THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

CASE NO: 454/2007

In the matter between

MANDLA MISHACK MLIMO
APPELLANT

and

THE STATE
RESPONDENT

CORAM: FARLAM, MTHIYANE JJA and KGOMO AJA

HEARD: 15 FEBRUARY 2008
DELIVERED: 18 MARCH 2008

Summary: Appellant indicted in the High Court for murder and attempted murder of husband and wife arising out of a shooting incident -

Whether judge's conduct during trial rendered it unfair.

Expert witness – whether trial court was entitled to accept the evidence of a witness who had not completed a diploma in ballistics as expert evidence – whether the witness's experience in the said field was sufficient.

Neutral Citation: MM Mlimo v The State (454/07) [2008] ZASCA 7 (18 March 2008).

JUDGMENT

MTHIYANE JA
MTHIYANE JA:

[1] The appellant was arraigned in the Pretoria High Court before Els J, on charges of murder, attempted murder and robbery with aggravating circumstances. He was acquitted on the charge of robbery with aggravating circumstances but convicted on the first two counts and sentenced to life imprisonment for murder and twelve years' imprisonment for attempted murder. The sentence of twelve years' imprisonment was not ordered to run concurrently with the life sentence. The appellant appeals to this court with its leave, against his convictions and sentences.

[2] The charges arose out of an incident in Laudium, Pretoria. At about 18.30 on 6 November 2005 Mrs Alida Rahman, her husband and their children returned home from a visit. When her husband, Mr Abdul Rahman (the deceased), stopped the car in the driveway and got out to open the gate, Mrs Rahman noticed that the gate was already partially open. Suspecting something amiss, she tried to warn the deceased against alighting, but found that the deceased had already stepped out of the vehicle and had his back to the door. The deceased then suddenly urged her to get out of the car but before doing so she attempted to reach for the hooter in order to raise the alarm. At that point a hand clutching a gun emerged from behind the deceased and a shot went off. She was shot in her right hand before reaching the hooter. This caused her to slide back and fall onto the ground. For a brief moment she did not know where her husband or her children, a boy and a girl aged 9 and 11 respectively,

were. She heard a car drive away from the scene. Crawling on her knees, she reached for the door and managed to get her children out of the car. She then crawled onto the right side of the car where she found the deceased lying sprawled on the road with a bullet wound in his chest.

[3] The appellant pleaded not guilty to the charges and in his plea explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977 pleaded a complete denial and placed all the elements of the charges against him in issue. It therefore followed that in order to secure a conviction the State had to lead all relevant evidence to link the appellant to the commission of the offences charged.

[4] The State called Dr Robert Gabriel Ngude, who conducted a post mortem examination on the deceased on 6 December 2005 and thereafter prepared the medical legal post mortem report in which the cause of death is given as:
'Gunshot wounds to the chest.'

[5] The appellant did not dispute that he was the licensed holder and owner of a semi-automatic pistol, described as a 40 S&W Calibre Vektor Model SP2, bearing serial number 101368. The State called Superintendent Zwelabo Solomon Sindane to give evidence as a ballistics expert. He testified that he had ballistically tested the appellant's firearm and concluded that the bullet that was removed from the body of the deceased and the two empty cartridges that were found at the scene were fired from it. This conclusion was arrived at after Sindane had compared the exhibits removed from the scene of the crime and with the bullet removed from the deceased's body with the bullets and the cartridges

fired from the appellant's firearm. He had examined them by 'coupling them underneath the microscope' and found marks that matched. This, said the witness, convinced him that the bullets and the cartridges concerned were fired from the appellant's firearm.

[6] The other witnesses called were Inspectors Thomas Willem Knoesen and David Shibambu who gave evidence concerning the recovery of the firearm. These two officers accompanied the appellant to the house of his friend, Mr Ernest Matlou, where the firearm was found under a bed. Shibambu said that the appellant explained that he left his firearm with Matlou for safekeeping. He went on to say his house had been broken into previously and that he feared his firearm might be stolen if it remained there.

[7] During cross-examination it was put to Knoesen that when the firearm was recovered it was in a safe under the bed. Knoesen disputed this and stuck to his version. Nothing turns on this dispute; it does not explain away the possession of the firearm at the time of the shooting of the deceased and his wife. A possible explanation which was, however, later disputed by the appellant emerged at the bail hearing. During his evidence at those proceedings Knoesen told the court that the appellant had told him that on the day of the shooting he was driving a car belonging to a friend, Raymond. He had his firearm strapped to his belt in a holster. While he was driving Raymond shouted for him to stop and claimed that he had seen a person who owed him (Raymond) money. The appellant stopped the vehicle as requested whereupon Raymond snatched the firearm, jumped out of the vehicle and started firing shots at the person. He thereafter jumped back into the car and the appellant drove

off. This was disputed during cross-examination. It was suggested that the appellant had informed Knoesen that the firearm had always been in his possession, except for the period after his arrest when he handed it to Matlou for safekeeping.

[8] The appellant closed his case without calling evidence in his defence. This after his application for a discharge at the end of the state's case in terms of s 174 of the Criminal Procedure Act was refused. The trial judge expressed the view that there was at that stage a fairly strong *prima facie*case against the appellant.

[9] On appeal the appellant attacked the conviction on three bases. First, it was contended he had not received a fair trial. The judge's behaviour during the trial, as evidenced by his impatience, confrontational manner and continuous descents into the arena, submitted counsel, rendered the trial unfair. Second, counsel submitted that the evidence of Knoesen was unreliable and open to constitutional challenge. The third and final point was that the trial court erred in accepting Superintendent Sindane as an expert witness and consequently the acceptance of his ballistics evidence.

[10] I deal first with the question whether the appellant received a fair trial. There is no doubt that the judge participated actively in the proceedings and there were undoubtedly times when he was impatient with the appellant's attorney during the trial. As I read the record the judge did not impede cross-examination. After each verbal skirmish or exchange between himself and the defence attorney the trial judge was careful to invite him to proceed with his cross-examination and to

thereafter lead whatever evidence he wished to place before the court. In my view there are times when the judge was justified in losing patience with the defence. The point may be illustrated by reference to a stage in the proceedings when Superintendent Sindane had already given evidence concerning bridge marks but the attorney pressed him to deal with that aspect once again. Undue impatience and irritability on the part of a judicial officer is inappropriate and undesirable. A trial judge or magistrate must ensure that 'justice is done'. He or she should so conduct the trial that his or her open-mindedness, impartiality and fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused (*S v Rall*1982 (1) SA 828 (A) at 831H–832A). This is particularly so where an accused person is represented by a junior and inexperienced counsel or attorney who might easily be intimidated by improper conduct on the part of the court. The same cannot, however, be said of the appellant's attorney. He never took a step back when the appellant's interest demanded that he forge ahead and handled the trial judge's impatient interventions with ease, true to his profession. He was steadfast and never lost his composure. Having regard to the record as a whole I am not persuaded that the manner in which the judge conducted himself in this case affected the fairness of the trial.

[11] I turn now to Knoesen's evidence. Counsel submitted that it should be rejected, firstly, because he had contradicted himself. Developing his argument on this point Counsel drew attention to the fact that Knoesen had initially said that the appellant had told him that he did not wish to say anything but told the court during the bail hearing that the appellant had related the incident involving the snatching of the firearm from him by Raymond. Counsel submitted also that the incident involving

Raymond was so far fetched that the court should find that the appellant in fact never said anything of the kind. Of course if that finding is made it must therefore follow that at the time of the shooting the firearm was in the appellant's possession. In the absence of any explanation of how the firearm came to be ballistically linked to the shooting, the inference is unavoidable that the appellant was correctly implicated in the shooting.

[12] In the alternative counsel submitted that Knoesen's evidence is open to challenge on constitutional grounds. It was submitted that the statements Knoesen attributed to the appellant should not be accepted on that account. This point however flounders in the light of Knoesen's unchallenged evidence that the appellant was duly warned by him before he could say anything.

[13] I turn to the third and final point, namely that the court erred in accepting Superintendent Sindane as an expert witness. The submission is premised on two points. First, it was said that Sindane had in his evidence conceded that he had not completed his diploma in the ballistics course; he still had one more year to complete. In my view a qualification is not a *sine qua non*for the evidence of a witness to qualify as an expert. All will depend on the facts of the particular case. The court may be satisfied that despite the lack of such a qualification the witness has sufficient qualification to express an expert opinion on the point in issue. It has been said:

'It is the function of the judge [including a magistrate] to decide whether the witness has sufficient qualifications to be able to give assistance. The court must be satisfied that the witness possesses sufficient skill, training or experience to assist it. His or her qualifications have to be measured against the evidence he or she has to give in order to determine whether

they are sufficient to enable him or her to give relevant evidence. It is not always necessary that the witnesses's skill or knowledge be acquired in the course of his or her profession – it depends on the topic. Thus, in *R v Silverlock* it was said that a solicitor who had made a study of handwriting could give expert evidence on the subject even if he had not made any professional use of his accomplishments.' (See DT Zeffertt. AP Paizes, A St Q Skeen *The South African Law of Evidence* (2003) 302; see also Lirieka Meintjies van der Walt, 'Science Friction: The Nature of Expert Evidence in General and Scientific Evidence in Particular' (2000) 117 *SALJ* 771 at 773-4.)

[14] There is every reason to accept Sindane as an expert witness. He is vastly experienced in his particular field of expertise and stated that he has been involved in no less than 3085 cases involving ballistics testing over a period of more than 6 years. A lack of formal qualification may be an indicator that the witness has not yet received sufficient training in the theoretical aspects in the field in which he or she gives evidence. But this is not the case here, given the vast experience the witness has accumulated over the years. Significantly the challenge is not about the content or substance of his evidence but rather, that he still had one more year to complete the course. During argument counsel offered no guidance as to what makes an expert an expert. In my view the vast experience that Sindane had qualified him to be an expert and the trial court was justified in accepting his evidence. In any event the challenge on appeal is a *volte face*, comes late in the day, as the appellant's attorney indicated during the trial that Sindane's qualifications were not disputed. Accordingly it no longer lies in the appellant's mouth at this stage to dispute the witness's qualifications.

[15] The second ground upon which Sindane's evidence was attacked was that he had conducted the ballistics test together with another official

from whom he appeared to have sought guidance or approval. I do not think there is any merit in this submission. It is clear from the evidence that Sindane conducted the test himself and arrived at the conclusion to which he did himself. In any event there is nothing wrong with officers working in tandem when they investigate cases.

[16] Having regard to the case as a whole I do not think the trial judge can be faulted for coming to the conclusion which he did. The evidence established that there was a shooting in which the deceased was killed and his wife shot and injured. The appellant's firearm was ballistically linked to the shooting. There was no countervailing evidence as the appellant did not testify. Accordingly the appeal against the convictions must fail.

[17] I turn to sentence. As already indicated the twelve year sentence was not ordered to run concurrently with the life sentence. One would have thought that concurrency with the life sentence would follow as a matter of course: see s 39(2)(a)(i) of the Correctional Services Act 111 of 1998. Not so, says counsel for the appellant. He submitted that, if this court was not minded to alter the sentence imposed, the prison authorities might require a clear statement that the twelve year prison sentence was to run concurrently with the life sentence. Counsel for the State did not oppose the request. However, if the prison authorities are obliged to apply the provisions of s 39(2)(a)(1)(i) of the Act, the sentence needs no alteration.

[18] Accordingly the following order is made:

The appeal is dismissed.

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KK MTHIYANE

JUDGE

OF APPEAL

CONCUR:

FARLAM JA
KGOMO AJA