

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A84/2014

In the matter between:-

LOUIS CHRISTOPHER MAREE

Appellant

and

THE STATE

Respondent

CORAM: MOCUMIE *et* DAFFUE, JJ *et* HINXA, AJ

HEARD: 16 MARCH 2015

DELIVERED: 18 JUNE 2015

ORDER

- (1) The appeal is upheld in part.
- (2) The order of the court *a quo* is set aside and replaced with the following:
 - ‘(a) The appellant is found guilty of culpable homicide;
 - (b) The appellant is sentenced to 5 (five) years’ imprisonment wholly suspended for 5 (five) years on condition that:
 - (i) the appellant is not convicted of culpable homicide or any competent verdict on a charge of culpable homicide, and for which he is sentenced to a term of imprisonment without the option of a fine, committed during the period of suspension;
 - (ii) the appellant shall pay reparation to the family of the deceased by providing for the deceased’s widow and minor child in the combined amount of R2 000.00 per month until the child is self-supporting or reaches the age of 18 years, whichever event occurs first;
 - (iii) a Trust in the name of the minor child shall be formed and registered to be managed by Trustees of the appellant’s choice,

such Trust to be responsible for the payment of the widow and child's reasonable needs and their maintenance for the duration set out above;

- (iv) the appellant, through Social Development, Free State, and South African Police Services, Free State, shall lead a delegation of the farming community to start talks with the neighbouring community on non-violent resolution of crime, including stock theft in the area'.

- (3) The sentence imposed is antedated to 25 March 2013.

JUDGMENT

THE COURT :

- [1] This appeal arises from an event which occurred on 27 March 2010 during which the appellant shot and killed the deceased, Mr Sello Jeremiah Potsane. The appellant together with his erstwhile co-accused, Mr Nicolaas van Aswegen appeared in the High court, Free State, Bloemfontein, on one count of pointing of a firearm (contravention of s 120 of the Firearms Control Act, 60 of 2000; (count 1); assault with intent to do grievous bodily harm; (count 2); murder (count 3) and malicious damage to property (count 4 - killing a dog). Appellant was discharged and acquitted in terms of s 174 of the Criminal Procedure Act, 51 of 1977, (the CPA) in respect of counts 1, 2 and 4 at the close of the State's case, but eventually convicted of murder – count 3 - by the court *a quo* (Ebrahim J). He was sentenced to 12 years' imprisonment. The appeal against conviction and sentence is with leave of the trial court.

POINT IN LIMINE: RIGHT TO A FAIR TRIAL

- [2] Adv Price SC, for the appellant, raised several issues, inter alia that the trial court committed serious and gross irregularities which vitiated

the trial as a fair trial and reliance was also placed on the failure of the prosecution to co-operate with the defence in the pre-trial processes, ie providing the defence with further particulars and or the contents of the police docket in order to assist the defence to prepare properly for the case. This is contrary to the authoritative decision in *Shabalala and Others v Attorney General of Transvaal and Another*¹. He argued that the trial court's attention was drawn to this anomaly at every step yet it proceeded without in the least admonishing the State or taking the transgressions into account when it evaluated the evidence against the appellant at the end of the trial. Thus, he submitted further, the conviction of the appellant infringed several of the appellant's constitutional rights amongst which s 35(3) of the Constitution of the Republic of South Africa, 1996, which guarantees an accused person the right to a fair trial², to be read with s 87 of the CPA. In response Adv Mohlala for the State, who also prosecuted this matter during the trial, did not refute these allegations, but instead argued that the defence nevertheless obtained the relevant documents it required directly from the police. So, we were told, the appellant was in the final analysis not prejudiced.

- [3] The ambit of the duty upon the prosecution to disclose documents to an accused person has been authoritatively defined by the Constitutional Court in *Shabalala*³. The following dicta from *Porritt v NDPP*⁴ are pertinent:

¹ *Shabalala and Others vs Attorney General of Transvaal and Others* 1995 (2) SACR 761 (CC); 1996 (1) SA 725;1995 12 BCLR 1593. See also *National Director of Public Prosecutions v King* [2010] ZSCA 8;2010(2)SACR 146 (SCA);2010(7) BCLR 656 (SCA);[2010]3 All SA 304 (SCA)(8 March 2010).

² See also Universal Declaration of Human Rights at article 10, the International Covenant on Civil and Political Rights at article 14, the European Convention for the Protection of Human Rights and Fundamental Freedoms at article 6 and the African Charter on Human Rights and People's Rights at article 7.

³ *Shabalala and Others vs Attorney General of Transvaal and Others* 1995 (2) SACR 761 (CC); 1996 (1) SA 725;1995 12 BCLR 1593. See also *National Director of Public Prosecutions v King* [2010] ZSCA 8;2010(2)SACR 146 (SCA);2010(7) BCLR 656 (SCA);[2010]3 All SA 304 (SCA)(8 March 2010).

⁴ *Porritt v NDPP and Others* [2015]1 All SA 169 (SCA).

‘[11]There is a fundamental difference between the role and functions of a prosecutor as opposed to those of a magistrate or a judge. The judiciary is held to the highest standards of independence and impartiality because they are the decision-makers in an adversarial judicial system. Prosecutors neither make the final decision on whether to acquit or convict, nor on whether evidence is admissible or not. Their function is to place before a court what the prosecution considers to be credible evidence relevant to what is alleged to be a crime. Their role excludes any notion of winning or losing. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.⁵

[12]The United Nations Guidelines on the Role of Prosecutors requires prosecutors to perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system (see paragraph 12 thereof).

Further (in terms of paragraph 13), prosecutors are enjoined, in the performance of their duties, to:

- “(a) carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
- (b) protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect”.

[13]The principles that govern prosecutorial conduct must therefore be seen and understood in the context of the role that prosecutors play. In adversarial criminal proceedings such as ours, it is inevitable that prosecutors will be

⁵ See *Bourcher v The Queen* [1955] SCR 16 (SCC) 23-24; *Malinga v The State* (543/13) [2014] ZASCA 161 (1 October 2014) at paras [15] – [18].

partisan. They conduct the case for one of the two sides in a trial, namely the State, as representing the citizenry. They often carry out their prosecutorial functions vigorously and zealously. A prosecutor's role in a criminal prosecution therefore makes it inevitable that he or she would be perceived to be biased.⁶ Prosecutors usually approach criminal prosecutions with a view, sometimes a very strong view, that accused persons are guilty. That is permissible, subject to the *caveat* that they must not prosecute in single-minded pursuit of a conviction. They have a duty towards the accused to ensure that an innocent person is not convicted. In this regard, they have a duty to disclose, in certain circumstances, facts harmful to their own case.⁷ In *S v Van Der Westhuizen*⁸ this court made the following observation:

'In our practice it is not the function of a prosecutor disinterestedly to place a hotchpotch of contradictory evidence before a court, and then leave the court to make of it what it wills. On the contrary, it is the obligation of a prosecutor firmly, but fairly and dispassionately, to construct and present a case from what appears to be credible evidence, and to challenge the evidence of the accused and other defence witnesses, with a view to discrediting such evidence, for the very purpose of obtaining a conviction. That is the essence of a prosecutor's function in an adversarial system and it is not peculiar to South Africa.'

[14]The protection of an accused person, therefore, lies not in a general standard of independence and impartiality required of all prosecutors, but in the right to a fair trial entrenched in s 35(3) of the Constitution.'

[4] It is not necessary for purposes hereof to deal with all irregularities relied upon on behalf of appellant. It is acknowledged that the trial

⁶ *S v Du Toit* 2004 (1) SACR 47 (T) at 65.

⁷ *S v Riekert* 1954 (4) SA 254 (SWA) at 261F, referring to *S v Steyn* 1954 (1) SA 324 (A) at 337A-C.

⁸ *S v Van Der Westhuizen* 2011 (2) SACR 26 (SCA) para 11.

court, without compromising objectivity, has a duty to manage a criminal trial within the law governing criminal procedure, has a duty to ensure that an accused is properly defended and that his constitutional rights are not negatively affected either by commission or omission. In this case appellant may regard himself fortunate that he employed the services of senior counsel and an experienced attorney who came to his assistance to remedy much of the wrongs experienced. Having said that, appellant's counsel conceded during oral argument that the alleged infringements of constitutional rights could not, on their own, lead to an acquittal of the appellant on the charges preferred against him, but should be judged having regard to the totality of the evidence presented. His concession was well made. The right to a fair was described in *S v Shaik*⁹ in these terms:

'The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one - way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires "fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

In the final analysis, although the conduct of the prosecution ought to be deprecated, in the totality of the evidence and in all fairness to all parties, the conduct highlighted above did not amount to such gross conduct as to vitiate the proceedings.

In the result and on that basis, we rule that the appellant was afforded a fair trial.

ON THE MERITS OF THE CASE.

⁹ *S v Shaik*⁹ 2008 (2) SA 208 (CC) at para [43]. See also *Magwaza v The State* (2016/14) [2015] ZASCA 36 (25 March 2015) at para [10].

- [5] The appellant then attacked the judgment and order of the trial court on the basis that it erred in convicting him of murder with *dolus directus* as the form of intent as the State had failed to prove such a case beyond reasonable doubt. The defence brought up certain alleged material discrepancies, inconsistencies and improbabilities in the evidence of the State witnesses.
- [6] The two Wesi brothers (David and Frans) were in each other's presence on the appellant's farm. Their evidence in essence is that the Wesi's were employed by Mr Van Aswegen, who was the appellant's co-accused and was later found not guilty and discharged on all counts. Whilst they were on the appellant's farm they noticed four men. They gave conflicting versions on how Van Aswegen allegedly assaulted Mr Lechesa Motsie who obeyed an instruction to approach Van Aswegen. Appellant was summoned to the farm by Van Aswegen and was advised to come armed with a rifle, which he did. This aspect need not detain us because of Van Aswegen's acquittal.
- [7] On the other hand these witnesses, including Motsie, the complainant in counts 1 and 2, testified that when the deceased was asked to approach he walked away instead. When pursued by the appellant he evaded him and disappeared. The appellant fired in the direction in which the deceased disappeared. The deceased's body was later discovered in the veld where he had died from a gunshot wound.
- [8] As far as the suggested discrepancies in the testimony of these witnesses are concerned, it must be remembered that they were spectators viewing the events from different angles because the occurrences were transformed into a moving scene. The Wesi brothers were on the bakkie several metres away from the place where the stated assaults by Van Aswegen on Motsie took place. Their versions are to an extent supported by Van Aswegen and even appellant where it mattered.

- [9] Capt. Christiaan Mangena is a ballistic expert attached to the South African Police Services (SAPS). He testified that he did not personally conduct the ballistic tests on the projectile, but it was shown to him whilst contained in a plastic bag by W/O Sylvia Monakali who conducted the tests. She was not called to testify. According to Capt. Mangena the bullet that killed the deceased was not a ricochet bullet as alleged by the defence.
- [10] Const Ngwenya is the officer who drafted the plan of the scene of crime and took photographs of the same scene, both on the ground and from the air. These photos were not of high quality and thus of little assistance to this court and most probably to the trial court as well. Const Ngwenya inexplicably and unprofessionally so, we must say, paced out the distances instead of taking tape measurements as Supt. Bolsik pointed out the different points *inter alia* pertaining to the deceased's position prior to the shooting and thereafter.
- [11] Dr Stephanus Petrus Jansen van Vuuren, a medical intern working under Dr Book, conducted the post mortem examination. He recorded on the post mortem report that the bullet entered the deceased's buttock and exited through the abdomen. He confirmed the cause of the death to be a 'gunshot wound, pelvis'. His findings set out in exhibit 'R' corroborated the version of the appellant's expert witnesses referred to later. After Dr Book came to a different conclusion as indicated in exhibit 'R', and after being shown an undamaged projectile by Capt Mangena, instead of the damaged one found on the scene, Dr Van Vuuren decided to alter his findings contained in the post mortem report to accord with Dr Book's conclusions.
- [12] Dr Robert Jean Book, with Capt Mangena, exhumed the body of the deceased some seven to eight months later. Dr Book observed the body of the deceased which he said was too putrefied to conduct

another post mortem. He however looked at three post mortem photographs to come to the conclusion that the bullet entered the deceased on the anterior wall of the abdomen and emerged at the back.

- [13] In the final analysis, the ballistic evidence led by the State was to the effect that the deceased sustained a gunshot wound on the abdomen with an exit wound on the right buttock. The entry wound was on the abdomen and the exit wound on the right buttock. That gunshot wound caused the death of the deceased.
- [14] The appellant testified that he was called by Van Aswegen, his co-accused, who informed him that he had found four men with seven dogs on his farm. Van Aswegen asked him to bring his rifle along as one Inspector Palm had been phoned who had given permission to shoot the dogs. It is not clear where the other two trespassers - apparently illegal hunters - were when appellant arrived at the scene. He only noticed two of the alleged trespassers accompanied by dogs. Appellant should have been aware from these set of facts of the possibility that there were more than these two people in the vicinity. He fired a warning shot whilst the two trespassers were directed to come closer. One, who turned out to be Motsie, surrendered himself, but the deceased tried to escape and ignored the command to surrender. Van Aswegen caught Motsie and pinned him to the ground to keep him under control. The appellant followed the escapee, the deceased, for a short distance but when he disappeared beyond a slope, he turned to where Van Aswegen and Motsie were. On his way back he saw a dog jumping up and down in the grass a distance from him. He fired two shots at it without aiming in an attempt to frighten the dog. It disappeared. His version was supported in all material details by Van Aswegen except whether the appellant had walked past Van Aswegen and Motsie when he followed the deceased.

- [15] The defence also adduced the evidence of an ex-police officer and ballistic expert, Mr Jacobus Steyl. He testified, in short, that the damaged condition of the projectile, the shape and position of the entry and exit wounds and the fact that the projectile was found underneath the body of the deceased conclusively indicated that the bullet that killed the deceased was a ricochet bullet. The defence further led the evidence of Prof Saayman, a pathologist who studied the evidence of Capt Mangena, Dr Van Vuuren and Dr Book and came to the same conclusion as Steyl: that the deceased was killed by a bullet that ricocheted. The evidence of both these witnesses was substantiated with medical assurance and made sense. It was neither refuted nor was any doubt cast on it by the State.
- [16] The trial court found that the appellant aimed at the deceased with the intent to kill him as the latter walked away from him.
- [17] Before us, appellant's counsel contended that the incident was a horrific accident and that the trial court erred in:
- 17.1 concluding that the appellant aimed deliberately at the deceased to shoot and kill him as he was angry at the loss he had suffered at the hands of thieves of his livestock;
 - 17.2 rejecting the appellant's version that he had made sure before he fired the shots at the dog that there was no person in the vicinity and thus could not have shot the deceased intentionally.
- [18] To secure a conviction on murder the State had to prove beyond reasonable doubt that the appellant unlawfully and intentionally killed the deceased. The test in a criminal case has been restated in *S v V*¹⁰, by the Supreme Court of Appeal: the true test is that if there is a reasonable possibility that the accused is not guilty, he should be acquitted. The accused should be convicted if the court finds not only that his version is improbable, but also that it is false beyond

¹⁰ *S v V* 2000 (1) SACR 453 (SCA) para 3.

reasonable doubt. It is not necessary for the court to believe an accused person in order to acquit him.

- [19] The approach to be adopted by a court of appeal when it deals with factual findings of a trial court is trite. A court of appeal will not interfere with the factual findings of a trial court unless the latter had committed a material misdirection on the facts. The presumption is that his or her conclusion is correct. The appeal court will only reverse it where it is convinced that such conclusion is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, it will uphold it.¹¹

The Supreme Court of Appeal in *S v Naidoo and Others*¹² reiterated this principle as follows:

'In the final analysis, a court of appeal does not overturn a trial court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.'

- [20] Counsel for the appellant submitted that the appellant did not have the intention to kill the deceased for the following reasons:
- 20.1 He made sure before he fired the shots that there was no person in the vicinity;
 - 20.2 One warning shot was fired in the air and two shots at the dog that he had seen jumping up and down in the long grass, but which two shots were fired in the opposite direction to where appellant last saw the deceased;
 - 20.3 He had every opportunity to shoot the deceased at short range if he wanted to kill him, instead of waiting for him to walk away for a considerable distance;

¹¹ *R v Dhlumayo and Others* 1948 (2) SA 677 AD at 705-706. See also *Booyesen v S* (A875/12) [2013] ZAGPPHC 104 (18 April 2013) para 12.

¹² *S v Naidoo and Others* 2003 (1) SACR 347; [2002] 4 All SA 710 (SCA) para 26. See also *S v Makgatho* 2013 (2) SACR 13 (SCA) para 17.

- 20.4 He was armed with a hunting rifle to which a telescope was mounted, but he shot from the hip, clearly indicative of the fact that he was not aiming at a person or even the dog, at grass level;
- 20.5 The projectile which appellant admitted killed the deceased was damaged, which showed that the bullet was deflected by some object including the long thick grass and ricocheted to hit the deceased fatally;
- 20.6 The appellant upon being confronted by a certain Mr Uys, who was sent to the scene first, expressed shock and uttered the following words: 'It is impossible. I was shooting at the dog.'
- 20.7 The appellant looked for the deceased in the opposite direction next to the fence demarcating his farm from his neighbour's whereas the deceased was found at least 250m away by Uys; and
- 20.8 The appellant went to apologise to the deceased's family for their loss.

[21] The trial court committed several misdirections, which in our view, led to the wrong conclusion that the appellant was guilty of murder. It found that the medical evidence presented by both the State and the defence was 'a rage of disagreement' but yet found it irrelevant for determination of the guilt or innocence of the appellant.

[22] This aspect is the crux of the case. The trial court was bound to assess it thoroughly in order to determine the appellant's guilt on murder with *dolus directus* or *dolus eventualis* or culpable homicide, and not his guilt or innocence in a vacuum. Without such determination the trial court was bound not to find its way to the correct verdict. It is further important for a trial court to analyse the expert evidence presented and to come to some conclusion in order to reject or accept it.

- [23] The trial court found that the appellant acted out of revenge for the loss he had suffered at the hands of poachers and thieves. This act of revenge was a factor that the trial court had a duty to factor in along with other matters that could point to a possible motive for the shooting. The fact that the appellant said he was angered by the thefts, coupled with the police's failure to intervene despite repeated reports the farmers had made, cannot without more, justify the murder conclusion. This also flies in the face of the unequivocal finding by the trial court that the appellant was an honest witness who did not attempt to evade questions, but stuck to his version. What this conveys is that he was regarded as a credible witness.

Having considered the evidence as a whole, the conviction on murder with *dolus directus* or *dolus eventualis* for that matter cannot stand.

- [24] This then leads us to consider the evidence that remains i.e. whether a reasonable person in the same circumstances in which the appellant found himself would have acted as he did. In other words whilst he was aware that the deceased and possibly other persons were in the vicinity, but having disappeared from his sight, even if it was in a different direction; would a reasonable person have fired shots to scare off the dog. This is so, particularly knowing, as it was admitted by the defence, that a dog and its owner are invariably next to each other during hunting.
- [25] Counsel for the State submitted that the version that the deceased was struck and killed by a ricochet bullet is not reasonably possibly true 'because of the distance between the spot where the appellant had testified he had fired the shots and where he had testified he had seen the deceased disappearing to and the spot where the body was found.'

[26] It is true that if the evidence is considered with the photographs and points indicated thereon, appellant on his version fired shots in a totally different direction from where the deceased (on his version) had disappeared. His version is contradicted by the State's evidence as well as the objective facts. Appellant tried to convince the trial court that the deceased walked along the border fence and that he fired in a direction far away to the left of that area. Even based on a finding that a ricochet bullet struck the deceased, which finding we make, appellant's version that the deceased could not be within or in close proximity of his arc of fire should be rejected as false. Although the evidence presented by the State's eye witnesses was of poor quality, the objective facts support their version in this regard.

[27] In our view, a reasonable person in the same circumstances as the appellant would not only have made sure that there was no person in the vicinity before he fired the shots, but would not have fired the shots in the first place. This is particularly so because, after the deceased disappeared from his sight, he would not know his exact location due to the long grass, the undulating terrain and because the deceased was walking all the time. Any other person on the neighbouring farm could have been struck by a stray or ricochet bullet as it did in this case. Motsie, who was already captured, would have identified the people he had been with on that day. The motor vehicle used by the trespassers to get to the farm was still parked on the road close to appellant and Van Aswegen's vehicles. The appellant claimed that he loved dogs and it was for this reason, he said, that he even prevailed upon Van Aswegen to be the one to shoot the other dog because it would be against his conscience. Yet he fired two shots at another dog knowing that he might kill it. Apparently a certain Inspector Palm, through Van Aswegen, had instigated them to do so.

- [28] We find that on the evidence viewed as a whole the appellant, while he did not have the requisite intention to kill the deceased, negligently killed him.

The appeal against the conviction on murder with *dolus directus*, for the aforesaid reasons, ought to succeed.

The appellant is thus guilty of culpable homicide.

ON SENTENCE

- [29] The alteration of the conviction from murder to culpable homicide places this court at large to consider sentence afresh. The appellant is a farmer and the sole breadwinner of his family. He was 69 years of age at the time of the commission of this offence. He is married with children who are all adults. He is a first offender. Over and above the seriousness of the offence, the appellant's moral blameworthiness in the circumstances must also be taken into account¹³.

- [30] As the Appellate Division in *S v Munyai*¹⁴ stated:

‘One instinctively baulks at the thought of a person of this advanced age being sent to the gallows [in our case long term imprisonment]. And, it is seems to me, the objects of punishment do not require this. It is true that old age is generally speaking, not a ground for leniency (see the writers referred to by Rumpff JA in *S v Zinn* 1969 (2) SA 537 (A) at 541G-542A). Nevertheless, our courts have (as for an example in *S v Heller* 1971 (2) SA 29 (A) at 55C) treated old age as *per se* as a mitigatory factor when deciding on an appropriate period of imprisonment. This has been done on the basis of compassion, I think, coupled with the perception that the community expects old people to be treated with sympathy (DP van der Merwe *Sentencing* at 5-26). Perhaps the reason for this is embodied in

¹³ SS Terblanche *The Guide to Sentencing in South Africa* 2 ed (2007) at 150, writes: ‘The modern view of the seriousness of crime generally also refers to blameworthiness of the offender...[T]he seriousness of the offence is affected by the extent to which the offender can be blamed or held accountable for the harm caused or risked by the [offence]...’

¹⁴ *S v Munyai and Others* 1993 (1) SACR 252 (A) at 255 g-i.

the saying 'pity at last is due to a feeble octogenarian' (*Oxford English Dictionary* sv 'Octogenarian').

- [31] Having said that, in our view, correctional supervision which was recommended by Prof Daniel Andries Louw¹⁵ and Mr Johannes Van Der Merwe¹⁶, although appropriate in cases of murder,¹⁷ in the right circumstances, would not be appropriate in this case. The incident occurred three years before sentence was passed by the trial court and thus five years ago by now. Its rehabilitative element of punishment has dissipated significantly and is less likely to serve its purpose, regard also being had to the age of the appellant. A sentence based on rehabilitative principles supported by the deceased's wife upon payment of a sum of money for reparation was suggested to the trial court and repeated in this court. The appellant is remorseful over what has happened. He contributed a certain amount of money towards the burial of the deceased.
- [32] The State's counsel submitted that even if appellant is capable of paying compensation, this court should still impose direct long term imprisonment. The authority relied upon by him is not applicable here as in that case the accused was convicted of murder. We accept that a court should not create an impression that rich people could obtain for themselves lenient sentences, whilst poorer people are not entitled to the same benefits. However restorative justice is nowadays accepted as one of the purposes of punishment and if it at all possible, it should be considered in appropriate cases.
- [33] Weighing up all the aggravating factors against the mitigating factors we are of the view that a term of imprisonment, wholly suspended on appropriate conditions, will adequately serve the interests of justice.

¹⁵ Professor Daniel Andries Louw is a clinical psychologist and retired Professor and head of the Centre of Psychology at the Faculty of Law, University of Free State.

¹⁶ A correctional services official,

¹⁷ See section 276(1)(h) of the Criminal Procedure Act 51 of 1977, as explained in Du Toit et al *Commentary on the Criminal Procedure Act (2013)* from 28-9. See also *S v R* 1993 (1) SACR 209 (A).

It will also serve as a deterrent to the appellant and hang over his head like a sword of Damocles.¹⁸ The cases in which white farm owners claim to have mistaken a Black person for a baboon, a dog or any kind of animal are becoming too common and must be painstakingly investigated, properly prosecuted and punished. Navsa JA commented in *S v Crossberg*¹⁹ that:

'It appeared that the racial overtones the case seemed to be assuming had caused tensions between the police investigating the incident and their superiors. Unfortunately, as this case shows, race continues to divide and bedevil our society'

In the *Crossberg*²⁰ case the appellant was 46 years old at the time of the commission of the offence of culpable homicide. Having converted his sentence of twenty years for murder to culpable homicide, the Supreme Court of Appeal sentenced him to five years' imprisonment, two years of which were suspended on certain conditions.

- [34] The sentence and orders we deem appropriate in this case were deliberated upon with counsel, in particular appellant's counsel. All considerations such as the affordability of any compensation the court deemed fit to order, including the formation of a Trust Fund for the benefit of the beneficiaries, were proposed to the trial court as well. This proposal was disregarded, understandably based on the verdict of murder that the court returned. We also deemed it appropriate to consider and filter in a condition which can go a long way to foster better relations between the two communities: the farming community of which the appellant is part of on the one hand and the neighbouring community of which the deceased and most farm workers come from. The State had very little inputs but certainly

¹⁸ See *Persadh v R 1944 NPD 357* at 358; *S v Scheepers* 2006 (1) SACR 72 (SCA) para 11.

¹⁹ *Crossberg v S* 2008(2) SACR (SCA) para 51

²⁰ *Crossberg* above.

did not object nor raise any impediments relating to the implementation of the proposed order.

[35] In the result the order set out above is granted.

B. C. MOCUMIE, J

J. P. DAFFUE, J

M. D. HINXA, AJ

On behalf of appellant: Adv. T. N. Price SC
Instructed by:
Nico Naude Attorneys
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On behalf of the respondent: Adv. M. A. Mohlala
Instructed by:
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