



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1124/2023

In the matter between:

QUENTIN ARLOW

APPLICANT

and

THE STATE

RESPONDENT

Neutral Citation: *Arlow v The State* (1124/2023) ZASCA 119 (17 September 2026)

Coram: MATOJANE and SMITH JJA and PHATSHOANE AJA

Heard: 25 May 2026

Delivered: 17 September 2026

Summary: Criminal Law – reconsideration of the refusal of special leave to appeal in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act) – application to adduce further evidence on appeal in terms of s 316(5)(a) of the Criminal Procedure Act 51 of 1977, read with s 19(b) of the Act – threshold for the admission of further evidence satisfied – further evidence raising a reasonable possibility that the applicant’s conviction could not be sustained – State failing to prove guilt beyond reasonable doubt – conviction and sentence set aside.

ORDER

On application for reconsideration: (referred to the Court by the President in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013):

- 1 The order of this Court dated 03 August 2023 refusing the application for special leave to appeal is reconsidered and varied in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 to the extent set out in para 2 of this order.
- 2 The application for special leave to appeal is granted.
- 3 The application for leave to adduce further evidence is granted.
- 4 The appeal is upheld.
- 5 The order of the high court is set aside and in its place is substituted the following:
‘1 The appeal succeeds. The conviction and sentence are set aside.’

JUDGMENT

Phatshoane AJA (Matojane and Smith JJA concurring):

Introduction

[1] This application has its genesis in the Magistrates' Court for the Regional Division of Mpumalanga, held in Mhala (trial court), where Mr Quentin Arlow, the applicant, was tried and convicted on a charge of attempted murder. Pursuant thereto, he was sentenced to five years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 (the CPA). The trial court refused his application for leave to appeal against both his conviction and sentence. Following a successful petition to the Judge President of the Mpumalanga Division of the High Court, his appeal against

the conviction and sentence was heard by the full bench, Ratshibvumo and Kgoele JJ (high court), which dismissed the appeal.

[2] The applicant petitioned this Court for special leave to appeal the judgment and order of the high court. Two judges of this Court considered the petition and dismissed it on the basis that no special circumstances warranted a further appeal to this Court. Aggrieved thereby, the applicant applied to the President of this Court in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act) for reconsideration, and if necessary, variation of this Court's order dated 3 August 2023, dismissing his petition. The President referred that application to us for oral argument in terms of s 17(2)(d) of the Act and, if granted, the determination of the appeal itself.

[3] This appeal was previously postponed because the record was incomplete in that a substantial part of the applicant's evidence-in-chief had not been transcribed. That portion of the record has now been furnished to this Court. The applicant's evidence was in Afrikaans. What is disconcerting is that the English translation of his evidence, which is also part of the transcript, leaves much to be desired. A considerable part of the applicant's testimony in Afrikaans was inaccurately conveyed to the trial court in English. This is a matter of serious concern and is strongly deprecated.

The proceedings in the regional court

[4] The applicant, a captain employed by the South African Police Service (SAPS), with 25 years of service, stationed at Phokeng K9 Rustenburg Dog Unit, was deployed to the Kruger National Park, Mpumalanga Province, to conduct searches of vehicles for explosives or firearms, as rhino poaching in the park was on the rise. The case against him was that, on 12 July 2016, in the course of his duties, at Mkhuhlu, a village near the park, he unlawfully and intentionally attempted to kill Mr Leonard Last Nkosi (the complainant) by shooting him with a firearm.

[5] He pleaded not guilty and provided the following plea explanation. He was on duty, clad in uniform with a bulletproof vest, at one of the Kruger National Park's gates. He stopped the complainant's vehicle, but the complainant thereafter drove away. In his marked police vehicle, with its blue lights activated, he gave chase to the

complainant. He blocked the complainant's vehicle with his state vehicle. He approached the complainant while holding a firearm. The complainant attempted to drive away and, in so doing, pushed him with the vehicle and nearly ran him over. As the applicant attempted to avoid being rammed by the vehicle, his firearm accidentally discharged a shot, which passed through the door panel of the complainant's vehicle and unintentionally struck and injured the complainant.

[6] The State called no fewer than four witnesses, namely, the complainant, Mr Setfree Fanexi Mhlongo (Mr Mhlongo), Mr Excellent Maseko (Mr Maseko), and Mr Master Sibusiso Leshaba (Mr Leshaba), while the applicant testified in his own defence. During the trial, a number of documents were admitted into evidence by consent, including a medical report (J88), compiled by Dr P Cheng. The report recorded that the complainant sustained entry and exit wounds to his right ankle measuring 0.5 cm (5 mm) and 0.3 cm (3 mm) in diameter, respectively. Having summarised the evidence, the trial court identified three questions for determination: (a) whether the applicant pulled the trigger; (b) whether the applicant had the intention to shoot and injure the complainant; and (c) whether there existed any ground of justification for the shooting.

[7] The trial court reasoned that when the applicant approached the complainant with a firearm, he had already cocked it and deliberately fired a shot. The court rejected the evidence that the 9 mm Parabellum calibre pistol, a semi-automatic firearm in the applicant's possession, was defective. It accepted the State's evidence as concise, straightforward, and credible. There had been no contradictions, and if there were, the court held, they were immaterial. As for the applicant's version, the court rejected it as far-fetched and improbable. The trial court was of the view that a police officer with 25 years of experience, as the applicant was, ought to have known that 'you do not point a firearm at any object unless you want to destroy or kill'. The court further found that, by cocking and pointing the firearm at the complainant, the applicant had the requisite intention to kill, and went on to state:

'The evidence does not suggest that the accused was in any danger. It is clear that the accused was angry with the complainant, that he allegedly misbehaved in the park and drove away while he was still talking to him.'

The trial court found no justification and accordingly returned a verdict of guilty on the charge of attempted murder.

The proceedings in the high court

[8] On appeal, the high court was required, inter alia, to determine whether the contradictions in the State's case were material. The high court was of the view that some of what was raised as contradictions were not discrepancies but different observations by different witnesses, which may have been influenced by various factors, including their vantage points. The court further held that it was no contradiction for one witness to hear utterances made by an individual while others in the same scene do not hear them. It noted that the alleged contradictions had to be viewed in light of the fact that three years had elapsed between the incident and the witnesses' testimony in court. In addition, the court noted that the public prosecutor displayed some impatience by preventing the complainant from placing certain aspects of the case on record.

[9] The high court found that the applicant's version of the accidental discharge of the firearm was inconsistent with the objective evidence and the surrounding circumstances. The court considered it significant that the applicant's conduct was directed solely at the complainant, notwithstanding the presence of other occupants in the vehicle. It reasoned that, by aiming the firearm at the lower part of the complainant's body, the applicant ensured that the complainant, as the driver, would be the only person exposed to the risk of being shot. Accordingly, the high court found no material misdirection in the trial court's acceptance of the State's version and rejection of the applicant's. Consequently, it dismissed the appeal against his conviction.

[10] Regarding the sentence, it was argued in the high court that the trial court erred by failing to follow the recommendations of the applicant's clinical psychologist to impose a wholly suspended sentence. The high court rejected the contention, holding that the psychologist's recommendations were intended to assist the court and were not binding on it. Absent an argument that the sentence was disturbingly or shockingly inappropriate, so reasoned the high court, there was no basis for interfering with the

trial court's sentencing discretion. The criticism against the trial court could not be sustained. Therefore, the court dismissed the appeal against the sentence.

The issues raised in this Court and their evaluation

[11] As already alluded to, we are here concerned with the application for reconsideration of the order of 3 August 2023, granted by two judges of this Court, refusing the applicant's application for special leave to appeal against the judgment and order of the high court. The order sought to be reconsidered was granted before the amendment to s 17(2)(f) of the Act took effect on 03 April 2024. Prior to its amendment, s 17(2)(f) of the Act provided:

'The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

[12] Following its amendment s 17(2)(f) of the Act now provides:

'The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may, in circumstances where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

[13] This Court in *Tarentaal Centre Investments (Pty) Ltd v Beneficio Developments*¹ said that the amendment did not alter the nature of the President's discretion in any way because the Constitutional Court in *S v Liesching and Others*,² held that exceptional circumstances, in the context of s 17(2)(f), should be linked to either the probability of grave individual injustice or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurs. Section 17(2)(f) is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused.

¹*Tarentaal Centre Investments (Pty) Ltd and Another v Beneficio Developments (Pty) Ltd* 2025 JDR 1461 (SCA) para 4.

² *S v Liesching and Others* 2019 (1) SACR 178 (CC) paras 138 - 139.

[14] The application for reconsideration is accompanied by an application to adduce further or new evidence relating to the prospective appeal, as contemplated in s 316(5)(a) of the CPA. In terms of s 19(b) and (c) of the Act, this Court may, in addition to any power as may specifically be provided for in any other law, receive further evidence or remit the matter to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, together with such instructions as regards the taking of further evidence or otherwise as this Court deems necessary.

[15] Both parties conceded that an order remitting this matter to the trial court to present further evidence would pose serious challenges, given the significant period that has elapsed (almost a decade) since the alleged offence was committed, as well as the unavailability of some of the counsel who represented the parties during the trial, and the presiding magistrate. The applicant's counsel, who represented him during the trial, passed away just before the address on the verdict. The applicant was subsequently represented by two different counsel during the address and the sentencing phase. In my view, these circumstances merit this Court's consideration of the application to adduce further evidence and, if justified, to receive such evidence in the interests of justice and to obviate wanton delays. Prior to considering the application to introduce further evidence, a brief evaluation of the evidence adduced at trial is essential, to which I now turn.

[16] The State's version was as follows. The complainant was accompanied by Mr Maseko, Mr Leshaba, and one Oupa when they left the Kruger National Park on 12 July 2016. The gate was opened for the complainant's vehicle to pass. He accelerated as he drove out of the park. He noticed a vehicle approaching at high speed from behind. He continued accelerating until he reached Mkhuhlu, the village where he resides. He was supposed to turn to the right. He slowed down. A vehicle pulled up from the left and blocked his path. An unknown man (the applicant) swiftly alighted from that vehicle, holding a firearm, and approached him. Three steps away, the applicant fired one shot at him.

[17] The bullet passed through the driver's door panel of the vehicle and struck the complainant on his right ankle. The applicant opened the driver's door and ordered the

complainant to disembark. He complied. The applicant showed the complainant his police badge. As the applicant moved towards his vehicle, the complainant grasped the applicant's attire and informed him that he was injured. The patrons at a nearby tavern began shouting at the applicant. He drove away. The complainant testified that his wound was bleeding moderately. He went to a hospital, where the wound was cleaned, medication was applied, and it was bandaged. He was discharged that same night.

[18] To avoid incriminating himself for fleeing from a police officer, the complainant testified that he never had the opportunity to observe whether the applicant's vehicle was marked. Under cross-examination, he also denied that the applicant had stopped his vehicle before it exited the park to search it. He also denied that, when he was stopped, he produced a permit after the officer had requested that he pull over. In addition, he denied that the officer wanted to interview him. When he exited the park, he saw a vehicle behind him but did not know that it was following him. Mr Leshaba testified to the contrary. According to him, the complainant knew that the vehicle was following them. He told his passengers that he would not stop because it was night-time and they were in the middle of the bush.

[19] The complainant gave conflicting accounts of how the shooting occurred. He testified that the applicant accosted him with a firearm, aiming to shoot him. The applicant discharged the firearm. The complainant later changed his account, stating that he did not know whether the applicant merely intended to fire a warning shot, to threaten him, or to aim at him. He went on to say:

'I do not know if he shot at me by mistake. He alighted from the motor vehicle holding a firearm. He aimed and shot me.'

In re-examination, in an attempt to clarify what he meant when he said the applicant aimed the firearm at him, he said:

'He did not shoot me through the window. He shot me when he was looking at me. He turned to the driver's side. He pointed the firearm. No longer looking down, pointing down. Pointing me straight. And then pulled the trigger.'

The magistrate then asked the complainant whether he could confirm that the applicant had shot him in the leg, to which the complainant replied:

'I never said he shot me; the bullet struck me, came to the leg; there are photos, your worship.'

The significance of these shifts cannot be understated.

[20] Mr Mhlongo, a security officer stationed at Kruger National Park, explained that he was working with the applicant on the afternoon of 12 July 2016. Approximately 18 steps away, he observed the applicant search the complainant's vehicle, and thereafter, Mr Mhlongo opened the gate for the vehicle to pass. It drove out of the park at high speed, followed by the applicant's vehicle. The applicant returned to the park about 40 minutes later and reported that he had given chase to the complainant's vehicle after not receiving a proper response from its occupants. He further reported that he had eventually managed to stop the vehicle but was immediately met with physical hostility. He therefore retreated and returned to the park. Under cross-examination, Mr Mhlongo stated that, when he opened the gate, he did not know whether the applicant had completed searching the vehicle. He nevertheless opened the gate because the applicant had not instructed him not to.

[21] Mr Maseko's evidence differs slightly. When they arrived at the park's gate, he saw two uniformed security officers. The complainant's vehicle was opened and searched by a security officer, but not by the applicant. Thereafter, the security officer opened the gate for the vehicle to pass. His evidence contradicted that of the complainant, who testified that the vehicle was not searched and that the security officer merely opened the gate to allow them to pass through.

[22] Mr Maseko went on to testify that, at some stage, he saw a vehicle's lights flashing behind the complainant's vehicle. The vehicle followed them. They stopped near a nightclub, and so did the vehicle behind them. It was parked behind the complainant's vehicle. The applicant alighted, took out a firearm from his bulletproof vest, walked to the driver's side, shot the complainant in the leg, and uttered some expletives. By contrast, the complainant, who was closer to the applicant than Mr Maseko, said nothing about the alleged unprintable epithets.

[23] Mr Maseko was asked how the shot was fired. He responded that he only realised that there had been a shooting after the fact. Upon being probed by the prosecutor, he stated that the firearm was pointed at the driver's door. Quite remarkably, he observed a small open wound on the complainant that bled profusely.

He then shifted the complainant to the passenger seat and drove the vehicle to the police station. On this aspect, his evidence is misaligned with that of the complainant, who testified that after the shooting, he alighted from the vehicle and grabbed the applicant by his clothes.

[24] The last witness for the State, Mr Leshaba, testified that upon their arrival at the gate, the applicant searched the complainant's vehicle by walking around it with a torch, shining it inside. Thereafter, the applicant returned to his vehicle. This evidence differs from that of Mr Maseko and the complainant, both of whom testified that the applicant did not search the complainant's vehicle. Mr Leshaba further explained that the gate was opened. The complainant's vehicle exited the park at normal speed, not at high speed as other witnesses testified. Halfway through their journey, he observed a vehicle flashing its lights behind the complainant's vehicle. They ignored it as the complainant told them that it was night-time and they were in the middle of the bush. The complainant's evidence differs somewhat in that he testified that he observed the lights of the vehicle behind him, but that the vehicle did not signal him to stop.

[25] Mr Leshaba testified that near a nightclub, the vehicle behind them overtook the complainant's vehicle and blocked its way. To avoid a collision, the complainant turned to the right. A police officer alighted from the vehicle, holding a firearm. He approached the driver's door; approximately two paces away, he pointed the firearm at the door and fired one shot. The applicant returned to his vehicle and left the scene. As the cross-examination progressed, Mr Leshaba explained: 'The [firearm] was aimed at his upper body, but I don't know how it went down or twisted to the leg'.

[26] The applicant's version was as follows. One of the park's patrons informed him that the complainant was driving recklessly at high speed in the park. He approached the complainant, who lowered his window. The complainant smelled strongly of alcohol. The applicant instructed him to stop his vehicle behind the SAPS vehicle parked close by. The complainant showed the applicant a permit that authorised him to visit the park. The applicant informed him that he was not interested in the permit but wanted him to stop his vehicle. The complainant did not comply with the instruction. Instead, while the applicant was still engaged in a conversation with him, he closed his vehicle's window and sped off.

[27] The applicant instructed Mr Mhlongo, who was 20 meters away, not to open the gate. It appears he may not have heard or misunderstood the instruction, as the gate was opened and the complainant's vehicle exited the park. The applicant explained that the police were posted in the park to combat rhino poaching. The circumstances at that stage gave rise to a reasonable suspicion that a serious crime was unfolding and that there may be firearms in the complainant's vehicle. Consequently, he pursued the complainant in his marked police van, with the blue lights and siren activated. He also did so because the complainant disobeyed his instructions and was under the influence of alcohol. As the complainant drove at excessive speed, the applicant switched off his siren and blue lights so that the complainant would not notice that the applicant was hot on his heels. This tactic was successful because the complainant's vehicle stopped on the roadside. The applicant then activated his blue lights again, at which point the complainant's vehicle drove off.

[28] As the traffic began to build up, the applicant overtook the complainant. The complainant swerved to the left, overtook several vehicles, drove recklessly, and almost ran over pedestrians. During the pursuit, the applicant blocked the complainant's path with his vehicle. He sprang out and approached the complainant. He once more sped off. The applicant narrowly avoided being struck by the complainant's vehicle as he leaped from the roadway. Again, he pursued the complainant, who turned into a shebeen. The applicant stopped his vehicle diagonally behind the complainant's. At that stage, the complainant's vehicle was blocked by a bus and unable to turn.

[29] As the applicant approached the complainant, he drew out his service pistol in response to what he perceived as an imminent and credible threat to his life and to a crime that had already been committed in his presence. A round was already chambered in the firearm, but the manual safety catch was engaged. The firearm was facing 45 degrees downward, as the applicant had been trained to do. He ordered the complainant to stop. While he was positioned on the driver's side of the complainant's vehicle, the vehicle pulled off towards him. He fell onto the bonnet/right fender with his upper body. The applicant held onto the complainant's vehicle with his right hand while holding the firearm in his left hand. He then stumbled and fell approximately a meter

from the vehicle, at which point the firearm discharged. The service pistol had been issued to him in 1994. At some stage, he observed that when he fired it, it would jam. He had reported the defect to his instructor, who advised him that it would resolve with time, but it never did.

[30] The applicant is of the view that, when he lost his footing while avoiding being run over, the firearm sustained an external impact. He stated that its safety clip probably shifted while still in his hand, resulting in the accidental discharge of a bullet. After he had stood up, he opened the driver's door, whereupon the complainant told him that he had been shot. The applicant requested the complainant to accompany him to the police station to deal with the matter there. When he tried to remove him from the vehicle, its occupants restrained the complainant. He later explained that he succeeded in pulling the complainant out of the vehicle. As they walked towards his vehicle, the complainant affronted him, and his passengers assaulted him. He therefore left the scene. He categorically denied that he pointed a firearm at the complainant and deliberately shot him. He had no intention to kill or injure anyone. He laid seven charges against the complainant; however, nothing came of it.

[31] Under cross-examination, the applicant admitted that one of the fundamental rules for handling a firearm is to keep a finger away from the trigger unless you are ready to fire. He did not pull the trigger. He explained that the hammer may have pulled back and forth in the course of his fall, which caused the firearm to discharge. It was put to him that the guidelines on firearm handling did not support this hypothesis. In turn, he said it has happened before, and such cases have been reported by SAPS. Throughout the trial, the applicant remained consistent in his version that the firearm discharged accidentally and that the shooting was unintentional.

[32] The factual background sketched above reveals certain contradictions in the evidence adduced by the State. However, contradictions do not, in themselves, justify the rejection of a witness's evidence unless they are material. As the high court correctly held, the decisive question is whether the inconsistencies are of such a nature as to undermine the reliability of the evidence as a whole. The applicant's version largely accorded with his plea examination and the version put to the State witnesses. In light of his admission that the bullet discharged from his service pistol

struck the complainant, it was straightforward for the trial court to conclude that the contradictions were immaterial. Ultimately, the trier of fact must evaluate whether, despite the contradictions, the truth has been told. An insuperable difficulty is that neither counsel for the State nor counsel for the applicant, nor the trial court, questioned how a 9 mm pistol could have caused the entrance and exit wounds of 5 mm and 3 mm diameters. The conspicuous discrepancy would require that the contradictions in the evidence presented, particularly as to how the shot was fired, be subjected to heightened scrutiny.

[33] The well-established general principle of our criminal law is entrenched in the maxim *actus non facit reum, nisi mens sit rea*: an act does not render a person criminally liable unless accompanied by the requisite fault. The form of fault (*mens rea*) required for criminal liability encompasses both intent (*dolus*) and negligence (*culpa*). Where an accused genuinely does not know or foresee the possibility that his or her conduct is unlawful, then he or she cannot be held to have the required guilty mind in the form of intention.³

[34] The principle that criminal liability should attach only to those who are at fault is foundational to our criminal justice system. As a general rule, persons who have acted without fault should not be deprived of their liberty by the State. Deprivation of liberty, without established culpability, is a breach of this rule. This rule is a corollary of another: when a person has committed an unlawful act intentionally or negligently, the State is entitled to impose punishment in accordance with the law.⁴

[35] In *Minister of Justice and Constitutional Development and Another v Masingili and Another*,⁵ the Constitutional Court made the following apt observations:

'It is useful to take a step back, for a quick look at the basics of criminal law. In our common law, it is generally accepted that culpability (also known as fault or *mens rea*) is a requirement for criminal liability. "There must be grounds upon which [an accused] may, in the eyes of the

³ J Burchell *South African Criminal Law and Procedure: Volume I: General Principles of Criminal Law* 4 ed (2011) at 56; J Burchell, PJ Schwikkard and TB Mosaka, *Burchell's Principles of Criminal Law* 6 ed (2025) at 55; see also G Kemp et al *Criminal Law in South Africa* 4 ed (2022) at 224.

⁴ *S v Coetzee and Others* 1997 (1) SACR 379 (CC) para 176.

⁵ *Minister of Justice and Constitutional Development and Another v Masingili and Another* 2014 (1) SACR 437 (CC) para 36 – 38.

law, personally be blamed for [his or her] unlawful conduct.” The focus is thus on the actor’s personal ability and knowledge, or lack thereof (as opposed to the conduct and unlawfulness requirements, where it is on the act). Once it is accepted that an accused has the mental ability required to establish criminal capacity, the conduct must be either intentional or negligent. For most crimes *dolus* (intent) is required. The accused must “will” the realisation of the conduct, knowing that the conduct is unlawful (*dolus directus*), or know and accept it even if it is not “willed” (*dolus indirectus*), or must foresee the possibility of the conduct and its unlawfulness, but nevertheless proceed (*dolus eventualis*).

The requirement of culpability encapsulates an accused person’s blameworthiness. Much of our criminal law is predicated on imposing legal liability on accused persons who perpetrate acts for which they are culpable; it is a general principle that criminal liability should broadly match personal culpability. In this sense, our criminal law recognises the importance of autonomy, which this court has affirmed a number of times.

The corollary to the idea that individuals should be held accountable for the choices they make is that ordinarily individuals should not be held accountable for choices they did not make. The *dolus* required is the ground for an accused’s personal blameworthiness arising from his or her unlawful conduct. Not only the fact of an accused’s blameworthiness but also its degree is relevant. The relative gravity of punishment must reflect the gravity of the offence.’

[36] The finding that the applicant deliberately shot the complainant is grounded on the evidence of some of the State witnesses. However, that evidence is undermined by contradictions concerning how the shooting occurred. This must be contrasted with the applicant’s version that the firearm discharged accidentally. It bears emphasis that there is no obligation upon an accused person, where the State bears the *onus*, ‘to convince the court’. If his version is reasonably possibly true, he is entitled to his acquittal even though his explanation is improbable. The test is whether there is a reasonable possibility that the accused’s evidence may be true.⁶

[37] This is a convenient stage to return to the application to admit further or new evidence on appeal. That evidence is set out in the affidavits filed in this Court in support of the application. After the criminal proceedings concluded, the complainant instituted a civil action against the Minister of Police (the Minister), claiming damages of approximately R27 million. He alleged that the applicant had, without justification,

⁶S v V 2000 (1) SACR 453 (SCA) at 455A-C.

shot him in the ankle with a 9 mm service pistol. Whereas the criminal case had been investigated by the Independent Police Investigative Directorate (IPID), the Minister engaged the SAPS legal department to conduct an investigation for the purposes of the civil trial.

[38] At the civil trial, a dispute emerged regarding the trajectory of the bullet that had allegedly shot the complainant. In support of the Minister's case, a forensic ballistic examiner attached to the SAPS Forensic Science Laboratory, Lieutenant Colonel Lucas Willem Visser (Lt-Col Visser), testified as an expert witness. He opined that it was impossible for a 9 mm bullet to cause an entrance wound of 5 mm in diameter, and equally impossible that the exit wound would be smaller than the entrance wound, that is, 3 mm. It is important to recite in some detail the salient averments as captured in his affidavit filed in this Court:

'4. On 29 July 2022, during the performance of my official duties I examined . . . motor vehicle . . . The vehicle ostensibly belongs to Mr LL Nkosi, the Plaintiff in a civil case against the Minister of Police, and also the Complainant in this matter. . .

6. I testified at the civil trial, and the following were the main points which I testified about:

6.1 The bullet holes in the door of the BMW motor vehicle were pointed out to me by Mr Nkosi.

6.2 The entrance and exit holes on the door of the motor vehicle showed an angle of 63° downwards.

6.3 The entrance hole in the door was smaller than the exit hole.

6.4 It was alleged that a Beretta 9mm pistol fired a bullet through the door and injured Mr Nkosi.

6.5 A Beretta 9mm pistol fires a projectile that travels at 360 m per second (if not impaired).

6.6 As the bullet penetrated the outer layer of metal of the door it became unstable.

6.7 When it penetrated the inner layer of the metal of the door it became even more unstable. That is why the entrance hole is smaller than the inside hole.

6.8 When exiting the door it became even more unstable and penetrated the console of the motor vehicle and exited the console, causing larger holes and tears as it went along.

7. Once a bullet becomes unstable it can never stabilise again. It will become more unstable every time it penetrates any material and the bullet/projectile will start tumbling.

8. According to a J88 report, which was completed by a doctor that examined Mr Nkosi, the entrance wound on the ankle of Mr Nkosi was 5 mm and the exit wound was 3 mm. I

categorically state that this wound could never have been caused by a 9 mm projectile that became highly unstable on its way through two layers of metal as well as plastic and rubber before reaching the ankle of Mr Nkosi. Both the entrance wound and the exit wound should have been much, much larger.

9. It is of particular importance that the wound caused by the object that penetrated the ankle, would be smaller than the wound on the exit of ankle (in inner ankle). This is because the bullet became even more unstable when penetrating the outside of the ankle. An entrance wound of 9 mm is not possible because the bullet in itself in a perfect condition is 9 mm which is nearly twice as big as the entrance wound. As the bullet travels on its way through the ankle it pushes tissue and blood in front of it and also would cause a much larger exit wound. According to the J88 of the wound found by the doctor, showed the converse, namely the entrance wound is larger than the exit wound.

10. A last point is the fact that the trajectory of the projectile, which I measured by using a probe, showed a downward angle of 63°. However, according to the J88 by the doctor that examined Mr Nkosi, the entrance and exit wounds on the ankle of Mr Nkosi was parallel. This wound could in no way have been caused by a 9 mm bullet travelling downwards at a trajectory of 63° penetrating two layers of metal and also layers of plastic and rubber before reaching the ankle and then cause an exit wound of 2 to 3 mm, which is parallel to the entrance wound.'

[39] Doctor Deodat Maré (Dr Maré), an orthopaedic surgeon since 1977, also testified as an expert witness in the Minister's case during the civil trial. Like Lt-Col Visser, he stated that the wound that was found on the complainant's ankle could not have been caused by a 9 mm bullet. In his affidavit filed on appeal, Dr Maré stated:

'2. On 17 March 2022, I examined one Last Leonard Nkosi at my surgery. Mr Nkosi related to me that he was injured by a bullet that was fired by a policeman. He pointed out a small scar on his right ankle. I examined the wound as well as the x-rays that had been taken of the ankle. I could find no abnormality in the ankle joint, nor any fractures or injuries. The tendons were normal.

3. I could find no abnormalities of neural structures, and everything functioned normally in his ankle.

4. I have treated many bullet wounds during my career, as I was involved in military medicine at some stage.

5. Accepting that a 9 mm bullet was fired from a firearm through the door of a motor vehicle, it is undeniably so that the bullet would become unstable. I would have expected an entrance wound much larger than 5 mm as indicated on the form J88, and even larger exit

wound. When a bullet becomes unstable, it becomes more unstable once it is deflected or hampered by tissue or any other material. Hence, a larger exit wound.

6. A 9 mm bullet is a relatively fast, stable bullet, but if it is slowed down, it becomes unstable and can never become stable again.

7. It was pointed out to me during the civil trial at the High Court, Mbombela, under case number 1438/2017, in which I testified as set out, *supra*, that a trajectory of 63° was the trajectory of the bullet through the door of the vehicle before it allegedly injured the said Mr Nkosi. This is not compatible with the virtually parallel entrance and exit wounds found by the doctor [who] examined Mr Nkosi, according to the J88.'

[40] The two judges who considered the petition in this Court did not have the benefit of the record and were not apprised of the further evidence. The submissions advanced before them were substantially identical to those considered and determined by the high court. For instance, it was contended that the high court failed to consider all the material contradictions and incorrectly deemed them insignificant, leading to the erroneous conclusion that the State had proved its case beyond reasonable doubt. As to the sentence, it was argued before our colleagues that the punishment was shockingly inappropriate, absent evidence of the seriousness of the wound inflicted, and that a social worker who testified in the applicant's case during the criminal trial had recommended the imposition of a wholly suspended sentence.

[41] The Constitutional Court made this important observation in *S v Liesching and Others*:⁷

'The proviso in s 17(2)(f) is very broad. It keeps the door of justice ajar in order to cure errors or mistakes, and for the consideration of a circumstance, which, if it were known at the time of the consideration of the petition, might have yielded a different outcome. It is therefore a means of preventing an injustice. *This would include new or further evidence that has come to light or that became known after the petition had been considered and determined.*' (My emphasis).

[42] The inadequate presentation of the defence case at the trial will, only in the rarest instances, be capable of being remedied by the admission of further evidence

⁷ *S v Liesching and Others* 2017 (2) SACR 193 (CC) para 54.

at the appeal stage.⁸ In laying down certain basic requirements for admitting new evidence on appeal, our courts have expressed reluctance to reopen a trial. Those requirements were summarised in *S v De Jager* as follows:⁹

- ‘(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
- (b) There should be a *prima facie* likelihood of the truth of the evidence.
- (c) The evidence should be materially relevant to the outcome of the trial.’

[43] With reference to s 22 of the Supreme Court Act 59 of 1959, the precursor to s 19 of the Act, which dealt with the powers of a court on appeal, the Constitutional Court in *Prophet v National Director of Public Prosecutions*¹⁰ restated the requirements for the admission of new evidence on appeal as follows:

‘... This Court has considered the circumstances in which evidence may be tendered in terms of s 22 on several occasions and concluded that it may only be done in exceptional circumstances where the evidence sought to be submitted is “weighty, material and to be believed” and there is a reasonable explanation for the late filing of the evidence.’

[44] Section 316(5)(b)(iii) of the CPA requires a ‘reasonably acceptable explanation’ for failure to produce the evidence timeously. In his explanation for the belated introduction of the evidence, the applicant intimated that had the complainant not insisted upon an inspection in loco of his vehicle, the two experts would probably never have testified at the civil trial. He was not aware of their existence and the nature of their evidence. Had he been made aware, he says, he would have called them as witnesses in his criminal trial. He also did not investigate the possibility that the shot fired from his service pistol may not have caused the complainant’s wound. He bona fide accepted that the wound was caused by the projectile that was discharged from his service pistol.

[45] The applicant further argued that his legal representative, appointed for him by the State during the criminal trial, did not clear up a question that was glaring, namely, how it was possible for an object with a diameter of 9 mm to cause the entrance and

⁸ *Rex v Carr* 1949 (2) SA 693 (A) at 699.

⁹ *S v De Jager* 1965 (2) SA 612 (A) at 613C-D.

¹⁰ *Prophet v National Director of Public Prosecutions* [2006] ZACC 17 (CC); 2007 (2) BCLR 140 (CC); 2006 (2) SACR 525 (CC); 2007 (6) SA 169 (CC) para 33.

exit wounds of 5 mm and 3 mm diameter, respectively. It is disquieting that the State omitted to present ballistic expert testimony that could have resolved these apparent inconsistencies. On 18 March 2022, the date on which the judgment had been handed down, the State reopened its case solely for the purpose of handing in an affidavit in terms of ss 212(4)(a) and 212(8)(a) of the CPA by Warrant Officer Julian Bernard Bosser (W/O Bosser), an expert in ballistics who, apparent from the affidavit, received training in the functioning of a firearm mechanism during the firing process, the trajectory of the bullet from the muzzle of the firearm to the final point of impact, including the wounding effect that the bullet has on tissue (wound ballistics). These pertinent issues, aside from a limited explanation of the firearm mechanism, were not addressed in the affidavit due to its restricted scope. W/O Bosser was also not called to testify.

[46] Prosecutors play a pivotal role in the attainment of justice. As this Court held in *Mulula v The State*:¹¹

‘ . . . After all, as has often been said, a prosecutor’s role is different from that of counsel or an attorney representing a client. Prosecutors stand in a special relationship to the court. Their primary duty is not to procure a conviction at all costs, but to assist the court in ascertaining the truth.’

In my view, insofar as the evidence relates to post-trial events, it can hardly be argued that the explanation proffered for its belated submission is unreasonable.

[47] A reading of the civil trial court’s judgment shows that Lt-Col Visser’s evidence was not disputed in that trial. The civil trial court noted that the evidence of both Lt - Col Visser and Dr Maré was corroborated by the plaintiff’s (complainant’s) expert, Dr Mogoru, who, in those proceedings, the presiding judge recorded:

‘(W)hen he was presented with a high-definition X-ray which was received into evidence as Exhibit “B” by me, spontaneously laughed and was constrained to concede that from that X-ray no visible damage such as he would have expected to find [was] visible on the right foot of the plaintiff, Mr Nkosi.’

¹¹ *Mulula v The State* [2014] ZASCA 103 para 12.

[48] In *Menday v Protea Assurance Co Ltd*¹² the Court said:

‘In essence the function of an expert is to assist the Court to reach a conclusion on matters on which the Court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the Court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable.’

[49] The State did not file affidavits in this Court contesting the veracity of the expert evidence. Lt-Col Visser and Dr Maré amassed vast experience in their respective fields. The tenor of their evidence, in the absence of any countervailing testimony, is material and of a kind to be believed. A prima facie likelihood of the truth of their evidence is therefore beyond any question. The evidence was materially relevant to the outcome of the criminal trial, as it is to the determination of this appeal. A failure to consider and accept the evidence would result in a miscarriage of justice, which s 17(2)(f) of the Act was manifestly designed to obviate. In my view, the threshold set out in *S v De Jager* has been met, which paves the way for further evidence to be received.

[50] It is trite that a court of appeal should not readily interfere with the factual findings of a trial court.¹³ Such findings will, however, be upset if they are clearly wrong, particularly if they are based on recorded evidence rather than the demeanour of witnesses. The further evidence reveals gaps and deficiencies in both the prosecutorial and investigative processes. The alleged offence was not properly investigated; as a result, insufficient evidence was made available to the prosecution and ultimately, placed before the trial court.

[51] To illustrate the point, the medical report, which recorded the entrance and exit wounds as measuring 5 mm and 3 mm respectively, was not properly interrogated to determine their probable cause. The expert evidence shows that, in the context of the present case, it was impossible for a 9 mm projectile to have caused the wounds. As counsel for the applicant argued, ‘one does not need to be an expert to wonder how it is possible that a projectile with a diameter of 9 mm could cause a 5 mm entrance

¹² *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569B-C.

¹³ *S v Kebana* 2009 JDR 0916 (SCA) para 12.

wound and, lo and behold, a 3 mm exit wound.’ It is lamentable that the trial court merely noted that the medical report indicated the injuries sustained by the complainant and that the parties did not dispute it.

[52] The further evidence belies any suggestion that the applicant aimed at and deliberately shot and injured the complainant. The applicant’s genuine but mistaken admission that the bullet discharged from his service pistol struck and injured the complainant does not assist the State’s case. What further militates against the finding that the applicant shot the complainant is evidence to the effect that the bullet perforated the driver’s door at a height of 73.5 cm with an estimated downward angle of 63 degrees. Therefore, it should be accepted that, as the evidence indicates, the exit wound would be lower than the entrance wound. The medical report did not indicate the lower exit wound; rather, it showed that both the entrance and exit wounds were horizontal.

[53] The fresh evidence points to a reasonable possibility that the applicant’s version of an accidental discharge may be true. An accused person is bound to be convicted if the evidence establishes his guilt beyond a reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent.¹⁴ The absence of intention on the applicant’s part calls into question the soundness of the conviction, and therefore it must be set aside. In the words of Slomowitz AJ: ‘ . . . in the search for truth it is better that guilty men should go free than that an innocent man should be punished.’¹⁵

[54] In terms of s 258 of the CPA, if the evidence on a charge of attempted murder does not prove that offence but, *inter alia*, proves assault with intent to do grievous bodily harm, common assault, robbery, public violence, or the offence of pointing a firearm in contravention of any law, the accused may be found guilty of the offence so proved. The further evidence raises a fundamental uncertainty regarding the factual basis upon which the State’s case rested, namely whether the complainant’s injury was caused by a bullet fired from the applicant’s firearm. In the absence of evidence

¹⁴ *S v Van Der Meyden* 1999 (1) SACR 447 (W) at 449J-450A.

¹⁵ *S v Kubeka* 1982 (1) SA 534 (W) at 538H.

establishing the cause of the complainant's injury, it cannot be determined what competent verdict, if any, may properly arise. With reference to the charge of murder in *S v Phakane*,¹⁶ the Constitutional Court said:

'Assault is a competent verdict for murder only if there is a link between the assault and the charge of murder. The second judgment accepts that the charge of murder and that of assault were based on separate incidents. The assault relied upon is alleged to have taken place on 20 August 2006. There is no basis in the record for this latter statement. That there must be a link between the factual basis of the main count and the competent verdict means that the assault must at least have been part of the *actus reus* on which the charge of murder was based. In this case the cause of Ms Boshomane's death is unknown. If we do not know the cause of the deceased's death, we cannot know what verdict would be competent to the charge of murder.'

[55] Assault with intent to do grievous bodily harm, and by extension assault *simpliciter*, is not a competent verdict where the acquittal of the accused on a charge of attempted murder is based on the absence of *dolus*, as here.¹⁷ The same difficulty applies to any other competent verdict: a competent verdict must arise from the factual basis of the main charge and be supported by evidence establishing all its elements beyond a reasonable doubt. It follows that the conviction on any of the competent verdicts cannot be sustained. The conclusion is irresistible that the State failed to prove its case beyond a reasonable doubt. The appeal must therefore succeed. In the result, the following order is made.

Order:

- 1 The order of this Court dated 03 August 2023 refusing the application for special leave to appeal is reconsidered and varied in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 to the extent set out in para 2 of this order.
- 2 The application for special leave to appeal is granted.
- 3 The application for leave to adduce further evidence is granted.
- 4 The appeal is upheld.

¹⁶*S v Phakane* [2017] ZACC 44 (CC); 2018 (1) SACR 300 (CC); 2018 (4) BCLR 438 (CC) para 43.

¹⁷ *S v Joshua* 2003 (1) SACR 1 (SCA) para 32.

5 The order of the high court is set aside and in its place is substituted the following:

‘1 The appeal succeeds. The conviction and sentence are set aside.’

MV PHATSHOANE
ACTING JUDGE OF APPEAL

Appearances:

For the applicant: CFJ Brand SC with D Hall
(Trust account), Mbombela
C/o Webbers Attorneys, Bloemfontein

For the respondent: T S Msibi with M Magwanyana
Instructed by: National Director of Public Prosecutions, Mbombela
C/o The State Attorney, Bloemfontein.