NOT REPORTABLE

CASE NO: CC 67/07/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DOMINIC MWILIMA **APPLICANT**

and

THE STATE **RESPONDENT**

CORAM: **SCHIMMING-CHASE, AJ**

Heard on: 18 July 2011

Delivered on: 18 August 2011

JUDGMENT

SCHIMMING-CHASE, AJ

[1] In this matter, the applicant applies for leave to appeal to the Supreme Court in terms of section 316(1) of the Criminal Procedure

Act, 51 of 1977 (“the Criminal Procedure Act”) as amended against his conviction on one count of murder and one count of obstructing the course of justice, as well as the resultant sentences of 20 years imprisonment on the count of murder and 5 years in respect of the count of obstructing the course of justice.

[2] The respondent cross appeals against the sentence on the count of murder on the grounds that the sentence was too lenient.

[3] At the hearing of this matter, counsel for the applicant confined himself to two main grounds of appeal. The first ground is that that the formal admissions made on behalf of the applicant by his legal representative at the trial in terms of section 220 of the Criminal Procedure Act were not reduced to writing and signed by the applicant, resulting in a material irregularity because they were effectively not properly recorded. The second ground is that there was non compliance with section 162 of the Criminal Procedure Act, because the oath was not administered by the presiding Judge or the Registrar of the Court.

[4] The State opposes the applicant’s application for leave to appeal on the basis that there are no reasonable prospects of success on appeal. With regard to the cross appeal, it is contended that the presiding Judge misdirected himself when he stated that he was unable to make a finding whether the shooting of the deceased by the

applicant was with *dolus eventualis* or *dolus directus*, and then decided to reward the applicant with the benefit of his doubt by convicting him with murder with *dolus eventualis,* as a result of which the sentence was inappropriately lenient.

[5] Briefly stated, the facts relating to the charges are that on 14 August 2005 in the district of Katima Mulilo the applicant, a police officer, pursued what can be characterised as a suspect and shot him, resulting in his death. This was seen by an eye witness, Progress Sipalela who had apparently previously known the applicant as a person working for a security company in Windhoek. Mr Sipalela also saw the applicant pick up something from the ground which appeared to be an empty cartridge and put it in his jeans. A police van arrived and the police officers in it asked the applicant to tell them who had shot the deceased. He replied that the person had run behind the building. After the police officers left, the applicant went behind a building and when he returned he got into his vehicle and drove away. Seeing that the police officers attending the scene had been misled,
Mr Sipalela then drove to the Katima Mulilo Police Station and reported what he had witnessed.

[6] The accused exercised his right to remain silent at the trial. At the commencement of the trial, the legal representative of the applicant made certain formal admissions on behalf of the appellant

in terms of section 220 of the Criminal Procedure Act. The recording of the admissions are as follows:

"Mr Mostert:	*May I proceed with the admissions, My Lord?*
Court	*We have the admissions. Have I got a copy of the admissions?*
Mr Mostert	*I will just make it orally, My Lord, my client is from Katima Mulilo and I only saw him this morning for the first time. I couldn't see him last week, so I am just going to make oral submissions.*
Court	*Oral admissions but you'll make a copy for filing, won't you?*
Mr Mostert	*Yes, My Lord*
Court	*Okay*
Mr Mostert	*Now the first admission is that we admit the identity of the deceased being Wengar Mutafela; we admit that when the body was transported to the mortuary, that it did not sustain further injuries; we admit the cause of death being a gunshot; we will admit the post mortem. The Accused person admits that the pistol that was seized was his official service pistol with serial number*

77619, a CZ make and it was in a working condition.

Court *Yes?*

Mr Mostert *That's it, My Lord. We will also admit the photoplan."*

[7] As regards the first ground of appeal the argument on behalf of the applicant is that although section 220 does not specifically require the admissions to be made in writing, the practice is that the formal admissions must be in writing. Failing to ensure that a formal document containing the admissions signed by the applicant was obtained, resulted in a material irregularity. It is further argued that the mechanical recording of what the legal representative stated does not amount to a properly recorded formal admission, because it was not signed by the applicant, and the presiding Judge's acceptance of the admissions resulted in a misdirection. It is also submitted that after these admissions were made, the State commenced reading the exhibits into the record, and with regard to the post mortem report, the state did not read into the record the portion indicating that the deceased was referred to as an "unknown male", which also resulted in an irregularity.

[8] In support of this argument, counsel for the applicant relied on S v Maweke and Others 1971 (2) SA 327 (A). This matter dealt with the long repealed section 284 of the Criminal Procedure Act 56 of

1955, which contains substantially similar provisions relating to formal admissions as contained in section 220. Counsel for the applicant submitted that this case is authority for the principle that formal admissions must be in writing and properly recorded. I was specifically referred to page 329E-G of that judgment, where it was held that a formal admission should be fully and accurately recorded. It was also submitted that despite the fact that it is not pertinently stated in the old section 284, or in section 220 that admissions must be in writing, the finding that it must be fully and accurately recorded in S v Maweke should be interpreted to mean that it must be in writing and signed by the applicant.

[9] Counsel for the respondent submits that this case does not support the submission made on behalf of the applicant. Not only are the facts of the case different, in that the Court found that the admission made was equivocal and ambiguous, the *ratio* in this case is that the Court must be sure of exactly what is admitted when formal admissions are made and received. The Court in S v Maweke specifically held that where an admission made by an accused person is equivocal or ambiguous, and permits of more than one interpretation, that construction which is more favourable to the accused must be adopted. It was also argued that even in terms of section 220 the same test is applicable. The Court must be clear of the ambit of exactly what was admitted.

[10] Counsel for the respondent further submits that although the legal representative of the applicant made these submissions orally at the trial, the record was transcribed and the Court was in a position to establish the ambit of the admission, and whether it was clear and unequivocal. There was no need to formally record these admissions in a separately signed document, as there is no requirement for this in section 220 or its earlier version for that matter. It is also argued that everyone was certain of the identity of the deceased. Even on the applicant's own version he placed himself on the scene. He chased the deceased with a firearm, and he did not exclude that his firearm discharged. In fact his own version led credence to the evidence of the other witnesses who testified on behalf of the State.

[11] I am in agreement with the submissions made by counsel for the respondent, and do not find merit in the submissions made on behalf of the applicant. At the trial the applicant through his legal representative placed the oral admissions in terms of section 220 on record, which is in compliance with that section which requires that either the accused or his legal advisor may admit any fact placed in issue. The record of proceedings, by which this Court is bound, contains a clear record of the admissions which are in my view unequivocal. In addition, from a perusal of the record I could not find any question put by the legal representative for the applicant at his trial indicating that there was any disagreement or ambiguity with regard to the formal admissions made at the commencement of the

trial.

[12]

[13]

[14] In determining whether or not to grant leave to appeal in a criminal case the trial judge must, both in relation to questions of fact and of law, direct herself specifically to the enquiry of *"whether there is a reasonable prospect that Judges of appeal will take a different view"* In borderline cases the gravity of the crime and the consequences to the applicant are doubtless elements to be taken into account. The primary consideration for decision is whether or not there is a reasonable prospect of success. (See R v Muller 1957(4) SA 642 (A).)

[15] Bearing in mind the principle that the applicant must show that he has reasonable prospects of success on appeal (See also R v Ngubane 1945 AD 185; Shinga v The State and Another (Society of Advocates) (Pietermaritzburg Bar Intervening *Amicus Curiae*); S v O'Connel and Others 2007 (2) SACR 2; S v Nowaseb 2007 (2) NR 640 at 641), I am of the opinion that the applicant has not shown that he has reasonable prospects on appeal in respect of this ground. Accordingly, the application for leave to appeal fails on this point.

[16] The second ground of appeal raised by the applicant relates to section 162 of the Criminal procedure Act which in essence provides that no person shall be examined under oath as a witness in criminal proceedings unless he or she is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court by the presiding Judge. It is submitted by counsel for

the applicant that this section makes it clear that the judge's clerk did not have authority to administer the oath, as a result of which the testimony of all witnesses in the applicant's trial cannot be regarded as evidence. It is further submitted that this also is a material irregularity and that the oral evidence led by the State was therefore legally inadmissible because only the trial Judge was competent to administer the oath. Furthermore, it was argued that the Supreme Court might take a different view of the practise of clerks administering the oath.

[17] It was submitted by counsel for the respondent that there is no substance in this argument and that the administering of the oath by a Judge's clerk, or in his or her absence a court orderly acting temporarily as Court Registrar is proper compliance or at least substantial compliance with section 162. In support of these submissions reliance was placed on the view of the authors Du Toit *et al*, Commentary on the Criminal Procedure Act dealing with section 162, and on S v Orphanou and Others 1990 (2) SACR 429 (W).

[18] I am in agreement with the submissions made on behalf of the respondent as well as the authority used in support of counsel's submissions. The oath was administered in the presence of the presiding Judge, and it has been longstanding practice in this Court for the Judge's clerk to administer the oath. In S v Orphanou, the Court also found at page 436 that there is nothing in the language of

section 162(1) or the background against which it was enacted to show that the provision that the oath be administered by the Judge or the Registrar of the Court is peremptory, and that what is of most significance is the undertaking by the witness to speak the truth under perjury and sanction of conscience and social ostracism which gives the greatest promise of veracity and not the status of the person who administers the oath. "In other words it is the state of mind of the witness that is paramount, not the status of the person who mechanically utters the words of which repetition is required".

[19] I am in respectful agreement with this finding and accordingly find that there was substantial compliance with section 162(1) with respect to the administering of the oath by the Judge's clerk and this ground of appeal must also fail as in my view there are no prospects of success with respect to this argument.

[20] With regard to the cross appeal by the respondent, it is submitted that the sentence of 18 years for murder was inappropriately lenient and that the presiding Judge misdirected himself when he initially found himself unable to decide whether the shooting was committed with *dolus eventualis* or *dolus directus,* and then decided to reward the applicant with the benefit of the doubt by convicting with murder *dolus eventualis.* It is also argued that this was a misdirection given the strength of direct evidence that had been placed before him by the State which evidence had not been

controverted by the applicant and furthermore, during sentence the presiding judge pointed out that it appeared to have the semblance of an assassination. In support for the submission that the sentence was too lenient, counsel for the respondent relied on the case of S v Stephanus Skeyer, an unreported judgment of this Court delivered on 16 October 2003 in case number CC 23/2001.

[21] It is true that the applicant as a police officer had a duty to protect the public and that he failed in his duty when he shot and killed the deceased, and also sent police officers investigating the incident on a wild goose chase.

[22] However it must be borne in mind that the applicant did not give evidence, and there was only one eye witness. The other witnesses who testified were involved after the fact. It is in my view understandable that the trial Judge could not conclude from the evidence that it was proved beyond reasonable doubt that the applicant intended to bring about the consequences of his action or that his aim and object was to bring about the deceased's death. It may well have been that there was an intention to injure, or even to fire a warning shot. In the absence of any other evidence pointing to *dolus directus* bearing in mind the State's burden of proof, I am unable to find that the Judge misdirected himself.

[23] I am also of the view that the facts in S v Skeyer are not

applicable in this matter. In S v Skeyer, a police officer who had a history of assaulting his ex girlfriend, collected a rifle with 30 bullets in the magazine, harassed members of his ex girlfriend's family and then went into a house where he shot his ex girlfriend's brother, aged 18 and another lady connected to the family, aged 28, for which he received *inter alia* two life sentences.

[24] In The State v Sean Reginald Burger, an unreported judgment of Van Niekerk J delivered on 9 December 2004 in case number CC 08/2003 the oft quoted legal position in regard to sentence was reiterated.

> *"Firstly the Court which has to impose sentence must consider the 'triad consisting of the crime, the offender and the interests of society'. (S v Zinn 1969(2) SA 537 (A) at 540 G). The Court must seek to balance these three aspects without overemphasizing one to the detriment of any of the others. Nor must the Court under emphasize any of the aspects, but rather give full weight to each, depending on the circumstances"* (See page 14-15)

[25] In the above case the murder was perpetrated by means of a particularly vicious assault on the deceased, during the course of which the accused vented his anger and aggression upon the deceased by stabbing her repeatedly with at least three sharp and

serrated kitchen knives. Furthermore, three of these knives broke during the assault in which a total of twenty wounds were inflicted by the accused. The accused was effectively sentenced to 20 years imprisonment. (See page 15 and 29).

[26] In the unreported Supreme Court decision of Tobias Mandago v The State, delivered on 6 March 2002 in case number SA 3/2001, the appellant, who was convicted of murder and robbery, appealed against his conviction and sentence. The Court confirmed the conviction of murder and increased the appellant's sentence from nine years to 20 years. At page 22 of the judgment Chomba AJA found that the murder *"for which the appellant was convicted was a particularly heinous homicide"*. He further stated on the same page that *"Moreover the appellant was at the material time a soldier in the defence force of Namibia. His clear duty was to ensure the safety and security of Namibians. To the contrary he engaged in a homicidal venture purely to satisfy his avarice for easy money."*

[27] Both the above cases show that life imprisonment, which the respondent essentially seeks on appeal is not always imposed as a sentence for murder. The courts have also found a 20 year sentence for murder appropriate, taking into consideration the triad of sentencing and the balancing act to be exercised. In my view, even if in the circumstances, a heavier sentence could have been considered, I do not find the sentence startingly inappropriate, and in my opinion a higher court would not interfere in this sentence, having not had the

opportunity to observe the demeanour of any of the witnesses or of the applicant at the trial. Thus I also hold the opinion that are also no reasonable prospects of success on appeal with this argument by the respondent, Accordingly, the cross appeal also fails.

[28] In the result, the following order is made:

(a) The applicant's application for leave to appeal is dismissed.

(b) The respondent's cross application for leave to appeal is dismissed.

_____

SCHIMMING-CHASE, AJ

ON BEHALF OF APPLICANT	L Mokhatu
Instructed by:	Du Pisani Legal Practitioners
ON BEHALF RESPONDENT	A Verhoef
Instructed by:	Prosecutor-General