THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case no: 440/07

In the matter between:

JEWELL CROSSBERG
Appellant

and

THE STATE
Respondent

Coram: *Navsa, Brand, Ponnan, Mlambo JJA et Malan AJA*

Date of hearing: **21 November 2007**

Date of delivery: **20 March 2008**

Summary: Disregarding the impact of at least 13 missing statements made by witnesses to the police, evidence not supporting conviction of murder – police and State's duty to make full disclosure discussed – conviction of murder substituted with conviction of culpable homicide – sentence – factors to be considered discussed.

Neutral citation: *Crossberg v S* (440/2007) [2008] ZASCA 13 (20 March 2008)

JUDGMENT

NAVSA JA:

[1] On 5 April 2007 the appellant, Mr Jewell Crossberg, a farmer and game lodge owner, was convicted in the Pretoria High Court (on circuit at Polokwane) of the murder of Mr Jealous Dube (the deceased), a farm worker. The conviction followed on the trial court's conclusion that on 21 June 2004, at Vogelenzang farm (the farm) in Musina, Limpopo, the appellant had, at close range, intentionally shot and killed the deceased. The appellant was also convicted on four counts of attempted murder, in that, he had during the same incident, fired shots in the direction of four of the deceased's co-workers.

[2] The appellant was sentenced to 20 years' imprisonment on the murder charge and five years' imprisonment on each of the four counts of attempted murder. The trial court ordered that the sentences run concurrently. Thus, the appellant was sentenced to an effective term of 20 years' imprisonment.

[3] The appellant appeals against his convictions with the leave of this court. In heads of argument submitted on his behalf the appellant's principal ground of appeal was premised on a fundamental irregularity, namely, the destruction or loss of 13 witness statements in the police docket, as a result of which, so it was submitted, his right to a fair trial in terms of s 35(3) of the Constitution had been infringed. He contended that he had been deprived of the opportunity to make a full answer and defence ─ that his right to adduce and challenge evidence fully had been fatally impaired.[1] This is an aspect to which I will return later in this judgment.

[4] The appellant contended further that, aside from this fundamental irregularity, the convictions were in any event liable to be set aside on the basis that the state had, on each of the counts, failed to prove his guilt beyond a reasonable doubt. It is perhaps necessary at the outset to dispel the fundamental misconception that the appellant's defence was that he had mistaken the deceased for a baboon. The true nature of his defence, the evidence adduced by the appellant and the State and the legal issues are dealt with hereafter.

Concession on behalf of appellant

[5] The appellant repeatedly and consistently admitted having fired two shots in the vicinity of where the deceased and his co-workers were present,

[1] The relevant provisions of s35(3) of the Constitution are as follows:
'Every accused person has a right to a fair trial, which includes the right –
…
(b) to have adequate time and facilities to prepare a defence;
…
(i) to adduce and challenge evidence; …'

stating that he had been unaware of their presence at the relevant time. When the appellant first notified the police telephonically about the deceased's death, he immediately informed them of this fact. Captain Johan Boshoff, a policeman who testified in support of the appellant's case, stated that, when he arrived at the scene on the day of the shooting, the appellant had handed over his revolver, confirmed that he had discharged two shots in the vicinity and informed him that someone had died. It appears that this version was repeated in a written 'warning' statement the appellant supplied to the police.

[6] In amplification of his plea of not guilty to all the charges, the appellant admitted, yet again, that he had fired the two shots. He denied, however, having directed those shots at any person.

[7] The appellant testified that on the fateful day, whilst driving his motor vehicle on the farm and seated behind the steering wheel, he had blindly ('blindelings') fired two shots into the bush in an attempt to scare off baboons that had crossed his path. According to the appellant, the baboons were a nuisance and repeatedly caused damage to structures at the game lodge on the farm. He had fired the two shots shortly after sunrise whilst travelling eastwards and the sun had impaired his view.

[8] From the outset the appellant did not contest that one of the shots fired by him had struck and killed the deceased. The appellant's revolver is a .38 calibre Smith & Wesson, which, according to an expert witness, Mr Lucas Visser, has an effective range of up to one kilometre. The shots admittedly fired by the appellant were discharged at a time when hunters and their guides were active on the farm. Furthermore, the shots were fired whilst he was approximately 300 to 400 metres away from a homestead and a workers' compound.

[9] The night before the shooting the appellant had warned 12 farm workers entrusted to him (to whom I shall refer for want of a better expression as 'guest workers'), not to walk around on the farm unaccompanied, because hunters were in the vicinity and they (the workers) would be at risk of their lives. As will become clear later in this judgment, the appellant ought to have been aware of the presence on the farm of some of the workers who were not in his immediate presence at the time he fired the shots.

[10] Significantly, counsel for the appellant informed us that before the commencement of the trial the appellant had unsuccessfully attempted to agree with the State to plead guilty to culpable homicide.

[11] Considering the cumulative effect of what is set out in the preceding paragraphs, counsel for the appellant conceded before us that, on the appellant's own version, maintained consistently before and during the trial and on appeal, and thus not tainted in any way by the irregularities referred to earlier, he fell to be convicted of culpable homicide.

[12] For a proper appreciation of the concession and of the issues to be determined in the present appeal it is necessary, at this stage, to deal with the

State's versions of events.

The State's version of events

[13] As best as can be discerned from the evidence adduced by three eyewitnesses, discounting contradictions, the essence of the State's version, is set out in the paragraphs that follow. The three witnesses, all farm workers who are Zimbabwean citizens, were Messrs Happias Mpofa, Elia Ngulube and Kenneth Molambo.

[14] On Saturday 19 June 2004, their employer, Mr Titling, transported them to the farm because he managed an experimental State farm that could not be left unsupervised and because his attendance was required elsewhere for two weeks. They were taken to the farm to be employed by the appellant, as guest workers, whilst Mr Titling was away. They were to be employed to unearth stones or tree stumps. The three witnesses were part of a total of 12 workers brought to the appellant's farm by Mr Titling.

[15] As indicated above, the appellant admitted that on Sunday 20 June 2004 the 12 workers were warned by him not to move around unaccompanied on the farm because of the risks attendant upon hunting activities. According to the version proffered by two State witnesses the appellant threatened to shoot them should he find them walking around unaccompanied. Mr Ngulube went somewhat further. What the appellant threatened to do, he said, was to shoot them if they worked badly. Moreover, Mr Ngulube testified, this threat had been issued in the most blatant and offensive racist terms ─ involving the use of what is euphemistically referred to as 'the k-word'. The warning was admitted by the appellant. The threats were denied ─ including the use of the racial epithet.

[16] On Monday 21 June 2004, at approximately 07h00, the appellant's driver, who was referred to by witnesses only as Never, arrived in a motor vehicle at the workers' compound on the farm and instructed two of the guest workers, referred to only as Target and Mandla, to accompany him to a site where stones were to be unearthed.

[17] Shortly after Never's departure the appellant arrived at the compound in his Land Cruiser motor vehicle. It was described as a Landcruiser 4x4 vehicle with a cab and an open back on which goods or people could be transported. Having ascertained that Never had already departed, the appellant instructed the remaining guest workers to board the vehicle and sit in the back. Messrs Mpofa and Ngulube were two of five workers[2] who sat in the back. The remaining five workers, who were still in the process of gathering tools and wheelbarrows, were left behind. It does not appear that they were left behind deliberately, but rather that the appellant departed hastily, before everyone was on board.

[2] The State witnesses differ in respect of the number of workers who sat on the back of the bakkie. According to Mr Mpofa eight guest workers were on the back of the bakkie. From Mr Ngulube's evidence it appears that there were five guest workers on the back of the bakkie.

[18] The appellant drove a short distance before they encountered Never, whose vehicle had run out of petrol. The appellant was angry and ordered Never to leave the farm, together with his family and possessions. The appellant then drove to where the stones were supposed to have been unearthed. The appellant asked why there were no stones. The workers told him that they had been unable to find any. It seems that the workers had no experience in this regard and were more accustomed to unearthing tree stumps.

[19] The appellant turned his vehicle around and drove back in the direction of the compound. On the way there they drove past the spot where Never's vehicle had stalled. The appellant instructed Never to board the vehicle. Never obeyed the instruction and they drove back towards the compound. The three State witnesses testified that along the way they encountered the five workers[3] who had been left behind, walking along the farm road with their tools and wheelbarrows. Upon the vehicle's approach, because of the narrowness of the road, the five workers split into two groups; three went to the right and two to the left. According to Mr Molambo he was one of those on the right. Immediately before the workers split into two groups, they were approximately seven metres away from the vehicle.

[20] The appellant brought the vehicle to a halt, pulled out his revolver, extended his arm through the open window and discharged at least five shots in the direction of the three workers on the right-hand side. They ran off into the bush.

[21] The two persons on the left-hand side were the deceased and a worker referred to as Onisimo. The two of them moved towards the vehicle, as if to board. The appellant immediately alighted and moved around the nose of the vehicle towards its left-hand side. He pointed the revolver at them and discharged a shot whilst they crouched. He fired a second shot which struck the deceased. At the time that he fired those two shots the appellant was three to five metres away from the two of them. After being struck the deceased groaned, struggled to get up and fell to the ground. Thereafter Onisimo immediately boarded the back of the vehicle. Without any further exchange of words the appellant re-entered the cabin of his Land Cruiser and

[3] It is not altogether clear whether Lloyd, one of the appellant's workers, had departed with Target, Mandla and Never or whether he had remained behind at the compound with the five guest workers. Consequently it is not altogether clear whether Lloyd was part of the contingent of workers that were encountered by the appellant as he drove along the farm road. Initially Mr Mpofa testified that Lloyd had been collected earlier, along with Target and Mandla, by Never. Immediately thereafter he said that Target and Mandla had departed with Never. Mr Mpofa testified further that four guest workers plus Lloyd had been left behind. Mr Mpofa confirmed that five persons were encountered along the farm road. Mr Ngulube testified that after the appellant had collected the guest workers, five of them plus Lloyd had been left behind. According to Mr Ngulube the appellant encountered five guest workers plus Lloyd and that when the workers split into two groups Lloyd was part of the group on the right. According to Mr Molambo four workers plus Lloyd had been left behind at the compound by the appellant. When, according to Mr Molambo, the appellant encountered them walking along the farm road, Lloyd and he and Talent made up the group of three that had split from the deceased and Onisimo.

drove to the compound leaving the deceased lying there.

[22] The following part of Mr Mpofa's testimony is important:

'Nou betreffende die skietery self … [d]ie persoon aan die linkerkant het beweeg in die rigting van die voertuig toe die eerste skoot afgevuur was --- Ja.

Maar hulle moes toe baie, baie naby aan die voertuig gewees het, is dit nie so nie? --- Ja u edele want hulle het op die bakkie gekom om in te klim. Hulle was te naby die bakkie gewees. En verstaan ek nou ook korrek, hulle het in die rigting dan van die beskuldigde beweeg. --- Ja, indien die beskuldigde by sy kar was so hulle was op pad na hom toe want hulle was op pad na die kar toe gewees.

…

--- [Die appellant] het uit die voertuig uitgeklim en aan sy neus gaan staan.

--- [H]y het reg voor hulle gestaan en skiet.

…

Mnr Mpofa, en ten spyte hiervan dat die ander man wat saam met … die oorledene was, ten spyte daarvan dat daar pas nou 'n skoot na hulle twee geskiet is en sy maa[t] nou pas raakgeskiet is, op 'n afstand wat u sê lyk vir my so t[w]ee of drie meter, kom hy nou doodluiters om die bakkie van die beskuldigde. --- Ja, een wat nie raak getref was nie, hy het wel in die beskuldigde se bakkie kom inklim.

En hy was glad nie bang vir die beskuldigde wat pas sy maat hier reg langs hom geskiet het nie? ---Dit is hoe hy opgetree het u edele. Hy het eenvoudig in die beskuldigde se bakkie kom klim.'

[23] The relevant part of Mr Ngulube's evidence concerning the shooting is as follows:

'So they approached the vehicle where the accused (inaudible)? --- My lord, ja they were coming from behind, from the tail of the vehicle around the vehicle trying to get to the inside of the vehicle my lord.

…

Yes my lord. They did not flee. They ran straight to the danger point. --- Ja they did not run away from the danger, but to the vehicle.

…

Now tell me, after the first shot was fired, what exactly did the two people do? --- They went down on their abdomen.

So they lay down flat on the ground? --- They lay down and crawled.

In which direction did they crawl? --- They were crawling to the side of the vehicle my lord.

In the same direction in which they had moved prior to the first shot? Did they now crawl in the same direction in which they ran to before the shot was fired? --- They were (inaudible) getting into the mouth of the gun.

…

Now, the question is are you saying that they were running…they were crawling in the same direction in which they were originally running before they were shot at? Towards the back of the vehicle? --- It is so that they were crawling towards the tail of the vehicle.

…

How far from the side of the vehicle were they more or less? From the left side of the vehicle? ---They were at a distance of five and less, metres from the vehicle.

…

Where were they at the time when they were crawling? --- When they were crawling they were near to the nose of the vehicle my lord.

…

And then could you just again tell us, after they crawled for about a metre or so did both of them stand up, or did only one of them stand up? --- Both of them stood up.
And did they then start running again or what? What specifically happened then? --- A second gunshot was fired my lord.
Is that so. When the second shot was fired were they already running again? Or what exactly was the position then? --- (Inaudible) after they stood up, before they can run away, then a second gunshot was fired my lord.
…
Who was in front and who was behind? ---The one that was in front of the other one Onisimo and then Jealous Dube. It is the one that was running from behind and (inaudible) that was struck by a gunshot.
And did he then fall down again, after the second shot? --- He fell unto the ground and started groaning.'

[24] According to both Mr Mpofa and Mr Ngulube, there was no vegetation between the appellant, on the one side, and Onisimo and the deceased, on the other which might possibly have obscured the view. Furthermore, according to Messrs Mpofa and Ngulube there was no vegetation between their vantage point and the deceased and Onisimo as they were being shot at.

[25] After the shooting the appellant and his passengers immediately returned to the compound. The workers were instructed to prepare to leave for a spot on the farm where they would now be required to unearth tree stumps. They were instructed to fill containers with water as there was no water where they were to work later that morning. Importantly, the workers were asked to count themselves to see if everyone was there ─ this aspect was never challenged by the appellant. The workers were also asked to recall the instruction the appellant had given them the night before.

[26] Thereafter the appellant departed with Never, informing the workers that the latter would return shortly to take them to the new work site. The workers filled the containers and waited. Never returned to the compound and together with them started walking towards the site at which they were to unearth the tree stumps. Whilst they were on their way Mr Mpofa told Never that he was not prepared to go to work until they established what had happened to the deceased.

[27] Never suggested that they report the matter to the police as he feared for their safety should they return to the place where the shooting incident had occurred. After a short while Lloyd and Target who had fled, arrived and informed the others that the deceased had been killed and was lying alongside the road. They all then proceeded to make their way to the police station. Upon their arrival they discovered that the appellant had already reported the matter to the police.

[28] Mr Molambo was one of the workers who had been left behind when the appellant first collected the five workers at the compound. He testified that after they had gathered the tools and wheelbarrows he, Lloyd and Target had attempted to catch up to their co-workers on the Land Cruiser. They stood on

the right-hand side of the vehicle. Mr Molambo testified that he and the other two were twenty metres away from the Land Cruiser when the appellant stopped the vehicle and said something in a language they did not understand. The appellant then fired three shots towards the right-hand side. Mr Molambo and the other two fled. He heard two further shots being discharged. He testified that he went directly back to the compound and did not return to the scene. Lloyd and Target arrived at the compound a while later.

[29] Mr Molambo testified in addition that, shortly before the appellant had fired the shots, the five workers who had been left behind and who were now in sight of the Land Cruiser went right up to it because they had all intended to board. According to Mr Molambo, when they returned to the compound, Onisimo had no knowledge of what had become of the deceased, except that the deceased had fallen down alongside the motor vehicle.

[30] Under cross-examination, Mr Molambo said that when they arrived at the spot at which they were to unearth the tree stumps he had asked the others where the deceased was. The only response he received was from Never, who said that he did not know. Mr Molambo then said that he wanted to establish what had happened to the deceased. The other guest workers all agreed. Never, on the other hand, suggested that they go to the police.

[31] The State did not call Onisimo, Never, Lloyd and the other guest workers as witnesses, nor was any explanation proffered nor evidence tendered as to why this was not done. It is now necessary to turn to the appellant's version of events.

The appellant's version of events

[32] The appellant admitted that he was angry when he encountered Never who, for the umpteenth time, had run out of petrol. Whilst the appellant was transporting Never and the five workers back to the compound he saw a troop of baboons a short distance away. He testified that he had discharged a shot to his left in the circumstances and for the reason set out in para [7] above. He denied that he had shot directly or intentionally at anyone.

[33] None of the three witnesses who testified in support of the State's case saw the baboons allegedly spotted by the appellant.

[34] Shortly after firing the two shots the appellant saw a man emerge, running from the bush, approaching the Land Cruiser from the left. He stopped the vehicle and asked who this individual was. His passengers told him that it was one of their co-workers. The man boarded the vehicle and they drove to the compound.

[35] The appellant confirmed that, after he and the workers had arrived at the compound, he told them to fill containers with water, which was unavailable at the new work site. He asked the guest workers to tell him how

many of them were on the farm. Thereafter the appellant departed from the compound, accompanied by Never, ostensibly to deal with the bakkie that had stalled. On the way there the appellant noticed, notwithstanding the dense bush, that there was something lying in the veld. He stopped, investigated, and discovered the body of the deceased. There was no pulse and it was clear that the person lying there was dead. The appellant instructed Never to return to the compound and to transport the workers to the spot where they would unearth tree stumps. He told Never that he, in turn, would report the matter to the police.

The objective facts

[36] The appellant reported the matter to the police shortly after 7h00 on the morning of 21 June 2004 and took them to the scene where the body of deceased was found. Superintendent Nephawe, who at that time was the Station Commander in Musina, was part of the first contingent of police who arrived at the scene. He testified that he and others had secured the scene and that police work was done strictly according to procedure. He handed over the scene to the fingerprint expert and official photographer, Inspector Louw.

[37] Inspector Louw, the fingerprint expert and official police photographer, testified that on the morning of the shooting incident the scene had been handed over to him. He had taken photographs of the body of the deceased from different angles. The photographs were presented as evidence in the trial.

[38] On 9 July 2004, Inspector Louw was required to photograph points on the farm as indicated by Messrs Ngulube, Mpofa and Molambo. It will be recalled that Mr Molambo had been part of the group on the right-hand side of the vehicle at the time of the shooting incident. These photographs were helpful during the trial and were of assistance to us in better appreciating the terrain and the scene at which the shooting took place. I interpose to state that according to Inspector Louw the witnesses had consulted with each other during the pointing out session, in contravention of police rules in this regard.

[39] The photographs show the dense bush and grass on either side of the farm road along which the appellant drove. One of the photographs shows the position of the body of the deceased in relation to the position of the Land Cruiser.

[40] When the police visited the scene, shortly after the incident had been reported, they found the body of the deceased lying approximately 16 metres away from the spot which Messrs Mpofa and Ngulube had indicated to the police photographer as that from which the appellant had fired the shots. They had not told the police photographer that the appellant had alighted from the vehicle prior to firing the shots. The deceased’s body was 12-15 metres into

the veld from the edge of the farm road along which the appellant's vehicle had been travelling. They had also indicated to the police photographer where Onisimo had been at the time that the appellant had discharged the shots that led to the deceased's death. This was a position 16.5 metres away from the deceased's body and approximately as deep into the veld as that body. The deceased's body was lying in dense bush and it was not visible from the road. There were no signs that it had been moved there from another location. There were no drag marks nor was there a trail or any other sign of blood. There was no indication that the deceased had crawled to that position. They found one set of footprints leading towards the body of the deceased and another set of the same prints leading in the opposite direction, towards the road. It was accepted during the trial that those footprints were left by the appellant.

[41] From the post-mortem report it is clear that the cause of death was an extensive intra-pulmonary haemorrhage caused by a gunshot wound that had pierced the body from one end of the side of the chest through to the other. The post-mortem report states that the bullet 'may have traversed and transected one of the large pulmonary veins resulting in the massive haemorrhage'. Regrettably, the pathologist who conducted the post-mortem examination was not called to testify.

[42] The appellant's revolver with the ammunition and the shells of two discharged bullets that had been handed to the police was examined by the ballistics expert, Mr Visser. He confirmed that he found four rounds of live ammunition and two spent cartridges in the revolver's chambers. His tests on the two cartridges established signs that two bullets had indeed been fired by that firearm. Mr Visser also confirmed that the revolver was a six-shooter – that it could only fire a maximum of six shots before it had to be reloaded. Unlike a pistol, a revolver does not eject cartridges. They remain in the revolver's chambers after shots have been fired.

[43] Mr Visser was unable to say from the wounds sustained by the deceased how the deceased and the appellant were positioned in relation to each other at the time that the fatal shot was fired. He testified, however, that from the position of the wounds it appeared that the deceased's arms were away from his body at that time so as to allow the bullet to pierce his body just under the armpit and exit through the other side of the chest without striking any other part of his body. He testified that it was unlikely that the deceased was standing in a normal position at the time he was shot.

[44] It is abundantly clear from the evidence of Superintendent Nephawe and of Inspector Louw and from the photographs that the deceased's body was not visible from the road. The body was well into the veld and it certainly was nowhere near the position described by Messrs Mpofa and Ngulube, during their testimony, as being the place at which the deceased was struck by the bullet fired by the appellant.

[45] Inspector Louw testified that although the police were principally concerned to look for human tracks, he could confirm that, when they first

visited the scene on the day of the shooting incident, there were animal tracks in the vicinity, including baboon tracks.

The docket and the missing statements

[46] When Mr Mpofa testified, he was initially adamant about the number of statements he had supplied to the police. He insisted that the statement that he had provided on 21 June 2004, the day of the incident, was the *only* statement he had made. He testified that the statement was complete and satisfactory. He was happy with its contents.

[47] When, under cross-examination, it was pointed out to Mr Mpofa that the statement disclosed to the defence by the prosecutor was dated July 2004 and had been taken by a policeman who had only later been assigned to the case, Mr Mpofa recanted and admitted that he had made a second statement. When he was asked what had happened to the first statement, he said that only the police would know.

[48] At that stage counsel representing the appellant sought access to the investigation diary. Under further cross-examination, Mr Mpofa was now adamant that he had supplied only two statements to the police. He testified that he had not read his first statement ─ he had only been asked to sign it after he had communicated his version of events to the policeman who had noted what he had said. Mr Mpofa accepted that this policeman would have written down everything he had communicated.

[49] Mr Mpofa testified that his second statement had been read back to him. Counsel for the appellant had somehow obtained another statement made by Mr Mpofa to the police on 25 June 2004. This statement was not in the police docket. When this statement was shown to him, Mr Mpofa recalled that he had made such a statement. Thus, as it turns out, he had made three statements to the police. It appears that the same holds true for a number of other witnesses.

[50] It is clear that at least 13 statements had not been disclosed by the police to the prosecutor and in turn therefore not to the appellant, including the first statements made by all the guest workers. The whereabouts of all these statements are still unknown.

[51] Superintendent Ramakadi, who testified in support of the State's case, had been directed to take over the investigation from a provincial level because of concerns about the integrity of the investigation, flowing from perceptions that the appellant was being favoured ─ some thought he had obtained bail too readily and speedily on the day of the shooting incident and was being assisted by local police. It appeared that the racial overtones the case seemed to be assuming had caused tensions between the police investigating the incident and their superiors. Unfortunately, as this case shows, race continues to divide and bedevil our society.

[52] It was clear from the cross-examination of Superintendent Ramakadi that the investigation diary had, from the outset and also after he had taken over the investigation, not been properly maintained and that proper entries, particularly concerning the taking of statements, had not been made.

[53] Superintendent Ramakadi testified that when he took over the investigation, all the witness statements that had been obtained by police personnel before him were in the docket. He had received written instructions to obtain further statements and to retake others. It is important to note the reasons he supplied for the 'retaking' of statements:
'Okay, I have many reasons (inaudible) one of them being that some of the statements that were taken, there was no logic of events that happened.
Yes? --- Some of them were not sworn in. When reading some of them, we could not say (inaudible) the writer of the statement wanted to say, they were not clear.
Any other reason? --- Okay, some of the statements were like, seeming they were like witnesses from other witnesses, so it is confirmed when you ask them, it was like, one witness would be taking a statement from the other.'

[54] At another stage of his testimony he said the following:
'Some of the statements were not written in a logic way, so how can I take further statements when I do not even understand the first statements.'

[55] It is important to appreciate that the first statements were a contemporaneous record of events by the witnesses concerned.

[56] Superintendent Ramakadi was unable to provide an explanation for the missing statements. It was clear when he was cross-examined that, not only were entries concerning the taking of statements not made in the investigation diary, but also that entries were made of statements even before they had been taken.

[57] When counsel for the respondent put it to Superintendent Ramakadi that Mr Molambo had disassociated himself from a material part of one of his statements (where he said that he had seen the appellant shoot at Onisimo

and the deceased), Superintendent Ramakadi responded as follows:
'Yes. The second statement, that A22, was on the A12, where the witness lied, not on the second statement.'

[58] More importantly, when the possibility was put to Superintendent Ramakadi that the information recorded in the police docket, under the title 'Sensational Crime report' (namely, that it had been alleged that on the day in question the appellant had been driving on his farm and had fired two shots in the general direction of what he thought was a wild animal) had been obtained from witnesses, he responded as follows (the comment to which he responded is included):
'[I] am going to argue Superintendent, that those witnesses put those facts into statements, and that is the reason why those statements were destroyed by the police. It is the absolute contradiction to the present versions. --- Okay,

it can be so, but you can look it in the other (inaudible) that maybe the person who compiled it, got his information from the accused himself. Because in the first photo album it was compiled when the accused was there, and he was the one pointing out.'
Of course, the two possibilities *are* those pointed out by Superintendent Ramakadi.

Evaluation

[59] Leaving aside, for the moment, the question of the impact of the missing statements, I turn to an evaluation of the evidence presented by the state.

[60] It is clear from what is set out above that the State's version of events, in the first instance, is totally at odds with the objective facts. Importantly, the relevant points shown to the photographer by the three main witnesses and reflected on the photographs presented in evidence, are at odds with their own testimony of how the shooting had occurred.

[61] It must be emphasised that it was not the state's case that the appellant had, subsequent to the shooting, moved the deceased's body to the spot where it was found and photographed. It was never put to the accused or Captain Boshoff in cross-examination that the scene had been tampered with. All the objective facts and the evidence of Superintendent Nephawe and Inspector Louw point to the contrary. In fact, if regard is had to the photographs taken by Inspector Louw on 9 July 2004, when the three witnesses did the pointing out, the position of where the deceased and Onisimo had been at the crucial time accords with the position in which his body was found. Therefore, accepting ─ as we have to ─ that he was fatally struck by the bullet at the place where his body was subsequently found, the description provided by Messrs Mpofa and Ngulube of how the appellant deliberately shot at the deceased and Onisimo at very close range, away from obstructing vegetation, must be rejected.

[62] Of course the appellant had the opportunity to reload his revolver before the police arrived, but there is no evidence that he did so. It is common cause that when the police received the appellant's revolver it contained only four live rounds of ammunition, indicating that only two bullets had been discharged. It was never put to the appellant that he had tampered with the revolver so as to dupe the police into believing that only two bullets had been discharged.

[63] Whilst Mr Ngulube testified that he was uncertain about the number of shots fired by the appellant, Mr Mpofa was emphatic that the appellant had fired seven shots in quick succession, which, as the expert testified, was physically impossible with the revolver in question.

[64] Cumulatively, the objective evidence decisively lends a lie to the state's

version of how the shooting had occurred.

[65] Furthermore, the state's version of how the shooting had occurred is at odds with the probabilities. It is highly unlikely that two persons being shot at, who have the opportunity of fleeing into dense vegetation, would choose rather to run towards the barrel of the gun. It is as unlikely that Onisimo would thereafter board the vehicle, seemingly without any fear. Upon their return to the compound Onisimo, who was right next to the deceased when he was shot and fell and groaned, was the person least aware of the deceased's fate — one would have expected the opposite if the shooting had indeed occurred as described. The same is true of the alleged other enquiries concerning the deceased's fate by those who observed the shooting from the best possible vantage point, the elevated position in which they were on the back of the Land Cruiser.

[66] Importantly, Mr Molambo testified that, when he enquired about what had happened to the deceased, not one of the guest workers responded and that Never, who had been with them and who would have had as good a vantage point as anyone, had replied he did not know.

[67] Moreover, on the state's version, the guest workers continued to prepare for the work they had been instructed to perform by filling containers and walking for at least a while in the direction of the new work-site before they voiced their concerns about the deceased, and none said anything about the horrible deed they had just observed. This too is most improbable.

[68] On the state's description of events the appellant behaved like a lunatic, shooting at a number of persons without reason and killing another at close range in the most wanton fashion. Yet, when the appellant departed with Never, not one of the guest workers thought of escaping from the farm immediately. The reason supplied was that they were afraid. That fear however, evaporated when they thought that they should report the deceased's death to the police. They made their way to the police station in great haste and apparently without experiencing any problems.

[69] It is also highly improbable that the appellant would behave in this most blatantly murderous fashion in full view of witnesses, almost all of whom were strangers and immediately thereafter report the matter to the police, well-knowing that his version was false and would probably be contradicted. This is particularly so, if one considers that, on the State's version of events, there appears to have been no apparent trigger for the appellant's alleged behaviour. If some of the guest workers were pushing wheelbarrows and carrying tools when they encountered the appellant, it makes the appellant's behaviour all the more bizarre.

[70] Even if one were not to regard the missing statements as a fundamental irregularity, they nevertheless still cast a pall over the acceptability of the evidence of the three main State witnesses. On Superintendent Ramakadi's evidence the first - most contemporaneous - statements that were taken were mostly illogical, incomplete and appeared to

have been taken with the witnesses acting in concert and influencing each other. How then can one conclude that any statement taken thereafter would be more reliable? No explanation was tendered by the State as to what became of those statements. The conclusion that those statements did not suit the state's case is irresistible.

[71] I have not dealt with the numerous contradictions between the three main witnesses, nor have I dealt with other unsatisfactory aspects of the evidence of each. In the case of Mr Mpofa disputes arose with the interpreter, which as the record shows, reflect badly on him. In relation to the number of statements which he and the other State witnesses had made he was shown to be untruthful and on the whole was an evasive witness. Having regard to the fundamental problems with the state's version as described in the preceding paragraphs, I do not intend to devote any further time to these aspects. It is clear that the court below erred in accepting the evidence of the three main witnesses. Their evidence at all levels lacked credibility, was improbable, at odds with the objective evidence and wholly unreliable.

[72] In a criminal trial the state bears the onus in respect of all the material elements that are required to be proved to secure a conviction on a stated charge. On the evaluation of the evidence set out above, it is clear that the convictions on the murder charge and the four counts of attempted murder are liable to be set aside. The state has failed to prove that the appellant intentionally shot and killed the deceased and that he fired the shots at the others in the manner described by the three main witnesses.

The State's duty to make disclosure

It is necessary to consider briefly the duties of the state and of the police and the role of courts in relation to police dockets and the obligation of full disclosure.

[73] In *Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC) the Constitutional Court dealt with s 25(3) of the Interim Constitution, in terms of which accused persons are guaranteed the right to a fair trial. The court in that case applied the section in the context of the State's claim to a blanket privilege against disclosure. It considered judgments from comparable jurisdictions where an accused's right to a fair trial is guaranteed. The Canadian case of *R v Stinchcombe* (1992) 68 CCC (3d) 1 (SCC) (18 CRR (2d) 210) was cited with approval and applied. I intend to deal with that and other relevant case law in due course.

[74] The principles enunciated by the Constitutional Court in *Shabalala's* case remain the same under the present Constitution. At para 50 the following appears:
'If the conflicting considerations are weighed, there appears to be an overwhelming balance in favour of an accused person's right to disclosure in those circumstances where there is no reasonable risk that such disclosure might lead to the disclosure of the identity of informers or State secrets or to

intimidation or obstruction of the proper ends of justice. The “blanket docket privilege” which effectively protects even such statements from disclosure therefore appears to be unreasonable, unjustifiable in an open and democratic society and is certainly not necessary.’

[75] In *Stinchcombe* the Supreme Court of Canada held that an accused’s right to make full answer and defence, which is one of the pillars of criminal justice, requires full disclosure by the Crown of all material it proposes to use at the trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it. A trial judge has the power of reviewing, should the issue be raised with him or her, a refusal or failure to make disclosure. Courts of appeal must, of course, consider whether there is a reasonable possibility that such failure or refusal has affected the outcome or impacted on an accused’s rights to a fair trial and, when necessary, in the interests of justice, order a new trial. In this regard the discussion in para 76 to 79 hereafter is of importance.

[76] In *R v Carambetsos* (2004) 117 CRR (2d) 1 (SCC) the Supreme Court of Canada re-emphasised that the purpose of a prosecution is not to obtain a conviction but rather to lay before a court what the Crown considers to be credible evidence relevant to the charged offence. The obligation of the police and the Crown to make full disclosure is set out in some detail.[4] There are a number of cases in other jurisdictions to similar effect and which deal with consequences of a failure to make full disclosure.[5]

[77] Police and prosecution services have duties of disclosure imposed by the Constitution with which they must comply. How then does an appellant deal with a failure to disclose? In *Taillefer* the Canadian Supreme Court, at para 81, said the following:
‘First, the onus is on the accused to demonstrate that there is a *reasonable possibility* that the verdict might have been different but for the Crown’s failure to disclose all of the relevant evidence. The accused does not have the heavy burden of demonstrating that it is probable or certain that the fresh evidence would have affected the verdict…As this court held in *Dixon*: “[i]mposing a test based on reasonable possibility strikes a fair balance between an accused’s interest in a fair trial and the public’s interest in the efficient administration of justice. It recognises the difficulty of reconstructing accurately the trial process and avoids the undesirable effect of undermining the Crown’s disclosure obligations...” ‘

[4] See also *R v Taillefer* (2004) 114 CRR (2d) 60 (SCC) and *R v Forster* (2006) 133 CRR (2d) 237 (CA Saskatchewan).

[5] *R v Leyland Magistrates, ex parte Hawthorn* [1979] 1 All ER 209 (QB); *R v Maguire and Others* [1992] 2 All ER 433 (CA); *Edwards v United Kingdom* (1992) 15 EHRR 417; *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1; *R v Feltham Magistrates’ Court, Mouat v Director of Public Prosecutions* [2001] 1 WLR 1293 (QB); *Hulki Güneş v Turkey* (2006) 43 EHRR 15 263.

[78] At para 82 of that case the following appears:

'Second. Applying this test requires that the appellate court determine that there was a reasonable possibility that the jury, with the benefit of all the relevant evidence, might have had a reasonable doubt as to the accused's guilt…[A]n overall effort must be made to reconstruct the overall picture of the evidence that would have been presented to the jury had it not been for the Crown's failure to disclose the relevant evidence. Whether there is a reasonable possibility that the verdict might have been different must be determined having regard to the evidence in its entirety.

[79] In *Taillefer* it was made clear that the determination of whether there exists a reasonable possibility that the fresh evidence would have an impact on the result of the trial process should be dealt with as a separate issue from the assessment of the effect of the failure to disclose on the overall fairness of the trial. At para 84 in relation to the fairness of the trial the court said the following:
'The reasonable possibility of affecting the overall fairness of the trial "must be based on *reasonably* possible uses of the non-disclosed evidence or *reasonably* possible avenues of investigation that were closed to the accused as a result of non-disclosure…" That would be the case, for example, if the undisclosed statement of a witness could reasonably have been used to impeach the credibility of prosecution witnesses. The conclusion would necessarily be the same if the prosecution fails to disclose to the defence that there is a witness who could have led to the timely discovery of other witnesses who were useful to the defence.'

[80] Each case must of course be considered on its own merits. A retrial is not ordered merely on an assertion that the State's failure to disclose impacted on the original trial. In the present case, whilst the statements themselves are not available for scrutiny, it is clear from the evidence adduced by the State (and referred to earlier) that they are highly relevant to the outcome and to the issue of a fair trial in relation to the murder charge. They go to the true strength of the state's case against the appellant and they impact on credibility. The State presented dubious reasons for the retaking of the statements and offered no reasonable explanation as to why so many statements were missing. The disclosure that numerous statements were taken and were missing came only after State witnesses had been 'caught out'. As stated earlier, entries were made in the investigation diary of statements even before they had been taken. The other factors set out in para 69 above are significant. In the totality of the circumstances of the present case, the conclusion that the first set of statements did not suit the State's case and that they are missing by design rather than misfortune is compelling. Of course, I hasten to add, counsel for the State who appeared before us is blameless. It is the manner in which the police investigation was conducted and the manner in which the police dealt with the statements and the witnesses that is under scrutiny. Police conduct in this case falls far short of what is required of our system of criminal justice.

[81] For the reasons set out in para 72 above the murder conviction can in any event not be sustained and it is therefore not necessary to explore the issue of non-disclosure any further.

Culpable Homicide

[82] As stated earlier, the appellant chose voluntarily, from the outset and throughout the investigation and the trial, to inform the police and the court about the manner and circumstances in which he discharged the shots. Furthermore, he attempted unsuccessfully to agree with the State to plead guilty to culpable homicide. The surrounding circumstances set out in paras 5 to 9 are largely common cause. The irregularities discussed above, thus, do not intrude upon the question of whether the appellant is, on his own version, consistently maintained even during the appeal, guilty of culpable homicide. This, as was pointed out in para 10, was correctly conceded by appellant's counsel.

[83] Culpable homicide is the unlawful, negligent killing of another. Negligence is assessed objectively, according to the standard of the reasonable person. For a conviction of culpable homicide it must be shown beyond a reasonable doubt that a reasonable person, in the same circumstances as an accused, would have foreseen the death of a victim as a consequence of his or her conduct and that a reasonable person would have taken steps to guard against the foreseeable death.[6] If an accused did not take such reasonable steps, then he or she has been negligent in regard to the victim's death.

[84] In the present case a reasonable person in the appellant's position would have foreseen the death of the deceased as a result of discharging a firearm in the manner and in the circumstances set out earlier. That notwithstanding, the appellant took no steps to guard against that consequence. The concession that the appellant was liable, on his own version, to be convicted of culpable homicide was therefore rightly made.

Sentence

[85] Counsel for the appellant vigorously submitted that, in the event that the murder and attempted murder convictions were set aside and substituted by one of culpable homicide, the matter should not be referred back for sentencing. All the available material to inform a proper sentence, so counsel contended, was before this court and it should therefore impose the sentence itself. I agree.

[86] In order to controvert the suggestion of a racist motive for firing the shots, the appellant relied on the evidence of Mr Condo Mulaudzi, a Musina councillor. Mr Mulaudzi testified that he has known the appellant for approximately thirty years. Even before 1994 the appellant contributed in cash and kind towards the upliftment of sections of the disadvantaged black community. He provided maize meal to pre-schools and other schools. He contributed refreshments and catering for matric functions. The appellant also

[6] Jonathan Burchell *Principles of Criminal Law* 3 ed (2005) pp 159-160 and 674.

contributed to sport functions.

[87] According to Mr Mulaudzi, the appellant financially assisted the poor with funerals and he provided free meat from carcasses that hunters had left behind. At a time when it was unpopular, he provided monetary assistance for the burial of an anti-apartheid activist.

[88] During questioning by the trial court, it became clear that Mr Mulaudzi was the appellant's business associate. This however does not detract from Mr Mulaudzi's unchallenged evidence concerning the appellant's good deeds.

[89] On the morning in question the appellant was clearly angry at Never. He appears to have been further annoyed by the fact that the workers were not going to be of assistance in unearthing stones. He had clearly impressed upon them the day before that he was the owner of the farm and that they were to obey his rules.

[90] When he collected the workers at the compound, he appeared impatient and drove away without checking to see if they had all boarded. He was behaving in a macho fashion. He was clearly intent upon impressing his authority. This was evident when he ordered Never to leave the farm with his family and possessions.

[91] In discharging the firearm in the circumstances referred to, he was behaving, to coin language from modern cinema, in 'Rambo-like' manner.

[92] In *S v Naidoo* 2003 (1) SACR 347 (SCA) at 358e-f, this court said the following;
'[I]t is undoubtedly so that the reasonably foreseeable consequences of an accused's conduct do play a role in assessing the gravity ("criminal blameworthiness") of the offence even where the conduct was negligent and not intentional and that there is no arbitrariness in that.'

[93] In *Naidoo* at 359b-f, it was emphasised that, in murder and culpable homicide, there is the unique and specific element of the loss of human life. This court distinguished (at 361h-362e) between cases of culpable homicide where the loss of life was as a result of a momentary lapse in concentration, on the one hand, and where it flowed from an intentional act such as assault, on the other. In *Naidoo* the facts fell between the two postulates.

[94] In *S v Nyathi* 2005 (2) SACR 273 (SCA), this court dealt with the question of moral blameworthiness and stated that, where a negligent act causes death, the punishment should acknowledge the sanctity of human life (at 277e-i).

[95] In *S v Nxumalo* 1982 (3) SA 856 (A) at 861h, Corbett JA said the following:

‘It seems to me that in determining an appropriate sentence in such cases the basic criterion to which the Court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Relevant to such culpability or blameworthiness would be the extent of the accused’s deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused’s negligence. At the same time the actual consequences of the accused’s negligence cannot be disregarded. If they have been serious and particularly if the accused’s negligence has resulted in serious injury to others or loss of life, such consequences will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed.’

[96] In *Nyathi*, Conradie JA considered translating degrees of negligence into years in custody. He thought it useful to have regard, in a general sort of way, to sentences imposed by courts. His examination of the relevant cases is repeated hereafter.

[97] The cases considered were serious road accident cases. In *S v Greyling* 1990 (1) SACR 49 (A), a 19-year-old who took a corner too fast collided with a concrete wall, killing four of five young women who had been conveyed on the back of his pickup. His sentence of five years’ imprisonment of which one year was suspended was on appeal altered to one of 12 months’ imprisonment. The court reaffirmed that in cases of gross negligence, imprisonment, even for a first offender, may be warranted. The youthfulness of the accused was taken into account (at 56f-g).

[98] In *S v Keulder* 1994 (1) SACR 91 (A), the accused was an alcoholic who was convicted of culpable homicide committed whilst driving in a heavily intoxicated condition. His sentence of two years’ imprisonment was set aside and the matter remitted to the trial court to consider the imposition of a sentence of correctional supervision. The accused had two previous convictions for road-related alcohol offences and his personal circumstances weighed heavily with the Appeal Court.

[99] In *S v Cunningham* 1996 (1) SACR 631 (A), the accused collided on the wrong side of the road with cyclists in an intersection. He abandoned his appeal against his sentence of three years’ correctional supervision in terms of s 276(1)(*h*) of the Criminal Procedure Act 51 of 1977 (the Act) and two years’ imprisonment, suspended. The court remarked that he was right to abandon his appeal in this regard.

[100] In *S v Naicker* 1996 (2) SACR 557 (A), the regional magistrate’s sentence of two years’ imprisonment, confirmed by the Provincial Division, was set aside on appeal and the matter remitted to the trial court for it to consider the imposition of correctional supervision. This court disagreed with the characterisation of the conduct in question as gross negligence ─ the appellant had moved at high speed (he had been racing another vehicle) into the slow lane obstructed by a tanker. The court observed, however, that he was clearly negligent in failing to keep a proper look-out before moving into

the left-hand lane.

[101] In *S v Birkenfield* 2000 (1) SACR 325 (SCA), the appellant rode his motorcycle very fast and without stopping at an intersection controlled by a stop sign, thereby killing a pedestrian as well as his pillion passenger. In confirming the sentence of five years' imprisonment in terms of s 276(1)(*i*) of the Act this court remarked that it was 'well within reasonable limits' (at 329g).

[102] In *S v Sikhakhane* 1992 (1) SACR 783 (N), a head-on collision was caused by the appellant's negligent overtaking. The negligence was considered to have been of a high degree. Two passengers and a driver in the approaching vehicle were killed and a motorcyclist seriously injured. A sentence of two years' imprisonment was confirmed on appeal.

[103] In *S v Omar* 1993 (2) SACR 5 (C), a driver strayed onto the wrong side of the road. He appeared to have lost concentration or to have fallen asleep. The court held that a sentence of correctional supervision in terms of s 276(1)(*h*) was appropriate.

[104] In *S v De Bruin* 1991 (2) SACR 158 (W), the accused had entered an intersection when the red light was against him. He had consumed alcohol before driving. He had three previous convictions for driving under the influence of liquor or for driving with a higher than permitted blood alcohol level. A sentence of four years' imprisonment was reduced to three years' imprisonment.

[105] In *S v Ngcobo* 1962 (2) SA 333 (N), the accused had driven his motor vehicle into a crowd in a well-lit street, killing four and injuring 24 people. On appeal, one year of a three year custodial sentence was suspended. He was held to have been grossly negligent by driving too fast whilst not keeping a proper lookout.

[106] Aside from cases bordering on recklessness, negligent conduct related to the driving of motor vehicles resulting in the loss of life appears to attract a lesser degree of moral opprobrium.

[107] In *S v Zake* 2007 (2) SACR 475 (E) the accused, a 26-year-old man, was a referee at a soccer match who happened to have a firearm in his tracksuit pants whilst officiating. After he had awarded a penalty he was surrounded by players contesting his decision. As they advanced towards him, he felt threatened and fired a shot which struck someone in the hand, exited and struck the coach of one of the teams killing him. The accused had been in custody for just over one year and had one previous conviction for assault in respect of which he was cautioned and discharged.

[108] In *Zake* the court had regard to the following dictum in *R v Karg* 1961 (1) SA 231 (A) at 236B-C:

'It is not wrong that the natural indignation of interested persons of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if the sentences for serious crimes are too lenient, the administration of

justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.'

[109] The accused in *Zake* had been handed the firearm for safekeeping but the court took into account against him that his possession of the firearm was illegal. It also took into account that a second victim was injured. In respect of the accused's conviction of culpable homicide the court imposed a sentence of six years' imprisonment of which two years were conditionally suspended for five years. The circumstances in *Zake* are closer to the facts of the present case. It should be borne in mind that in *Zake* the accused was responding to the aggression displayed by players who were angered by the penalty decision.

[110] Each case, must of course, be decided on its own facts. At the time of the commission of the offence the appellant was 46 years old. He is married with three dependents. The appellant paid for funeral expenses in relation to the burial of the deceased. He had also paid to transport the deceased's body back to Zimbabwe. The appellant, as described above, involved himself in charitable and developmental work. He appears to be a prosperous businessman and is clearly a valuable member of society.

[111] At this stage, however, it is necessary to properly characterise the appellant's conduct. He fired the shots in the circumstances referred to above. The conduct in question was directed at imposing the appellant's authority over the farm and the guest workers in a cavalier fashion. Accepting that he was intent on scaring off baboons, he could easily have done so with due regard to the safety of those entrusted to him and the presence of people on the farm. Firearms, as South Africans know all too well, are lethal weapons. The revolver in question, to the knowledge of the appellant, was deadly effective over a long distance. It was submitted on behalf of the appellant that, in the totality of the circumstances, taking into account the seriousness of the offence, the community interest and the personal circumstances of the accused, a wholly suspended sentenced is justified. I disagree.

[112] The appellant was transporting farm workers who were under his supervision and protection. He was in charge of a farm on which there was human activity. In my view, having regard to all the circumstances, a custodial sentence is called for. The degree of negligence, considering that the appellant ought to have been more concerned about the safety of all the employees entrusted to him, is high. His conduct was deliberately aggressive and without due regard to the danger to human life on the farm. On the appellant's own version of events, if he was indeed shooting to scare off baboons, nothing prevented him from firing into the air.

[113] Counsel for the State submitted that, in the event of the conviction on murder being set aside and substituted with a conviction of culpable homicide, a sentence of imprisonment in terms of s 276(1)(*i*) of the Act should follow.

[114] In my view, however, considering the appellant's conduct, the

community interest and the personal circumstances of the appellant, an appropriate sentence is five years' imprisonment, two years of which are suspended on condition that the appellant is not convicted of culpable homicide, assault with intent to do grievous bodily harm or any contravention of the Firearms Control Act 60 of 2000, committed during the period of suspension.

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M S NAVSA
JUDGE OF APPEAL

CONCUR:

BRAND JA
PONNAN JA
MALAN AJA

MLAMBO JA:

[115] I have had the benefit of reading the judgment of my colleague, Navsa. I am constrained to disagree with his conclusions. I do not agree that the evidence of the three eyewitnesses called by the state lacked credibility and that it was unsatisfactory and wholly unreliable. In my view all the evidence properly analysed, shows that the appellant intentionally shot and killed the deceased (Jealous Dube) and that when he fired shots at the other complainants he also intended to kill them. The sole question in dispute is his state of culpability (if any) when he fired the shots. I hold that his claim that there was a troop of baboons at the place and time is not only false beyond reasonable doubt, but is irreconcilable with anything less than a murderously intentional or reckless shooting by him at his human victims. I also hold the view that the appellant received a fair trial despite the inability of the prosecution to provide him with the original witness statements.

[116] A convenient starting point is the evidence. It is trite that in determining the guilt or innocence of an accused all the evidence must be taken into account. Cameron JA articulated the correct approach in *S v M* 2006 (1) SACR 135 (SCA) at para [189] thus:

'The point is that the totality of the evidence must be measured, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides the balance weighs so heavily in favour of the State that any reasonable doubt about the accused's guilt is excluded'.

See also *S v Gentle* 2005 (1) SACR 420 (SCA) at 433h-I.

[117] I intend to deal only with those facts which, in my respectful view, have not been accorded their appropriate impact by my colleague Navsa. The version of the state is that the deceased was one of five employees who were encountered on the farm road carrying their work tools when the appellant shot at them. The state's version is further that when Never returned to the compound in his bakkie, after the discovery of the deceased's body by the appellant, he returned with the tools left behind by the five employees when the shooting started. Incidentally this evidence about the tools was not challenged in cross-examination. On the other hand the version presented by the appellant is that he saw a troop of baboons crossing his path and, without stopping his vehicle, blindly fired two shots on either side to scare them off because of their nuisance tendencies.

[118] A critical factor is that the state's version excludes the presence of baboons in the vicinity of the shooting whilst the appellant's version excludes the presence of the five employees. My colleague Navsa is correct that the appellant never said he mistook the five employees for baboons. His version properly understood excludes the presence of the five employees in that vicinity when he fired the shots. Perhaps it is prudent to quote the appellant's words:

'Toe ons naby die huis kom, plus minus so 300 meter van die huis af het daar 'n klomp bobbejane voor my oor die pad gehardloop. Ek het my rewolwer by my gehad, ek het hom uitgehaal en ek het 'n skoot na regs, sommer net in die veld ingeskiet en 'n skoot na links, net om hierdie bobbejane te verwilder.'

And further:

'Ek het op geen mense daar geskiet, ek het geen mense gesien ook daar nie u edele.'

[119] In my view the presence of the deceased's body as well as the undisputed recovery of work tools in that vicinity fortifies the state's

eyewitness' version that there were five employees on the scene, the deceased being one of them, and no baboons. It is stating the obvious that humans walk upright whilst baboons use all four limbs. In addition, humans are much larger than even the largest baboon. Objectively speaking therefore humans can be effortlessly distinguished from baboons. Therefore the presence of the deceased's body at the location, having succumbed to a bullet fired by the appellant, as another objective fact strengthens the state's version that he was one of the five employees who were shot at by the appellant at that location.

[120] Clearly therefore one must conclude that as a matter of fact there were no baboons at that location but the five employees. It is simply implausible that the early morning sun may have affected the appellant's view. He was emphatic that he did not see the five employees there but only baboons crossing his path. This leads one to the question whether he could reasonably possibly have thought there were baboons – even though in fact there weren't. He, as already stated, disavowed this and one is in any way impelled, on the strength of the objective facts already alluded to**,** which one must accept, to rule out this possibility beyond reasonable doubt. The trial judge (Bosielo J) expressed himself thus in this regard:

'While dealing with the general probabilities of this matter, it is my view that the version of the accused, as he put forward to this court is not only improbable but is false beyond reasonable doubt. I already alluded to the fact that I had an opportunity to look at the various photographs in the photo album, Exhibit A, which depicts the scene of the shooting incident.

It is for me unthinkable that any person, sitting in a motor vehicle, driven by the accused, driving on that road, at 07:00 or 08:00 in the morning, could not have seen five adult persons walking directly in front of him towards him. In simple terms, in my view, that version defies simple logic and common sense.'

This also decisively rules out the simultaneous presence of baboons in that location. In my view the absence of baboons exposes the lie in the appellant's version of why he discharged his firearm purportedly to scare off baboons. The eyewitnesses are all *ad idem* that the five employees on the road, had split into two groups of two and three and that the appellant first pointed his firearm at the group of three and fired shots at them and that they ran away

(Kenneth Molambo, Talent and Lloyd). They also say he then turned his firearm on the two on the other side of the road (Onisimo and the deceased) and fired further shots at them. One of those shots struck the deceased.

[121] In my view it is inconceivable that the appellant's version can be reasonably possibly true whilst also accepting the state**'**s version 'with which it is irreconcilable'. See *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at para [8] where this proposition, by Nugent J in *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449c-450b, is endorsed. The *Van der Meyden* proposition simply put is that:

(a) Evidence which incriminates the accused and evidence which exculpates him cannot both be true.

(b) A court bases its conclusion, whether to convict or acquit, on all the evidence not on only part thereof.

(c) In analysing evidence a court may find that some of it is false, that some of it is unreliable, and that some of it may be possibly false or unreliable but none of it may simply be ignored.

See also *S v Trainor* 2003 (1) SACR 35 (SCA) at 40 para 8 and 41 para 9; *S v Liebenberg* 2005 (2) SACR 355 (SCA) at para 15.

[122] My colleague Navsa's primary basis for rejecting the state's version is that the eyewitness' testimony in court is contradicted by the objective facts. In this regard reliance is placed on the fact that the deceased's body was recorded by the police to have been lying in dense bush, 16 metres away from where the eyewitnesses said the appellant was when he fired the shots; that the body was 12-15 metres from the edge of the road where the appellant's vehicle was; that Onisimo's position as pointed out by the eyewitnesses was 16.5 metres away from where the deceased's body was and also deep inside the dense bush; that the police recorded that there were no signs that the deceased had crawled or had been dragged to where the body was found; that only one set of footprints was visible to and from the body; that only two shells were found inside the appellant's revolver by the police.

[123] It is correct that Mpofa and Ngulube in particular, who witnessed the

whole shooting, were weak witnesses regarding the distances alluded to by my colleague Navsa. This weakness, however, in my respectful view cannot found a basis to reject all their evidence. For whatever criticism there is against the three eyewitnesses, it cannot be suggested that they were not present at the scene when the shooting occurred. Another fact that seems to be overlooked is that even if the deceased's body was found about 16.5 metres away from where the witnesses say Onisimo was, both are on the same side, which is what the eyewitnesses stated. Furthermore the state's eyewitnesses testified that this was a moving scene – people were being shot at – and there was some running around. The eyewitnesses clearly stated that Onisimo and the deceased ran around whilst being shot at in an attempt to reach the appellant's bakkie. Indeed Visser, the ballistics expert, confirms that the deceased was not facing the appellant when the bullet struck him. A further aspect is that Kenneth Molambo's testimony is untainted by Mpofa and Ngulube's problems. He is one of the complainants regarding the attempted murder counts and he was unequivocal that he, Talent and Lloyd ran away because the appellant was shooting at them.

[124] It is also correct that the appellant and the eyewitnesses pointed out the same location where the shooting took place. The appellant pointed out the scene on the day of the incident and the eyewitnesses nearly three weeks thereafter. This lends further credence to the eyewitness account about the incident per se. They were not present when the appellant led the police to the scene on the day of the incident but they were able to point it out when taken there by the police some three weeks later.

[125] Considerable criticism is also levelled at the state's evidence on the basis that it is highly improbable that Onisimo would, whilst being shot at by the appellant, run towards the appellant's bakkie instead of running away as did Kenneth Molambo, Talent and Lloyd. A further basis of improbability relied on is that the state's version suggests that the appellant behaved like a complete lunatic in shooting at the five employees at point blank without provocation and in full view of witnesses. I do not find any improbability in this eyewitness account. We have no evidence from the appellant, other than his

claim – which strikes me as equally absurd – that he shot blindly to scare off baboons, to suggest that the situation is not as described by the eyewitnesses. It is not open to us sitting on appeal to reject first-hand evidence, without controverting evidence, but simply because we think people in the heat of the moment, could not have behaved in a certain manner. Whilst I am mindful not to overemphasise the advantages of the trial judge, my view is that in this case he was in a more advantageous position than us. He saw and heard the witnesses and commented:

'I find it necessary to state that I have had ample opportunity to observe Mphofu, Ngulube and Molambo while they testified under oath in this court. With the greatest of respect to them, (and I must state that I do not intend to ridicule them in any manner whatsoever), all three of them appear to me to be fairly simple and unsophisticated persons.

They all answered all questions, which were put to them satisfactorily, without any hesitation and directly. I have already alluded to the fact that they were exposed to a very long, prolonged, searching and incisive cross-examination.
However, I never got an impression, during their testimony, that they were either hostile or antagonistic towards the accused. They never exaggerated or even tried to embellish their version. Whenever they were confronted with apparent inconsistencies in their versions, they offered satisfactory explanations.
To my mind, no sound or valid criticism can be levelled against them.'

Simply put we cannot, sitting on appeal and relying on nothing but our own inclinations of how people should or would have behaved, reject otherwise plausible direct evidence. That eyewitness testimony should not be lightly rejected is illustrated by Mpofa when in cross-examination, it was put to him that it was highly improbable for Onisimo to have run towards rather than away from the appellant. His response was simple but stark in its significance:

'Dit is hoe hy opgetree het u edele. Hy het eenvoudig in die beskuldigde se bakkie kom klim.'

[126] It is also erroneous, in my respectful view, to find that there was no trigger to the appellant's conduct and therefore conclude that it is improbable that he behaved as attested to by the eyewitnesses. In the first place the appellant was angry when he encountered Never with his bakkie having run out of petrol for the umpteenth time. That he was angry is confirmed by Mpofa and Ngulube and is illustrated by his reaction in dismissing Never on the spot and instructing him to remove himself, his possessions, and his family from the farm. The probabilities are further very strong that directly after

encountering Never the appellant arrived at the work place where the employees were supposed to have unearthed stones the previous day and finding that none had been so unearthed, his anger did not abate, and directly thereafter when he encountered the five employees on the farm road having warned them the day before not to roam around the farm, his anger spilled over and he reacted in the manner described by the eyewitnesses.

[127] The discovery of the deceased's body by the appellant is another aspect that deserves proper consideration. The objective evidence is that the body was found in dense bushes. Superintendent Nephawe, Captain Boshoff and Inspector Louw who were the first on the scene are all *ad idem* that they would never have seen the body, hidden as it was in the dense bushes, had the appellant not pointed it out to them. The appellant left all the employees at the compound and was only accompanied by Never to fetch the stalled bakkie. It was on this return trip that he says he noticed the body, his attention being drawn to it fortuitously. He provides no detail how this was possible with the surrounding dense bushes and what exactly drew his attention to the body. The explanation he ventures is dubious to say the least – that on the return trip his view into the bushes was not impeded. The probability – which in my view is overwhelming – is that the appellant knew that he had shot someone there and had gone back to assess the situation.

[128] The finding of two shells in the appellant's revolver, as an objective fact, is also relied upon to discredit the eyewitness account that the appellant fired more than two shots. My respectful view is that the appellant had ample time from the time of the shooting until he handed his revolver to the police to tamper with his firearm to fit in with the version he proffered to the police and in court. That this is a strong probability is fortified by his dubious story of firing shots to scare off baboons, which as I have already shown, stands to be rejected out of hand.

[129] It is clear in my respectful view that having considered the evidence in its totality and properly analysing the objective facts, the probabilities and the strengths and weaknesses of the respective versions, the state has

succeeded in proving the guilt of the appellant beyond reasonable doubt. With regard to the failure to call the other guest workers as witnesses, such as Onisimo, counsel for the state informed us that this witness, like the others who is also Zimbabwean, could not be located.

I now turn to the issue of the missing statements.

[130] My colleague Navsa has conducted an exhaustive treatise of the law regarding the state's duty to make disclosure to an accused person. Indeed in *Shabalala v Attorney-General, Transvaal,* 1996 (1) SA 725 (CC) the Constitutional Court outlawed blanket docket privilege as previously asserted by the state and thereby reinforced an accused's right to a fair trial, by ordaining that an accused person is entitled to have access to documents in a police docket.

[131] What would constitute a fair trial depends on the circumstances of each case. *Shabalala* at 743 para 36 and 37. Simply put the full ambit of an accused's right to a fair trial in so far as access to docket contents is concerned is that an accused must be in a position to formulate and provide a full answer and defence to the charges brought against him. This was articulated in *Stinchcombe v The Queen* (1991) 68 CCC (3d) 1 (18 CRR (2d) 210) at 217 as follows:

'The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted.'

See also *R v Taillefer* (2004) 114 CRR (2d) 60 (SCC) at 84 para 71.

[132] As a result of the view I take on the merits of this matter I deem it prudent to comment on the appellant's contention that his right to make full answer and defence to the charges, was infringed which resulted in him not receiving a fair trial in this matter, because of the inability of the state to provide him with the original witness statements.

[133] It is correct that in this case the state's inability to disclose to the

appellant the original witness statements was a breach of its duty. I use the term ‘inability’ for the simple reason that the state did not refuse to disclose but was not in possession of these statements which, save for one, had vanished without trace from the police docket. The mere fact that the state has breached its duty to disclose does not necessarily mean that his right to make full answer and disclosure has been infringed with the consequence that he has not received a fair trial. The issue that has to be determined first is the extent of the breach and its impact on the trial. Each case must be determined having regard to the particular circumstances thereof. *Shabalala* (supra) at para 36. The position was, in my respectful view, properly articulated by Mahomed CJ in *S v Shikunga* 1997 (2) SACR 470 (Nm SC) at 484c-f as follows:

‘Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is whether the verdict has been tainted by such irregularity. Where this question is answered in the negative the verdict should stand. What one is doing is attempting to balance two equally compelling claims - the claim that society has that a guilty person should be convicted, and the claim that the integrity of the judicial process should be upheld. Where the irregularity is of a fundamental nature and where the irregularity, though less fundamental, taints the conviction the latter interest prevails. Where however the irregularity is such that it is not of a fundamental nature and it does not taint the verdict the former interest prevails. This does not detract from the caution which a court of appeal would ordinarily adopt in accepting the submission that a clearly established constitutional irregularity did not prejudice the accused in any way or taint the conviction which followed thereupon.’

See also *Smile v S* [1998] 2 All SA 613 (A) at 618 and *S v Maputle* 2003 (2) SACR 15 at paras 5 and 6.

[134] The appellant cannot, in my view, be heard to assert that his right to make full answer and defence to the charges was also infringed. The appellant provided a version from the time he reported the incident to the police, ie before he was even charged, and persisted therein right through the

trial. That version was that he fired two shots to scare off baboons that had crossed his path. The impact of the non-disclosure on the appellant's right to test the credibility and reliability of the eyewitness evidence was minimal if anything. In the first place the prosecution was unaware of the existence of the missing statements, which fact emerged during the cross-examination of Mpofa. What the prosecution was in possession of was the third set of witness statements which had been provided to the defence. Therefore the prosecution itself was not privy to nor placed any reliance on the missing statements. The prosecution case was also of necessity not based on the missing statements but on statements it had provided to the defence. Therefore the prosecution's case was in no way advantaged by the missing statements nor can the appellant claim to have been ambushed. A further point to make is that the appellant made full use of his right to cross-examine. This is a right which the Constitutional Court has also recognised. See *President of the RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC) at 36 para 61.

[135] Curiously, the defence was in possession of one of the missing statements which caught the prosecution by surprise when it was shown to one of its witnesses under cross-examination. No explanation has thus far been provided by the defence as to how they came into possession of a statement which went missing with others from a police docket. Possession by the defence of this statement, albeit one, nevertheless lessened whatever negative impact the non-disclosure of the others had on the appellant's right to a fair trial.

[136] I do not agree with my colleague Navsa that a conclusion that the missing statements did not suit the state's case is irresistible. This view is based on Superintendent Ramakadi's assertion that the reason the police decided to take fresh statements was because the original ones were mostly illogical, incomplete and appeared to have been taken by certain witnesses from other witnesses. This evidence must be contrasted with the evidence of Captain Boshoff, the original investigating officer in the case and who testified in support of the appellant's case. He had perused four and a part of a fifth of

the original statements and the only discernible contradiction he could point out in these statements related to the type of firearm the appellant used. We have had no sight of these statements and as a result we are not in a position to make our own assessment whether indeed the missing statements did not suit the state's case or would have advanced the appellant's case. A further consideration is that Ramakadi and Boshoff who had sight of the missing statements provided no details whether the statements they referred to were made by the eyewitnesses called by the state or by other witnesses.

[137] I also do not agree that the statements went missing by design rather than misfortune. Ramakadi explained that when the decision was taken to retake the statements the initial ones were put in a different section of the docket. He stated that he did not know how they eventually got lost. It is also clear from the record that the docket was handled by a number of police officers. In my view the police can only be criticised for incompetence and not for wilful wrongdoing.

[138] In my view the breach by the state to make disclosure was not so fundamental as to vitiate the proceedings. The appellant enjoyed overall a substantially fair trial. Objectively considered this is a matter that should be determined on the evidence on record unaffected by the breach.

[139] In the final analysis it is clear, in my respectful view, that having considered the evidence in its totality, the state established beyond reasonable doubt that the appellant shot knowingly at his five employees, not to scare off baboons, and by so doing intended to murder them, or proceeded recklessly in the knowledge that he might. The evidence also shows that the appellant's version is not reasonably possibly true and that he was properly convicted and sentenced. My colleague Navsa finds that the appellant in firing the shots behaved in a cavalier fashion to assert his authority over the farm and guest employees. He could only behave in this fashion if he was aware of their presence in the vicinity. As already shown he disavowed their presence on the scene and it is simply out of the question that baboons presented him with an opportunity to show his employees who is in charge. That being the

case it is my respectful view that there is no basis in law and fact to justify his conviction on culpable homicide, based as it is, on his discredited version.

[140] I would dismiss the appeal.

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D MLAMBO
JUDGE OF APPEAL

PONNAN JA:

[141] I have read the judgments of my colleagues Navsa and Mlambo JJA. I agree with the former but am constrained to disagree with the latter. On a proper conspectus of all the evidence two mutually exclusive, broad hypotheses emerge. The first is that the appellant deliberately and with the requisite *dolus directus*, shot and killed the deceased. This hypothesis admits of no other form of intention. The second, advanced by the defence, is that the killing occurred as a result of the negligent discharge by the appellant of his firearm. The first, which has been advanced by the State in this case, finds favour with Mlambo JA. Navsa JA, on the other hand, plumps for the second. In what follows I shall endeavour to demonstrate that the first postulated hypothesis is untenable.

[142] I agree with my colleague Mlambo that, in determining the guilt of an accused person, all the evidence must be taken into account. As it was put by this court in *S v Trainor* 2003 (1) SACR 35 (SCA) para 9:

'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety.'

That, however, is no licence for an inversion of the inquiry. The correct starting point remains the State case, which unquestionably has to pass a certain minimum threshold before one even turns to consider the veracity of

the defence. To commence with the defence version, to subject it in isolation to rigorous scrutiny, to find it wanting and thus susceptible to rejection, as Mlambo JA has done, is to my mind the very antithesis of approaching the evidence holistically.

[143] If one starts, as one must, with the State case, one is confronted by a myriad of internal and external contradictions. My colleague Navsa in his judgment dealt only with the more significant contradictions. Although not exhaustive they are sufficient in my view to cast serious doubt on the acceptability of the evidence of each eye-witness who testified for the State and consequently on the State case as a whole. I do not discount in any way their lack of sophistication, the generally intimidating milieu of the courtroom and the fact that they had to relive what for them must have been a harrowing experience. Even allowing for all of that, the evidence of each was riddled with improbabilities and contradictions.

[144] Navsa JA has sought to discern what he describes as the essence of the State's case. With respect to my learned colleague, he is far too charitable to that case. On my reading of the evidence, a logically coherent picture simply fails to emerge.

[145] It can hardly be in dispute that there were indeed workers on the scene of the shooting and that one of them was shot and killed by the appellant. It must also follow that there might well have been tools in the vicinity of the shooting. In that, Mlambo JA is undoubtedly correct. The presence of the workers, however, does not necessarily exclude the presence of baboons. What I cannot understand is why the presence or absence of baboons has assumed such heightened significance in this case. Because even if one were to accept ─ as my colleague Mlambo appears to ─ that the appellant falsely conjured up the baboons to explain his resort to his firearm, that hardly justifies the conclusion that the shooting was intentional. Nor is acceptance of the fact that the workers were present necessarily the end of the inquiry. Each participated in a pointing out. What was pointed out was inconsistent with their oral testimony in court and difficult to reconcile with the objective

facts. The nett result of all of this is that one is totally at a loss as to what the vantage point of each worker was or precisely what each saw. That, I am afraid, is one of the more elementary difficulties with the State case. It gets worse.

[146] When shots were being fired at the workers from fairly close range, both Onisimo and the deceased are supposed to have run towards the source of danger ─ not away from it. Onisimo in fact boarded the appellant's vehicle. The deceased after being struck by a bullet literally fell at the feet of Onisimo. Strangely, Onisimo thereafter seemed to be oblivious to the deceased's fate. The vehicle departed from the scene of the shooting and none of the workers (anywhere between five and eight in number according to the State case) who were at that stage occupants of the vehicle expressed concern for the deceased. And yet, given their testimony, they must already have been aware that the deceased had either been killed or was lying seriously injured in the veld. The workers then regrouped, readied themselves to go about their work, sought to verify by a headcount if any of their number was missing and thereafter set out to their new worksite ─ all of this in a generally desultory fashion as if nothing untoward had happened.

[147] Mlambo JA states that it is not open to us, sitting as a court of appeal to reject evidence simply because we think people could not have behaved in a particular way. As is apparent from the judgment of Navsa JA, however, that is not the sole basis for the rejection of the evidence in this case. My colleague Mlambo also objects to us relying on our own 'inclinations' as to how people should have behaved to reject plausible direct evidence. The answer to this is that first, the evidence properly analysed is anything but plausible. Second, courts of law daily have regard to their own experiences of, and insight into, human behaviour, in deciding upon the inferences to be drawn from the objective facts relating to the actions of witnesses (*S v Kalogoropoulos* 1993 (1) SACR 12 (A) 22*d*-*e*). A court would clearly also be justified in testing the evidence of a witness about his or her state of mind, not only against the prior and subsequent conduct of that witness and the other witnesses in the case, but also against the court's experience of human

behaviour and social interaction (*S v Eadie* 2002 (3) SACR 719 (SCA) para 64).

[148] The evidence of the eye-witnesses as to the number of shots discharged by the appellant is not only contradictory but is also at odds with that of the police officer who took the appellant's firearm into his custody. Whilst it is notionally possible for the appellant to have tampered with his firearm, the State gave no hint at that possibility during his cross-examination. And yet Mlambo JA concludes as a strong probability that he must have tampered with his firearm. What advantage would have been gained by such conduct is lost on me. The appellant admitted from the outset to firing two shots. That, at a time when he knew that the deceased had been struck and killed and when he was not to know what the version of the eye-witnesses would be. As it subsequently transpired, one of the eye-witnesses put the number of shots discharged as high as seven. In the context of this case the appellant's admission that he discharged two shots, one of which as we well know struck the deceased, can hardly be considered exculpatory. Why then, it must be asked, would the appellant tamper with his firearm, when such conduct would not garner any advantage for him?

[149] It is indeed so that this Court's powers to interfere on appeal with the findings of fact of a trial court are limited (See *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 *e-f*; *S v Francis* 1991 (1) SACR 198 (A) at 204*e*.) In this regard, Mlambo JA is undoubtedly correct. However, as this Court put it in *S v Heslop* 2007 (4) SA 38 (SCA) para 13:

'The correct approach to the deference which a Court of appeal ought properly to accord credibility findings made by a trial court, based directly or indirectly on the demeanour of witnesses who have testified orally before it, has been dealt with in a number of decisions. I merely wish to emphasise the following aspect. It is cause for concern to find laudatory epithets applied by a trial court to witnesses when the record shows that their performance, judged by the written word, was obviously far from satisfactory. In such a case an appeal Court will more readily interfere with the findings of the trial court as to the weight to be attached to the witnesses' evidence and its ultimate conclusion based on such findings.'

Furthermore, in *Union Spinning Mills (Pty) Ltd v Paltex Dye House and Another* 2002 (4) SA 408 (SCA) para 24, this Court held:

'Although Courts of appeal are slow to disturb findings of credibility they generally have greater liberty to do so where a finding of fact does not essentially depend on the personal impression made by a witness' demeanour but predominantly upon inferences from other facts and upon probabilities. In such a case a Court of appeal with the benefit of an overall conspectus of the full record may often be in a better position to draw inferences, particularly in regard to secondary facts.' (See also *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) para 14.)

[150] Whilst I plainly do not share the trial court's conclusion that 'no sound or valid criticism can be levelled against' the state witnesses, I nonetheless do not propose to deal with each of the points of criticism that can legitimately be advanced against the evidence of each of them. My reading of the record reveals each to be manifestly unreliable. That much is evident from the judgment of Navsa JA. It thus follows that, even if the appellant's version were to be rejected, as Mlambo JA would have it, the State case remains nonetheless woefully inadequate to support a finding that the appellant discharged his firearm with the requisite *dolus directus*.

[151] Mlambo JA appears to accept that Mphofa and Ngulube were 'weak witnesses regarding the distances'. For my part I am far more condemnatory of them on that score. That they are 'weak' regarding an important aspect such as distances is in my view a significant deficiency. Properly contextualised, their evidence is at odds with that of the other state witnesses, particularly the police officers who attended the scene immediately after the shooting, to the effect that the body of the deceased was to be found in dense bush some 16.5 metres away from where the appellant allegedly discharged his firearm. That their version is at odds with the objective facts is devastating to the State case, for it gives the lie to their account that the appellant shot at the deceased at fairly close range whilst the latter was walking towards the vehicle. That 'weakness', to once again borrow from Mlambo JA, must perforce found the basis for the rejection of the hypothesis advanced by the State.

[152] A further criticism of the State case is that it neither called – nor adduced any evidence for its failure to call – the other guest workers who were on the farm at the relevant time and who must have witnessed the

shooting. Absent any evidence, as is the case here, a trier of fact would have been entitled to draw an adverse inference from such failure. It is no answer to that criticism to invoke, as Mlambo JA appears to, the explanation tendered from the bar by counsel for the State in this court on appeal.

[153] Mlambo JA states: 'The impact of the non-disclosure on the appellant's right to test the credibility and the reliability of the eyewitnesses' evidence was minimal if anything'. He later adds: 'We have had no sight of these statements and as a result we are not in a position to make our own assessment whether indeed the missing statements did not suit the State's case or would have advanced the appellant's case'.

Not only do those assertions appear to be mutually incompatible, but on the view that I take of the matter, the missing witness statements are fatal to a conviction on the murder charge. Once again there is a paucity of information. There may well have been a perfectly innocent explanation for the statements having gone missing, but none was tendered by the State. Moreover, there was an initial denial of the existence of such statements. That in itself impacts negatively on the credibility of the relevant witness. Be that as it may, it was only when irrefutable evidence in the form of one of the missing statements was produced, that there was a willingness to even acknowledge that prior statements had indeed been secured from the eye-witnesses. I can hardly imagine that the impact of what may well have been two sets of statements per eye-witness would have been 'minimal if at all', as Mlambo JA puts it. Quite the contrary, for clearly the defence was denied the opportunity of cross-examining eye-witnesses on material evidence contained in their witness statements. Those statements must have been secured by the police with at least an eye on a prosecution. The standing of the witnesses ─ who were, in a word, pathetic ─ would not, I daresay, have improved if they had also been subjected to cross-examination on the additional statements, particularly statements that, on the State's own case, were logically incoherent and had been made by witnesses who had influenced and schooled one another. That being so, it is hard to resist the conclusion that the investigation docket had been deliberately doctored. But it may well be unnecessary to go that far.

[154] Mlambo JA finds it curious that one of the missing statements was in the possession of the defence. I would term it fortunate. Otherwise a fundamental irregularity may not have seen the light of day and a grave injustice may have resulted. Although counsel for the appellant offered to divulge to this Court how that statement came to be in his possession, he was not taken up on his offer. To my mind the defence acted quite properly in this regard.

[155] Mlambo JA suggests that the possession by the defence of one statement lessens whatever negative impact the non-disclosure may have had on the appellant's rights to a fair trial. That, of course, assumes on his approach that there *was* indeed a negative impact; a negative impact which, according to him, is incapable of quantification. Well, if there was indeed a negative impact, the logical corollary thereof ─ notwithstanding my colleague's finding to the contrary ─ has to be that the State in fact has been advantaged. It strikes me that on any reckoning the prejudice to the appellant in this case has to be substantial. For, whilst the appellant may well have made full use of the right to cross-examine, he was denied access to crucial evidential material. As a consequence the essential content of the right, it seems to me, has been negated.

[156] If the appellant is to be convicted of culpable homicide, as Navsa JA would have it, that would occur in consequence of the State case being rejected. The appellant would thus fall to be convicted on his own version. In that event the manifest irregularity matters not. If, however, the appellant is to be convicted of murder, as Mlambo JA would have it, that could only happen were the appellant's version to be rejected. The appellant would thus fall to be convicted on the evidence adduced by the State. That being so, the fact that the appellant advanced a consistent version since inception would be entirely irrelevant and can hardly therefore avail the State in either negativing or mitigating the effect of the irregularity. It follows that the irregularity, which impacts directly and substantially on the fairness of the trial and the effect of which cannot (as I have already intimated) be quantified, becomes to my mind, an insuperable obstacle. In that event one therefore plainly cannot get to a murder conviction.

[1 57] Mlambo JA states that it is inconceivable that the appellant's version can be reasonably possibly true whilst also accepting the State's version with which it is irreconcilable. In support of that proposition my colleague calls in

aid the judgment of Nugent J in *S v Van der Meyden* 1999(1) SACR 447 (W). Mlambo JA appears to distill three broad propositions from that judgment. I,

on the other hand, feel constrained to set out in full the relevant dictum (at 449*h*-450*b*), which reads:

'It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is "completely acceptable and unshaken". The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case" examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence. . . .

The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.' (See also *S v Trainor* 2003 (1) SACR 35 (SCA) at 40*h*-41*a*; *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101*b*.)

As Navsa JA has ably demonstrated, the State's case is neither acceptable nor unshaken. In those circumstances there can be no warrant for rejecting the defence version on the basis that it is not reasonably possibly true.

[158] Bearing in mind where the onus lies in this case and more importantly the nature of the onus, Navsa JA commences with the State case. In that context he details various unsatisfactory features in the state case. Those are glossed over, largely ignored or dealt with in a somewhat random fashion by Mlambo JA. Instead Mlambo JA contents himself, from the outset, with what he terms 'those facts that have not been accorded their appropriate impact by Navsa JA'. He then proceeds to level what I can only describe as various disparate criticisms at the judgment of Navsa JA. Those criticisms leave me in

no doubt that the carefully reasoned judgment of Navsa JA is unassailable.

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V PONNAN
JUDGE OF APPEAL

CONCUR:
NAVSA JA
BRAND JA
MALAN AJA

The order

[159] In the result the appeal is successful only to the extent reflected in the order that follows:

1. The convictions on the charge of murder and on the four counts of attempted murder are set aside, as are the related sentences.
2. The conviction on the murder charge is substituted with a conviction of culpable homicide.
3. The appellant is sentenced to five years' imprisonment, two years of which are suspended for five years on condition that the appellant is not convicted of culpable homicide, assault with intent to do grievous bodily harm or any contravention of the Firearms Control Act 60 of 2000, committed during the period of suspension.