COURT: And the state preferred not to give me a copy of the ballistic report. Now we are arguing about what the ballistic report is supposed to have said.

MR BROUGHTON: M'Lord, it was not disputed by the defence that it was in fact so that it was not – the evidence of Inspector Van Tonder was clear in this regard. He testified that according to the ballistics expert, it could not be determined whether the bullet was fired from the firearm of Mr Hennop. That was never disputed by the defence. It is common cause, it could not be determined. If the defence contested that, it would have come out in cross-examination, and the state would have taken the aspect further by calling in the ballistics expert to clarify the issue, etcetera, but it was common cause that it could not be determined whether the bullet was in fact fired, and there is a difference between cannot determine and it is in fact so, the bullet was not fired. Then one still sits with the DNA evidence. The DNA evidence is solid objective evidence which connects the accused to the scene. What the accused has endeavoured or attempted to do, he has raised a speculative hypothesis as to how his blood came to be on three different exhibits that were collected on the crime scene. M'Lord, I have referred extensively in my heads of argument on this issue, I have referred the court to the case law dealing with this. A hypothesis is not enough. If the accused puts forward a certain proposition, there has to be a factual basis for it. There is no factual basis.'

[17] The transcript of the record shows that Mr Broughton was indeed correct as to what Van Tonder had said. The evidence was read back to the court. Despite this, when Mr Broughton replied to the arguments of counsel for the accused, he had yet again to explain the meaning of the indeterminate finding of the ballistics expert.

‘MR BROUGHTON: In reply, firstly I think I should just deal with the issue of accused no 2. The only inference one can draw from the evidence of Inspector Van Tonder was, it could not be determined – it is not a case of that it was in fact not fired – it was common cause, the evidence was not disputed by the defence. It was common cause that it could not be established or determined whether the bullet was in fact fired. So in my mind it is not material that the state did not – that is the precise reason why the state did not pursue the issue further, because it was common cause between the state and the defence.

COURT: I am having a difficulty of understanding exactly what is the full meaning of that sentence. On my notes, in fact, when he gave evidence, according to my notes, I said that it was not fired from …

MR BROUGHTON: But we have listened to the evidence.

COURT: I am just trying to show you the confusion that that statement can possibly cause. In my own mind I thought that was what he said.

MR BROUGHTON: M’Lord, with respect, there can only be one interpretation that one can attach to it, that he was unable to determine, unable to establish whether the bullet was fired. If the bullet was in fact not fired according to this test, he would have mentioned as much in his statement. A categorical statement would have been made to the effect, the bullet was not fired from the firearm of Mr Hennop.

COURT: As the statement is, it is not as clear as one would have expected it to be.

MR BROUGHTON: M’Lord, it is clear. The fact remains that it could not be determined. If the bullet was not fired, then it would have been stated by the ballistics expert, the bullet was not fired from Mr Hennop’s firearm. It would have been a categorical statement to that effect. It is not material to my mind that the state did not lead that evidence. The state did not pursue it further because it was not disputed by the defence. It is common cause, and to my mind the only interpretation, the only inference that can be drawn is that it could not be established, and therefore, since it was common cause, it was unnecessary for the state to take the matter further. It is not for the state to close every avenue of escape that might be available.

COURT: But the question of the bullet is a very critical question. It is not a peripheral issue.

MR BROUGHTON: It would have been a critical issue, had it been stated that the bullet was not fired from Mr Hennop’s firearm. Then certainly it would have been a critical issue, but it could not be determined, and there is a marked difference in the terminology, a marked difference.

COURT: Now we are interpreting what Inspector Van Tonder said into English. He said it in Afrikaans. We are now interpreting it into English. He did not use the words that we are currently using.

MR BROUGHTON: M'Lord, I asked him – I first of all confirmed that a report was obtained on the analysis of the firearm of Mr Hennop and the bullet extracted from the face of the accused, and then my question was: "Kon daar bepaal word", in other words, could there be determined or established – "kon daar bepaal word of die koeëlpunt van die beskuldigde se gesig vanuit mnr Hennop se vuurwapen afgevuur was", and the answer was in fact no, "Nee".

COURT: I do not know why it could not.

MR BROUGHTON: M'Lord, with respect, it was not disputed by the defence.

COURT: I say it was not disputed, but I do not know why they could not determine that.

MR BROUGHTON: That might be so, but had it been established that the bullet was not fired from the firearm, it would have been stated as much, with respect. I think logic dictates, it would have been stated as such, on the probabilities, and because the aspect as not taken further, because it was common cause, the state did not deem it necessary to take the aspect further. Had it been stated by the ballistics expert that the bullet was not fired from the firearm, obviously then it would become a very material aspect or issue, but even so, the accused can still not get past the DNA evidence. There is no evidence which shows that his blood accidentally came to be on certain of the exhibits found on the scene. His blood was found on three different exhibits collected on the crime scene. The accused says he was never at the scene or anywhere near the scene on the date in question, but he cannot explain how it is that his blood came to be on the exhibits.

COURT: But then, should one not - when one looks at that DNA test, would I be right to say that one will have to look also at the circumstances surrounding the shooting itself, and also the fact that the bullet which was extracted from the accused's face, according to the report, as you put it, it could not be determined if that bullet was fired from Mr Hennop's firearm. I think that result of the DNA test, that cannot be looked at in isolation. All of them must be put into the pot, and from there try and make out what the probabilities are.

MR BROUGHTON: M'Lord, it could possibly be a problem if it was indicated by the ballistics expert that the bullet was not fired from Mr Hennop's firearm. Then possibly there could be a problem with the DNA evidence, but the fact remains, there is no factual basis on which it can be said that there was a mistake made by the DNA analyst in analysing these various exhibits. There is no factual basis.

The Supreme Court of Appeal has made it clear . . . speculative hypothesis proffered by the accused is not sufficient to raise reasonable doubt. There must be a factual basis supporting the proposition.

COURT: I fully agree with you on that point, but what I am trying to say is, DNA results, when one looks at them, one must also take into account the ballistics report.

MR BROUGHTON: Correct, M'Lord, but we are sitting with evidence that it is not a case of the bullet was not fired, and the DNA evidence is solid. The DNA evidence is solid objective evidence, which has not been – no fault can be found in the DNA evidence. There was no mistake made. There is no evidence to suggest that a mistake was made. That is solid objective evidence. That is not subjective evidence. That is solid objective evidence which overwhelmingly places the accused on the scene.

COURT: I agree, but then if at all there is other evidence which ends up creating a problem, because up to now, *I am still wondering why that bullet could not – why the ballistics expert could not determine whether this bullet was fired from this firearm. Up to now, I am speculative in my mind as to what could be the reason. That is my first difficulty. Then my second difficulty, I was not even given that report, to satisfy myself exactly, because now we are trying to interpret what Inspector Van Tonder is alleged to have said, and all those difficulties could have been removed by the state simply handing in that report.*

MR BROUGHTON: M'Lord, it is my respectful submission that if the defence had – if it was not common cause that it could not be determined, then the state would have proceeded further. It is my respectful submission that the state did not have to take the aspect further in the light thereof, it was common cause, it could not be determined and the court cannot – if you have regard to the probabilities, if the bullet was not linked – if the bullet was not fired, if it could be found that the bullet was not fired from the firearm, then on the probabilities it would have been stated as much and evidence would have been led in that regard, that the bullet was not fired. The defence in fact would have taken the aspect further. . . . If it was clear, the defence in fact would have taken the aspect further because it would have been material to their defence and it would have corroborated the version of the accused as regards his alibi, but it was common cause, it could not be determined. Now, there is a major difference between the two. If it was found that the bullet was not fired, then possibly problems could arise with the evidence of the DNA, but as things stand at this stage, what do we have? We must look at the evidence, the facts. What do the facts show, clearly? That his blood is found on the scene. There is no evidence suggesting that the DNA analyst made a mistake. There is

no factual basis for the speculative hypothesis proffered by the accused that his blood may have accidentally come onto certain of the exhibits found on the scene.' (The emphasis is mine.)

[18] The difficulty that Seriti J kept repeating in his questioning underlies his decision. In concluding that the State had not proved that Mtshweni had been on the scene of the crime the judge said, in his judgment:

'There is no evidence of a person injured at the scene of the crime except the deceased and one of the assailants that Mr Hennop shot twice on the face. The ballistic report . . . was not made available to the court and there was no explanation why same could not be made available to the court. There was also no explanation from a state witness as to why it could not be determined that the bullet was not fired from the firearm of Mr Hennop. *The only inference that can be drawn from the said facts is that accused no 2 is not the person who was shot twice on the face by Mr Hennop. If not so, one would have expected that the ballistic report would clearly indicate that the bullet extracted from the cheek of accused no 2 was fired from the firearm of Mr Hennop, or to indicate why it could not be determined that the bullet was not fired from the firearm of Mr Hennop*' (my emphasis).

The court continued:

'I am of the view that the DNA test results cannot be safely relied upon because of the difficulties raised by the ballistic evidence . . . and the entire evidence led in this case.'

Further on the judge said:

'When the court looks at the version of accused no 2, the court finds the said version to be reasonably possibly true, *particularly in the light of the ballistic report* . . .' (my emphasis).

[19] Whatever view one has of the reasoning of the court (and the apparent absence of logic in drawing inferences from the evidence presented) there can be no appeal by the State against an acquittal where the court has erred in evaluating the facts and drawing inferences, even if the error is grave. In *Magmoed v Janse van Rensburg*[2] Corbett JA held that it is not competent for the prosecution to raise as a

[2]1993 (1) SA 777 (A) at 817A-B.

question of law in terms of s 319 of the Act the enquiry whether a reasonable court could not have acquitted the accused.

[20] The State argues, however, that the judge erred in law: given the view of the court that the ballistic report was crucial to the evaluation of the evidence, the court was obliged to call the ballistic expert as a witness. The question of law is framed thus by the State:

'Was there not a duty on the Trial Court in terms of section 186 of the Criminal Procedure Act 51 of 1977 to call the ballistics expert who analysed Mr Hennop's firearm and the bullet extracted from the face of the respondent, to explain why it could not be determined whether the bullet in question was in fact fired from the said firearm or not, where it appears *ex post facto* and objectively considered that the evidence of the said ballistics witness was essential to the just decision of the case pertaining to the Respondent, especially in the light of the fact that the Respondent was shot twice in the face and the DNA evidence overwhelmingly incriminated the Respondent?'

[21] Section 186 provides:

'The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court *shall* so subpoena a witness or so cause a witness to be subpoenaed *if the evidence of such witness appears to the court essential to the just decision of the case*' (my emphasis).

The State argues that the court below did consider the evidence of the ballistics expert essential to the just decision of the case. The passages from argument and from the judgment cited above clearly show this to be so. It is true that in his judgment refusing to reserve on the question of law Seriti J commented that he had not believed the evidence to be essential to the just decision of the case. He said:

'[T]he calling of a ballistic expert as a witness, in my view, would not have advanced the state's case in any manner. The aunt of the accused, who testified against the accused, was found by the court, for a variety of reasons, to be an unreliable witness. Even if the ballistic expert could have given

evidence and explained to the court why he arrived at the decision that he did, same could not have led to the conviction of the accused.'

The passage is plainly inconsistent with both the judgment and the statements made by the court during argument. Given the number of times that the judge, before giving judgment, expressed his view that the state's failure to call the ballistic expert was critical, the reliance on this failure in the judgment, and the failure of the court even to mention the DNA evidence in the judgment refusing to reserve the question of law, I consider that the later statement that the evidence was not essential was made without having regard to the proceedings at the trial and to the earlier judgment on the merits.

[22] In my view it is clear from the record that Seriti J did believe that the evidence of the ballistics expert was essential to the just decision of the case and acquitted Mtshweni because there was no explanation of the inconclusive finding. He had a duty, in view of his belief that it was essential to the just decision of the case, himself to call the witness. Moreover it is apparent from the passages of the argument quoted above that Seriti J did not understand the import of the ballistics report. He said as much. All the more so, therefore, did he have an obligation to call the witness in order to understand that evidence. He was obliged in terms of s 186, and thus as a matter of law, to have acted in terms of the section.

[23] Counsel for Mtshweni, relying on *S v Gabaatlholwe*,[3] argued that the evidence of the ballistics expert was not in fact essential to the just decision of the case: the witness could do no more than explain that her finding was neutral – indeterminate.

[3]2003 (1) SACR 313 (SCA).

The court in *Gabaatholwe* said, in interpreting what 'essential to the just decision of the case' means:[4]

'[T]he court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result. That does not mean that a conviction or acquittal (as the case may be) will not follow but rather that such conviction or acquittal as will follow will have been arrived at without reliance on available evidence that would probably (not possibly) affect the result and there is no explanation before the court which justifies the failure to call that witness. If the statement of the proposed witness is not unequivocal or is non-specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value.'

[24] As Mr Broughton was at pains to argue during the course of the trial, the ballistics expert's evidence would in all probability have been equivocal and of no value. Objectively, therefore, s 186 seems to have no application. But Seriti J clearly considered that it was essential: the acquittal turned on the absence of the evidence. The assessment of whether evidence is essential is indeed left to the presiding judge.[5] It is his or her view that must be taken into account in determining whether the court is under an obligation to call a witness: *S v B.*[6] The trial court in this case, given its firm view on the importance of the ballistics report, was therefore under a legal duty to call the ballistics expert. Its failure to do so amounted to an error of law.

[25] Section 319 of the Act provides that if a question of law arises 'on a trial' the prosecutor (or the accused) may reserve that question for the consideration of the Supreme Court of Appeal. The trial court was requested to reserve the question framed by the State, but declined. This court, as I have said, granted leave to reserve the question so framed.

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[4]Para 6.
[5] See *Gabaatlholwe* para 8.
[6]1980 (2) SA 946 (A) at 953A-B.

[26] The question is answered in the affirmative. The trial court was under a duty to call the ballistic expert who compiled the report on the bullet extracted from Mtshweni's head and on the firearm which Hennop used to shoot at his assailant. That does not end the matter. In terms of s 322(1)(a) of the Act, in the case of any question of law reserved the court of appeal may allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of any wrong decision of the question of law. Section 322(4) provides that where the question of law has been reserved on the application of the prosecutor in the case of an acquittal, and a decision has been given by the court of appeal in favour of the prosecutor, the court of appeal may make an order requiring steps to be taken under s 324. This in turn allows the court of appeal to order that proceedings in respect of the same offences on which the accused was charged be instituted, either on the same or different charges.

[27] The State asks that Mtshweni be retried on the same charges. During the course of the appeal hearing this court asked Mr Manzini for Mtshweni and Mr Broughton for the State to consider and deliver further heads of argument on whether the provisions of the Act which permit a retrial after an acquittal are in conformity with the Constitution. I am indebted to counsel[7] for their very full and useful heads of argument in this regard.

[28] Section 35(3)(m) of the Constitution provides that an accused person has the right not to be tried for an offence in respect of any act or omission for which that person has previously been acquitted or convicted – a right that entrenches the

[7] P J J de Jager SC drafted the heads of argument for Mtshweni.

common law right expressed in the maxim '*nemo debet bis vexari pro una et eadem causa*'. This is the right against double jeopardy which gives rise to the defences of *autrefois convict* or *autrefois acquit*, both of which are found in the Act.[8] The right is of ancient origin and is almost universally applied. It is based on two main values. First, the need to ensure that matters reach finality, both in the interests of an accused and of the State. Second, the need to safeguard an individual against State oppression by placing constraints on the prosecuting authority to avoid successive prosecutions for the same conduct.[9]

[29] The provisions of the Act that permit the institution of criminal proceedings against an accused person in terms of ss 322 and 324 are premised, however, on the basis that the trial in which the accused was acquitted was vitiated by an irregularity such that the acquittal was not one on the merits of the charge.[10] Thus where an acquittal is based on the wrong answer to a legal question a retrial does not in fact amount to double jeopardy. Steytler,[11] commenting on the issue of double jeopardy, states:

'In asking whether an accused was acquitted, the question is whether the accused was in jeopardy with regard to culpable conduct? Where an acquittal was based on a wrong answer to a legal question, and not on the merits, an appeal on the question of law, although militating against an accused's interest in finality, cannot be said to be an abuse of the prosecutorial power. To the contrary, it is a proper application of state power to ensure that the law is correctly applied . . . .'[12]

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[8]Sections 106(1)(c) and (d).
[9]See Nico Steytler *Constitutional Criminal Procedure, A commentary on the Constitution of the Republic of South Africa, 1996* (1998) p382ff, cited without comment in the South African Law Commission's Third Interim Report on Simplification of Criminal Procedure: The right of the Director of Public Prosecutions to appeal on questions of fact (2000) p 64.
[10]The decision in *S v Moodie* 1961 (4) SA 752 (A) that where there is a serious irregularity in the conduct of a trial there will be a failure of justice that vitiates the proceedings, such that a new trial can be instituted, was approved in *S v Basson* 2004 (1) SACR 285 (CC): 2005 (1) SA 171 para 60.
[11]Op cit pp 386-7.
[12]See also Iain Currie and Johan de Waal *The Bill of Rights Handbook* 5 ed p 788

[30] This principle was restated by the Constitutional Court in *S v Basson*.[13] Ackermann J stated:

'In *McIntyre en andere v Pietersen . . .* [14] it was held that the purpose of the right contained in s 35(3)(m) was to protect citizens against the possibility of repeated prosecutions for the same conduct. The Court held that such protection was necessary in the interests of fairness and also because of the public interest in the finality of judgments. It follows that in the circumstances where a retrial does not give rise to double jeopardy the retrial will not amount to an unfair trial in violation of s 35(3)(m) of the Constitution.'

[31] In the supplementary heads of argument filed for Mtshweni, counsel submits that an accused's right to a fair trial 'which is guaranteed by the provisions of Section 35 of the Constitution in relation to the issue of double jeopardy is not affected by section 324 [of the Act]. Neither in English law, nor in Canadian or American law has the protection against double jeopardy been extended to cases where an acquittal had resulted due to technical mistakes, lack of jurisdiction or a reason other than a wrong finding on the merits of the case.'[15]

[32] It is clear, therefore, that there is no argument before this court that where a trial court has erred on a question of law, the institution of a new trial will infringe s 35(3)(m). The possibility of double jeopardy does not arise.[16] And, as the State argues, there will be a serious miscarriage of justice should a proper trial not ensue.

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[13]Above para 66.
[14]1998 (1) BCLR 18 (T).
[15]Counsel relies on the following Canadian authorities: *Regina v Century 21 Ramos Realty Inc and Ramos* 37 DLR (4) 649; *Hogg Constitutional Court of Canada* 2 ed pp776-777; *The Canadian Charter of Rights and Freedoms* ed Beaudoin and Ratushny QC 2 ed pp 542—543; and *Corporations Professionelle Des Medicinis Du Quebec v Thibault* (1998) 1 SCR 1033.
[16]In *DPP v Viljoen* 2005 (1) SACR 505 (SCA) this court, having granted an application for the reservation of questions of law, ordered that proceedings in respect of the same offence in respect of which the respondent was acquitted be instituted on the same, or a suitably amended, charge. And in *S v Katoo* 2005 (1) SACR 522 (SCA), where a question of law had been reserved, the court ordered that the respondent be retried on one of the counts in respect of which he had been acquitted.

It is not only an accused whose interests must be protected by the criminal justice system. There must be fairness to the public, represented by the State, as well. There must be fairness to the victims of the crime and their families. In *S v Jaipal*[17] the Constitutional Court said:

'The right of an accused to a fair trial requires fairness to the accused as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

[33] Mtshweni contends, however, that in this case there was in fact an acquittal on the merits even if there was an error of law, and that a retrial will be an infringement of s 35(3)(m) of the Constitution. But, as I have already said, the acquittal was based on the trial judge's failure to call a witness whose evidence he thought was essential to a just decision in the case. He did not comply with the legal obligation imposed on him by s 186: he erred in law. There was thus a serious defect in the proceedings that vitiates the trial. A retrial on the same charges will not place Mtshweni in jeopardy again: he was not in jeopardy in the trial before the court below because of that court's error of law.

[34] The question of law reserved is thus decided in favour of the State. The acquittal of the respondent is set aside and it is ordered that proceedings in respect of the same offences in respect of which the respondent was acquitted may again be instituted on the same charges, suitably amended if necessary, as if the respondent had not previously been arraigned, tried and acquitted: provided that no judge or assessor before whom the original trial took place shall take part in the proceedings.

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[17] 2005 (1) SACR 215 (CC) para 29. See also *Zanner v DPP, Johannesburg* 2006 (2) SACR 45 (SCA) para 21 where the court cited this passage.

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C H Lewis
Judge of Appeal

Concur:

Farlam JA

Cloete JA