



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

**Not Reportable
Case No: CAF 01/2025**

Trial Court Case No: CC18/2021

In the matter between:

JOHANNES DEMCY DIELELE

Appellant

and

THE STATE

Respondent

Coram: PETERSEN ADJP, MATHLAPE AJ and MNYOVU AJ

Date heard: 17 April 2026

Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 10h00 on 8 May 2026.

Summary: Criminal law –Appeal against conviction and sentence – Murder read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 – Unlawful possession of firearm and ammunition in contravention of ss 3 and 90 of the Firearms Control Act 60 of 2000 – Application for reinstatement of lapsed

appeal and condonation of late prosecution – Interests of justice and prospects of success favouring condonation – Hearsay evidence – Law of Evidence Amendment Act 45 of 1988, s 3(1)(c) – Admission of deceased witness’s written statement and oral accounts to family members – Balancing of probative value against prejudice – Hearsay directly identifying accused as perpetrator admissible only where compelling indicia of trustworthiness beyond mere unavailability of declarant – Court *a quo* misdirected itself in admitting hearsay – Ballistic evidence – Murder weapon (7.65mm) not linked to appellant – Only firearm associated with appellant (9mm) positively excluded as murder weapon – Proof beyond reasonable doubt not discharged on circumstantial evidence alone – Unlawful possession charges – No expert evidence establishing that item recovered constituted a ‘firearm’ as defined in s 1 of the Act – Essential element of offences not proven – Appeal against all three convictions and sentences upheld – Appellant acquitted on all counts.

JUDGMENT

PETERSEN ADJP (MATHLAPE AJ and MNYOVU AJ concurring):

Introduction

[1] This is an appeal by the appellant, Johannes Demcy Dielele (the appellant), against the convictions and sentences imposed by the court *a quo* (Mfenyana J) on 23 and 27 October 2023 respectively. The appellant seeks reinstatement of his lapsed appeal and condonation of the late filing of the notice of appeal and the late prosecution of the appeal.

[2] The appellant was convicted of murder read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 (Count 1), unlawful possession of a firearm in contravention of s 3 of the Firearms Control Act 60 of 2000 (Count 2), and unlawful possession of ammunition in contravention of s 90 of the Firearms Control Act 60 of 2000 (Count 3). He was sentenced to life

imprisonment on Count 1, five years' imprisonment on Count 2, and three years' imprisonment on Count 3, with the sentences on Counts 2 and 3 ordered to run concurrently with the life sentence.

The application for reinstatement and condonation

Background to the delay

[3] Leave to appeal against both the convictions and the sentences was granted by the court *a quo* on 27 October 2023. The appellant failed to prosecute his appeal timeously and the appeal lapsed. He subsequently brought the present application for reinstatement and condonation.

[4] The trial commenced in 2021 and concluded on 27 October 2023 when the appellant was sentenced. Leave to appeal was granted on the same day. The notice of appeal was filed woefully out time.¹ The relevant documents were only filed in April 2026, a delay of approximately two and a half years. This is an inordinate delay that requires a thorough explanation.

[5] The appellant deposed to a founding affidavit in which he accounts for the delay as follows. He was financially unable to instruct his legal team to proceed with the appeal immediately upon the conclusion of the trial. His family had been funding his legal fees throughout the trial and those funds were exhausted. He elected to prioritise an application for bail pending appeal on new facts (Case No. CAB 03/2022), believing that release on bail would enable him to return to his employment as a Controller in the Technical Services Department of the Ditsobotla Local Municipality and to raise the necessary funds. That bail application was struck off the roll on 17 September 2024, one of the stated reasons being that the notice of appeal had not been served and filed and the appeal had accordingly lapsed.

¹*Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C–F.

[6] Following the striking off of the bail application, the appellant instructed his legal team to deal with the appeal. The reinstatement application was filed in April 2026. The explanation for the period between September 2024 and April 2026 is less satisfactory, it amounts to a continuation of financial difficulties. However, the appellant has shown that he maintained contact with his legal representatives and was making efforts to fund them, including by way of arrangements allowing them to act on a limited basis without full payment.

Legal principles

[7] The test for condonation and reinstatement is well-established. The court must consider, the degree and cause of the delay; the adequacy of the explanation; the prospects of success on the merits; the interests of justice, including the liberty of the subject; and any prejudice to the respondent. In criminal matters, especially where liberty is at stake, the court will lean towards granting condonation where the explanation is genuine and the appeal is not without merit. Prospects of success is the weightiest factor.

[8] The explanation for the initial period of delay is acceptable. An incarcerated person who lacks the financial means to prosecute an appeal for which leave has been granted should not be deprived of that right solely by reason of poverty. The explanation for the delay between September 2024 and April 2026 is less satisfactory, but the appellant demonstrated continued engagement with his legal team and there is no suggestion of deliberate delinquency or bad faith.

[9] The State has not identified any specific prejudice it would suffer from reinstatement and does not oppose the application for condonation and reinstatement. The trial record is intact, witnesses are known, and the matter can be decided on the papers before us.

[10] The appeal has real and substantial prospects of success. The interests of justice, and the constitutional imperative that a man sentenced to a life sentence be afforded the appellate scrutiny for which leave was expressly granted, strongly favour the grant of condonation.

[11] Condonation is accordingly granted. The notice of appeal is deemed duly filed and the appeal is reinstated.

The main appeal against conviction and sentence

Factual background

[12] The appellant and the deceased, E[...] D[...] K[...], were in a romantic relationship from approximately 2013. They had a child together, O[...]. By June 2018, the relationship had deteriorated after the deceased apparently discovered the appellant with another woman and a child bearing a resemblance to the appellant. The deceased ended the relationship and changed her cellphone number to avoid contact.

[13] On the evening of 4 August 2018, the appellant telephoned N[...] K[...] (the deceased's sister) and later spoke to C[...] K[...] (the deceased's mother), seeking to locate the deceased. He was asked to be alerted when the deceased arrived home. Later that evening, the appellant drove to the K[...] home in Verdwaal, Itsoseng. His arrival was noted by C[...] K[...]. The deceased and her cousin, M[...] A[...] B[...] ('D[...]'), had gone to the outdoor toilet. The appellant followed them outside.

[14] Shortly thereafter, C[...] and N[...] heard D[...] screaming. They ran outside. C[...] saw the appellant walking backwards from the direction of the toilet towards his vehicle. She asked him what had happened; he did not respond. He drove off, colliding with the gate as he left. The deceased was found near the toilet with a gunshot wound to the right side of her head. She

was declared dead by paramedics. The post-mortem report by Dr Maleka Samuel Letebele confirmed the cause of death as penetrating head trauma due to gunshot to the head. The fatal projectile was discharged from a 7.65mm calibre firearm.

[15] No eyewitness observed the actual shooting. Neither C[...] nor N[...] saw the appellant in possession of a firearm at any time. D[...], who was with the deceased at the toilet, had died in an unrelated accident before the commencement of the trial. The State sought to introduce her account through hearsay evidence. The appellant was arrested some days after the incident. A 9mm pistol and three rounds of 9mm ammunition were found in a school bag in the vehicle in which he was travelling.

[16] The appellant did not testify and called no witnesses in his defence.

Issues for determination

[17] The following issues fall for determination. Whether the hearsay evidence of D[...] was correctly admitted in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. Whether, on the totality of the evidence, the State proved the appellant's guilt on Count 1 (murder) beyond a reasonable doubt. Whether the State proved the elements of Counts 2 and 3 (unlawful possession of a firearm and ammunition) beyond a reasonable doubt; and sentence, which falls away if the convictions are set aside.

Count 1: Murder

The hearsay evidence

[18] The cornerstone of the State's case on Count 1 was the evidence admitted by the court *a quo* pursuant to its ruling of 6 September 2023.² The court *a quo* admitted hearsay evidence in terms of s 3(1)(c) of the Law of

²Law of Evidence Amendment Act 45 of 1988 (the Hearsay Act), s 3(1)(c).

Evidence Amendment Act:³ (a) the written statement of the deceased D[...] to the police; and (b) the oral statements that D[...] had made to C[...] and N[...], to the effect that the appellant had held the deceased in a “vice grip” and shot her. Without this evidence, no direct identification of the appellant as the shooter exists on the record.

[19] Section 3(1)(c) permits admission of hearsay where the court, having regard to the interests of justice, is satisfied that the evidence should be admitted, taking into account: the nature of the proceedings; the nature of the evidence; the purpose for which it is tendered; the probative value; the reason why direct evidence is unavailable; prejudice to a party; and any other factor. The exercise of this discretion requires a careful balancing of probative value against potential prejudice.

[20] With respect to the court *a quo*, the balancing exercise conducted in the hearsay ruling was insufficient in the following respects. First, as to the oral statements to C[...] and N[...], these were not contemporaneously recorded. They were made by D[...], a relative of the deceased, herself under emotional stress, to the deceased's immediate family members. The circumstances attending the making of these statements do not provide the hallmarks of trustworthiness that would warrant their reception over the objection of an accused who cannot cross examine the declarant. In *S v Ndhlovu*⁴ the Supreme Court of Appeal held that:

‘[17] ... a trial court must in applying the hearsay provisions of the 1988 Act be scrupulous to ensure respect for the accused’s fundamental right to a fair trial. Safeguards including the following are important:

First, a presiding judicial official is generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence. More specifically under the Act, ‘It is the

³*The State v Johannes Dempsey Dielele* (CC18/2021) ZANWHC 15 (Mfenyana J).

⁴ *S v Ndhlovu* 2002 (2) SACR 325 (SCA) at para [17].

duty of a trial Judge to keep inadmissible evidence out, [and] not to listen passively as the record is turned into a papery sump of “evidence”.’

[21] Second, even in respect of the written police statement, the prejudice to the appellant is severe. D[...] is described as having been at the toilet with the deceased when the shooting occurred. Her statement, if accurate, is the only eyewitness account placing the appellant as the shooter. The accused is unable to challenge her perception, test her proximity to the events, probe her state of mind, or expose any motive to falsify. The Constitutional Court in *Kapa v S*⁵ approved the admission of a deceased eyewitness account but emphasised that the interests of justice calculus must be applied with care and is not satisfied by unavailability alone. The prejudice here, total inability to contest the sole identification evidence, is acute and was insufficiently weighed.

[22] Third, the court *a quo* found that the hearsay was “corroborated” by the evidence of C[...] and N[...]. That finding misdirected the enquiry. Corroboration for purposes of the s 3(1)(c) balancing must be independent evidence going to the critical fact, that the appellant was the person who fired the weapon. The evidence of C[...] and N[...] confirms only the appellant’s presence, his conduct in following the deceased, and his flight after the shot. None of it independently establishes who pulled the trigger. So-called corroboration of peripheral facts does not reduce the prejudice arising from the inability to cross examine the sole identifying declarant.

[23] The hearsay evidence, both the written statement and the oral accounts, should not have been admitted. The court *a quo* misdirected itself in admitting it.

The ballistic evidence and its exculpatory effect

⁵ *Kapa v S* 2023 (1) SACR 583 (CC) at [29], [34]–[36].

[24] The ballistic evidence creates an independent and decisive obstacle to the murder conviction. The ballistic expert testified that the fired 7.65mm cartridge case recovered from the murder scene at Itsoseng matched a 7.65mm Pietro Baretta semi-automatic pistol, but that pistol was linked to a separate Lichtenburg case number, representing a different police station and a different jurisdiction. That weapon was never connected to the appellant.

[25] The only firearm found in the possession of, or associated with, the appellant was a 9mm pistol discovered in a school bag in the vehicle in which he was travelling at the time of his arrest. This was a different calibre weapon. The ballistic expert confirmed there is no link between the 9mm pistol and the murder. During the hearing of this appeal, the State conceded in its heads of argument that the bullet fragments recovered from the deceased's skull could not be linked to any firearm belonging to or associated with the appellant.

[26] This concession is decisive on Count 1. The State's own concession forecloses any forensic basis for concluding that the murder weapon was associated with the appellant. This is not a case where the firearm is merely unrecovered, the evidence positively establishes that the weapon which fired the fatal shot was a 7.65mm pistol sourced from an entirely different case and location, and has no proven connection to the appellant.

Whether guilt was proved beyond reasonable doubt

[27] The State's burden is to prove guilt beyond a reasonable doubt.⁶ The accused need only show that his version, or a version consistent with his innocence, is reasonably possibly true.⁷ Where the State's case depends on circumstantial evidence, the two cardinal rules in *R v Blom*⁸ apply, the inferred

⁶*S v Shackell* 2001 (2) SACR 185 (SCA) at 194F–I.

⁷*S v Boesak* 2001 (1) SA 912 (CC) at [24].

fact must be consistent with all proved facts; and the proved facts must exclude every reasonable inference other than guilt.

[28] With the hearsay excluded, and the ballistic evidence positively disconnecting the appellant from the murder weapon, the following evidence remains. The appellant and the deceased had a troubled relationship; the appellant sought the deceased out by telephone on the day of the shooting and drove to her home; he followed the deceased and D[...] outside; he was seen walking backwards from the direction of the toilet seconds after the shot was fired; he drove away without responding to C[...]’s question; and no firearm that fired the fatal shot was recovered from him or linked to him.

[29] While this evidence creates a strong suspicion, however grave, is not proof beyond a reasonable doubt. The proved facts do not exclude every reasonable inference other than guilt. Other inferences remain reasonably possible. The appellant may have arrived at the scene to find the deceased already shot and fled in a panic; an unknown third party may have fired the shot and been at or near the toilet area. The State has not excluded these possibilities, and the exculpatory ballistic evidence, conceded by the State itself, makes them more than merely fanciful.

[30] The appellant’s election not to testify does not remedy this deficiency. As this Court is bound to hold, the failure to testify does not supplement a prosecution case that has not discharged the burden of proof beyond a reasonable doubt.

[31] The conviction on Count 1 cannot stand. The appeal against the murder conviction succeeds.

Counts 2 and 3: Firearm and Ammunition

⁸ *R v Blom* 1939 AD 188 at 202–203.

[32] The convictions on Counts 2 and 3 relate to the 9mm pistol and ammunition found in the school bag in the vehicle in which the appellant was travelling. Two independent grounds require that these convictions be set aside.

[33] First, as demonstrated above, the 9mm pistol has no ballistic connection to the murder. The murder weapon was a 7.65mm pistol from a separate case. The only forensic basis on which the 9mm pistol was material to the prosecution was the supposed link to the murder, and that link does not exist.

[34] Second, and independently, no expert evidence was led to establish that the 9mm item found in the bag was a “firearm” as defined in section 1 of the Firearms Control Act 60 of 2000. An offence under section 3 of that Act requires proof that the item in question is a device designed or adapted to discharge a projectile through a barrel by means of gas produced by burning propellant material, or a component of such a device. Warrant Officer Seetso described the item as a “9mm pistol” but no ballistic expert testified to its statutory classification. The essential element that the item is a “firearm” within the Act has not been proved beyond a reasonable doubt.

[35] The convictions on Counts 2 and 3 are set aside on both grounds.

Sentence

[36] It follows axiomatically that since the convictions on all three counts are set aside, the sentences fall away.

Order

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

1. Condonation for the late service and filing of the notice of appeal is granted.
2. Condonation for the late prosecution of the appeal is granted.

3. The appeal is reinstated.
4. The appeal against the convictions and sentences on all three counts succeeds. The order of the court *a quo* is replaced with the following order:

“The accused is acquitted on Count 1 (murder, read with section 51(1) of the Criminal Law Amendment Act 105 of 1997); Count 2 (unlawful possession of a firearm); and Count 3 (unlawful possession of ammunition).”

A H PETERSEN
ACTING DEPUTY JUDGE PRESIDENT
NORTH WEST DIVISION, MAHIKENG

I agree.

H B MATLHAPE
ACTING JUDGE
NORTH WEST DIVISION, MAHIKENG

I agree.

B F MNYOVU
ACTING JUDGE

NORTH WEST DIVISION, MAHIKENG

Appearances:

For the appellant: Adv. R.J. Nkhahle

Instructed by: G.A. Mooka Attorneys

For the respondent: Adv. C Nontenjwa

Instructed by: Office of the Director of Public Prosecutions,
Mahikeng