REPUBLIC OF NAMIBIA

CASE NO.; CC1/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE **Applicant**

and

LAZARUS NATANGWE SHADUKA **Respondent**

CORAM: **VAN NIEKERK, J**

Heard: 8 February 2011

Delivered: 22 March 2011

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK, J: [1] After a criminal trial the respondent, to whom I shall refer as "the accused", was acquitted on a count of murder, read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003), but convicted on the competent verdict of culpable homicide in relation to his wife, the deceased. He was also convicted on a second charge of attempting to defeat or obstruct the course of justice. On the first count he was sentenced to a fine of N$25 000 or 1 year imprisonment. On the second conviction he was sentence to a fine of N$2000 or 2 months imprisonment.

[2] The State is seeking leave to appeal against the acquittal on the murder count. It further seeks leave to appeal against both the sentences imposed. The application is opposed.

[3] The well known test to be applied in applications of this kind is that set

out in *R v Ngubane* 1945 AD 185 at 187, where the Court said that it is for the applicant to satisfy the Court that, if leave to appeal be granted, he has a reasonable prospect of success on appeal. In reaffirming this test, the Appellate Division stated in S *v Shabalala* 1966 (2)

SA 297 (AA) at 299D:

> ".....die 'moontlikheid' dat die Hof van Appel 'n 'moontlike' fout in die beredenering sou kon vind en 'miskien' tot die konklusie kon kom dat die verhaal van die beskuldigde waar kan wees, is so 'n anemiese toets dat 'n aansoek vir verlof in enige saak daarop sou kon slaag. Alleen dan wanneer die Verhoorregter tot 'n weloorwoe konklusie kom dat daar gronde is waarop die Hof van Appel tot 'n ander afleiding van die feite kan kom as wat hy gekom het, en daar dus 'n redelike moontlikheid van sukses vir die applikant bestaan, behoort verlof toegestaan te word. Bestaan daardie moontlikheid, behoort verlof ook toegestaan te word sonder huiwering of teesin."

> [my translation follows]:
> "...the 'possibility' that the Court of Appeal may find a 'possible' error in the reasoning and may perhaps come to the conclusion that the story of the accused may be true, is such an anaemic test that an application for leave in every case could succeed thereon. Only when the trial Judge comes to a well-considered conclusion that there are grounds on which the Court of Appeal can come to a different conclusion on the facts to the one to which he has come, and that the applicant thus has a reasonable possibility of success on appeal, ought leave to appeal to be granted. If that possibility exists, leave ought to be granted without hesitation or reluctance."

[4] This approach was confirmed in *S v Ackerman* 1973 (1) SA 765 (AA) at 768B-D. See also S *v Tcoeib* 1992 NR 198 (HC) at 199G-H. The test is not whether the appeal will succeed, but whether there is a reasonable possibility that it may succeed (S *v Ackerman (supra)* at

767H).

[5] In *R v Muller* 1957 (4) SA 642 (A) the following was emphasised (at 645D-F):

> "In determining whether or not to grant a convicted person leave to appeal ……the dominant criterion is whether or not the applicant will have a reasonable prospect of success on appeal (Rex *v Baloi,* 1949 (1) SA 523 (AD)). The mere circumstance that a case is 'arguable' is insufficient; unless the term 'arguable' be used 'in the sense that there is substance in the argument advanced on behalf of the applicant' *(Baloi's* case, *supra* at p. 524). From the very nature of things it is always somewhat invidious for a Judge to have to determine whether a judgment which he has himself given may be considered by a higher Court to be wrong; but that is a duty imposed by the Legislature upon Judges in both civil and criminal matters. As regards the latter, difficult though it may be for a trial Judge to disabuse his mind of the fact that he has himself found the Crown case to be proved beyond reasonable doubt, he must, both in relation to questions of fact and of law, direct himself specifically to the enquiry of 'whether there is a reasonable prospect that the Judges of Appeal will take a different view' *(per* CENTLIVRES, J.A., in *Rex v Kuzwayo,* 1949 (3) SA 761 (AD) at p. 765). In borderline cases the gravity of the crime and the consequences to the applicant are doubtless elements to be taken into account but, even in capital cases, the primary consideration for decision is whether or not there is a reasonable prospect of success (Rex *v Shaffee,* 1952 (2) SA 484 (AD)).

[6] The State lists several grounds of appeal against the conviction on culpable homicide. They are as follows:

> "That the Honourable Judge misdirected herself and/or erred in law and/or in fact by:
>
> 1. Not rejecting the accused's defence of an accidental shooting in totality as:
>
> - The reason why the respondent pulled the trigger remains totally unexplained as the court rejected the respondent's version that the deceased fell back onto the firearm;
> - The reason why the respondent did not activate the safety catch of the firearm remains wholly unexplained;
> - The reason why the respondent did not point the firearm away from the deceased remains totally unexplained;
> - The reason why the respondent pressed a loaded, cocked firearm against the body of the deceased remains totally unexplained.

2. Not finding that the only reasonable inference to be drawn from the evidence and the probabilities in the case is that the

respondent acted with *dolus* when he pulled the trigger of the firearm as:

- The respondent was correctly found to be a lying witness who gave contradictory explanations to explain his wife's death;

The respondent and the deceased had a troubled marriage with a history of domestic violence and the respondent in the past threatened to kill the deceased;

It is so improbable that it can be rejected as false beyond a reasonable doubt that the deceased would have played with the firearm and cocked it for no apparent reason;

- The warning statement of the respondent does not support a defence of accidental shooting as it refers to the firearm *itself* that went off and respondent does not admit pulling the trigger in his warning statement;
- The firearm is a deadly weapon which the respondent fired at close range into the upper body of the deceased with fatal consequences.

3. Not considering, alternatively not properly considering that to constitute in law an intention to kill there need not be a set purpose to cause death or even a desire to cause death as a person in law intends to kill if he deliberately does an unlawful act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not and by not finding that the respondent at least acted with *dolus eventualis* when he pulled the trigger.

4. Wrongly relying on the majority judgment in S *v Mlambo* 1957 (4) SA 727 (AD) which is not applicable to this case as it is applicable to cases where the Court cannot draw an inference of *dolus* due to the absence of indications of an intent to kill, e.g. the absence of evidence of a deadly weapon used, absence of a cause of death, and absence of a history of animosity between an accused and deceased."

[7] Mrs *Wantenaar* who appears for the State, filed heads of argument in which she deals collectively with these grounds and expressly indicates that none of the grounds are abandoned. At the hearing she stood by the heads of argument, highlighting some aspects and making additional submissions on the issue of the sentence on the second conviction.

[8] As far as the conviction is concerned, I also find it convenient to approach the grounds of appeal collectively. They are essentially aimed at one ultimate finding, namely that the State did not prove beyond a reasonable doubt that the accused acted with intention to kill.

[9] Although paragraph 2 of the grounds of appeal states that the Court should have found that the accused "at least" acted with *dolus eventualis,* as such leaving open the possibility for an argument that the deceased acted with *dolus directus,* I do not understand the actual focus of the State's complaint to be (as shown by the heads of argument and the oral submissions made) that the Court should have found that the accused acted with direct intent. In oral submissions Mrs *Wantenaar* submitted that the Court did not consider the issue of *dolus eventualis* as such. As Mr *Strydom* for the accused pointed out and State counsel acknowledged, the State did not present its case during the trial on the basis of legal intention, but squarely on the basis of a direct intention to kill. However, I do agree with counsel for the State that it is open to argue for the purposes of this application that the Court should have made a finding of the presence of *dolus eventualis.*

[10] The State takes issue with the fact that the Court had regard to the majority judgment in *S v Mlambo* 1957 (4) SA 727 (AD). The State is correct when it points out that the case is distinguishable on the facts. In the *Mlambo* case, unlike in the present case, the cause of death and the instrument used were not known. However, to my mind it does not matter, as the principle on which the Court relied can be applied *in casu.* I intended to focus at that stage of the judgment (at para. [45]) on the issue of "inferring murder or culpable homicide from conduct showing consciousness of guilt." *(cf Mlambo* at p728B). The accused, by lying at Paramount about his own involvement in the deceased's death, acted in a manner showing consciousness of guilt. The point I wished to make at that stage is that the fact that the accused showed

consciousness of guilt by lying does not necessarily mean that he had intention to kill. Of course this is not the end of the enquiry. One must also consider other aspects such as the weapon used, the location and nature of the injury inflicted and the further conduct and statements of the accused, etc., as the Court indeed did.

[11] Nevertheless, even if the *dictum* of the minority judgment relied on by the State is followed, the ultimate finding of the Court, namely that the State proved negligence and not intention, would still have been the same. In view of the State's grounds of appeal it is necessary to look more closely at this *dictum* (hereinafter "the *Mlambo dictum*") (at 738B-D), which reads as follows:

> "..... [I]f an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so."

[12] The *Mlambo dictum* has often been followed with approval, but was also placed in perspective, as it has at times wrongly been used against a lying accused (see S *v Steynberg* 1983 (3) SA 140 (AA) 146A-148E). In the course of the discussion in *Steynberg,* the Appellate Division referred to the following statement in *Goodrich v Goodrich* 1946 AD 390 at 396 and held that its point of departure is completely reconcilable with the line of thought in the *Mlambo dictum:*

> "... in each case one has to ask oneself whether the fact that a party has sought to strengthen his case by perjured evidence proves or tends to prove that his case is ill-founded, and one should be careful to guard against the intrusion of any idea that a

party should lose his case as a penalty for perjury."

[13] The *Steynberg* judgment is in Afrikaans, but the English head note sets out the gist of the wider discussion adequately enough:

> "The application of the *Mlambo* approach often has satisfactory and correct results. But the application thereof obviously does not mean that, when an accused gives a false explanation about a fatal assault he perpetrated on someone about which he alone is able to give evidence, the inference must be made that he had the intention to kill the deceased. That was not what was decided in the *Mlambo* case. In the nature of things it is, in general, impossible to devise an exhaustive formula according to which it can be judged whether the particular approach is applicable or not. That depends on the particular circumstances of each case. The nature and extent of the accused's lies are of great importance. In addition, all the other factors which appear, from the evidence, to be relevant to the adjudication of the question whether the inference that the accused had the intention to kill is justified should be placed in the scale; and this adjudication should be undertaken with due observance of the established rules of logic in connection with circumstantial evidence formulated in *R v Blom* 1939 AD 188 at 202 - 3."

[14] The application of the *Steynberg dictum* to the facts of that case on appeal (at p148F-150A) is insightful, especially as it also concerns a case in which the deceased was shot in circumstances where he and the accused were alone and the accused lied about what had transpired. (See also the approach and facts in S *v Van As* 1991 (2) SACR 74 (W)).

[15] As I understand the State's application, it is not based thereon that this Court erred in making any finding on the facts. There is the following statement in paragraph 2 of the notice of application for leave which sets out the factual basis on which the State says dolus eventualis should have been found: "It is so improbable that it can be rejected as false beyond a reasonable doubt that the deceased would have played with the firearm and cocked it for no apparent reason." The fact is that in para. [18] of the judgment on sentence the Court held that it could not reject the accused's

evidence on this issue as false beyond a reasonable doubt. In any event, I see no basis on which this finding can be attacked.

[16] Applying the *Steynberg dictum* to the facts as found in the instant case, the available evidence to my mind does not lead to the result that the only reasonable inference that can be drawn is that the accused acted with intention. The aspects of the evidence which remain unexplained and which are listed by the State, taken with the other evidence, do not lead to only one conclusion. They are just as compatible with an inference of intention as they are compatible with an inference of negligence. For instance, even if the accused pulled the trigger this action could have been done either with intention or with negligence. A further example can be cited: The fact that the accused did not activate the safety pin does not necessarily lead to a conclusion that he could only have acted with subjective foresight that his actions could result in fatality and that he reconciled himself with that possibility, as was submitted by Mrs *Wantenaar.* In this regard the following *dictum* in S *v Sigwahla* 1967 (4) SA 566 (AD) at 570E-F is important to bear in mind:

> "Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so."

[17] In my view the insistence by the State that the Court should make a finding of subjective foresight and reconciliation with the foreseen result requires of the Court to make a leap in logic across a chasm that is just too wide.

[18] As far as the sentences are concerned, the State seeks leave to appeal on the grounds that the Court erred by:

"5. Not finding that the respondent's unexplained actions of pressing a loaded cocked deadly weapon (firearm) against the body of the deceased and then pulling the trigger amounts to reckless negligence.
6. Not imposing a sentence of direct imprisonment but imposing a fine on the conviction of culpable homicide and thereby imposing a sentence which is so lenient that it induces a sense of shock and which is grossly inadequate in the circumstances as it does not serve a deterrent purpose at all but puts a stamp of triviality on the crime committed by the respondent;
7. Overemphasizing the personal interests of the respondent and the mitigating factors;
8. Underemphasizing the high degree of moral blameworthiness of the respondent and the fact that the consequences of his conduct were totally foreseeable and of his own making and that the respondent's awareness of the risk involved is an aggravating circumstance:
9. Underemphasizing the interest of the society and not properly considering that this interest of society ties up with the deterrent purpose of punishment and that the punishment must not only deter the respondent but must also deter the public in general from acting in a similar way;
10. Not imposing a term of direct imprisonment but imposing a fine on the conviction of an attempt to defeat or obstruct the.....[course] of justice and thereby overemphasizing the personal circumstances of the respondent and the mitigating factors and thereby putting a stamp of triviality on this offence;
11. Describing the crime of an attempt to defeat or obstruct the ..... [course] of justice in the circumstances of the case as technical and thereby not considering that the respondent's deliberate and callous.....[course] of conduct to defeat or obstruct justice after killing of the deceased is an aggravating factor." [my omissions and insertions]

[19] The State did not expand in argument upon the fifth ground of appeal. In the context of negligence, recklessness is considered to be gross negligence, in which case the ground of appeal is semantic. I shall not consider it further.

[20] The gist of the State's complaint about the sentences imposed is that the imposition of a fine for each of the offences is too light - effective

imprisonment should have been imposed. In the heads of argument the State highlighted the need to punish commensurate with the accused's degree of moral blameworthiness and placed emphasis on retribution and the need for deterring others. For all the reasons set out in the judgment on sentence, the sentence imposed for the culpable homicide conviction is in my view not too lenient in circumstances where no assault was proved and where the accused has already been in custody for two years awaiting trial. The amount of the fine is by no means light.

[21] On the issue of the attempt to obstruct the course of justice State counsel relied to the case of *S v Andhee* 1996 (1) SACR 419 (A) for the proposition that the appropriate sentence for such a crime is effective imprisonment. In this case the Appellate Division stated (at 423*j):*

> "The offence of attempting to defeat or obstruct the ends of justice is rightly regarded as a serious one which may, and frequently does, warrant severe punishment *(S v Mene and Another* 1988 (3) SA 641 (A) at 665J-666A; S *v W* 1995 (1) SACR 606 (A) at 608i)."

[22] I have, with respect, no quarrel with this statement, which certainly does not lay down any general rule as to punishment in such cases. It would, clearly, depend on the circumstances of each case whether severe punishment is warranted. In the *Mene* case the accused were experienced policemen who made false reports and laid false charges against others to cover up their own complicity in damaging a police vehicle. The case of *W* involved a prosecutor who withdrew a criminal case against an accused in exchange for sexual intercourse. Clearly the fact that the accused were in positions of trust requiring a high degree of integrity was an aggravating factor in each of these cases. This is not the position in the instant case. In

the *Andhee* case the accused was a medical doctor who ran over and fatally injured a 13 year old pedestrian. The accused left the scene without attempting to ascertain the nature and extent of her injuries. In order to escape detection and avoid the consequences of his unlawful conduct, he claimed that his car had been stolen and that he was at a party at the time of the collision. He later spun an intricate web of deception which included persuading other persons to give false testimony on his behalf in court. These aspects were considered to be aggravating. Clearly all these cases are distinguishable on the facts. They are far more serious than the case of the accused *in casu.*

[23] In conclusion on the issue of sentence I am of the view that, bearing in mind that sentence is pre-eminently in the discretion of the trial Court, there are no reasonable prospects that another Court will find that any misdirection was committed in weighing the different relevant interests or that the sentences were glaringly inadequate in the circumstances of this case.

[24] The result is therefore that the application for leave to appeal is refused.

VAN NIEKERK, J

Appearance for the parties:

For the applicant: Mrs B Wantenaar

Office of the Prosecutor General

For the respondent: Adv J A N Strydom

Instr. by Hennie Barnard & Partners