IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

REGISTRAR'S Ref: 2015/196

JPV No: 2014/041

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

17 February 2016 .....

In the matter between:

THE STATE

V

MASOOA, MEEKAHAEFELE

JUDGMENT

DECISION TO CALL WITNESSES: SECTION 167 and 186

SPILG, J:

17 February 2016

INTRODUCTION

1. The defence closed its case on the last day allocated for the hearing which was in November 2015. I was concerned about the need to invoke the provisions of section 186 of the Criminal Procedure Act 51 of 1977 (*'the CPA'*) and the advisability of recalling certain witnesses under section 167.

   Unless otherwise indicated all reference to sections are those contained in the CPA.

2. One of the concerns relates to the implications of Major Mangena's expert testimony. He testified that despite other tests done on the jacket worn by the deceased at the time of the incident, despite certain holes that were subsequently made in the jacket and despite the jacket having been returned to the deceased's widow and then brought back much later for forensic analysis he was satisfied that the tests were completely reliable and that the nature of the tests safely excluded these extraneous factors and interferences.

3. If the court accepted that aspect of the evidence which was based purely on the application of scientific analysis and his expert knowledge then the only issues would be the Major's credibility and whether the court itself when weighing up the totality of evidence (which would also include some of the photographs which the Major claimed independently supported his conclusions) could raise any query regarding the veracity of the scientifically based testimony and thereby cast doubt as to whether the State had proven its case beyond reasonable doubt.

   In other words this court appreciated that according to the Major's testimony he could discount all factors raised by the defence which might have interfered with the reliability or accuracy of the tests and the conclusions drawn from them unless the defence could bring countervailing expert testimony, could challenge his credibility or the court itself was not satisfied with the Major's expert testimony when weighing all the evidence.

4. I was also concerned about the respective levels of knowledge of the assessors and myself regarding the basic operation of a motorcycle and the basic functioning of a semi-automatic firearm such as the one possessed by the deceased. Neither assessor has ridden a motorcycle nor is aware of how a semi-automatic firearm functions. I had ridden a motorcycle on a few occasions when much younger and in a court case over which I presided a number of years ago the parties had requested an inspection in loco at a police firing range to witness the functioning of a semi-automatic firearm. Such knowledge might place me at an advantage over the assessors when weighing the evidence.

5. While the firearms and holsters were entered as real evidence before the court during the State's presentation of its case, the accused had not disclosed in detail what allegedly transpired between the deceased and himself until he took the witness stand. Although a court can consider real evidence while deliberating, I considered it prudent that the firearm and holsters be produced in open court so that any further examinations that the court might want to undertake will be in the presence of the parties and they can make any further observations or present any further evidence they may wish. There was also the question of producing the deceased's helmet.

6. Finally the accused did not put what appeared to be certain relevant details of his version relating to how the incident between himself and the deceased unfolded particularly from the time when he alleged that he had created a diversion until the time when the deceased was unable to crawl further while on the ground after having been shot.

7. In *S v Karolia* 2006 (2) SACR 75 (SCA) it was considered unnecessary for the trial judge to afford the parties an opportunity to address him or her on whether the court itself should call witnesses under its section 186 powers. Zulman JA said at para 9;

'The section makes it plain that the Court a quo was entitled to, at any stage of the proceedings, which would include a stage even after both the State and the defence had completed their arguments, to cause witnesses to be subpoenaed (S v Gerbers 1997 (2) SACR 601 (SCA) ([1997] 3 All SA 61)). There is no requirement that the Court give any notice to the parties before deciding to so act. The Court has a wide discretion in the matter (see for example R v Hepworth 1928 AD 265 at 277 and R v Gani 1958 (1) SA 102 (A)).'

8. Heher JA penned a minority dissenting judgment in *Karolia* which dealt exclusively with sentence but did not question the above cited passage. However in the decision of *S v Gabaatlholwe* 2003 (1) SACR 313 (SCA) given some two years earlier[1] Heher JA speaking for the court stated that the views of the parties should always be established before the court itself decides to call a witness. The motivation for this statement appears from the situation faced by the presiding judge in the case[2]. It would therefore appear that the circumstances under which the trial court decided to invoke section 186 in the *Karolia* case demonstrated that a failure to obtain the views of the parties before taking the decision to call a witness was not necessarily critical.

9. I considered that, irrespective of the wording of section 186, in the present case there was potential prejudice to the accused if the section was invoked, as would also be the case with applying section 167.

10. Accordingly before remanding the trial the parties were advised that I wished to hear argument regarding the possibility of the court calling additional expert

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[1] The judgment in *Karolia* was handed down in May 2004

[2] *Gabaatlholwe* at para 7:

'The parties will often possess insights into the contribution which a witness could make not apparent to the Judge or magistrate and their views should always be canvassed before the decision is taken (as the Judge did in this case). The best indication to the trial court of the importance that a party attaches to calling a witness is the assiduity which that party applies to ensuring that the witness is available to it. In this case the defence made no attempt to subpoena the witness. The explanation that he was hostile was both unconvincing and insufficient. The Court was not asked to exercise its powers although it had made perfectly plain that its earlier ruling was limited to the stage at which it was made. Nor was any indication given it that defence counsel regarded his earlier submissions about the essentiality of the witness as being of continued validity'.

witnesses, calling evidence with regard to the controlling of the deceased's motorcycle and the mechanism of firearms as well as recalling other witnesses who had already testified.

11. The accused indicated through his counsel *Adv Dingizwayo* that he wished to consider calling his own expert witness to consider the reliability of the tests conducted by the Major. I indicated that this would obviously resolve the concern in that regard.

12. At the resumed hearing on 20 January 2016 defence counsel advised that the accused did not wish to engage any expert. Moreover his instructions were to oppose the recall of witnesses, the receipt of any further evidence whether of experts or otherwise and objected to the court looking at or examining the real evidence that had been produced, such as the firearms, the holsters and the deceased's jacket.

    It was argued that the State had elected to present its case the way did and that any additional evidence would bolster shore up the State case since it was flimsy.

13. Near the end of his argument Adv Dingizwayo informed the court that his instructions were to ask for the court's recusal on the grounds that it was biased and sought to introduce new evidence so as to bolster the State case. On enquiry and after taking instructions counsel advised that if I decided not to call for, or recall, any further evidence and did not look at the exhibits then there would be no need for the court to recuse itself.

14. The instruction was subsequently changed to calling for the court's recusal irrespective of my decision. At this stage Adv Dingizwayo also sought to withdraw from the case. I did not consider that there were sufficient grounds for doing so.

15. The defence then argued the recusal application from the bar. It was clarified that no issue was taken with the conduct of either assessor during the trial even though they had asked questions of witnesses through me or directly themselves, as was the case when the accused testified.

Adv Persad opposed the application on behalf of the State and Adv Dingizwayo replied.

The application was refused and I indicated that reasons would be given at the end of the trial. I also indicated that the accused was at liberty to launch the application afresh if I decided to call for any additional evidence or for the examination of any object.

16. I intend to deal first with the principles involved in considering whether to call for new evidence under section 186 or to recall witnesses under, section 167, who have already testified. Consideration will then be given to what further evidence, if any, should be heard.

INTRODUCING EVIDENCE UNDER SECTION 186

17. Section 186 provides;

> *Court may subpoena witness*
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> *The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.*

18. The commentary in Hiemstra's Criminal Procedure on this section opens with the following observations;

> *This section and its associate section 167 (which relates to the recalling of witnesses by the court and the calling of persons who are present) give a criminal court a more inquisitorial role than that enjoyed by a civil court. The judicial officer has to see to it that justice is done. It is not the function of the judicial officer simply to decide on what the parties place before the court. The famous remark by Curlewis JA in R v Hepworth 1928 AD 265 at 277 is all the more important in view of the exhortation to fairness in C 35(3):*
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> > *"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that the justice is done".*
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> *The judge's remarks not only apply in the consideration of this section but are particularly apposite to it. How the dual role of a person who decides, and at the same time administers justice, is fulfilled calls for sound judicial discernment. On the one hand, the court searches for the facts but, on the other hand, a perceptibly even-handed trial is the goal. How far a court will go to repair the carelessness of a party is a matter of sound common sense in each case.'*

19. Over and above these observations is the necessity to maintain impartiality, open mindedness and fairness[3]. The court must be astute not to take over the role of the prosecutor, or lose its impartiality, or the appearance of impartiality.

[3] eg; *S v Le Grange* 2009 (1) SACR 125 (SCA) at para 14

20. Cases on the subject observe that the section has both a discretionary and a peremptory part[4].

The peremptory requirement, which obliges a court to call for evidence, arises if the witness' evidence appears to the presiding officer to be essential for the *'just decision of the case'.* A failure to call for such evidence in these circumstances can amount to an error in law requiring a retrial[5].

21. Accordingly if this court were to convict it may be open for the accused to argue that the court was obliged to receive further evidence on the ground that it was essential to the just decision of the case. Technically the State may claim that the court should have done so since the decision is one of law which renders it subject to challenge on appeal by the State[6].

In cases where it is not essential to call a witness for the just decision of the case then the court exercises a discretion which places it on risk if it decides to call in circumstances where it failed to exercise its discretion judicially[7].

22. The difficult position the court finds itself in is well recognised. In *S v Gerbers* 1997 (2) SACR 601 (SCA) at 609B-C Marais JA said this;

> *There is obviously potential tension between the need to fulfil the role of a judicial officer as described in Hepworth's case supra and the need to avoid conduct of the kind which led to the characterising of the judicial officer's behaviour in cases such as S v Rall 1982 (1) SA 828 (A) as irregular and resulting in a failure of justice. Nonetheless, it remains incumbent upon all judicial officers to constantly bear in mind that their bona fide efforts to do justice may be misconstrued by one or other of the parties as undue partisanship and that difficult as it may sometimes be to find the right balance between undue judicial*

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[4] *R v D and others* 1951 (4) SA 450 (A)
[5] *Director Public Prosecutions, Transvaal v Mtshweni* 2007 (2) SACR 217 (SCA) esp. at para 24
See generally: Hiemstra (supra) on section 186.
[6] *Mtshweni* at paras 24 and 34
[7] *S v Kwinika* 1989 (1) SA 896 (W)

passivism and undue judicial intervention, they must ever strive to do so.

23. In deciding whether to invoke section 186 the court must scrutinise the reason for doing so, in case the real reason is to shore up the State case.

Heher JA put it as follows in *Gabaatlholwe* 2003 (1) SACR 313 (SCA) at para 6;

> *' In s 186 'essential to the just decision of the case' means that the court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result. That does not mean that a conviction or acquittal (as the case may be) will not follow but rather that such conviction or acquittal as will follow will have been arrived at without reliance on available evidence that would probably (not possibly) affect the result and there is no explanation before the court which justifies the failure to call that witness. If the statement of the proposed witness is not unequivocal or is non-specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value.'*

24. It has also been said that the requirement for the testimony to be *'essential'* is met if it is evidence which will disturb the probabilities one way or the other. A court must also ensure as best it can to balance both its obligations under the peremptory provisions of section 186 with the ever present danger of a perception of bias.

25. Three concerns arise in the present case. Firstly the amount of additional evidence that may be involved calls for the exercise of great caution as it may be construed as descending into the arena. Secondly; the point already made in *Gabaatlholwe* that the court must be satisfied that the further evidence will probably, not just possibly, affect the outcome. This would also take into account the value of the evidence tendered.

Finally it is well recognised that the provisions of section 186 are in tension with the obligation of the State to prove its case beyond reasonable doubt and with

the presumption of innocence. However it is also necessary to ensure that the rights of the accused have content where *pro deo* counsel may be inexperienced.

An example would be where a version is not put when it should have been. In the result questions may be asked as to why a version was not put and adverse inferences might be drawn that the version eventually presented was fashioned only after hearing all the evidence that the State could present. Another example is where counsel may not correctly assess the gravamen of the evidence led, particularly of experts, resulting in a failure to challenge the underlying premise whether it is scientific, analytical or factual.

26. A court must therefore adopt absolute impartiality when considering whether to receive further evidence or not. And if further evidence is directed then the court must ensure that strict neutrality is maintained in the way questions are asked. The accused must also be afforded an opportunity to call further evidence in rebuttal should any potentially adverse evidence be produced. A court cannot avoid the consequences of a *post facto* complaint of bias if the evidence turns out unfavourably for the accused. What it must ensure is that the motive for directing further evidence under section 186 is not partisan and that it is essential to receive it for the just decision of the case

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27. A further introductory remark relates to whether the peremptory leg of section 186 is constitutionally sound bearing in mind the onus the State bears, the right of an accused to be innocent until proven guilty *'beyond a reasonable doubt'* and the right to remain silent. However the point of constitutionality was not raised and therefore need not detain us.

28. Section 167 compliments section 186 insofar as the calling or recalling of a witness appears to the court to be essential to the just decision of the case. It is however confined to a witness who has already been subpoenaed or who has already testified. Furthermore there is not a peremptory element. Section 167 reads;

Court may examine witness or person in attendance

The court may at any stage of criminal proceedings examine any person, other than an accused, who has been subpoenaed to attend such proceedings or who is in attendance at such proceedings, and may recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.

29. I proceed to consider the necessity for further evidence in light of these prescripts. It is convenient to start with evidence which has become moot or which does not require resolution under sections 167 or 186.

THE RELOADING MECHANISM OF A VECTOR SEMI-AUTOMATIC FIREARM

30. The deceased possessed a Vector firearm. During evidence an expert gave evidence on behalf of the State regarding the automatic reloading mechanism of the weapon. Once a round is fired the next cartridge is automatically lifted from the magazine into the chamber. There was no cross examination on that specific piece of evidence.

31. The court was concerned about whether the automatic lifting of a cartridge from the magazine into the chamber could be supressed and considered the advisability of being shown a demonstration, at a firing range, with the specific concerns of the court being addrtessed. Adv Dingizwayo on behalf of the accused confirmed that it was unnecessary and accepted that the automatic reloading mechanism could not be supressed. This was after taking instructions and confirming that the evidence tendered by a metro police officer that there

was no cartridge in the chamber when the deceased's firearm was handed over to him at the scene by the accused would be challenged on the grounds of honesty and reliability.

THE REAL EVIDENCE EXHIBITS

32. The State introduced the following physical exhibits into evidence;

    a. The two firearms and the holsters admittedly possessed by the accused and the deceased;

    b. The jacket worn by the deceased at the time of the shooting.

33. Although the exhibits are in safekeeping they constitute real evidence before the court. As with all exhibits tendered in evidence the court is at liberty to examine them at any stage.

34. When the accused's firearm and holster were handed into evidence by the State the accused had not explained when he first took out his firearm or where it was located at the time. This was only revealed later when the accused testified. I must make it plain that it is not suggested that the accused ought to have mentioned it earlier. Subject to any argument by the State in due course, it does not appear that the need arose.

35. The accused described how his firearm was carried in its holster and positioned behind his back on the left side when the deceased alighted from the motorcycle.

36. The accused contends that the court had an opportunity to look at his firearm and holster and examine whether the revolver could be slipped out or whether it had to be physically removed. This is not so. As pointed out already the accused had not yet put his version regarding where the firearm was located let alone whether it was in its holster when the deceased approached him.

37. The firearm and holster are real evidence which we can look at any time, even during our deliberations. I was of the view that if such examination might prove to be potentially prejudicial to the accused then he should have an opportunity of pointing anything of relevance out, rather than us making findings exclusively from our own observations.

38. I therefore have no hesitation in saying that examining the firearm in its holster in open court cannot by any stretch of the imagination either be building a case for the State or evincing bias against the accused as he contended.

39. The court will examine the way in which the accused's revolver would have been placed inside the holster immediately before it was drawn in the manner alleged by the accused.

    It appears preferable that the court should not do this in the confines of chambers after listening to argument. It appears to be in the interests of the accused that the manner in which the firearm fits into its holster before being drawn and how it would then be removed should be examined in open court. The accused will then have an opportunity to make any observations. The court does not intend invoking section 167 to recall any witness. However the accused is not precluded from making any observations or himself demonstrating if he so wishes.

THE HELMET WORN BY THE DECEASED

40. The photographs of the crime scene depict the deceased's helmet. It is common cause that it was worn by him at the time of the shooting and when the accused did his diversionary manoeuvre and fired at the deceased. The deceased was also wearing it during the close combat engagement to which the accused attested.

41. This court would ordinary be able to make assumptions regarding a person's field of vision. Once again having ridden a motorcycle a long time ago I have some conception of the restricted vertical and peripheral vision of a motorcyclist.

    I was concerned that this may affect my assessment of the evidence given.

42. The accused is adamant that the helmet not be produced. Ideally it should. It is depicted in the photographs and one may draw certain conclusions regarding the extent of downward vision.

43. I however have reread my notes and Major Manema was asked about whether there were any limitations on the deceased's peripheral vision while wearing the helmet- he answered in the negative. I believe that I am able to disabuse my mind regarding a possible limitation on vertical vision. This is the preferred route considering the potential that exists of a perception of bias and that any examination may be found to be of limited value. Accordingly the helmet will not be produced or examined.

CONTROLING A MOTORCYCLE

44. The difficulty which arises is that the court has had some experience with motorcycles while the assessors have had none. Rather than undertake independent research it is necessary for the assessors and I to have knowledge of how a motorcycle can be stopped by using the right hand only. The evidence of the State rejects any possibility of the deceased holding the firearm at the time he stopped his vehicle while the accused contends that the deceased, from the time when he was alongside the accused's motor vehicle until he alighted from it, held the firearm in his outstretched left hand pointed at the accused's vehicle and never during that entire period did he return that hand to the handlebars or any controls.

45. I cannot disabuse myself of my limited knowledge without being apprised of other ways of bringing a motorcycle to a stop and I may unduly influence the assessors in that regard. They candidly inform me that they have no experience of motorcycles and seek insight regarding the controlling of a motorcycle.

46. This court is placed in the unenviable position of risking influencing assessors who have absolutely no knowledge of motorcycles in circumstances where each member of the court should at least have insight into the controls of a motorcycle which are used to bring it to a stop in order to alight and how this can be achieved without using the left hand.

47. The issue is not whether an expert rider can command a motorcycle in the manner described by the accused, which also included turning it towards the left with only the right hand on the handlebars. It is for the court, including the assessors, to be apprised of the minimum controls that could be engaged in the circumstances alleged by the accused to bring the motorcycle to a standstill for the rider to alight. In my case it is also necessary to deal with what I must acknowledge to be my own limited experience and the perceptions that are being formed around that. There is no doubt that I can be readily disabused of my perceptions through appropriate testimony.

48. The motorcycle ridden by the deceased and depicted in the photographs has been used for a number of demonstrations. Accordingly its existence and identity is common cause.

49. In regard to who should testify: The accused has been critical of the Johannesburg Metropolitan Police's involvement at the scene and the veracity of their testimony. That being so, it appears that the best person to give expert testimony on the controls of the motorcycle and how it can be brought to a standstill is a person from the distributors of the motorcycle suitably qualified. The only other option appears to be a current or past racing motorcyclist provided he or she is suitably qualified.

50. This evidence would fall under section 186. In my view it is essential that the court, comprising the assessors and myself, have an equal working knowledge of the controls of the motorcycle in question and are informed of all the possible ways that it can be brought to a standstill in the manner as testified to by the accused and without using the left hand.

51. The issue is not a loaded one nor is it used to shore up the State's case. The evidence will disturb the probabilities one way or the other. The fact that it would be destructive of the accused's case if it is physically impossible to stop a motorcycle without using the left hand does not mean that the court desired this result or that it is demonstrating a perception of bias.

    The court has a real concern that, without knowing how a motorcycle can be physically brought to a standstill, assumptions may be made and perceptions not addressed. It is also necessary that each member of the court is placed on an equal footing as best one can with regard to the functioning of the controls of a motorcycle and which of the controls are or are not essential to bring it to a standstill in the circumstances as described by the accused.

52. It is not unusual that a court will imperceptibly rely on its own understanding of the workings of mechanically or electrically powered objects; from a cellphone to the motorcar. Invariably a motor accident case involves the application of one or more inarticulate premises regarding a car's functioning. The premises are based on preconceptions derived from our experiences. It is important for a court to recognise the possibility of such preconceptions and in order to ensure a just decision it appears essential that expert testimony be obtained to address those preconceptions with evidence that may, not will, cast doubt on them, bearing in mind that the State must prove its case beyond a reasonable doubt.

53. I am satisfied that the peremptory part of section 186 adequately covers this type of situation. In any event I consider that the reasons set out for obtaining expert evidence under this head would also justify directing its reception under the discretionary part of the section.

RECALLING WITNESSES

54. I have already mentioned that certain details of the accused's version regarding how the incident unfolded, leading to the fatal shooting, were not put to a number of witnesses.

55. I have sought to weigh the potential disadvantages to the accused. The principal disadvantage concerns the inferences that may be sought to be drawn from such failure. Nonetheless I must bear in mind that the accused, who is or was an attorney, is aware of this. Moreover, ordinarily a court will not recall a witness simply in order to have a version put. Doing so may be perceived to be descending into the arena.

56. Sonia Bergkamp claimed to have witnessed the vehicles of the accused and of the deceased while travelling until the place where the motorcycle stopped. Details of the incident as related by the accused and the extent of traffic at the point where the bus or traffic siding is located were not put to her.

57. I have carefully read my notes and it is apparent that, while the version was not put expressly, the witness recounted enough to demonstrate that the two versions are irreconcilable, whatever specific details may still be put. The issue of the acceptance or rejection of her evidence will remain based on the reliability and credibility of the testimony she has already given and, applying the test set out earlier, putting the further details of the accused's version to this witness will not disturb the probabilities.

58. The next possible witness is Mr Panday. Nothing was put to him regarding whether his view of the incident was obstructed, the extent of traffic and whether the accused and deceased were rushing to each other when any of the shots he claimed to have witnessed were fired. The accused did not put his version of the close combat which ensued, the proximity of the accused to the

deceased when the first shot fired by the accused struck the deceased or that the deceased was crawling after the final shot was fired.

59. It is understandable that the witnesses' obstructed line of sight was not put to him. It only arose after he testified and from an observation made by the court at the scene when attending the offices where Panday claimed to have witnessed the incident.

60. This part of the inspection was undertaken at the suggestion of the assessors and myself. On looking out the window from Panday's office I drew attention to the extent of traffic and that a motor vehicle could easily have obscured his line of vision. These observations were independently confirmed by everyone at the inspection and were duly noted into the record.

61. There was therefore no omission on counsel's part to put to Panday questions regarding the extent to which his view may have been obstructed. While it may have been helpful to now afford Panday an opportunity to deal with this, there may be a mistaken perception created that the court is descending into the arena.

62. While the accused's version should have been put in greater detail to Mr Panday, since he claimed to have witnessed much of what occurred from across the road, and while Panday may not have been given an opportunity to explain the extent to which traffic may have obstructed his view, even sporadically, it is clear that his vision would have been obstructed to varying degrees.

Once again Panday's evidence will be tested with regard to credibility and reliability on what he has already testified to and it cannot be said that putting these details of the accused's version will disturb the probabilities. While it may go to inferences to be drawn from a failure to put the version at the time this appears to be matter for argument.

63. Accordingly while these witnesses will not be recalled by the court the accused is of course at liberty to apply for their recall if he so wishes.

MAJOR MANGENA

64. The need to recall Major Mangena is however essential to the just decision of this matter. The accused failed to put details of his version as to how the incident unfolded. Major Mangena was qualified to testify as an expert on crime reconstruction and different weapons.

65. In particular the accused did not put any version regarding the proximity of the deceased to him when the shots were fired. Also, it was not put to the Major that there was a struggle after the first shot was fired or that there was a tussle which might be relevant to the issue of whether residue could have been removed from the deceased's hand as the forensic evidence was that none was found indicating that the deceased, on the State's version, had not fired a shot.

    It therefore appears to be essential to the just decision in this case for Major Mangena to be recalled under section 167 and apprised of the accused's version of how the incident unfolded and to comment on it. It is also clear to me that the resultant evidence can displace the probabilities one way or the other.

EXPERT TESTIMONY ON THE RELIABILITY OF TESTS ON THE JACKET

66. It is common cause that the deceased was struck by two bullets; the fatal shot which struck the deceased in the upper arm and perforated the chest and a non-fatal shot which in the Major's expert opinion was a close proximity shot that had entered the deceased in the back and exited the front of his body. The

position of the entry wound in respect of the second shot is highly relevant since, if Major Mangena's testimony is accepted, it will contradict the testimony given by the accused as to how the fight ensued between him and the deceased. The accused had expressly discounted any possibility of that shot striking the deceased in any area other than the front of his body.

67. Suffice it to add that at this stage there is also other expert testimony relating to the absence of gun residue on the deceased's hands and the testimony of two witness who alleged to have seen parts of the incident unfold which do not support the accused's version of events.

Accordingly the expert testimony of the Major, if left unchallenged by other expert testimony regarding whether doubt can be cast on the reliability of any tests that were conducted by him on the jacket, with or without reference to the photographs taken at the scene or during the autopsy, may prove decisive.

68. Moreover the nature of the attack on the Major's testimony was already revealed at the end of the State case in the defence's application for discharge under section 174.

It comes down to whether argument by the accused may create a doubt that the nature of the scientific tests performed were such as to exclude all factors that may have contaminated the results or otherwise put them in doubt.

Adv Dingizwayo did not suggest that there would be any additional arguments raised.

69. The court made a conscious decision to sit with two assessors who are both practicing advocates. However I cannot speak for how they may or may not weigh the evidence or be influenced by argument. Accordingly it is not simply a matter of how I might be persuaded by argument. I must take into account the risk of argument not trumping the courts obligation to give due weight to expert forensic evidence, if it is reliable, on the issue of whether or not the Major has

demonstrated beyond reasonable doubt that any contamination of the jacket did not affect the outcome of his results. There is also the risk of the assessors reaching that conclusion.

Furthermore the presiding judge is the sole determiner of law and, in light of the decision in the recent case of *Pistorius*[8] before the Supreme Court of Appeal, the weight to be given to expert testimony, if proven reliable, may become a matter on which I may be obliged to direct the assessors. I refer in particular to paragraph 36 of Leach JA's judgment:

> *"There seems to me to be no difference in principle between the exclusion of relevant evidence by ruling it inadmissible and excluding such evidence, once admitted, by not taking it into account to decide the issues in dispute. In either event the judicial process becomes flawed by regard not being had to material which might affect the outcome. As much as excluding evidence on the basis of admissibility is a legal issue, it seems to me to also be a legal issue should account not be taken of any evidence placed before court which ought to be weighed in the scales."*

70. During the application for discharge the defence called into question the findings and explanation of the State's forensic expert, Major Mangena. However an overview of his testimony indicates that he provided explanations that probably affect the outcome in regard to the entry and exit wounds found on the deceased's body based on his examination of the jacket, with or without reference to the photographs of either the jacket or the deceased's body.

71. I say this with particular reference to the weight that the SCA considered should have been accorded , in the *Pistorius* case, to the evidence of the expert having regard to the nature of his specialist expertise in the field in question [9].

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[8] *Director of Public Prosecutions, Gauteng v Pistorius* [2016] 1 All SA 346 (SCA) at
[9] *supra* at paras 36, 38, 40.

The present case involves the applied sciences, resulting in the court, by which I include my fellow assessors, being to a great degree out of its depth. While the acceptance of an expert's testimony in one case certainly does not mean that his or her opinion will be accepted in another or be treated preferentially, in *Pistorius* the SCA effectively held that the nature of the expert testimony tendered and the qualifications of the expert, in the circumstances of the case, rendered the expert's opinion evidence, which is circumstantial evidence, of significant value. On the facts of that case it was preferred even over *vive voce* evidence to the contrary.

72. The field of expertise in *Pistorius* was scene reconstruction based on the application of science and scientific tools[10]. In this case the opinion evidence is given in respect of the same field of expertise. Moreover the SCA had no reservations about the competency of the expert in question to testify within this field of expertise. The expert in that case, as in this one, is Major Mangena.

73. I hasten to emphasise that the fact that the SCA preferred his evidence and found that the court *a quo* should have accepted his opinion evidence above the *vive voce* evidence presented on behalf of the accused does not mean that this court is also obliged to accept his evidence. What it does mean is that his evidence will have to be properly weighed and will affect the outcome one way or the other.

The SCA said at para 38;
'In the present instance, although the question of the accused's intention at the relevant time is one of fact to be determined by inference, there regrettably does appear to have been such 'an absence of appreciation of material evidence' relevant to that issue. In this regard, the failure of the court to take into account the evidence of Capt Mangena , a police forensic expert, whose evidence as to the reconstruction of the crime scene was found by the court to have been 'particularly useful', is of particular importance.'

It continued at para 40;
All of this was circumstantial evidence crucial to a decision on whether the accused, at the time he fired the fatal four shots, must have foreseen, and therefore did foresee, the potentially fatal consequences of his action. And yet this evidence was seemingly ignored by the trial court in its assessment of the presence of dolus eventualis. Had it been taken into account, the decision in regard to the absence of dolus eventualis may well have been different. In the light of the authorities I have mentioned, to seemingly disregard it must be regarded as an error in law.

[10] *Supra* at paras 38 and 39

74. The fact that this court may accept the testimony of the Major or that a court on appeal might (since the issue would be one of law[11]) makes it essential for the just decision of this case that independent evidence be received from another expert regarding whether there might be any extraneous factor that could put the results of the tests conducted by the Major into doubt, whether with or without the assistance of the photographs. I also believe that *Gerbers* is an apposite case to rely on.

75. This brings me to the question raised at earlier hearings as to whether there are additional photographs of the jacket, in particular of the back of the jacket, that might have been taken at the scene or during the autopsy. This was objected to on grounds that it will assist the State case.

    I do not see that. It may assist either party. The Major relies on his scientific analysis to conclude that the bullet entered the back of the jacket. If there is another photograph in the series of photographs taken at the scene or at the autopsy that can demonstrate otherwise, or otherwise assist, then the expert who is to be called should have access to it.

76. Since there has been no response with regard to the enquiries made by the court, I also direct that Constable M Sithole and Dr SK Chikwava are recalled for the sole purpose of informing the court whether any photographs in addition to those reflected in exhibits B (Police photos of scene) and E (Case Presentation by Dr Chikwava) were taken and if so to produce them.

GENERAL

77. I am conscious that the number of witnesses to be called and examinations to be undertaken may in them self indicate that the court is descending into the arena or wishes to bolster the State's evidence. I believe that I have set out in

[11] *Pistorius* at paras 36, 37 and 40

each case the neutral nature of the enquiry, if not possibly erring in favour of the accused.

78. I have enquired from Regional Court Magistrates while presiding in Randburg as to the number of occasions they have utilised section 186 for calling more than one witness or additional experts. I was informed that it is not that unusual.

79. While practice cannot be decisive and the reasons would be case specific there are two cases in particular which demonstrate that the SCA has favourably considered the calling of a number of witnesses by the trial court.

80. *Gerbers* has already been mentioned. In that case the presiding judge had called additional witnesses, with regard to the location of the gunshot wounds (whether frontal or at the back) and what accounted for the number of shots fired, and also recalled the accused to the stand. The SCA found that the calling of these witnesses and the admittedly extensive questioning by the trial judge did not amount to an irregularity[12].

81. In *Karolia* at least three additional witnesses were called by the trial judge. They were called without notification to the parties and after they had presented argument[13]. The SCA said[14]:

> *'In my view, the Court a quo was perfectly justified in calling the witnesses in question so as to clarify uncertainties regarding the injuries allegedly sustained by Lotz which remained unclear after the State and the defence had closed their respective cases. Secondly, the evidence of the deceased's widow, who was one such witness, was also aimed at clarifying the contention advanced by the accused that he did not initially recognise the deceased. Counsel for the accused wisely did not in argument before this Court seek to challenge the correctness of the*

[12] *Gerbers* at 607J-608D, 608G-H and 610A

[13] Contrast the earlier case of *Gabaatlholwe* at para 7 where the SCA said that the views of the parties should always be canvassed before a court decides to invoke section 186.

[14] *Karolia* at para 10

recalling of the last-mentioned witness. The Court very properly attempted to discover the truth in order to do substantial justice between the accused and the prosecution so as to arrive at 'a just decision of the case'. I, accordingly, do not believe that in the circumstances the calling of the further witnesses or the recalling of the deceased's widow amounted to an irregularity or that there was any failure of justice in this regard or that the Court a quo erred in the exercise of its discretion.'

ORDER

82. I accordingly order that

1. *In terms of section 167 of the Criminal Procedure Act 51 of 1977('the Act') the following witnesses are recalled;*

    a. *Major Mangena*

    b. *Constable M Sithole and Dr SK Chikwava in order to inform the court whether any photographs in addition to those reflected in exhibits B (Police photos of scene) and E (Case presentation by Dr Chikwava) were taken and if so to produce them.*

2. *In terms of section 186 of the Act the following witness is caused to be subpoenaed as a witness in these proceedings:*

    a. *An expert witness who can testify on how to operate the controls of the motorcycle the deceased was riding and testify with regard to the controls that are used to bring the motorcycle to a standstill in order to alight as depicted in the photographs taken by Constable Sithole at the scene of the incident and how that can be achieved without using the rider's left hand.*

    Such expert may be from the distributors of the motorcycle failing which a person who races or has raced motorcycles provided such

witnesses can be duly qualified as an expert on the functioning and operation of the motorcycle in question or the category of motorcycle in question;

b. *An expert who can testify on whether the outcome of the forensic examination of the jacket by Major Mangena might be compromised by any contamination or handling, cutting or other interference with the jacket having regard to the jacket and all the photographs taken of the jacket at the scene and during the autopsy.*

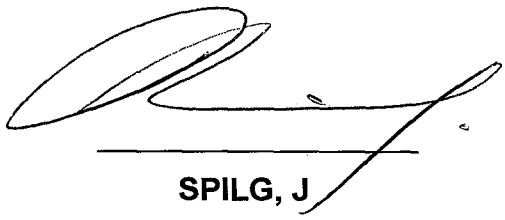
3. *The court will examine the following:*

a. *The deceased's motor cycle.*

The purpose is to understand its controls, where they are located and how they are operated and for purposes of any demonstration that the expert may consider it appropriate to undertake or which the court considers in terms of section 186 it is appropriate that such expert undertakes for purposes of receiving evidence within the strictures of section 186 of the Act and the limitations of para 2(a) above;

b. *The accused's holster and revolver.*

The purpose is to examine how the revolver is removed from the holster.



SPILG, J

DATES OF ARGUMENT: 20 January 2016

DATE OF JUDGMENT: 17 February 2016

COUNSEL:

FOR THE STATE: Adv Persad

FOR THE ACCUSED: Adv Dingizwayo