THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1257/2023

In the matter between:

MZWANDILE RONALD MAGASELA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Magasela v The State* (1257/2023) [2025] ZASCA 08 (31 January 2025)

Coram: **MABINDLA-BOQWANA, WEINER and KEIGHTLEY JJA and CHILI and MOLITSOANE AJJA**

Heard: 6 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The time and date for hand-down is deemed to be 31 January 2025 at 11h00.

Summary: Appeal against conviction and sentence – proof beyond a reasonable doubt – rejection of appellant's version – not reasonably possibly true – intent to kill proven – murder conviction upheld – sentence – misdirection by trial court - substantial and compelling circumstances present – deviation from minimum sentence justified – sentence of eight years' imprisonment appropriate.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mokose and Sardiwall JJ, sitting as court of appeal):

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld.
3. The order of the high court is amended to read as follows:

   '1 The appeal against conviction is dismissed.

   2 The appeal against sentence is upheld to the extent only that the appellant is sentenced to a period of imprisonment of eight years.

   3 The sentence is antedated to 11 September 2019.'

JUDGMENT

Weiner JA

Introduction

[1] The appellant, Mzwandile Ronald Magasela, was charged in the Regional Court, Benoni (the trial court) on one count of murder read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997. The State alleged that, on 18 May 2018 the appellant intentionally shot and killed Thabo Mac Khoza (the deceased). He pleaded not guilty to the charge of murder and provided a plea explanation. He stated that the deceased died as a result of a single shot that was accidentally discharged from the appellant's firearm, after the deceased attempted to grab hold of the appellant's firearm during a physical altercation. The appellant

tried to pull the firearm away from the deceased, and a shot went off unexpectedly. The appellant denied that he intended to kill the deceased.

[2] The trial court rejected the appellant's version and accepted the testimony of the single state witness Mr Lucky Tangzwane (Mr Tangzwane).[1] The appellant was convicted as charged and sentenced to 15 years' imprisonment. He was also declared unfit to possess a firearm. The trial court granted the appellant leave to appeal against the conviction and sentence imposed.

[3] The appeal served before the full bench of the Gauteng Division of the High Court, Pretoria (the high court) on 11 November 2021. It dismissed the appeal on both conviction and sentence. The appellant applied for special leave to appeal to this Court. It was granted against both the conviction and sentence on 8 November 2023.

[4] The appellant submitted that the trial court erred in the evaluation of the evidence and that the trial court and the full bench were wrong in rejecting his version. He denied that he intended to kill the deceased. It was submitted on his behalf that he should rather have been convicted of culpable homicide. He disputed that the State had proven his intention to kill beyond a reasonable doubt, and contended that his version was reasonably possibly true and should have been accepted. He further submitted that he should not have been sentenced to fifteen years' imprisonment as there were substantial and compelling circumstances to depart from the prescribed minimum sentence.

Background facts

[1] Mr Tangzwane was a single witness on the events surrounding the shooting of the deceased.

[5] The appellant, the deceased and a Jabulile[2] were tenants in the Calderwood Lifestyle Estate in Benoni. On 18 May 2018, Jabulile, the appellant's neighbour, approached him and reported that the deceased was harassing her and that he had prevented her from entering her apartment. The deceased then departed and the appellant accompanied Jabulile to her apartment. The appellant advised Jabulile to lock herself in her apartment and that she should not open the door to her apartment if the deceased returned. The appellant returned to his apartment with his three -year-old son and proceeded to prepare food for them.

[6] The appellant then received a call from Jabulile who reported that the deceased was back at her apartment and that he was kicking at the door. She requested the appellant to summon the security officer at the main gate of the complex to request him to assist her in dealing with the deceased.

[7] The appellant proceeded to the main gate where he reported to Mr Tangzwane, the security officer at the complex, that the deceased was harassing Jabulile. Mr Tangzwane and the appellant returned to Jabulile's apartment where the deceased was pulling the security gate of Jabulile’s apartment in an attempt to gain entry. The deceased was holding a bottle of beer and appeared to be intoxicated. Whilst Mr Tangzwane was attempting to communicate with Jabulile, the deceased hit the window through which Mr Tangzwane and Jabulile were talking.

[8] Mr Tangzwane attempted to remove the deceased from that area and to escort him to his apartment. The deceased continued to swear at Jabulile. Whilst Mr Tangzwane was attempting to lead the deceased to his apartment, the deceased again hit the window of Jabulile's apartment. The appellant took his child, who

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[2] Jabulile’s surname is not mentioned in the record.

began to cry, to his own apartment. The deceased managed to extricate himself from Mr Tangzwane's hold and again moved towards the security gate in front of the appellant's apartment. The deceased accused him of being in a relationship with Jabulile and began swearing at the appellant.

[9] The appellant testified that at this point, the deceased spilled some of the content of the beer bottle on the ground. The appellant exited his apartment to assist Mr Tangzwane. The deceased then lunged at the appellant. Mr Tangzwane, in attempting to remove the beer bottle from the deceased, bent down under the deceased, who was bent over, to remove the bottle. He was pushing the deceased towards the stairs. At some point, the appellant's son had emerged from his apartment. The deceased was aggressive and hit the appellant twice with the beer bottle on the chest. The deceased stepped on his son's foot, causing him to cry out. The appellant rushed his child back towards the apartment with his back turned towards Mr Tangzwane and the deceased.

[10] The appellant, who was employed by Parade Total Transportation (a courier company) as an anti-hijack team member stated that, on this evening, he was carrying his 9mm firearm in its holster, concealed by his jacket. The safety catch of the firearm was off and there was a bullet in the chamber. He normally carries the firearm like that to enable him to draw it and shoot when in imminent danger, and if necessary.

[11] According to the appellant, whilst he was pushing his son towards the door of his apartment, the deceased noticed that the appellant was carrying a gun and inquired whether he was going to shoot him. When the appellant looked up, he saw the deceased lunging towards him. He thought the deceased was attempting to grab his firearm. The appellant withdrew his firearm from the holster but held it behind his right hip pointing downwards. The deceased, still in a bent over

position, was grabbing for the firearm; the appellant lifted his arm behind him to prevent the deceased from reaching his firearm, and during this scuffle a shot was discharged that hit the deceased in the head.

[12] Mr Tangzwane, who was still trying to remove the beer bottle from beneath the deceased heard a gunshot and saw the deceased fall down. Mr Tangzwane then saw the appellant holding a firearm. He did not see when or how the shot was fired. The appellant appeared shocked and immediately called to Jabulile to call for help and bring towels so that he could stop the deceased's bleeding.

[13] The appellant denied that he intentionally shot the deceased. The deceased, according to the appellant and Mr Tangzwane was still bent over. He assumed that when he pulled the firearm back, the firearm was directed at the deceased's bowed head.

Mr Tangzwane's evidence

[14] The evidence until the scuffle occurred was common cause between Mr Tangzwane and the appellant. However, Mr Tangzwane disputed the appellant's evidence that his son had emerged from his apartment and walked into the passage where the altercation between the appellant, Mr Tangzwane and the deceased was happening. He claimed that the appellant locked the door behind him when he exited his apartment to confront the deceased, leaving his child inside. Mr Tangzwane also denied that the deceased had mentioned appellant's firearm or that the deceased enquired whether the appellant intended shooting him.

[15] Mr Tangzwane testified that he was bent over, beneath the deceased, pushing against the deceased, trying to remove the beer bottle when the shot went

off. It was accepted by the magistrate that the deceased was totally out of control and in all probability intoxicated.

Analysis

[16] It is trite that 'there is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond a reasonable doubt. The corollary is that the accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true.'[3]

[17] The trial court, however, adopted the novel approach by beginning with its evaluation of the appellant's version and not properly evaluating the evidence of Mr Tangzwane. In contrast to the present case, in *Bulelani v S (Bulelani)*, the court 'properly evaluated the facts before it and correctly followed the above principles as it had correctly pointed out that it had to consider the totality of the evidence before it, and not to follow a piecemeal approach in order to come to a correct and just decision'.[4]

[18] In *S v Chabalala (Chabalala),*[5] this Court amplified the *holistic* approach required by a trial court in examining the evidence on the question of the guilt or innocence of an accused. It stated:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weights so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party. . . was decisive but that can only be *an ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to

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[3] *Bulelani v S (Bulelani)* [2024] ZAGPPHC 50 para 29.
[4] Ibid at para 30.
[5] *S v Chabalala (Chabalala)* 2003 (1) SACR 134 (SCA) para 15 at 139I-140B.

one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.'[6]

[19] The approach taken by the magistrate is contrary to that set out in *Chabalala and Bulelani.* It is trite that '[t]he court can base its finding on the evidence of a single witness as long as such evidence is substantially satisfactory in every material respect or if there is corroboration.'[7] It is thus necessary to traverse Mr Tangzwane's evidence with some caution as he is a single witness on the events preceding the shot being fired. The evidence of the pathologist that the deceased was shot in the head could not be disputed. The following excerpts from the testimony of Mr Tangzwane are relevant and material:

'**<u>Mr Van As:</u>** So when the shot was discharged you were pushing, or what is happening?

<u>Witness</u>: It happened very fast. When I heard the gunshot, it was the time when I took the bottle away from him

<u>Mr Van As:</u> within your knowledge, in your sight, what you can see, was there a stage where there was a fight, or where there was a struggle for this firearm?

<u>Witness:</u> I cannot say. As I have said that everything happened so fast, I only heard a gunshot.

<u>Mr Van As:</u> was there any physical contact, touching or anything?

<u>Witness:</u> he pushed the bottle and then I went underneath him, then I took the bottle away from him. Everything happened fast.

<u>Mr Van As:</u> Because the accused will testify that he noticed that the deceased noticed that the accused was wearing a gun, so he asked him whether he wanted to shoot him

<u>Witness Answer</u>: I cannot remember, I did not hear all that.

<u>Mr Van As</u>: Now at the time that you took the bottle from the deceased, the beer bottle, was the deceased still trying to get to the accused?

<u>Witness</u>: Yes

<u>Mr Van As:</u> Now according to the accused he was actually removing his gun from his holster after he became aware that the deceased actually was moving towards him and trying to keep the gun away from him. . . because he realised that the accused [sic] became aware of the gun.

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[6] Ibid at para 15.
[7] *Mahlangu and Another v S* [2011] ZASCA 64; 2011 (2) SACR 164 (SCA) para 21.

Witness: I do not know that, because I did not even see him when he took it out

Mr Van As: You say the deceased bent down?

Witness: When he bent down, it seemed like he was fighting, so when he was fighting he bent down. When he bent down, I went underneath so that I can grab that bottle away from him.

Mr Van As: Yes, When the pushing and shoving happened in the passage in front of the unit of the accused, the child came into the passage.

Witness: . . . Yes, when the altercation started your worship the child went out when the father was going out as well.

Mr Van As: Are you saying that the child. . . you saw the child in the passage. You admit that the child came out of the unit of the accused.

Witness: When the child went out he was following the father, and then she was taken back, the child was taken back

Mr Van As: I get the impression that the deceased was keeping you very busy sir

Witness: Yes, because he was someone who had so much power, so he is the person whom I was focusing on.

Mr Van As: Alright Sir, but the point I want to get at is at the time… at one stage the accused actually pushed his child inside the house.

Witness: Yes, the time he was going out when there was a noise he took back the child into the house.

Mr Van As: But immediately before the shot went off?

Witness: No. He pushed back the child inside the house or the unit before the gunshot, and then when the gunshot went off, the child was already inside the unit.

Witness: When I took the bottle that is when the gunshot… that is when I heard the gunshot. . . The gunshot went off when I was taking the bottle, and then when I heard the shot, that is when I ended up on the wall. I was standing by the wall

Mr Van As: The accused will testify that the deceased grabbed his firearm from his hand.

Witness: I did not see that

Mr Van As: You cannot dispute that it happened. Is that correct?

Witness: I am disputing it did not happen, because I was there.

Mr Van As: so what did happen sir?

Witness: when he pushed him with the bottle on the chest, I took the bottle. When I took the bottle that is when there was a shot, a gunshot.

Mr Van AS: so you saw everything?

Witness: yes

Mr Van As: So when did the accused take out the firearm?

Witness: I did not see the gun when it was taken out. I only heard the gunshot.

Mr Van As: Now let me understand this. You stand like this, you grab the bottle, and then the gunshot went off at the same time?

Witness: I was not standing, I was grabbing the bottle from the deceased person, because the deceased's hand was still up, so he was still going to fight.

Mr Van As: You cannot say how the accused was holding the gun? Before the gunshot or after the gunshot? Before the gunshot.

Witness: I did not see the firearm.

Mr Van As: But was the deceased standing up? Can you exactly explain to the Court what was your position, what was the deceased's position?

Witness: When I grabbed the bottle away from him I bent down so that I can have power, so that I can have power to push him back and remove him so that we can go backward. Then he bent down because he wanted to fight… When I pushed him, that is when I heard a gunshot

Mr Van As: When the shot went off, were you standing? What were you doing exactly at that time Sir? At that time when the shot went off, what were you doing?

Witness: When the gunshot went off I was pushing the deceased.

Mr Van As: At the time when the deceased was shot Sir.

Witness: He was bending down, as he is demonstrating, and I was under him.

COURT: Indicating that he bent over forward. Is that correct?

Mr Van As: I am specifically asking you, at the time when the shot was fired, what were the positions? That is what I need to determine at this point in time

Witness: I was in-between the two of them I was in-between the two of them, I as pushing, the other one was on the left-hand side, the other was on my right-hand side.

Mr Van As: But I have just asked you that previously today, and you said that the accused at the time when the shot was fired, was standing behind you, and the deceased was in front of you.

Witness: Yes, but I was in-between the two of them.

Mr Van As: Do I have to understand now that the deceased was standing up straight, you were standing up straight, everyone was standing up straight when the shot was fired?

Witness: No, we were not standing straight, because the deceased was trying to fight with the accused person. I was trying to stop that fight so I was pushing the deceased.

Mr Van As: When the shot was fired, was there any physical contact between the deceased and the accused?

Witness: That is the time when he pushed him with the bottle only

Mr Van As: So he shot him at the time...when the shot went off the deceased was pushing the accused with the bottle?

Witness: He pushed him with the bottle, then I grabbed the bottle [intervenes]

Mr Van As: The deceased...can you just show the Court his position when he was shot? Just show the Court his position, that is all.

Witness: He was bending over Your Worship. I was under him. He wanted to fight back … He was taking his hands to the accused, because he wanted to be in contact with him.

Mr Van As: You were facing the deceased when the shot went off. It is not a difficult question.

Witness: Yes

MR VAN AS: So you could not see at that stage, you could not see where the accused was.

Witness: He was in front of me.

COURT: The accused not the deceased Sir. This gentleman.

Witness: He was on my side, but behind me.

Witness: I did not see them fighting for the firearm

Court: okay but listen to the question of Mr Van As. He is asking, did it not happen, or what is the situation? Or could it have happened, but you did not see it?

Witness: I did not see it.

Mr Van As: But it is correct that at that time when the shot went off … you were focusing on the deceased, and the accused was behind you

Witness: Yes

Mr Van As: When the shot was discharged according to you, must there have been at least a metre between them or not?

Witness: I do not think it was a metre, because we were very close to each other

Mr Van As: Did the firearm ever come past you when the shot was fired or was it fired from behind you?

Witness: As I have said, I was under the deceased. I heard the firearm and then I fell onto the walls.…

Witness: As I have said. when the firearm, the gunshot went off, I was focusing on him. So I do not know from which direction the gunshot was coming from and where it was heading to.

. . .

Mr Van As: Did he have the... did you see the key for the flat?

Mr Van As: So he locked the burglar door with a key?

Witness: Most of the locks there at that apartment, you lock it, you press it and then it locks automatically, and then when you open it you need to use a key to open it

Mr Van As: Did you lock… did he lock it with a key? That was the question

Witness: No, you do not lock with a key, you only push it and then it automatically locks, and then when you open, you open with a key

Mr Van As: I further put it to you that the shot that was discharged was not deliberately discharged by the accused.

Witness: I would not know I am not the one who was holding the firearm.'

[20] From the aforegoing, it is clear that Mr Tangzwane would not have been able to see the skirmish and tussle over the firearm because of the position that he was in. The quick moving and chaotic nature of the events would have contributed to Mr Tangzwane's inability to make an accurate and reliable observation. Mr Tangzwane was concentrating on attempting to remove the deceased and did not recall each detail of the evening's events. He conceded that he did not see the shooting, or the firearm until the deceased fell down.

[21] Whilst the trial court found that it cannot be said that the appellant was a poor witness, the magistrate rejected the appellant's version because the court deemed it to be improbable. This finding was made before the court considered the state's version and was based solely on a consideration of the appellant's version of the events. The trial court found that it was unlikely that Mr Tangzwane would not have seen the appellant's son emerge from his flat into the passage where the altercation occurred. The fact that the deceased was shot in the head was inconsistent with the appellant's testimony and deemed improbable by the trial court. The trial court found that it was unlikely that the appellant's hand would have been drawn back high enough to rise to the level of the deceased's

head, where the bullet struck. Mr Tangzwane's evidence denying that there was a struggle for the firearm before the shot was discharged, was accepted. The trial court stated that Mr Tangzwane 'remained adamant that there was no scuffle for a firearm or the grabbing of a firearm'. From the excerpts of the testimony of Mr Tangzwane set out above, it is clear that some of these material findings are factually incorrect.

[22] It is trite that '[t]his court's powers to interfere on appeal with the findings of fact of a trial court are limited. . . In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.'[8] (footnotes omitted.)

[23] The appellant relied upon *S v Shackell (Shackell),*[9] which facts were described as similar to the circumstances in the present case. In *Shackell*, the appellant, a police officer, heard a commotion from the deceased's cell. The deceased had been incarcerated for his own safety, being considered mentally unstable and behaving aggressively. The appellant thought that the deceased might need help and went to his assistance. He found the solid door of the deceased's cell open but the grille door behind it locked. The deceased was behaving like a deranged person running into the walls of his cell, shouting threats and proclaiming that he was God Almighty. While the appellant was standing next to the grille door the deceased suddenly approached him. He grabbed the appellant's shirt front through the bars with both hands and pulled the appellant towards himself and against the door. The appellant's service pistol was in a holster at his side. The deceased suddenly tried to grab the pistol from its holster.

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[8] *S v Monyane and Others* [2006] ZASCA 113; [2006] SCA 141 (RSA); 2008 (1) SACR 543 (SCA) para 15.
[9] *S v Shackell (Shackell)* [2001] ZASCA 72; [2001] 4 All SA 279 (A).

The appellant managed to wrench his pistol away from the deceased. He then held it behind his back. The deceased was still pulling the appellant by the front of his shirt against the bars of the door. The appellant stated that he was unable to resist the deceased with his one free hand and he instinctively brought his other hand, which held his pistol, forward in order to push himself away from the bars with both hands. As he stepped backwards, he tripped and stumbled. In the process a shot unexpectedly went off which struck and killed the deceased. His pistol was loaded and uncocked at the time.

[24] Based on the unorthodox approach adopted by the trial court, it found that *Shackell* was distinguishable because the only evidence available in *Shackell* was based on the version of the defence. In the present case, the trial court held that there was the evidence of Mr Tangzwane, an independent witness. The trial court stated: 'Let us for the moment accept that [the appellant's] version of the events is the truth and that is actually what happened'. The trial court then listed the improbabilities that it relied upon. It stated that the appellant would want the trial court to believe that: the deceased in this matter was slanted over forwards; that the security guard did not see his (appellant's) child escaping from the apartment; and further that the deceased would be bent over facing the appellant's flat.

[25] It is difficult to understand why the version that the deceased was bent over facing the appellant's apartment, was considered improbable. Mr Tangzwane testified that the deceased was bent over forward. He also confirmed that the three parties involved in the scuffle were very close to each other. He was trying to push the deceased backwards and away from the appellant. That was the situation just before the shot was discharged.

[26] It is common cause that, other than the appellant's testimony, there was no direct evidence as to how the shot was fired. Thus, the question of whether the

appellant shot the deceased intentionally had to be determined with reference to the circumstantial evidence surrounding the discharge of the shot. It is common cause that there was a skirmish between the deceased and the appellant immediately before the discharge of the shot. The undisputed aspects of deceased's version are inconsistent with an intention to kill the deceased. The following undisputed facts lend credibility to the appellant's version that the shot was fired accidentally and that he did not intend to kill the deceased:

a) The prior conduct of the appellant. He reported the deceased's conduct to the security officer employed by the complex and did not take the law into his own hands;

b) The deceased was 'out of control', aggressive, and clearly intoxicated;

c) After Mr Tangzwane took the bottle away from the deceased, the deceased still tried to reach for the appellant;

d) When the shot was fired, the parties were less than a metre apart and 'very close to each other', according to Mr Tangzwane;

e) The appellant had no motive to kill the deceased;

f) It is highly improbable that the appellant would have had the intention to shoot and kill the deceased in front of his young son;

g) After the deceased was shot, the appellant was in shock - he attempted to assist the deceased and administer medical treatment, which is inconsistent with the actions of someone intent on killing the deceased;

h) The appellant professed his remorse and apologised to the family for their loss. The deceased's wife did not demand that the appellant be incarcerated for shooting the deceased; and

i) The trial court also referred to the fact that the 'prosecution also indicated that a non-custodial sentence may be warranted in this matter'.

[27] It was submitted by counsel for the appellant that the improbabilities in the version of the appellant that the trial court referred to in its judgment, cannot be

said to be of such a nature that it justifies the rejection of the appellant's version as not reasonably possibly true.

[28] The contradictions between the appellant’s evidence and that of Mr Tangzwane are not significant. Mr Tangzwane was unable to see what happened immediately before the shot went off. As stated in *Shackell*:[10]

‘It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version it true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court *a quo* its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true. This conclusion is strengthened by the absence of any apparent reason why the appellant would, without any motive, decide to brutally murder the deceased by shooting him in the mouth at point blank range. As a consequence the matter must be decided on the appellant's version. According to the appellant's version he never intended to fire a shot. On the acceptance of this version there is no room for a finding of *dolus* in any of its recognised forms. If follows that the conviction of murder cannot stand.’

[29] The trial court in the present matter committed the same error – its reasoning lacked the final and crucial step ie notwithstanding certain improbabilities in the appellant's version, the reasonable possibility remains that the substance thereof may be true. After considering the appellant's version in isolation, the trial court concluded that the appellant's version borders on an impossibility, that it is false and that it falls to be rejected. Thus, any analysis of

[10] *Shackell* para 30.

the evidence of Mr Tangzwane would have been of no consequence. The minor contradictions between the evidence of the appellant and Mr Tangzwane, accepted by the trial court, were insufficient to reject the appellant's version. The trial court erred in accepting the evidence of a single witness to reject the appellant's version, without first critically scrutinising Mr Tangzwane's testimony as a single witness. In this regard, in *S v Artman and Another,*[11] Holmes JA held:

'She was, however, a single witness in the implication of the appellants. That fact, however, does not require the existence of implicatory corroboration: indeed, in that event she would not be a single witness. What was required was that her testimony should be clear and satisfactory in all material respects.'[12]

[30] The inference, drawn by the trial court that the appellant intentionally shot the deceased is not consistent with all the proved facts. It also does not exclude every reasonable inference save the one that the appellant intended to kill the deceased. The full bench accepted the findings of the trial court without demur. It erred in proceeding from the premise that the factual findings and conclusion reached by the trial court were correct. Like the trial court, it failed to consider whether the appellant's version of the events was reasonably possibly true. The weighing up of the evidence was seriously flawed and cannot be accepted. Both courts seem to have ignored the vital portion of Mr Tangzwane's evidence that he did not see how the shooting happened. Thus, although his testimony may have been 'substantially satisfactory', it was not so 'in every material respect', as he was unable to testify on the crucial element of the firearm being discharged. And there was also no corroboration of his testimony in this regard. Thus this finding on the facts is, in my view, clearly wrong and the murder conviction cannot stand.

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[11] *S v Artman and Another* 1968 (3) SA 339 (A).
[12] Ibid para 341A-B.

[31] However, that is not the end of the matter. The question that arises in this matter is whether this Court, on the facts before it, should find the appellant guilty of murder on the basis of *dolus eventualis*, alternatively culpable homicide. As in *Shackell*, on his own version the appellant was walking around with a loaded, unsafe, cocked pistol**.** 'The conduct of the appellant, thus described by himself, fell short of what is required of the reasonable man. The appellant's conduct was accordingly negligent. His negligent conduct was a direct cause of the deceased's death'.[11]

[32] The appellant was carrying a loaded, unsafe, cocked pistol, which he removed from its holster amid a physical altercation with the deceased. The conduct of the appellant, thus described by himself, fell short of what is required of the reasonable man. The appellant's conduct was accordingly negligent and his negligence was the direct cause of the deceased's death. The further legal question that then arises is whether, given these circumstances, it can be found that the appellant was guilty of culpable homicide or *dolus eventualis* ie did he subjectively foresee the possibility of his firearm being discharged thus causing the deceased's death. Further, whether notwithstanding that foresight, he proceeded to act in the manner he did. The correct legal approach to this question was enunciated as follows in *S v Sigwahla*:[12]

'The expression "intention to kill" does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. This form of intention is known as *dolus eventualis* as distinct from *dolus directus*. The fact that objectively the accused ought reasonably have foreseen such possibility is not sufficient. The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a *bonus paterfamilias* in the position of the accused. In other words, the distinction between subjective foresight and objective

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[11] *Shackell* at para 31.
[12] *S v Sigwahla* 1967 (4) SA 566 (A) at 570B-D.

foreseeability must not become blurred. The *factum probandum* is *dolus*, not *culpa*. These two different concepts never coincide.'

[33] The two legs of the enquiry are not considered in isolation. This approach was refined by this Court in *Humphreys v S (Humphreys)*,[13] I quote extensively from Brand JA's judgment, as the test set out so comprehensively by him is worth repeating. *Humphreys* concerned a bus driver, who transported scholars. He was accustomed to taking a short cut by driving over a railway line. He had done this successfully until the day of the fatal crash when a train collided with the bus. Ten children died and four were critically wounded. Humphreys was found guilty of culpable homicide as opposed to murder *dolus directus* or *dolus eventualis*. Brand JA's reasoned as follows:

'. . . the fact remains that a voluntary act and *dolus* are two discrete requirements for a conviction of murder. It follows that the presence of the one does not presuppose the existence of the other. Despite the establishment of voluntary conduct, the question therefore remains: did the court a quo correctly find that the appellant had the requisite intent to cause the death of ten of his passengers and attempt to take away the life of four others. . .

For the first component of *dolus eventualis* it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for *dolus* and negligence. On the other hand, like any other fact, subjective foresight can be proved by inference. . .

Adopting what essentially amounted to this line of inferential reasoning, the court a quo concluded that in the prevailing circumstances, the appellant subjectively foresaw the death of his passengers as a possible consequence of his conduct. I do not believe this conclusion can be faulted. I think it can confidently be accepted that no person in their right mind can avoid recognition of the possibility that a collision between a motor vehicle and an oncoming train

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[13] *Humphreys v S* [2013] ZASCA 20; 2013 (2) SACR 1 (SCA); 2015 (1) SA 491 (SCA) paras 12-18.

may have fatal consequences for the passenger of the vehicle. . . To deny this foresight would in my view be comparable to a denial of foreseeing the possibility that a stab wound in the chest may be fatal. Since there is nothing on the evidence to suggest a subjective foresight on the part of the appellant so radically different from the norm, I agree with the conclusion by the court a quo that the element of subjective foresight had been established.

This brings me to the second element of *dolus eventualis*, namely that of reconciliation with the foreseen possibility. The import of this element was explained by Jansen JA in *S v Ngubane* 1985 (3) SA 677 (A) at 685A-H in the following way:

“A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, eg by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility. . . The concept of conscious (advertent) negligence (*luxuria*) is well known on the Continent and has in recent times often been discussed by our writers. . .

Conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain". . . Our cases often speak of the agent being "reckless" of that consequence, but in this context it means consenting, reconciling or taking into the bargain. . . and not the "recklessness" of the Anglo American systems nor an aggravated degree of negligence. It is the particular, subjective, volitional mental state in regard to the foreseen possibility which characterises *dolus eventualis* and which is absent in *luxuria*.

The question is, therefore, whether it had been established that the appellant reconciled himself with the consequences of his conduct which he subjectively foresaw. The court a quo held that he did. But I have difficulty with this finding. It seems to me that the court a quo had been influenced by the confusion in terminology against which Jansen JA sounded a note of caution in *Ngubane*. …

Once the second element of *dolus eventualis* is misunderstood as the equivalent of recklessness in the sense of aggravated negligence, a finding that this element had been established on the facts of this case, seems inevitable. By all accounts the appellant was clearly reckless in the extreme. But, as Jansen JA explained, this is not what the second element entails. The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw

would not actually occur, the second element of *dolus eventualis* would not have been established.

On the facts of this case I believe that the latter inference is not only a reasonable one, but indeed the most probable one. I say this for two reasons: First, I believe common sense dictates that if the appellant foresaw the possibility of fatal injury to one or more of his passengers – as I found he did – he must by the same token have foreseen fatal injury to himself. An inference that the appellant took the death of his passengers into the bargain when he proceeded with his action would unavoidably require the further necessary inference that the appellant also took his own death into the bargain. Put differently, the appellant must have been indifferent as to whether he would live or die. But there is no indication on the evidence that the appellant valued his own life any less than the average person or that it was immaterial to him whether or not he would lose his life. In consequence I do not think it can be said that the appellant had reconciled himself with the possibility of his own death. What must follow from this is that he had not reconciled himself with the occurrence of the collision or the death of his passengers either. In short, he foresaw the possibility of the collision, but he thought it would not happen; he took a risk which he thought would not materialise.'

[34] The onus is on the State to prove that the appellant had actual foresight of the possibility of death and that despite same, he was reckless of the consequences of his actions. As held in *Shackell*:

'[t]he evidence it [the State] adduced is such that no reasonable inference of, let alone of accepting the consequences of his conduct, can be drawn. On the contrary, the appellant's reaction immediately after the deceased died was that he had not meant to kill the man. This was not just an expression of remorse: it was a clear indication that he had not actually foreseen death as a possibility.'[14]

[35] On the evidence presented by the State, even if the appellant foresaw the possibility of his conduct causing the deceased's demise, it was not shown that he acted with reckless disregard of the consequences. He would have realised that deliberately firing a shot could have the disastrous consequences of hitting his son

[14] *Shackell* at para 32.

or Mr Tangzwane. In my view, the State has not proved 'subjective foresight' beyond a reasonable doubt. The events unfolded quickly and chaotically. Accordingly, the State has not proved *dolus eventualis* and the appeal against the conviction of murder must succeed. A verdict of culpable homicide would have accordingly been appropriate.

Appeal against sentence

[36] As the conviction for murder should in my view be set aside, the sentence passed by the trial court and upheld by the full bench would no longer be appropriate. Although certain facts were presented to the trial court on the personal circumstances of the appellant, I am of the view that a comprehensive correctional services and victim's impact assessment should be placed before the court determining the appropriate sentence. Accordingly, I would have referred the matter back to the trial court for sentence to be imposed afresh.

[37] Accordingly, I would have made the following order:

1 The appeal against conviction and sentence is upheld;

2 The order of the full bench is set aside and replaced with the following:

'The appellant is found guilty of culpable homicide.

The matter is referred back to the trial court to consider an appropriate sentence afresh in the light of the findings in this judgment.'

S E WEINER

JUDGE OF APPEAL

Mabindla-Boqwana and Keightley JJA (Chili and Molitsoane AJJA concurring):

Introduction

[38] We have read the judgment of our colleague, Weiner JA (the first judgment). We regretfully disagree with its reasoning and outcome. In our view, the trial court and the high court correctly concluded that the appellant's version of the shooting was not reasonably possibly true and for this reason it fell to be rejected. Once that is so, the appellant's conviction on the charge of murder must stand, and culpable homicide as an alternative verdict for his conviction does not enter the picture.

[39] We are grateful to our colleague for setting out the background facts and the applicable legal principles with which we agree. Where we differ from the first judgment is in our analysis of the relevant facts and the conclusions drawn from them.

[40] The events leading up to the shooting of the deceased are largely uncontentious and nothing much turns on them. The critical stage of the incident is the shooting itself and how it happened. In many respects the evidence of the state's main witness, Mr Tangzwane, did not differ from that of the appellant. The deceased was by all accounts intoxicated and swore at the appellant. He hit him with a beer bottle on the chest at least once, according to Mr Tangzwane, or twice, according to the appellant. It was during this altercation, which occurred in the narrow passage outside the appellant's door, that the fatal shot was fired. It is common cause that the appellant was in the passage at the time of the shooting, having exited his unit because of the fracas caused by the deceased. The deceased pushed the appellant with the beer bottle, attempting to assault him and insulted

him. Mr Tangzwane was intent on pushing the deceased away and down the stairs in an attempt to stop the fracas.

[41] According to Mr Tangzwane, he managed to remove the beer bottle from the deceased's hand. He was between the deceased and the appellant at this stage, with the appellant closest to his door, and the deceased closest to the stairs. Mr Tangzwane was focused on removing the beer bottle and his attention was on the deceased. His evidence was criticised by the appellant for being contradictory about the positioning of the two men in relation to him during the incident. It was pointed out by the appellant's counsel that in some parts of his evidence Mr Tangzwane had stated that the deceased was on his left-hand side and the appellant on his right, whereas later he testified that the appellant was behind him. In our view, this criticism is baseless. It is clear from the evidence that none of the men was standing still. The deceased was pushing forward, Mr Tangzwane was trying to push him back and to remove the beer bottle and, on his own version, the deceased also did not stand still. It is consequently understandable that in this fluid situation, the positioning of the deceased and the appellant shifted. What is clear, and in our view, uncontroversial, is that at the time the shot was fired the appellant was behind Mr Tangzwane.

[42] What this means is that at the critical time when the shot was fired Mr Tangzwane did not have sight of the appellant. He was thus unable to say how it happened. Mr Tangzwane did not try to hide this fact or claim that he had seen more than he did. His evidence was clear and consistent on this score: his focus was on the deceased and on removing the beer bottle from his hand when he heard (he expressly testified that he did not see) the shot being fired.

[43] In our view, the fact that Mr Tangzwane did not see the shot being fired is far from being decisive on the question of whether the state proved its case against

the appellant on the charge of murder. Critically, the appellant testified at his trial and his version had to be tested along with the other evidence. We disagree with the submission made by the appellant that the trial court erred from the word go when it considered the appellant's version before that of the state in its judgment. The appellant's version had to be evaluated considering the evidence as a whole, as did that of the state. The trial court duly did so. The trial court may have structured its reasoning inelegantly, that is however not material, as the main consideration is whether the evidence as a whole supports the finding of guilt on the charge of murder.

[44] Despite not witnessing the actual shot, Mr Tangzwane's description of events was materially important to the evaluation of the evidence as a whole. He stated more than once, at different stages of his testimony, that he heard the gunshot as he took the bottle away from the deceased. He was not challenged on this aspect of his evidence, nor did the appellant, in his testimony, contradict him on this score. It must be accepted, then, that the shot was fired as Mr Tangzwane took the bottle away from the deceased, in other words, virtually simultaneously, or at least immediately thereafter. The probabilities also favour Mr Tangzwane's version that his entire focus was on dispossessing the deceased of the bottle.

[45] As we have already noted, Mr Tangzwane did not have the appellant in his sights when the shot went off. However, he was adamant that he had not seen any firearm prior to the shooting, nor heard any talk of a firearm in the lead-up to the shooting. In this latter respect, his version contradicted that of the appellant, who testified that the deceased noticed that he had a firearm and asked whether he (the appellant) wanted to shoot him. The evidence of both Mr Tangzwane and the appellant indicated that the men were close together in the narrow passage. It must be accepted as highly probable that, given their proximity, had the deceased told the appellant that he had seen his firearm, and followed up with the question of

whether the appellant was intent on using it against him, Mr Tangzwane would have heard this exchange. It is also probable that he would have remembered the exchange, given that he was positioned between the men and thus at risk of being shot. Mr Tangzwane vehemently disputed any talk of a firearm between the deceased and the appellant.

[46] This on its own is not a sufficient basis on which to reject the appellant's version, but it weighs against him in an important respect. As we discuss in more depth later, the appellant's version centred around a struggle for the firearm. In the appellant's narrative, the fuel that ignited that struggle was the deceased spotting the appellant's firearm and the appellant becoming aware that he had done so. If this version lacks credibility, the appellant's entire defence is on shaky ground.

[47] Before analysing the appellant's version, two further aspects of Mr Tangzwane's evidence are noteworthy. The first is that both he and the deceased were not in an upright position when the shot was fired. Mr Tangzwane was in a bent position under the deceased, trying to push him back. The deceased was also bent over, but not completely. He stood somewhere between straight and a right- or 90- degree angle. The appellant was vague about the position of the deceased but did not contradict Mr Tangzwane's evidence in this respect.

[48] The second aspect is Mr Tangzwane's evidence on the issue of whether the appellant's child was outside in the passage shortly before and when the shot was fired. The appellant's version is that his son had come out of the unit with him and was in the passage. Mr Tangzwane was adamant that, while the child had been outside the unit earlier, he was inside the unit behind the burglar gate when his father came out to engage with the deceased, and when the shooting occurred.

On this issue, the two witnesses for the state and for the defence were completely at odds.

[49] The appellant's defence was that the shooting was accidental, having occurred during a struggle between him and the deceased over the appellant's firearm. According to the appellant, when he heard the noise outside of his unit he went to the door and opened it. The burglar gate was closed. The deceased was aggressive, shouting and insulting the appellant. The appellant opened his gate and exited the unit. At this stage his son escaped and was running around. The deceased hit the appellant with his beer bottle. When he tried to hit him for the third time the appellant pushed him. The deceased staggered back and stepped onto his son's foot. He turned around to push his son back into his unit. The appellant was wearing his firearm in a holster. He heard the deceased say that he noticed the appellant had a firearm, and the deceased asked whether the appellant was going to shoot him. He looked up and saw the deceased coming. The appellant pulled the firearm out of the holster and held it behind his right-hand thigh. He told the deceased not to come near him. The appellant turned around to push his son into his unit and at this point he felt a hand grabbing the firearm. He pulled the firearm towards him and that is when the shot was fired.

[50] This was the broad outline provided by the appellant. Further questioning from counsel, both in his examination in chief and cross-examination yielded more details. The appellant's firearm had a round in the chamber and the safety was off, which, according to him, was the normal way he carried it. This meant he could pull and shoot. However, according to him, his finger was not on the trigger when he was holding it. When asked to explain how the firearm could have fired without his finger being on the trigger, he answered that maybe his finger had slid onto the trigger while he was trying to get a full grip on his firearm.

[51] The appellant initially described the deceased as 'grabbing' the firearm, and pulling it, which caused the appellant to pull it back towards him, and the shot to be fired. He later said that the deceased's hand 'grabbed' his hand. However, in cross-examination, a different picture emerged. The appellant testified that he had not seen the deceased's hand, nor did he see the position of the deceased when, according to the appellant, he 'went for the firearm'. In fact, he subsequently clarified and said that he had not felt the full hand, only the fingers, and he did not disagree when it was put to him that it had been a small touch of the fingers that he had felt.

[52] These explanations raise questions about the appellant's initial version that the firearm went off during a struggle between him and the deceased for its possession. For the firearm to have been accidentally discharged during a struggle, that struggle would have had to have been forceful enough to cause the appellant's finger to slide onto the trigger and press it hard enough to discharge a bullet. On his version, the bullet was discharged as he pulled his hand holding the firearm back towards him. It stands to reason that the deceased would have had to use equal or near-equal force when pulling the firearm away from the appellant. Common sense dictates that this would have required the deceased to have had a strong grip on the firearm. This is inconsistent with the lighter touch of fingers that emerged during the appellant's cross-examination.

[53] As noted earlier, further improbabilities as to the appellant's version arise from the fact that, despite being in very close proximity to the appellant and the deceased, Mr Tangzwane did not hear the alleged interchange between them about appellant's firearm. It is highly unlikely that he would have not heard the conversation if it had happened or that he would have forgotten about it. Mr Tangzwane was very clear that the shot was unexpected and came out of the blue at about the time that he removed the beer bottle from the deceased. Had there

been a conversation between the deceased and the appellant about the firearm, and a warning by the appellant, on his version, that he warned the deceased not to come near him, the gunshot would not have been unexpected by Mr Tangzwane. Indeed, it is unlikely that Mr Tangzwane would have remained between the two men, and in the line of fire, had there been talk of a firearm. Particularly if, as the appellant testified, he warned the deceased not to come near him after he had pulled out the firearm. Moreover, it is unlikely that he would have failed to witness the deceased, on whom he had been focused, grabbing, pulling or struggling for the firearm. The probabilities all point to the conversation between the appellant and the deceased about the firearm never having happened at all.

[54] It is also unlikely that Mr Tangzwane was mistaken about the deceased's son being inside the unit and not in the passage when the shooting occurred. He acknowledged that at an earlier stage the child had been with his father outside the unit. However, it is common cause that the incident happened in two phases. After the first phase, the appellant and his son went back inside their unit and the appellant prepared food for the child. It was during this second phase that the shooting occurred, after the appellant came out of his unit once again to engage with the deceased. Had the child come out once more with his father, Mr Tangzwane would have seen him, given that the passage was narrow. He would have seen the deceased stepping on the child if he was outside on the second occasion. The probabilities are that the child remained inside and that only the adults were in the passage.

[55] The most pressing difficulty with the appellant's version is the absence of any rational explanation for the trajectory of the bullet if things happened as the appellant says they did. The evidence from the post-mortem showed that the bullet entered the left parietal region on the upper part of the deceased's skull and

exited the right occipital region at the back. It was accepted by both the state and defence that the bullet followed a downward trajectory in the skull. In other words, the firearm was fired from above the head at an angle pointing downwards, so as to exit further down on the right-hand side. There was not much height difference between the two men.

[56] On the appellant's version, after the deceased noticed his firearm, he removed it from the holster and held it in his right hand, behind his thigh and pointing down. He then turned to shepherd his son back through the door of his unit. The deceased was then behind him. He felt the deceased's fingers on his gun-hand (or the firearm itself – the evidence is not clear). The deceased pulled the firearm back and the appellant retaliated by pulling it towards himself, accidentally discharging the bullet. Only then did the appellant turn around towards the deceased. It is almost impossible to understand how, in that scenario, the bullet could have been discharged in a downward trajectory to enter the top portion of the deceased's head. In our view, the trial court was correct in its analysis that:

'If we accept the accused's version then it means that his arm holding the firearm must have been pulled back upwards to such an extent that a shot goes off behind him without him resisting the pulling up of his hand until it would reach such a height that a shot could go off and strike the deceased in his head. … [S]urely, immediately when he feels this person grabbing his firearm from the back he would resist? Therefore … it would have been impossible for the deceased to pull up his arm to such a height behind the accused that a shot would be able to be triggered at that height to strike him in his head.'

[57] The appellant was asked by both his counsel and the prosecutor to explain how the bullet had managed to follow this trajectory. He gave nothing but evasive answers to these questions, such as 'when the firearm was down on my hand like that, when he pulled it, I think the force I used to pull back, it could have directed the firearm towards his head'. The appellant's evasive answers are understandable

for the simple reason that on his version the bullet could not possibly have followed the trajectory that it did. As the trial court correctly noted, had there been a struggle as described by the appellant, the bullet could only have hit the deceased lower down, or missed him altogether. It could not have entered his head near the top and followed a downward path.

[58] It is this glaring improbability in the appellant's version, coupled with several other improbabilities, that combine to render the appellant's version so improbable that it cannot be reasonably possibly true. The appellant's counsel sought to argue that Mr Tangzwane's version that the deceased was in a bent position as he tried to push him, supports the appellant's version. To the contrary, the trajectory of the bullet is consistent with a shooter who fired when he was facing the deceased, in a position higher than that of the deceased who was in a bent position, with the shooter's firing arm in front of the deceased. When all the evidence is weighed, the only reasonable probability is that the appellant's version that his son escaped from the unit immediately before the shooting and that the shot was fired while the deceased was behind him was a fabrication devised to support his accidental shooting narrative. It provided a platform for the accused to say that he had his back to the deceased, ushering his son inside the unit when the firearm discharged. The trial court was correct to reject his version. It could not be sustained as being reasonably possibly true when all the evidence was weighed together.

[59] The state's version must be accepted: the appellant was facing the deceased when he shot him. In our view, it is clear that the appellant acted with the requisite intention when he did so. It is not necessary to determine whether he fired the firearm with the direct objective to cause the deceased's death. In fact, as can be seen from our further discussion immediately below, even on the appellant's own

version, he must subjectively have foreseen that his actions could result in the death of the deceased and reconciled himself with that consequence.

[60] Where we depart fundamentally with the approach adopted in the first judgment is in our finding that the trial court was correct to reject the appellant's version. However, even if, contrary to our finding, the appellant's version is considered, his conviction on the charge of murder was justified.

[61] On his version, the appellant exited his unit to assist Mr Tangzwane in dealing with the deceased. He did so in full knowledge that he had his loaded firearm, primed to fire, strapped to him in a holster. The appellant became aware that the deceased had noticed the firearm. At that stage, the deceased was belligerent and spoiling for a fight by continuing to try to assault the appellant with a beer bottle. In his words: 'I saw him coming'.

[62] The appellant did not retreat to his unit with his son, he elected instead to remove his firearm from its holster. He knew that the safety pin was off because this is how he normally carries his firearm. Consequently, he was fully aware that he had in his hand a weapon with a bullet in the chamber which, if the trigger was depressed, would fire instantly. He said he removed the firearm because: '…the way he was coming to me and he already mentioned the firearm, I thought maybe he wanted to take it away from me'. With the firearm in his hand, and with the deceased advancing towards him, the appellant turned his back on the deceased. In doing so, he exposed the firearm, which he said was held behind his right-hand thigh, to the deceased.

[63] The appellant must subjectively have foreseen that his actions could possibly result in a fatal shot being fired. Unlike the position in *Shackell*,[15] which

[15] *Shackell* at para 7.

is discussed in the first judgment, the appellant deliberately removed the loaded and primed firearm from its holster in advance. He did so in circumstances where, on his version, he anticipated a struggle. The appellant elected, not to avoid a possible struggle by retreating, but instead, to confront it by removing the firearm from the holster. When he turned his back on the deceased, the appellant placed the firearm directly within his path, knowing that he was a short distance away. This is the conduct of one who foresees the possibility of death and proceeds reckless of that possibility eventuating. It is, in our view, a clear case of someone acting, not negligently, as the first judgment finds, but with the requisite *dolus eventualis* for murder. Therefore, even on the appellant's own version, his conviction on a charge of murder was sound.

[64] For these reasons, in our view, the trial court correctly convicted the appellant of murder. The high court did not err in dismissing his appeal against the merits of his conviction.

[65] It remains to consider the question of whether the trial court committed a misdirection in sentencing the appellant to the prescribed minimum sentence of 15 years' imprisonment. Although the trial court found that mitigating factors were present, it concluded that these did not constitute substantial and compelling circumstances to justify a deviation from the prescribed minimum. Both the trial court and the high court considered as significant the fact that the shooting was deliberate in circumstances where, although there was some provocation on the part of the deceased, the appellant's life was not endangered.

[66] It is trite that an appeal court may not interfere in a sentence imposed by a trial court in the absence of a material misdirection, or if the sentence is so inappropriate as to induce a sense of shock. In our view, the trial court misdirected itself in finding that the mitigating factors present did not constitute substantial

and compelling circumstances warranting a deviation from the minimum sentence.

[67] The circumstances giving rise to the scuffle are important. The deceased had been verbally abusive to the appellant's neighbour, to the extent that she had asked him to intervene. Mr Tangzwane tried his best to deal with the situation, but he was unable to calm down the deceased or remove him from the scene on his own. The appellant was in his home with his child who was upset by the deceased's conduct. The appellant appears to have acted on the spur of the moment, heightened by the commotion. He was a first offender and father of four children whom he supported, maintained and with whom he retained regular contact. One of these was his three-year-old son who was with him at the time of the incident. The appellant was in stable employment. He showed remorse in the immediate aftermath of the shooting by rendering assistance to the deceased and apologised to the deceased's family when he testified in mitigation of sentence. Cumulatively, these constitute substantial and compelling circumstances warranting deviation from the prescribed minimum sentence of 15 years' imprisonment. We consider that a period of eight years' imprisonment is appropriate in these circumstances.

[68] For all the above reasons, we make the following order:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld.
3. The order of the high court is amended to read as follows:

   '1 The appeal against conviction is dismissed.

   2 The appeal against sentence is upheld to the extent only that the appellant is sentenced to a period of imprisonment of eight years.

   3 The sentence is antedated to 11 September 2019.'

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

R M KEIGHTLEY
JUDGE OF APPEAL

Appearances

For the appellant:	Adv P A Wilkins
Instructed by:	Botha-Booyens & Van As Attorneys, Johannesburg
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For the respondent:	Adv M J Nethononda
Instructed by:	The Director of Public Prosecutions, Johannesburg.