IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO : **CC113/13**

In the matter between:

THE STATE

and

OSCAR LEONARD CARL PISTORIUS Accused

HEADS OF ARGUMENT

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THE COUNTS

1. The Accused is charged with four counts:

1.1 **Count 1 : murder**

The allegations relied upon in the Indictment are that the Accused unlawfully and intentionally killed Reeva Steenkamp ("the Deceased").

1.2 **Count 2**

1.2.1 The allegations relied upon by the State in the Indictment are that the Accused contravened Section 120(8) (read with the relevant sections thereto) of the Firearms Control Act, 60 of 2000 ("the Firearms Act"), in that on 30 September 2012, and whilst travelling in a vehicle with other passengers, he unlawfully discharged his 9 mm pistol through the open sunroof

of the car they were travelling in, without any good reason to have done so.

1.2.2 The alternative to Count 2 is that the Accused contravened Section 120(3)(b) of the Firearms Act by discharging his firearm as referred to in Count 2, with reckless disregard for the other passengers in the car and/or people in the vicinity.

1.3 **Count 3**

1.3.1 The allegations relied upon by the State in the Indictment are that the Accused contravened Section 120(7) (read with the relevant sections thereto) of the Firearms Act by unlawfully discharging a Glock 27 pistol in Tasha's Restaurant without any good reason to have done so.

1.3.2 The First Alternative to Count 3 is that the Accused contravened Section 120(3)(a) of the Firearms Act by using the said Glock pistol in circumstances referred to in Count 3, which caused damage to the floor of the restaurant.

1.3.3 The Second Alternative to Count 3 is that the Accused contravened Section 120(3)(b) of the Firearms Act by discharging the said Glock pistol in

Tasha's Restaurant, at a table in the restaurant amongst other patrons in a manner likely to endanger the safety of people at his table and/or other patrons and the property of the restaurant.

1.4 **Count 4**

The allegations relied upon by the State are that the Accused contravened Section 90 (read with relevant sections thereto) of the Firearms Act, by unlawfully possessing 38 x 38 rounds of ammunition at his house at 286 Bushwillow Street, Silverwoods Country Estate, Silver Lakes, without any right to possess the said ammunition.

2. We proceed to deal with Count 1 – Murder.

SYNOPSIS OF COUNT 1 : MURDER

3. When considering the State's contentions that the Accused acted with direct intent to kill the Deceased, one must bear in mind that the State's case is premised on circumstantial evidence. To discharge the burden resting upon it, the State must prove:

3.1 that the inference sought to be drawn by the State must be consistent with all the proved facts;

3.2 all proved facts must exclude all other reasonable inferences

from them, save the one sought to be drawn;

3.3 if they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.

(**S v Blom** referred to below).

4. However, the State endeavours to group a number of inferences together as justification for its case. The difficulty is that reliance cannot be placed on any such inference, unless every inference sought to be drawn meets the requisite criteria laid down in **S v Blom**.

5. For its reliance on direct intent, the State alleges that:

5.1 There was an argument between the Accused and the Deceased during the early morning hours of 14 February 2013.

5.2 The argument culminated in the Deceased having fled to the toilet. She locked herself in the toilet and screamed.

5.3 The Accused fired 4 shots with the intention to kill the Deceased. The shots perforated the toilet door, fatally injuring the Deceased.

5.4 It also seems that the State may, somewhat tentatively, suggest that the relationship between the Accused and Deceased was conducive to a rage-type killing, by the Accused.

6. Therefore, the existence of the alleged argument and the alleged screaming by the Deceased are crucial for the State's reliance on direct intent.

7. In regard to the alleged argument, the State seeks to rely on Professor Saayman's evidence to show that the Deceased's last food intake was at about **01:00**. According to the State this will support its case that there was an argument from about **02:00** up until the shooting, which occurred shortly after **03:00**.

8. We will show hereunder that on Professor Saayman's own evidence in regard to gastric emptying, the last food intake could have occurred at about **23:00**, as he stated that there could be a time variation of up to two hours (if calculated according to his estimation of the last food intake at **01:00**).

9. We will also show that Professor Saayman's own evidence does not justify his estimated timing of the last food intake as the only reasonable inference, excluding all other inferences. Our contention is supported by the evidence of Professors Botha and Lundgren.

10. The State seeks to rely on Mrs van der Merwe's evidence to prove the existence of an argument.

11. We deal in detail with Mrs van der Merwe's evidence hereinbelow to demonstrate that her evidence definitely does not prove an argument

between the Accused and the Deceased, still less does it prove an argument between them as the only reasonable inference excluding all other reasonable inferences.

12. There were two separate incidents of sounds. The first sounds were described by the witnesses, Dr and Mrs Stipp, as gunshots, and the second sounds were similarly described by Dr and Mrs Stipp as gunshots.

13. In regard to the contention that the Deceased was screaming prior to the fatal shooting, regard must be had to the fact that both sounds could not have been caused by gunshots, as it is common cause that only four shots were fired. The four shots perforated the toilet door and four empty cartridges were found.

14. Dr and Mrs Stipp's evidence made it unnecessary to call an expert to confirm that the sound caused by a 9 mm pistol being fired may sound similar (to a layperson) to the sound made by a cricket bat striking the toilet door as Dr and Mrs Stipp's evidence confirmed the similarity in sound in the early hours of the morning to a layperson. Wolmarans, in any event, confirmed the aforegoing.

15. The Accused's version is that the first sounds were the 4 gunshots, and the second sounds were caused by the Accused striking the door three times with a cricket bat in an attempt to break the toilet door open.

16. The State expert witness, Colonel Vermeulen, testified that the toilet door was initially perforated by the four bullets and thereafter damaged by the cricket bat. Dixon and Wolmarans agreed. This accords with the version of the Accused.

17. During Dr Stipp's evidence the State disclosed that the second sounds (at **03:17**) were the gunshots. This was after Dr Stipp had testified that the Deceased would not a have been able to scream after the shots.

18. The State must have realised that it must make the second sounds the shots, otherwise the State's evidence about a female screaming would prove to be wrong.

19. We will show hereunder that the State's decision to make the second sounds the gunshots created serious improbabilities and contradictions in the State's own case.

20. We detail the evidence below when we deal with the first sounds to demonstrate that the first sounds were in fact the four gunshots.

21. Mrs van der Merwe's evidence makes it clear that the first sounds were the gunshots. Mrs van der Merwe's evidence is that she heard a female voice far away, which was not constant, thereafter she heard four gunshots and then the screaming.

22. Mrs van der Merwe's evidence accords with the State's Further Particulars that the argument *"stopped after the shots were fired"*

(Further Particulars, Ad paragraph 5.2, 5.3 and 5.5, par 1).

23. Dr Stipp, Professors Saayman and Botha agreed that the Deceased was fatally wounded and could not have screamed after the four shots.

24. Before the shots the Accused shouted for the intruder/s to leave the house. After the shots and upon realising what had happened he was shouting for help, screaming or crying out loud.

25. The screaming after the gunshots (the first sounds) heard by witnesses could only have been the Accused, as he was the only other person in the house. His shouting and screaming was to be expected after he had discovered that he had shot the Deceased.

26. The shouting at the intruder/s before the first sounds (the shots) was directed at the intruder/s and not to alert or call for help from the neighbours or people living in the area. No doubt, the screaming or crying out loud before the second sounds must have been much louder, as its purpose was to seek help from people outside his house as this had been heard as far away as ± 177 metres.

27. This explains why Mrs van der Merwe and Mrs Stipp only heard the screaming/crying out loud after the first sounds.

28. The fact that Mrs van der Merwe heard the female voice talking far away, and not shouting, is consistent with the fact that the female voice came from a different location.

29. If Mrs van der Merwe had heard the female voice coming from the direction of the Accused's house, she would not have moved in the opposite direction of the Accused's house to try and listen to where the voice came from. She moved in the direction of the Farm Inn, which is in the opposite direction (from the Accused's house).

30. On the State's own case, the screaming/shouting/crying out loud after the first sounds could only have endured for a maximum of about 5 minutes prior **03:17** (the time of the second sounds) as, according to the State witnesses, the screaming stopped at the time of the second sounds having occurred.

31. The aforegoing contention must be correct as it does not only accord with the Accused's evidence and his estimated time of about 5 minutes interval between the first and second sounds (Record 1488, lines 19-20), but also with the fact that he was still crying out loud/screaming when he struck the door with the cricket bat. The Accused was in any event shortly thereafter on the telephone to Johan Stander **(03:19)**, to 911 **(3:20)**, to security **(03:21)**, the call from security (**03:22**) and at approximately **03:22.** Johan Stander, Carice Viljoen (Stander) and Peter Baba (security) observed the Accused carrying the Deceased down the stairs, whereafter the Accused was in the presence of Carice Viljoen, Johan Stander, Dr Stipp, the paramedics and the police.

32. This confirms that the only time the immediate neighbours could have heard screaming/shouting/crying out loud, was during the about 5

minutes before **03:17**. We demonstrate in detail below that the crying out loud heard by the immediate neighbours occurred at the same time as the screaming heard by the four State witnesses.

33. The immediate neighbours referred to the screaming as crying out loud. This also accorded with the evidence of Mrs van der Merwe who thought that it was a woman crying out loud, however, her husband told her that it was the Accused. The crying also conforms to Ms Makwanazi's affidavit, referred to in the evidence of Mrs Stipp, which was heard at the same time Dr and Mrs Stipp heard the *"female"* screaming.

34. We will also demonstrate hereunder that there are conflicting and contradictory versions by witnesses corroborating concerning the screaming, which will in any event not make it possible for the Court to find, on an application of the principles relevant to circumstantial evidence, that the only reasonable inference is that it was the Deceased screaming and that that inference excludes all other reasonable inferences that it was the Accused who was screaming.

35. The difficulties inherent in the State's case caused it to vacillate between conflicting versions in its own case.

36. The vacillation is a consequence of the State's contradictory approach:

36.1 concerning Mrs van der Merwe's evidence that the gunshots silenced the female voice (the argument) (which were the first

sounds);

36.2 by contending that the second sounds were the gunshots, contrary to Mrs van der Merwe's evidence;

36.3 by contending that the gunshots silenced the screaming (but the screaming occurred after the first sounds);

36.4 by relying on Colonel Vermeulen's evidence that the toilet door was first damaged by the shots and thereafter by the cricket bat;

36.5 notwithstanding the aforegoing, to contend that the second sounds were the gunshots and in the process to completely fail to explain the occurrence of the first sounds.

37. The vacillation and conflict in the State's approach was caused by its reliance on *dolus directus*.

38. The State's reliance on *dolus directus* arose in the bail application in the form of an alleged premeditated murder, which is *dolus directus* with pre-planning or premeditation.

39. In order to *"prove"* the premeditated murder in the bail application, the State called the then Investigating Officer, Hilton Botha, who *inter alia* testified that according to forensic tests:

39.1 the Accused had his prosthesis attached when he fired the shots (Exhibit D page 110 and 167); and

39.2 the Accused stood about 1.5m from the toilet door, when he fired the shots. (Exhibit D page 101)

40. The version advanced by the State at the bail hearing, as referred to above, was false and shown to be false in the trial. At the time of the bail application there was no evidence, forensic or otherwise, as contended for by Hilton Botha, that the Accused had his prosthesis on when he fired the shots and/or that he stood about 1.5m from the toilet door when he fired the shots.

41. On the contrary, at the trial Captain Mangena gave evidence that the Accused was on his stumps when he fired the shots (Record page 1048, lines 16-18 and 23-25 – 1049, line 1).

42. As to the contention that the Accused was about 1.5m from the toilet door when he fired the shots:

42.1 Captain Mangena, in his report and during his evidence, stated that the Accused could have been anywhere between the passage wall (at the entrance to the bathroom) and not less than 60 cm from the toilet door at the time when he fired the shots (Record, Mangena Report, Exhibit VV, par 18.3.2) (Record 1043, lines 19-25).

42.2 The aforegoing was also part of the Further Particulars and Further and Better Particulars where the State alleged that *"the*

shooter was more likely not wearing his prosthetic legs and fired from a distance greater than 60 cm from the toilet door"(Further Particulars, Ad para 7.1 – 7.7 and 17.7 to 17.8, Further and Better Particulars, Ad par 7 and 16 and 17).

42.3 In cross-examination, Captain Mangena conceded that the Accused's version that he was not standing about 1.5 metres from the toilet door, but at the entrance to the bathroom, was more probable if regard is had to the position of two of the empty cartridges found, one in the passage and one in the entrance to the bathroom – (Record, page 1062, lines 11-21) and the fact that the primer residue (discharged when a shot is fired) found in the vicinity of the light switch at the entrance to the bathroom where according to the Accused he was when he fired the shots (Record, page 1041, lines 16-25, 1042, lines 1-24, 1062, lines 1-10).

42.4 In fact, when Captain Mangena was asked on what basis (or forensic tests) Hilton Botha could say that the Accused was approximately 1.5 metres from the toilet door when he fired the shots, he said that he had no idea where it came from. (Record 1013, lines 15-20).

43. Patently, it was very important for the Accused to expose the full extent of the false evidence by Hilton Botha to show that a strategy was applied to falsely incriminate him on a charge of premeditated murder,

notwithstanding the known absence of facts to corroborate such alleged premeditated murder.

44. It was not a real option for the Accused to call Hilton Botha as his false evidence in trying to incriminate the Accused, was a clear indication that he would not give truthful evidence on behalf of the Accused.

45. As Hilton Botha was also the investigating officer after the bail application (he was only subsequently replaced by Captain van Aardt), it was important that he be called by the State as a witness, not only to be examined on his false evidence which as designed to falsely incriminate the Accused at the bail application, but also to expose his conduct during the investigation. His evidence proved highly relevant to the preservation of the scene, particularly in the main bedroom.

46. Colonel van Rensburg testified that he was with Hilton Botha in the main bedroom early that morning. He, Colonel van Rensburg, then went to the guest bedroom (the first bedroom next to the main bedroom). It is unknown where Hilton Botha was at that stage as he remained in the main bedroom when Colonel van Rensburg went outside onto the balcony and to the guest room next door. This was prior to the photographer's arrival on the scene. (Record, 836, lines 11-25).

47. Notwithstanding various challenges posed by the defence at the beginning and during the trial for Hilton Botha to be called (Record, page 817, lines 16-25 and 11, lines 12-24 (plea explanation)), as well as when

Van Rensburg gave evidence (Record, p 817, lines 16-24), the State failed to do so. There is no doubt that his evidence was important, not only to account for and explain his false evidence, but also to explain his actions in the main bedroom prior to the photographer taking photographs of the main bedroom.

48. It is also significant that the State was very selective in calling witnesses, so as to endeavour to avoid known conflicts in the State's case. This was contrary to the principle that the State must act without fear, favour or prejudice. Rather than promote the interests of justice, it did a disservice to that which should have served the interests of justice.

49. For instance, the State called witnesses, who were positioned 80 metres and 177 metres respectively from the house of the Accused when they say they heard a woman screaming. However, the State failed to call the immediate neighbours of the Accused, as it realised they would not support the allegation that a woman was screaming.

50. The State also did not call the person who was employed by Dr and Mrs Stipp, Ms Makwanazi, as a witness, as she would also not have supported the State's case (Record, 1110, lines 3-10, 1174, lines 9-25, 1175, lines 1-9, 1494, line 25 – 1495, lines 1-6). This is despite the fact that Mrs Stipp introduced Ms Makwanazi's evidence.

51. The State called Colonel van Rensburg, who pretended, contrary to the affidavits in the State's possession, that he was the only police official

who went upstairs during the early the morning of 14 February 2013 with Hilton Botha (prior to the arrival of the photographer). This was not only in conflict with his own affidavit, but also affidavits by:

51.1 Sergeant Sebetha (Record 840, lines 4-18 and 861, lines 7-25; 862, lines 1-25; 863, lines 1-25);

51.2 Captain Maluleke (Record 863, lines 10-25; 864, lines 1-25);

51.3 Captain van der Merwe (Record 863, lines 10-14);

51.4 Detective Sergeant Chauke (Record 863, lines 10-14);

51.5 Detective Mashishi (Record 863, lines 10-14); and

51.6 Constable Prinsloo (Record 863, lines 10-14),

contained in the Police Docket, who were all available State witnesses.

52. The State also called the photographer, Warrant Officer Van Staden, who also professed not to have been accompanied by other police members when he took the photographs during the early morning between about 06:00 and 07:00 (Record, 914, lines 16-22 and 915, lines 8-9 and 24-25; 916, lines 1-6 and 959, lines 16-25). This was exposed to be false. (Record 985-990) (Photos 81 – 86, 87, 97, 98, 100, 111, 112, 103 in comparison with IMG 5370, 5368, 5374, 5375, 5376). In particular, the State failed to call not only witnesses who were present when he took the photographs, but also Colonel Motha who was also responsible for taking photographs at the same time as W/O Van Staden (Record 978, lines 13-25; 979, lines 1-8).

53. It is unfair to expect the Accused to call police witnesses, who made statements as State witnesses, as in such event, the Accused will be forced to assume the risk that such witnesses may accommodate the State in cross-examination.

54. An adverse inference may be drawn if a witness is available and relevant, and he/she is not called. In this instance, where witnesses were available and able to elucidate the facts for the State, which was absolutely necessary in view of the conflicts in the State's case, the State's failure to call those witnesses justifies the inference concerning a fear that such evidence might expose facts unfavourable to or might even damage the State's case[1].

55. The law is clear. The party on whom the onus rests (the State) may find that a failure to call a witness creates the risk that the onus will become decisive[2] in which event the State, bearing the onus, might not be able to

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1 **TSHISHONGA v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER 2007 (4) SA 135 (LC) 2007 (4) SA p157 PILLAY J**: '*The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a prima facie case. But an adverse inference must be drawn if a party fails to testify or produce evidence of a witness who is available and able to elucidate the facts, as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him, or even damage his case. That inference is strengthened if the witnesses have a public duty to testify.'*
NTSOMI v MINISTER OF LAW AND ORDER 1990 (1) SA 512 (C): '*It is generally true that if a party fails to place the evidence of a witness who is available and able to elucidate the facts before a trial court, such failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him.'*

2 **RALIPHASWA v MUGIVHI AND OTHERS 2008 (4) SA 154 (SCA)2008 (4) SA p158 SNYDERS AJA** : "*The party on whom the onus rests has no greater obligation to call a witness, but may find that a failure to call a witness creates the risk of the onus proving decisive."*

convince a Court that it has discharged the onus[3].

56. Furthermore, Section 179(4) of the Constitution provides that:

> *"National legislation must ensure that the prosecuting authority exercise its functions without fear, favour or prejudice."*

57. The national legislation giving effect to Section 179(4) of the Constitution is the National Prosecuting Authority Act 32 of 1998 ("NPA Act"). Section 32(1)(a) of the NPA Act incorporated this obligation.

58. Our case law makes it clear that to ensure a fair trial:

58.1 Prosecutors must be objective in regard to the interests of the victim, society and the Accused.[4]

58.2 The right to a fair trial embraces a concept of substantive fairness.[5]

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[3] **Privy Council case of Adel Muhammed El Dabbah v Attorney-General for Palestine** and Canadian cases including **Lemay v The King** and **R v Yebes**. In the Yebes matter McIntire J said:
'The Crown has a discretion as to which witnesses it will call in presenting its case to the court. This discretion will not be interfered with unless the Crown has exercised it for some oblique or improper reason: see Lemay v The King, supra. No such improper motive is alleged here. While the Crown may not be required to call a given witness, the failure of the Crown to call a witness may leave a gap in the Crown's case which will leave the Crown's burden of proof undischarged and entitle the Accused to an acquittal. It is in this sense that the Crown may be expected to call all witnesses essential to the unfolding of the narrative of events upon which the Crown's case is based.'

[4] **Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)** 2001 (4) SA 938 CC

[5] **S v Zuma and Others** 1995 (2) SA 642 CC (par 15)
See also : **S v Dzukuda and Others; S v Tshilo** 2000 (SACR) 443 (CC)

58.3 The State is required to lead by example.[6]

58.4 The prosecutor does not only represent the interests of the State, but he/she also has a duty towards the Accused to see that an honest person is not convicted and that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay credible evidence before the Court. The role of the prosecution excludes any notion of winning or losing.[7]

59. As such, the State's failure to call material witnesses prejudiced the Accused and is a relevant factor to be considered in assessing the evidence. A criminal matter is not a game to determine a winner or loser. Fairness, objectivity and prosecutorial duties made it imperative for the State not to have selected witnesses *"good"* for the State and ignore others *"bad"* for the State.

60. The State's failure to call material witnesses, particularly police witnesses, must have the effect to negating inferences the State seeks to rely upon, such as:

60.1 that the scene was as is depicted in the photographs of Van Staden;

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6 **Mohammed v President of the Republic of South Africa** 2001 (3) SA 893 CC at para 68

7 **Bonugli and Another v Deputy National Director of Public Prosecutions and Others** 2010 (2) SACR 134 (T)

Compare also the judgments of the courts of the United States of America in, for instance, Berger v United States 295 US 78 (1935) at 88; People v Zimmer 51 NY 2d 390 (1980) at 393.

60.2 that other police members did not go upstairs prior to Colonel van Rensburg and Hilton Botha having done so, and prior to the photographer having taken photographs.

61. The Court cannot accept that the scene as depicted in the photographs resembles the main bedroom as it was found, in the face of a clear indication that other police members were at the scene and may have disturbed the scene.

62. The State cannot avoid or circumvent its responsibilities by making witnesses available, particularly when they are police witnesses.

63. Insofar as the State sought to rely on a rage-type personality of the Accused and a manipulative relationship, which could have been conducive to the intentional killing of the Deceased following the alleged *"argument"*, we conclusively demonstrate hereunder that the opposite was true:

63.1 The relationship was not about the Accused's own interests and him manipulating the Deceased, nor was it an abusive relationship.

63.2 The contrary is shown hereunder.

63.3 The Accused was not shown and not found to be a malingerer, narcissist, with a rage-type personality, nor to be a person with an explosive and aggressive personality.

64. We will also demonstrate hereunder that the Accused also did not act with *dolus eventualis* in respect of the Deceased.

65. The Accused's evidence was consistent that he had thought that the Deceased was in the bedroom when he discharged the shots. His conduct immediately before and after the shooting supports his version.

66. It could therefore not be suggested that the Accused foresaw the possibility that the Deceased was in the toilet and that he reconciled himself with that possibility.

67. The State's reliance on error *in persona* is legally misplaced as will be shown hereunder.

68. The State in fact attempts to introduce the doctrine of transferred malice/intent which does not form part of our law for at least the last 70 years.

69. We will also show that the Accused fired the shots as a consequence of an increased startle response, which is a reflexive response, negating either the *actus reus,* but more probably negates criminal capacity.

70. We will show that if the Court were to find that the shooting was not a reflexive response, then it could only have been in putative private defence as the Accused subjectively believed he was protecting himself and the de.

71. We will also show that the Accused is not guilty of culpable homicide on the basis that his conduct conformed with the conduct of the reasonable person with a similar disability acting in the same circumstances.

72. Evidently, the State hoped to bolster its case (on murder) by introducing counts 2 to 4.

73. Counts 2 to 4 fell within the jurisdiction of the Gauteng Local Division (Johannesburg), but were moved to the jurisdiction of the Gauteng Provincial Division (Pretoria) in terms of Section 111 of the Criminal Procedure Act 51 of 1977.

74. However, in **Attorney-General Northern Cape v Brühns**[8] it was held that a conviction on one charge cannot be used for the purpose of proving another charge.

75. It follows that a conviction on any of counts 2 to 4 may not be used to *"prove"*, count 1 (murder).

76. With the above in mind, we proceed to deal with the merits or further demerits of the charge of murder.

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[8] 1985 (3) SA 688 A. The Appellate Division in **Brühns** did not approve and in fact overruled **S v Khanyapa** 1979 (1) SA 824 (A) at 839 B – l840 B and 840 *in fin* – 841 A where the Court (in **Khanyapa)**took a conviction on one count into account to prove another count.

ANALYSIS OF COUNT 1 – MURDER

Introduction

77. As stated above, the State elected to proceed with the charge of murder with *dolus directus* as the form of intent. The State premised its case on three principal issues:

77.1 an alleged argument between the Accused and the Deceased, allegedly for an hour before the shooting, which led to the shooting;

77.2 that the Deceased allegedly screamed before the shooting;

77.3 the evidence of the Accused.

78. Possibly, the State also hoped to discover evidence that the Accused was aggressive, manipulative and a rage-type personality, who may have the propensity or risk to kill his partner in an intimate relationship. We show conclusively hereunder, in dealing with the relationship that the opposite is true.

79. We will demonstrate hereunder that the State's case is not only premised on conflicting evidence, but that it is self-destructive. It is self-destructive in the sense that:

79.1 The first case is that there was a female talking ("the argument")

before the shooting, and not screaming, before the shots. The female talking stopped because of the shooting. The shooting in this case was the first sounds.

79.2 The second case is there was anxious and fearful screaming before the shots and the screaming stopped because of the shooting. The shooting in this case was the second sounds.

79.3 The third self-destruction is to be found in the State's own case that the door was first damaged by the shots and subsequently by the cricket bat. However, the State elected the second sounds to be the shots and the first sounds (also sounding like shots) remain a mystery, as the first sound on the State's version, could not be the cricket bat.

80. The charge of murder will be dealt with under the following headings:

80.1 Legal Principles applicable;

80.2 The times of the chronology of material events during the early morning hours of 14/02/2013 (time lines);

80.3 The State's reliance on:-

80.3.1 The alleged argument;

80.3.2 The status of the first sounds and the second sounds;

80.3.3 The alleged screams by the Deceased;

80.3.4 The Relationship between the Accused and Deceased;

80.4 The Accused's version;

80.5 Murder – *dolus directus*;

80.6 Murder - *Dolus eventualis;*

80.7 *Error in Persona* and the Doctrine of Transferred Malice;

80.8 Murder - Putative Self Defence*;*

80.9 Culpable Homicide;

LEGAL PRINCIPLES APPLICABLE TO THE ONUS

81. A number of evidential principles as pronounced upon by our Courts, relevant to the onus to be discharged by the State, find application in this matter.

82. The most important legal principle in this matter is the requisite legal approach to circumstantial evidence in criminal matters, as the State's case is premised on circumstantial evidence.

82.1 When the State relies on circumstantial evidence, it does so by

seeking to rely on inferences to be drawn from the indirect or circumstantial evidence, so as to arrive at a conclusion that the only reasonable inference in the circumstances, is that the Accused intended to kill the Deceased.

82.2 The inference which the State seeks to rely on, would justify/support a conviction, only if:

"1) the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude the other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."[9]

(emphasis supplied)

83. The onus is on the State to prove the guilt of the Accused beyond a reasonable doubt. This means that the Accused is entitled to be acquitted if it is reasonably possible that he might be innocent.[10]

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9 **R v Blom 1939 AD 188 at 202-3 Watermeyer AR**

10 **S v Van der Meyden 1999 (2) SA 79 (W): '***The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the Accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 especially at 373, 383). These are not*

84. The Accused does not have to convince the Court of the truth of his explanations. The Court must be satisfied, not only that his explanation is improbable, but that it is beyond a reasonable doubt false.[11]

85. The Court does not have to believe the Accused's version, still less has it to believe it in all its details. It is sufficient if there is a reasonable possibility that it may be substantially true.[12]

86. The Court does not need to reject the State's case in order to acquit the Accused and it is not enough if the Accused contradicted other acceptable evidence. If there exists a reasonable possibility that his evidence may be true, he is entitled to the benefit of the doubt.[13]

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separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the Accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the Accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true. In R v Hlongwane 1959 (3) SA 337 (A), after pointing out that an Accused must be acquitted if an alibi might reasonably be true, Holmes AJA said the following at 340H--341B, which applies equally to any other defence which might present itself:
'But it is important to bear in mind that in applying this test, the alibi does not have to be considered in isolation. . . . The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impressions of the witnesses.'

11 **Rex Difford (1937) AD 370 at p.373**: *'It is equally clear that no onus rests on the Accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true then he is entitled to his acquittal.'*

12 **Rex v M (1946 AD 1023 at p. 1027)**

13 **S v Kubeka 1982 (1) SA 534 (W) at 537F-G:** *'Whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. It is not*

87. The evidence of the Accused cannot be rejected on the basis that it was improbable just because it was not in conformity with the evidence given by the State witnesses.[14]

88. Contradictions in the evidence *per se* do not lead to the rejection of such evidence as the contradictions may simply be indicative of an error.[15]

89. It is not sufficient for a witness to be credible, a witness must also be reliable.[16]

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enough that he contradicts other acceptable evidence. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State. In this J regard, see, amongst other authorities, S v Smook 1961 (2) PH H228 (A);

[14] **S v Ndhlovu 1991 (2) SACR 322 (W): '***The magistrate sought to deal with this matter by rejecting the appellant's evidence on the basis that, insofar as it was not in conformity with the evidence given by the two State witnesses called, it was improbable. The magistrate of course correctly stated the test which was to be applied in situations such as this, and no doubt derived from cases such as R v Difford 1937 AD 370, and put the matter, correctly in my view, in these terms:*
'Now, the court is well aware that the onus of proof rests entirely on the State to prove its case beyond reasonable doubt, and there is no onus on the Accused to disprove his guilt or to prove innocence at all.
The court is also aware of the fact that, if the version that is advanced by the Accused is reasonably possibly true, the court, the Accused is entitled to his acquittal, although the court does not necessarily believe what the Accused is saying.'
The magistrate appears then to have dealt with the matter on the basis of the probabilities or, put differently, what was considered by the Court a quo to be the improbabilities in the version of the Accused.'

[15] **S v Oosthuizen 1982 (3) SA 571 (T) at 576B-C:***'Contradictions per se do not lead to the rejection of a witness' evidence. As Nicholas J, as he then was, observed in S v Oosthuizen 1982 (3) SA 571 (T) at 576B – C, they may simply be indicative of an error. And . . . not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence.'*

[16] **S v Janse Van Rensburg and Another 2009 (2) SACR 216 (C): '***Logic dictates that, where there are two conflicting versions or two mutually destructive stories, both cannot be true. Only one can be true. Consequently the other must be false. However, the dictates of logic do not displace the standard of proof required either in a civil or criminal matter. In order to determine the objective truth of the one version and the falsity of the other, it is important to consider not only the credibility of the witnesses, but also the reliability of such witnesses. Evidence that is reliable should be weighed against the evidence that is found to be false and*

89.1 A witness may be credible or honest because of his/her own subjective beliefs, which he/she perceives to be correct.

89.2 However, the evidence of an honest or a seemingly honest witness may not be factually correct (and will therefore be unreliable) as it may either be contaminated by facts subsequently obtained or by his/her perceptions.

89.3 Unreliability is generally exposed when seemingly truthful evidence is in conflict with the objective facts or probabilities, or where the objective facts expose the incorrectness of the evidence or inaccuracies or improbabilities in the evidence.

89.4 Unreliability will overrule credibility (honesty).[17]

90. Reliable and objective evidence serves as a safe measurement to weigh the accounts of witnesses to determine whether the accounts of witnesses meet the requisite threshold- in this case proof beyond a reasonable doubt[18] and in the context of circumstantial evidence, that

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in the process measured against the probabilities. In the final analysis the court must determine whether the State has mustered the requisite threshold - in this case proof beyond reasonable doubt. (See E S v Saban en 'n Ander 1992 (1) SACR 199 (A) at 203j - 204b; S v Van der Meyden 1999 (1) SACR 447 (W) (1999 (2) SA 79) at 449g - 450b; and S v Trainor 2003 (1) SACR 35 (SCA) ([2003] 1 All SA 435) at para 9.)

[17] **S v NGXUMZA and Another 2001 (1) SACR 408 (Tk): '***There is no corroboration for the identifying evidence of Mzoxolo. He might have placed the two Accused in the roles of the persons he saw, and honestly believed that he had seen them, through his strong imagination and having seen them during the day in similar clothing. With identity evidence, the question is not so much credibility as objective reliability - Hiemstra (op cit at 79).*

[18] See **Janse van Rensburg** (*supra)*

the account given by a witness is consistent with all the proved facts to the extent that it excludes every (other) reasonable inference.

91. A false explanation by the Accused may not be sufficient to justify the inference that he/she had the intention to kill the Deceased.

91.1 Although the nature or extent of a lie is important, such a lie is a factor which should be placed in the scale of adjudication with due observance of the established rules of logic relevant to the proper adjudication of circumstantial evidence as formulated in **R v Blom** (supra).[19]

91.2 In **S v Steynberg** (supra), the Court of Appeal[20] referred with approval to **Maharaj v Parandaya 1939 NPD 239** where Judge Feetham at 243 held: *"Some innocent people meet accusations by simply telling the truth. Others, who may be equally innocent of the accusation, take refuge in some invented story, because they are not satisfied that the truth alone would be sufficient to carry conviction,"* and also:

91.3 **Goodrich v Goodrich 1946 AD 390 where Greenberg JA (at 396)** held: *"... in each case one has to ask oneself whether the fact that a party has sought to strengthen his case by perjured evidence proves or tends to prove that his case is ill-founded,*

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[19] **S v Steynberg 1983 (3) SA 140 (A))**

[20] **Steynberg (*supra)* at 146**

and one should be careful to guard against the intrusion of any idea that a party should lose his case as a penalty for perjury."

92. With the above legal principles in mind, the objective facts as they relate to the timing of the chronology of the events, during the early morning of 14 February 2013 must be analysed, so as to weigh the allegations made by the State, against the objective and acceptable evidence, and to consider the credibility and reliability of witnesses.

CHRONOLOGY OF EVENTS (TIME LINES)

93. In order to be reliable, the chronology of the events, with reference to the relevant times when the events occurred, must be measured against objective evidence, such as telephone call data and acceptable and reliable evidence.

94. If the chronology of events is determined by means of objective and acceptable and reliable evidence, it will provide a useful mechanism or measurement against which the evidence of witnesses should be measured or weighed, so as to avoid a risk that perceived honesty conceals unreliability or untruthfulness.

95. In order to determine, as accurately as possible, the different times when material events occurred during the early morning on 14 February 2013, the evidence relevant thereto will be summarized with specific reference to the times of material events, which occurred during the early morning

of 14 February 2013.

96. For purposes of determining when the material events occurred, it must be borne in mind that :

96.1 it is not in dispute that the Accused fired four shots;

96.2 that the Accused subsequently struck the toilet door with a cricket bat, the latter action having enabled the Accused to remove panels from the door in order to gain access to the toilet so as to remove the Deceased from the toilet;

96.3 there were two sounds at different times, both sounding like gunshots to certain witnesses. The first sounds were described as 3 or 4 shots and the second sounds as 2-3, 3, 4 or 4 to 5 or a volley of shots.

97. In determining the different times of the material events (the time lines), we ignore contradictions unrelated to the facts necessary to objectively determine the time lines, unless such contradictions have a bearing on the acceptability and reliability of the evidence.

THE CHRONOLOGY OF EVENTS RELEVANT TO THE EARLY HOURS OF THE MORNING OF 14 FEBRUARY 2013 (THE TIME LINES)

98. To avoid any disputes, only for purposes of determining the time lines:

98.1 The first shots heard by Dr and Mrs Stipp, Mrs Van der Merwe

and the one bang heard by Mrs Nhlengethwa, are referred to as the “first sounds”.

98.2 The subsequent “shots”/bangs/thuds, heard by Dr Stipp, Mrs Stipp, Mrs Burger and Mr Johnson are referred to as the “second sounds”.

99. The objective evidence relied upon for purposes of the time lines consists of :

99.1 The admitted telephone calls as per the Silverwoods Security telephone data (Exhibit Q);

99.2 The summary of calls as per a chart prepared by the Police (Exhibit ZZ5);

99.3 The admitted telephone call data; and

99.4 The undisputed testimony of witnesses, with reference to telephone call data;

99.5 The undisputed Security Guard Track System (“the System”) (Exhibit TTT), which was the system operated by security in the Silverwoods Estate. In terms of the security protocol, the guards on duty activated the system at various points within the Estate, as proof that they were doing their security rounds within the Estate.

99.6 Undisputed photographs.

DINNER (APPROXIMATELY 01:00 (ON 14 FEBRUARY 2013) ACCORDING TO THE STATE (AND 19:00-20:00 ON 13 FEBRUARY 2013, ACCORDING TO THE ACCUSED)

100. The time of the dinner is in dispute. Accordingly, we deal herein with the material allegations relevant to the alleged time of the dinner, to demonstrate that the alleged time of the "dinner" or last food intake at approximately **01:00**, as alleged by the State, cannot be reliable and does not meet the requisite standard of objectivity or reliability to form part of the time lines.

101. The State seeks to prove that a meal was consumed at about **01:00** to show that the Accused and Deceased were still awake at about **02:00**, so as to support the State in its allegations that an argument took place between the Accused and Deceased, which argument in turn gave rise to the shooting about one hour later.

102. However, in the State's Reply to the Further Particulars requested (ad paragraphs 5.2, 5.3 and 5.5), paragraph 10 thereof, the State's case was different. In paragraph 10 the State stated that *"The Deceased had something to eat hours before she was killed"*.

103. This clearly demonstrates that the last food intake at about 01:00 was an afterthought and it explains why Professor Saayman also did not deal with it in his post-mortem report.

104. The State is bound to its further particulars.[21]

105. It must be stated that even if the Deceased consumed food at about 01:00 it does not justify an inference as the only reasonable inference, excluding all other reasonable inferences:

105.1 that the Accused and the Deceased were having dinner, as the Deceased could have had something to eat on her own;

105.2 that the Deceased and the Accused were still awake an hour later at about 02:00;

105.3 that the Accused and the Deceased engaged in an argument after the food intake.

106. At best for the State it would show that the Accused and/or the Deceased were/was awake at ± 01:00.

107. However, we will demonstrate hereunder, that the allegation that "dinner" was consumed at **01:00** and that there was an "argument" about one hour later, are at best speculative and lacks cogency and can never qualify to be the only reasonable inference from the proved facts.

108. It is important to bear in mind that the version of the Accused is the only version available and the State's endeavoured reliance on dinner at ±

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[21] **R v Wilken** 1945 EDL 246 at 253
See also Du Toit et al *Commentary on the Criminal Procedure Act* at 14-27

01:00 is at best premised on circumstantial evidence. As such, the State's assertion of dinner at ± 01:00 must be the only reasonable inference (excluding all other reasonable inferences).[22]

109. The version of the Accused in regard to dinner is:

109.1 When he arrived home just after **18h00**(on the 13th) the Deceased was busy preparing food;

109.2 They had stir-fry chicken and vegetables for dinner (Record, page 1666, line 1-2) between **19h00** and **20h00**. (Record, page 1460, line 7-12).

109.3 The iPad activities of the Accused incidentally show that between **19h10** and **20h00** there were no activities recorded(Exhibit WW). The Accused explained that they were having dinner during that time. (Record, page 1460, line 7-12). (This is objective support for the version of the Accused).

109.4 Thereafter at around approximately **20h00**, the Accused and the Deceased had a warm drink in the main bedroom. (Record 1463, line 10-11 and 1469, lines 5-6). The mugs shown in photographs on the bedside tables provide objective evidence to confirm this (Photo 74).

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[22] **Blom** *supra*

110. The question is whether the version of the Accused in respect of the time of dinner was shown to be false beyond a reasonable doubt. Conversely, the question is whether the State has proved that the only reasonable inference is that the Accused and Deceased had consumed dinner at approximately **01.00** and that the State has excluded another reasonable inference, being that the Accused and the Deceased were having dinner at 19:00. If the State cannot prove the dinner time at ± 01:00 as the only reasonable inference on the evidence, then the State has failed to prove that *"dinner"* was at ± **01:00**.

111. If the State does not rely on dinner by the Accused and Deceased, but as a last food intake by the Deceased, then the State has a difficulty as food intake by the Deceased does not imply:

111.1 that the Accused was awake;

111.2 that it would take a whole hour (from 01:00 to 02:00) to consume the late night food intake so as to corroborate an "argument" at about 02:00.

112. With the above difficulties (for the State) in mind, we refer to the evidence.

113. The State seeks to rely on Professor Saayman's evidence for the contention that the Accused and the Deceased had "dinner" at approximately 01:00 am on 14 February 2013.

114. However, Professor Saayman's evidence only refers to a "suggested" last food intake by the Deceased, and not to anything that could be construed as the Accused and Deceased having dinner.

115. We deal, in some detail, with the evidence of Professor Saayman. A précis of his evidence is:

115.1 that the only evidence he based his inference on, was the stomach contents;

115.2 he emphasised that to determine the time of a last meal intake, was not exact and depended on many factors, which he did not have knowledge of at the time;

115.3 his estimation of 2 hours before her death, is a probable position, but it could vary by an hour or two in either direction, which could make the approximate time of last food intake ± between 23:00 and 01:00.

116. It is of course possible (but highly unlikely) that Professor Saayman may be right, which is not the test for circumstantial evidence as Professor Saayman's evidence is based on inference.

117. Professor Saayman testified that, in his experience, with limited reference to publications on gastric emptying, and because of the volume of the undigested food found in the stomach of the Deceased, he *"would suggest"* that the Deceased consumed her last meal

approximately two hours before her death (Record 539, line 5-6). This would make the approximate time of "dinner" **01:00** *(emphasis supplied).*

118. On the evidence the Accused went to sleep first. It is conceivable that on this basis the Deceased might have had something to eat at 23:00.

119. However, we will demonstrate below that even the timing of 23:00 is speculative or just a mere possibility.

120. Importantly, in drawing this inference, Prof Saayman had no knowledge of the nature of the food intake, the volume of the food intake or any other circumstances or facts, other than stomach contents, which could have played a role in stomach or gastric emptying.

121. He also did not conduct further examinations, such as the opening of the duodenum, so as to support his suggestion, which he ought to have done.

122. Accordingly, his suggestion of a last food intake at about 23:00 or about 01:00 is premised on a single piece of circumstantial evidence, i.e. stomach contents.

123. Therefore, the principal question is whether Professor Saayman's inference, based on this single aspect, justifies a finding that the only reasonable inference is that the Deceased's last food intake was at approximately **23:00** or **01:00** and whether that inference excludes all other reasonable inferences.

124. If not, Professor Saayman's evidence would not meet the requisite proof concerning the acceptability of circumstantial evidence.

125. It will be demonstrated below that Professor Saayman's evidence in this regard cannot be accepted as the only reasonable inference, excluding all other inferences.

126. Furthermore, he explicitly stated that he could only provide a "probable time frame and it has to be prefaced by saying that it probably can vary by an hour or two in either direction, depending on volume, type of food, mental state, etcetera". (Record 530, line 11-14) *(emphasis supplied)*

127. It is important to point out that Professor Saayman at no stage endeavoured to convince the Court that his views on gastric emptying, and therefore his determination of the approximate time of the last food intake before death, would or could be the only reasonable inference, excluding all other reasonable inferences.

128. On the contrary, Professor Saayman made it clear in his evidence that his views expressed by him was *"to some extent in terms of probabilities, but I think it is important that the Court appreciate that there may be inter-individual variations between myself and someone else, but there may also be intra-individual variations."* (Record 517, lines 24-25 and 518, line 1). Proof on "probabilities" is not the test in criminal proceedings. (Emphasis supplied). He also referred to his estimation as a *"probability position"* and not as the only reasonable inference

excluding all other inferences (Record 533, line 1). *(Emphasis supplied)*

129. This explains why Professor Saayman was merely prepared to "suggest" that the Deceased had her last meal approximately two hours before her death (Record 539, line 5).

130. Moreover, Professor Saayman made it clear that gastric emptying was not an exact science and he accepted that *"varying time frames that may be implicated"*. (Record 517, line 23)

131. This also explains why Professor Saayman said that his estimation could probably vary by an hour or two in either direction.

132. If, on Professor Saayman's evidence, an hour or two variation in estimated times in either direction, is an acceptable variation on the "suggested" time of last food intake, it could take the probable time of last food intake by the Deceased to approximately **23:00**. This does not assist the State in its "argument" theory.

133. Apart from the fact that Professor Saayman's estimation has a probable variation *"by an hour or two in either direction"* the allegation by the State that the Accused an Deceased had "dinner" at **01:00** defies logic and probabilities, if regard is had to what is stated below:

133.1 When the Accused arrived home, just after **18:00**, the Deceased was busy preparing stir-fry chicken and vegetables. (Record 1459, line 1 and 1666, line 1-2) This was not disputed by the

State in cross-examination of the Accused.

133.2 On the State's contention, the Accused and Deceased would then have waited 7 hours (until **01:00)** to have dinner.

133.3 The Accused is a professional athlete and the Deceased was a model. It does not make sense that they would not have had dinner at a reasonable time when the food was ready, but would have waited for 7 hours to have dinner at approximately **01:00**.

133.4 On the State's contention, after deciding not to have dinner when the food was prepared and ready, the Accused and Deceased must either have left the food in the kitchen or taken it upstairs to eat at a later.

133.5 The Accused and Deceased went upstairs to the main bedroom at around approximately **20:00** (Record 1461, lines 7-8) where they had a hot drink. The mugs on the two bedside tables support the version of the Accused in this regard (Photo 74 and 56) (Record 1463, lines 10-12).

133.6 On the State's contention, the Accused and the Deceased must then have returned to the kitchen to have dinner at ± **01:00,** as none of the photographs of the main bedroom depict any plates, cutlery or crockery in the main bedroom (save for the mugs). The aforegoing makes no logical sense.

133.7 In cross-examination, Mr Nel put it to the Accused that whilst the Deceased was eating, they were arguing and that was the argument that Mrs Van der Merwe heard (Record 1796, lines 22-26 and 1797, lines 1-2 and 1942, lines 3-5). This does not make sense as this would mean that the Accused and the Deceased must have had dinner at about **02:00**, which is inconsistent with any possible version proffered by Professor Saayman's evidence.

134. Although Professor Saayman "suggested" that the last meal was consumed approximately two hours before her death (but that there could have been a variation of the 2 hours on his estimated time), his evidence that in the case of a light meal gastric emptying could occur within 90 to 180 minutes (Record 519, line 8-11) is contradictory.

135. It is unclear why Professor Saayman ignored the fact that on his own evidence, gastric emptying in the case of a light meal could take up to three hours, whilst without knowing the volume of the last meal and what the meal comprised of, he estimated a two hour period prior to death as having been the last food intake.

136. An added difficulty with Professor Saayman's evidence is that he testified that due to *inter alia* enzymes and hydrochloric acid in the stomach, the physical process of digestion did not stop at the time of death (Record 520, lines 2-15). The body of the Deceased was only refrigerated at approximately **11:45** (Record 2277, lines 11-12), which

was about ten hours after the last food intake estimated by Professor Saayman. Notwithstanding, there was still recognizable food content in the stomach, an occurrence which in applying Professor Saayman's theory, could not have been possible. According to Professor Lundgren, this demonstrated how speculative the process and timing of gastric emptying was (Record 2292, lines 1-25).

137. What is clear from the above is that, based on his own concessions, Professor Saayman's estimation was never meant to be the only reasonable inference concerning the timing of the last food intake.

138. Moreover, the acceptability of Professor Saayman's evidence, for purposes of satisfying the standard laid down for circumstantial evidence, was further eroded by the evidence of Professor Botha and Professor Lundgren.

139. Professor Botha made it clear that it was too risky for a pathologist to estimate the time of last food intake with reference to gastric emptying (Record 1306, lines 10-11).*"Very difficult for a pathologist to gain expertise in this field."*

140. He conceded that he could not say that Professor Saayman was wrong (Record 1322, lines 11-16). This concession does not mean that he was accepting that Professor Saayman was right. It only means that because of the unknown variants or factors the estimation. It may be right or may be wrong.

141. Professor Botha, in his evidence, *inter alia,* referred to an article by Jason Payne-Jones, Forensic Medicine and Clinical and Pathological Aspects (Exhibit GGG and Record 1304, lines 19-25), to demonstrate the danger in relying on gastric emptying in determining the time of the last food intake prior to death.

142. In the said publication Jason Payne-Jones *et al* made it clear:

142.1 *"For estimating the time since death the volume of stomach contents compared to the quantity and quality of the last meal and transportation distance into the small intestine (duodenum) must be known."* (Page 109 of Exhibit GGG);

142.2 *"The State of digestion and transportation rate of food from the stomach into the duodenum depend on many ante mortem (eg. anatomical, physiological, psychological, pathological, food type) factors which contribute to the great intra- and inter-individual variability of gastric emptying. Estimations considering all circumstances, should only be made with great reservation."* (Page 109 of Exhibit GGG);

142.3 That *"only a rough estimation of time of death can be derived from the examination of the stomach contents in the absence of additional information"* (Page 110 of Exhibit GGG);

142.4 They referred to tests concluded in 47 cases at autopsy which

showed that:

142.4.1 If 50% of the last meal was found in the stomach, the last food intake was about three to four hours prior to death, but not shorter than, and not greater than 10 hours;

142.4.2 If 90% of the last meal was found in the stomach, the last food intake was probably within the hour prior to death but not more than three to four hours;

142.4.3 If only 30% of the last meal is found, the last food intake was around four to five hours, prior to death, but not shorter than one to two and not longer than 10-11 hours prior to death;

143. Professor Saayman accepted the correctness of the article (Exhibit V) by Jason Payne Jones(Record 530, lines 15-25 and 531, lines 1-18), but pointed out that six hours nil per mouth, according to the article, would ensure that the stomach was empty after 6 hours (Record 532, lines 21-25). Professor Saayman concluded that the six hour nil per mouth period furthered *"the basis of my probability position in terms of this particular patient."* (Record 533, lines 1-2).

144. It is unclear why Professor Saayman sought to rely on 6 hours nil per mouth for an empty stomach after 6 hours, referred to by Jason Payne-

Jones, to support the time estimated by him. Professor Lundgren specifically deals with the 6 hour period, to which we will refer below.

145. There are further difficulties with Professor Saayman's evidence, particularly with reference to Jason Payne-Jones:

145.1 Professor Saayman did not know the volume of the food intake, which "must be known" according to Jason Payne-Jones, page 109 of Exhibit C.C.C.);

145.2 Professor Saayman did not open the duodenum as part of the process to try to determine the time of the last food intake and the time of death, which would have been a necessary step (See Jason Payne-Jones Page 109 of Exhibit CCC)(Record 529, lines 19-25 and Post Mortem Report Exhibit B);

145.3 Professor Saayman's post-mortem report (Exhibit B) does not even deal with gastric emptying times. This justifies the inference that, subsequent to the post mortem having been concluded, the State sought to rely on gastric emptying, so as to estimate the timing of the last food intake by the Deceased, notwithstanding the fact that crucial knowledge (*inter alia,* the volume of food intake, type of food intake and the health history of the Deceased) was unknown. It was then too late to consider taking important steps, such as the opening of the duodenum.

146. Professor Botha, in his evidence, referred to the most authoritative textbook on Forensic Pathology, the Third Edition of Knight's Forensic Pathology (Exhibit GGG). At page 83 the learned author states : *"with one exception, this controversial topic could be dismissed summarily as being quite irrelevant. For many years pathologists have argued over the reliability of the state of digestion of gastric contents as an indicator of the time between the last meal and death, the leading case in modern times being that of Truscott in Canada. There is now almost a consensus that with extremely circumscribed exceptions, the method is too uncertain to have much validity."*

(Emphasis supplied)

147. The exception referred to by Knight, is if the time of the last meal is known, then the time of death could be estimated (Knight Page 83).

148. Having regard to all of the above, Professor Botha made it clear that for a pathologist to try and estimate the time of the last meal by looking at the stomach content was too risky (Record 1306, lines 9-23).

149. Professor Lundgren supported the evidence of Professor Botha in regard to gastric emptying. She testified that in her experience, as the Head of Anaesthesiology at Wits, and also at Chris Hani Baragwaneth Academic Hospital, as well as her years in private practice, she was in a position to state that the timing of gastric emptying was unreliable (unpredictable).

150. Professor Lundgren further made it clear that as a clinician, she could

not support Professor Saayman's estimation of ± two hours (Record 2293, lines 3-4).

151. She explained that the minimum of nil per mouth for six hours, for solid food to be emptied gastricly was not absolute, but rather in the expectation that *"in the hopes that the stomach is empty after that six hour period."* (Record 2263, lines 4-7).

152. She explained that among other things, it depended on the type of food intake. She explained for instance that vegetables were indigestible and may delay gastric emptying (Record 2263, lines 9-10) (the dinner consisted of stir-fry chicken and vegetables).

153. She further explained that endogenous and exogenous factors would all play a role in determining the process of gastric emptying. Endogenous factors are factors within the body and exogenous factors are factors from outside the body (Record 2264, lines 1-2).

154. Professor Lundgren also dealt with factors delaying gastric emptying, such as neurological, emotional and hormonal interaction and pre-menopausal woman (the Deceased was pre-menopausal) (Record 2264, lines 10-12). She also testified that slimming drugs could delay gastric emptying (Record 2264, line 25 and 2265, line 1).

155. There is no evidence whether or not any of the above factors (but for pre-menopause) applied to the Deceased, and in the absence of that

knowledge it is not possible to make a reliable estimation.

156. She further explained that the volume of gastric contents after a meal varied from person to person, from day to day in the same person, was dependent on many factors and was not an exact science (Record 2263, lines 1-25 and 2264, lines 1-25).

157. She testified that it was *"speculative to attempt to estimate when the Deceased's last food intake occurred, based purely on the presence of gastric contents"*. (Record 2266, lines 14-16). *(emphasis supplied)*

158. She testified that even after a slice of buttered toast and tea, there may be solids left in the stomach after four hours (Record 2292, lines 14-16).

159. She anecdotally referred to one of her patients, who was on a strict 'nil per mouth' for eight hours before an operation, who still regurgitated green stomach contents after anaesthetics had been administered(Record 2263, lines 19-21). Professor Lundgren explained that the above was not the only incident and that there had been many such incidents in her career (Record 2284, lines 15-19).

160. As stated above, it in any event remains unknown whether or not the Deceased had any food intake subsequent to the Accused falling asleep. This could be anytime between **23:00** to **01:00**, according to Professor Saayman's suggested estimation.

161. What is evident from the above is that Professor Saayman's evidence,

(with due regard to Professors Botha's and Lundgren's evidence) falls short of the legal requisite to exclude other reasonable inferences relevant to the time of the last intake of food.

162. It is respectfully submitted that the disputed evidence concerning the time of the last intake of food (or dinner), and the conflicting evidence relevant thereto, have the result that the Court ought not to find that the only reasonable inference is that the Accused and the Deceased had dinner or that the Deceased had consumed food any time between **23:00 to 01:00**.

163. Consequently, the estimated time of "dinner", as alleged by the State, does not qualify to form part of the time chronology, as the value of the time chronology is in the fact that the times are supported by objective evidence or reliable and acceptable evidence, so as to configure a reliable measurement to measure other evidence against.

THE (ALLEGED) ARGUMENT (APPROXIMATELY 2-3AM)

164. Similarly, it is necessary to determine if the allegation of an argument between the Accused and the Deceased, at ±**02:00** to **03:00** , has sufficient cogency so as to qualify as being the only reasonable inference, excluding all other inferences. If not, the "argument" and alleged time of an "argument" should not be considered as forming part of the time chronology, as it could not be objectively determined or be determined reliably by acceptable evidence.

165. The State alleges that there was an argument between the Accused and the Deceased, which preceded and resulted in the shooting. The State contends that the "argument" was overheard by Mrs Van der Merwe (Record 1941, lines 19-20).

166. Mrs Van der Merwe's evidence does not prove the existence of an argument, still less does her evidence justify the inference, as the only reasonable inference, excluding all other reasonable inferences, that there was an argument between the Accused and the Deceased, which preceded and gave rise to the shooting.

167. Before considering the evidence of Mrs van der Merwe, it is necessary to consider the Further Particulars furnished by the State. In the State's Reply to the Further Particulars requested on behalf of the Accused, the State replied:

167.1 *"As the only reasonable inference on the facts available to the State the motive of the Accused was to kill the Deceased. It is the State's case that there was an argument between the Accused and the Deceased. The Accused killed the Deceased because of the argument. The State is <u>unaware of the exact</u> details of the argument <u>or when it started</u>"* (Ad paragraph 5.1); *(emphasis added)*

167.2 *"The state relies on the evidence of Estelle Van Der Merwe. During the early hours of 14 February she states she heard,*

"talking like fighting" and a woman's voice constantly talking. She formed the impression that the woman was arguing. This stopped after the shots were fired" (Ad paragraphs 5.2, 5.3 and 5.5 paragraph 1);

167.3 *"Estelle Van Der Merwe (A9) and (A9a) heard the voice of a woman that she perceived to be fighting- this had been disclosed to the Accused. It is the state's case that the arguing or fighting happened at the house of the Accused"* (Ad paragraphs 10.2.7 & 10.2.8);

168. In the Request for Further and Better Particulars the State replied as follows with regard to the alleged argument:

168.1 *"We repeat that we are not aware of the exact details of the argument but are aware of a witness having heard a woman's voice and we will argue that by inference it was the voice of the Deceased. We are aware that witnesses heard a woman scream before the shots were fired. <u>We are aware that the screams and the woman's voice stopped after the shots were fired</u>. We repeat our response to paragraph 5.2-5.5 here"* (Ad paragraph 5).

(emphasis added)

169. What is stated in the Further Particulars referred to in paragraph 8.5.1 above where the State states that the screams and the woman's voice (talking) stopped after the shots.

170. Mrs van der Merwe's evidence was that there was no screaming by a woman before the shots. None of the witnesses made reference to arguing and screaming (at the same time) before the first sounds.

171. In the Accused's Second Request for Further and Better Particulars with reference to the alleged argument, the State replied:

171.1 *"It is the State's case that as the only reasonable inference from the facts, there was an argument. We are not aware of any of the detail regarding the argument; it may become clear during the trial"* (Ad paragraph 2.5, paragraph 2.1).
(emphasis added)

172. However, Mrs Van der Merwe's evidence, relevant to the alleged argument, is inconsistent with the Further Particulars. Her evidence was as follows:

172.1 She woke up at around **01:56** (Record 159, line 1);

172.2 She heard the voice of a woman, but it was far away. (Record 168, lines 10-17; 170, lines 21-24) She could not hear words or language. She had no idea where the voice was coming from but it was far from their house (Record 170, lines 13-15).

172.3 The woman's voice was quiet for periods, which could be intervals of 5 minutes or 20 minutes (Record 168, lines 24-25).

172.4 She wanted to find out where the voice was coming from. She looked out towards the Farm-Inn (which is in the opposite direction from the house of the Accused), to try and find out where the voice was coming from (Record 159, line 18).

172.5 What is interesting is that during her re-examination, when asked in which direction she had looked during the early morning of 14 February 2013, after hearing a woman's voice, she testified, *"Farm Inns direction"*. She was then asked which direction she had looked in on 21 February 2014 (the night the defence team conducted sound tests at the house of the Accused) she responded, *"Farm Inns direction and Oscar's house"*. (Record, 175, Van der Merwe, lines 1-5). This in itself is an indication that on 14 February 2013 she did not believe that the female's voice emanated from the direction of the Accused's house because at no stage at that time did she (also) look in the direction of the Accused's house.

(Emphasis supplied)

172.6 At about **03:00** she heard four gunshots (Record 159, lines 19-20), which were confirmed by her husband to be gunshots (Record 161, lines 9-10). The shots were shortly one after the other (Record 161, lines 1-3).

172.7 Contrary to the Further Particulars:

172.7.1 She could not say she heard the female voice shortly before the gunshots.

172.7.2 She could not say if there was a long period of silence before the shots (Record 169, lines 8-9).

172.7.3 She did not hear a woman screaming before the shots. (Record 169, lines 24-25).

172.7.4 She could not say it was “talking like fighting”.

172.7.5 She could not say that she had “formed the impression that the woman was arguing”.

172.7.6 She could not say that it was a woman “constantly talking”.

172.7.7 She could not say the voice was continuing up to the gunshots and then stopped.

172.7.8 She could not say the voice came from the Accused’s house.

173. Van der Merwe’s evidence raises, at best for the State, a speculative inference of a possibility of an argument.

174. The State’s reliance on the argument is further diluted and refuted by Mrs Stipp’s evidence. According to Mrs Stipp’s evidence she was awake

at about **02:59** (her clock, which was approximately 3 minutes early, showed **03:02** –Record 1102, lines 8-10 and 1104, lines 6-7). She was in the process of getting up, when she heard 3 sounds, which sounded like gunshots (Record 1102, lines 12-13).

175. Before the gunshots, Mrs Stipp, who was awake, did not hear a female voice talking or arguing.

176. The inevitable inference and at the minimum a reasonable inference is that the voice that Mrs van der Merwe heard was not emanating from the house of the Accused.

177. The State's reliance on an argument is further refuted by the evidence of Peter Baba, the security guard.

178. According to his evidence, which is supported by the information on the guard track (Exhibit "TTT"), he was positioned at the following stands in relation to the Accused's house:

178.1 At **02:18** at stand 287, which is the property of Mr Nhlengethwa, which is right next to the house of the Accused.

178.2 He passed the house of the Accused to go to stands 162 and 153. He was at stand 162 at **02:20** and at stand 153 at **02:22**.

179. When he was in the immediate vicinity of the Accused's house or having passed his house he did not hear any arguing. According to him

everything was normal (Record 432, line 22-23, 433, line 17-19).

180. If the lights were on at the house of the Accused or if they were arguing to the extent that Mrs van der Merwe could hear a female voice, Peter Baba would have told the Court about it and not that *"everything was normal"*. (Record 432, lines 19-20)

181. Clearly, the speculative nature concerning the evidence of a female voice far away, which the State seeks to rely upon for the existence of an argument, does not meet the criteria so as to constitute acceptable circumstantial evidence. It also does not meet any objective standard in order to qualify to form part of an event for purposes of the time lines.

182. We refer the Honourable Court to the summarised time line, whereafter we will motivate the time line as summarised.

SUMMARIZED, THE TIME CHRONOLOGY OF EVENTS EARLY MORNING OF 14 FEBRUARY 2013 IS AS FOLLOWS:

183. **02:20:** Security activated guard track next to the house of the Accused

184. Approximately any time between **03:12**– **03:14**: First sounds

185. Approximately **03:14/5**: Accused shouting for help

186. Approximately any time between **03:12 – 03:17**: Screaming

187. ±**03:15**: Accused seen walking in the bathroom

188. **03:15:51** (duration 16 seconds): Dr Stipp's telephone call to Security

189. **03:16** (duration 58 seconds): Mr Johnson's call to Strubenskop Security

190. **03:16:13:** Mr Michael Nhlengethwa's first call to security- did not go through

191. **03:16:36** (duration 44 seconds): Mr Michael Nhlengethwa's second call to security

192. **03:17**: Dr Stipp's attempted call to 10111

193. **03:17**: Second sounds

194. **03:19:03** (duration 24 seconds): Accused's call to Johan Stander (Exhibit ZZ8)

195. **03:20:05** (duration 66 seconds): Accused's call to 911 (Exhibit ZZ8)

196. **03:21:33** (duration 9 seconds): Accused's call to Security (Exhibit ZZ8 and Exhibit R)

197. **03:22:05** (duration 12 seconds): Security (Peter Baba) call to the Accused

198. **03:22** Security (Peter Baba) arrived at the house of the Accused

199. Approximately **03:22**: Johan Stander and Carice Viljoen arrived at the house of the Accused

200. Approximately **03:23/24**: Dr Stipp arrived at the house of the Accused

201. **03:27:06**: Johan Stander's call to 911 in the presence of Dr Stipp

202. **03:27:14** (duration nil): Dr Stipp's attempted call to security (Exhibit Q2)

203. **03:41:58**: Ambulance arrived at security gate of Silverwoods Estate (Photo YYY)

204. Approximately **03:50**: Declaration of death by Paramedics (Record 2187- Carice Viljoen) and Accused going upstairs to collect identity document of the Deceased

205. Approximately **03:55**: The Police arrived at the house of the Accused

THE FIRST SOUNDS- ANYTIME BETWEEN APPROXIMATELY 3:13 AND 3:14

206. **MRS VAN DER MERWE**

206.1 She woke up at around **01:56** (Record 159, line 1).

206.2 At approximately **03:00** she heard four gunshots (Record 159, lines 19-20), which was confirmed by her husband to have been gunshots (Record 161, lines 9-10). The shots occurred one shortly after the other (Record 161, lines 1-3).

206.3 After the four shots, she heard somebody crying out loud. It appeared to her to be a woman's voice but her husband told her

it was the Accused (Record 161, lines 24-25 and 162, line 1).

206.4 What is clear from Mrs van der Merwe's evidence is that the crying out loud, which sounded like a woman, was after the first shots.

206.5 We will demonstrate hereunder that the crying out loud (or screaming) occurred between approximately **03:12** and **03:17**.

206.6 It is thus clear that the four shots heard by Mrs van der Merwe occurred prior to **03:12** which is consistent with her statement of *"round about 03:00"*.

206.7 Dr and Mrs Stipp testified that the screaming was heard between the first and second sounds.

206.8 Mr and Mrs Nhlengethwa testified that the crying out loud was shortly after the first sounds (the "bang") as Mr Nhlengethwa called security at **03:16:36** to report the crying out loud which was before the second sounds at **03:17**.

206.9 Mr Johnson and Mrs Burger testified that the screaming was between approximately **03:12** and **03:17**.

206.10 The screaming stopped at **03:17** (See Dr Stipp (up to **03:15)**, Mrs Stipp, Ms Burger, Mrs Johnson).

206.11 It cannot be argued that Mrs van der Merwe heard the crying out

loud after the second sounds, which were at **03:17**, as it will be demonstrated below that the Accused screamed, shouted or cried out loud up to **03:17** (the second sounds), as it was then, according to Mrs Stipp, Mr Johnson and Mrs Burger (and the Accused) that the screaming stopped.

206.12 It accords with Mr Nhlengethwa and Mrs Nhlengethwa's evidence that he made a call at **03:16** to report the crying out loud.

206.13 Moreover, from **03:19** to **03:22** the Accused was engaged in telephone calls to Johan Stander, 911 and security;

206.14 At approximately **03:22** the Accused carried the Deceased downstairs. He was observed doing this by Johan Stander, Carice Viljoen and Peter Baba who arrived at his house at about **03:22**;

206.15 Thereafter, the Accused was in the presence of Carice Viljoen, Johan Stander, the paramedics and Police;

206.16 On the State's version, in its Reply to the Request for Further Particulars, Mrs Van Der Merwe heard an "argument" which stopped simultaneously with the four shots. This means, on the State's case, that the Deceased was shot because of the argument.

206.17 Accordingly, on the State's version the shots heard by Mrs van der Merwe could only be a reference to the first sounds as according to the State, the second sounds were preceded by screams and not arguing.

206.18 The four shots heard by Mrs van der Merwe accord with the four shots fired by the Accused.

206.19 There can be no doubt that the four shots heard by Mrs Van Der Merwe constituted the first sounds. On her evidence it was round about **03:00**, which could be any time after **03:00** but before the crying out loud/screaming, which we will demonstrate occurred between approximately **03:12** and **03:17**.

207. **MRS A STIPP**

207.1 According to Mrs Stipp, the time indicated on her clock radio was **03:02** when she woke up. She was in the process of getting up when she heard 3 sounds, which sounded like gunshots (Record 1102, lines 8-10). According to her, her clock radio could be 3 minutes early (Record 1104, lines 6-7).

207.2 This accords with the evidence of Mrs Van Der Merwe, but for the fact that Mrs Van Der Merwe heard four shots, and but for the fact that it is uncertain how long after **03:00** the shots were fired.

207.3 On her evidence, the first sounds were at about **03:02.** This must be analysed with reference to the second sounds which were at **03:17.**

207.4 According to Mrs Stipp's evidence, after the shots:

207.4.1 she spoke to her husband which was of short duration;

207.4.2 she looked through the window;

207.4.3 she went to the (smaller) balcony. She remained there for a short time (Record, 1103, lines 11-14 and 1128, lines 7-12);

207.4.4 she moved to the bigger balcony for a better view. She was not honest about going to the bigger balcony. Dr Stipp testified that, *"she was looking through her window and I heard the screaming ... I remember talking to her because I, you could actually hear from the balcony where I was standing. So she was not with me initially when I heard the screams. She was still in the house. When I went inside again, I met her at the door. She was coming to meet me, I was coming in. So she was not standing beside me at the railing looking out"* (Record 353, lines 14-21)

207.4.5 Dr Stipp then walked back into the bedroom before **03:15** as he made a call to security (at **03:15:51**) and then attempted to call 10111 (at **03:17**). According to Dr Stipp he met Mrs Stipp at the door as she was coming from inside the house when he moved to the main bedroom to make the call.

207.5 Dr Stipp moved into the main bedroom just before **03:15**.

207.6 On an analysis of Mrs Stipp's movements from hearing the first shots, it is clear that her movements continued for a relatively short time.

207.7 Her evidence that she heard the first shots shortly after **03:02** could therefore not be correct as her movements between getting up and **03:15** could definitely not be 13 minutes.

207.8 This means that the first sounds must have occurred relatively shortly before **03:15**, which could be anything between **03:12** and **03:13**.

207.9 The time of about **03:13/14** is consistent with Mr and Mrs Nhlengethwa's evidence. Mr Nhlengethwa made the calls at **03:16**. If regard is had to Mr Nhlengethwa's movements from the time he woke up until he made the calls at **03:16**, it is consistent with the estimation of the first sounds to be around

03:12/14.

208. **DR STIPP**

208.1 Dr Stipp was woken up by three loud bangs, as a consequence of which he went to the bigger balcony. (Record 309, lines 19-22)

208.2 He heard a woman screaming and also a man screaming (Record 322, lines 4-11). This was before **03:15** as he returned to the main bedroom and phoned Silverwoods Security at **03:15:51** as recorded in the Security's Telkom phone log (duration 16 seconds). (Exhibit QQ and Record 313, lines 7-8)

208.3 It is clear that he heard the first sounds before he made the call at **03:15:51**, which is consistent with the evidence of Mrs Stipp and Mrs Nhlengethwa (who woke Mr Nhlengethwa up).

208.4 An analysis of the movements of Dr Stipp between the first sounds and the second sounds shows that on his version the first sounds must have occurred very shortly before the second sounds. However, we will demonstrate hereunder that Dr Stipp's time estimations were incorrect and in some instances untrue.

209. **MR NHLENGETHWA**

209.1 When facing the Accused's house, he is the immediate neighbour to the left of the Accused's house.

209.2 Mr Nhlengethwa's wife woke him up and told him she had heard a bang.

209.3 He went to his daughter's room to make sure she was safe. He checked the house quickly (Record 2209, lines 2-5) then went back to the main bedroom, where he peered through the blinds.

209.4 Thereafter, he heard a man crying very loudly in a high pitched voice.

209.5 He phoned security at **03:16:13** to report the loud crying. (Exhibit QQ). The call did not go through.

209.6 He again phoned security at **03:16:36**. (Exhibit QQ) and spoke for 44 seconds in reporting the loud crying.

209.7 If regard is had to his movements from the time he woke up to making the call to security at **03:16**, the estimation is that the first sounds must have been anytime between approximately **03:12** to **03:14**.

209.8 This estimated time is consistent with the estimated times of the first sounds above.

210. **MRS NHLENGETHWA**

210.1 She is the wife of Mr Nhlengethwa.

210.2 She woke up because of a ‘bang’ noise. She woke her husband up. Her husband left the main bedroom to check if their daughter was safe and whether it was safe in the house.

210.3 She heard a male shouting *“help, help, help,”* when her husband was outside the main bedroom.

210.4 Not long after that she heard a male crying very loudly in a high pitched voice. She imitated the crying out loud in Court, which recording will be played in Court during argument. It resembles a high pitched scream.

210.5 Her husband called security (at **03:16**) to report the loud crying.

210.6 Her evidence confirms the estimation of the time of the first sounds to be anything between approximately **03:12** and **03:14**.

211. **MR JOHNSON**

211.1 Mr Johnson heard a woman screaming.

211.2 He ran to the patio.

211.3 On the patio he heard the woman screaming and a man

shouting for help.

211.4 He stood on the balcony for a short time (Record 212, lines 11-12).

211.5 He went inside to make a call at **03:16**.

211.6 His movements before **03:16** could not have taken longer than 2 to 3 minutes.

211.7 On 6 March 2013 Mr Johnson compiled notes of the events (Record 263, line 7). He edited or amended the notes three times to ensure their accuracy (Record 263, line 5 and 278, lines 10-11). The notes were marked exhibit's O1-O3.

211.8 In all three editions of the notes he estimated that *"it was around **03:12**"* when he woke up and heard a woman screaming. (Exhibit's O1-O3) (*emphasis supplied*). His movements analysed above show that on the probabilities it would have been after **03:12**.

211.9 In the final paragraph of his notes, he stated that his wife's *"version was the same as I explained above."*

211.10 According to the evidence of Dr Stipp, Mrs Van der Merwe, Mr Nhlengethwa, Mrs Nhlengethwa and the Accused, the screaming/crying out loud started relatively soon after the first

sounds.

211.11 If regard is had to his movements prior to his telephone call to security at **03:16**, and the evidence of the other witnesses referred to above, as to when the screaming/shouting/crying out loudly started in relation to the first sounds, the first sounds would have occurred between around **03:12** to **03:14**.

212. **MRS BURGER**

212.1 Mrs Burger testified that she woke up just after **03:00** from a woman's screams (Record 28, lines 9-11). Her husband contradicted her evidence by stating that she woke up, not because of the screams, but because of him getting out of bed. (Record 180, lines 24-25).

212.2 Her time of just after **03:00** cannot be correct if compared to the evidence of Mr Johnson, Dr Stipp, his notes (which Mrs Burger agreed with), Mr and Mrs Nhlengethwa. However, just after **03:00** may be a wide time frame.

212.3 She heard a woman screaming and a man shouting *"help"* three times. She called her husband, (who was on the balcony) to return to the bedroom. Her husband then telephonically spoke to (Strubenskop) Security at **03:16** for 58 seconds. (Record 28, lines 1-25, 29, lines 1-25, 30, lines 1-13 and 140, lines 3-5)

212.4 It is clear that it was of short duration from when she woke up until her husband called security.

212.5 It is clear from the evidence of Dr Stipp, Mrs Stipp and Mr and Mrs Nhlengethwa that the screaming occurred relatively soon after the first sounds.

212.6 On the evidence of Mrs Burger, in the context of the evidence of Mr Johnson and his notes and the evidence of Dr and Mrs Stipp and Mrs Nhlengethwa, having regard to her evidence from the time she woke up to the second sounds, the first sounds would have occurred anything between **03:12 to 03:14**.

213. **CARICE VILJOEN (STANDER)**

213.1 Mrs Viljoen woke up and heard dogs barking.

213.2 She then heard a man shouting, *"help, help, help."*

213.3 According to her, the shouting was approximately five minutes before her father, Johan Stander, had received a call from the Accused, which was at **03:19**. This causes the time estimation to be approximately **03:14** when *"help, help, help"* was shouted.

213.4 In the context of the evidence of Mrs Nhlengethwa, Mr Johnson, Mrs Burger, the Accused shouted *"help, help, help"* relatively soon after the first sounds.

213.5 Accordingly, her evidence supports the time estimation that the first sounds must have occurred between approximately **03:12 – 03:14.**

214. **MRS MOTSHWANE**

214.1 When facing the Accused's house, she is the immediate neighbour of the Accused, living in the house to the right of the Accused's house.

214.2 She woke up, hearing a man crying out very loudly. The crying was continuous (Record 2250,l lines 12-25– 2251, lines 1-6). She imitated the crying out loud which resembled a high pitched scream. The recording will be played in Court during argument.

214.3 In her statement she said that she had heard a man crying out loudly at about **03:20**.

214.4 She testified that the **03:20** was an estimate as she did not look at the time when she woke up (Record 2254, lines 24-25).

214.5 According to all four State witnesses there was no loud sounds from anyone after **03:17** (i.e. the second sounds). In any event, the Accused was on the telephone with Johan Stander at **03:19** for 24 seconds (Exhibit ZZ8), and thereafter at **03:20** on the telephone with 911 for 66 seconds (Exhibit ZZ8). Then he called Security at **03:21** and Security returned his call at **03:22**. At

approximately **03:22** he carried the Deceased downstairs and was observed by Carice Viljoen, Johan Stander and Peter Baba who confirmed the time having been **03:22**.

214.6 The crying out loud could therefore not have been at approximately **03:20**.

214.7 She testified that after some time she heard a *"car passing by".* She looked through the window facing the house of the Accused. She saw the Mini Cooper. She told her husband, *"I just seen the Mini Cooper that has just stopped there."* (Record 2252, lines 12-15)

214.8 She said that from the time she had heard the crying out loud for the first time to the time of the Mini Cooper stopping was *"more than five minutes. Plus minus ten minutes, not more than ten minutes…"* (Record 2253, lines 16-23)

214.9 The Mini Cooper of Carice Viljoen arrived at the Accused's house at about **03:22** (according to the evidence of Johan Stander and Carice Viljoen they arrived in the Mini Cooper of Carice Viljoen within approximately 3 minutes from the time when the call from the Accused was received by Johan Stander at **03:19**). Peter Baba confirmed this as he met them at the house of the Accused. He called the Accused at **03:22** when he arrived at the house of the Accused. The time of his call at

03:22 was confirmed in Exhibit ZZ8. Johan Stander, Carice Viljoen and Peter Baba saw the Accused carrying the Deceased down the stairs which confirms that the three of them arrived more or less at the same time at the Accused's house.

214.10 Mrs Motshwane's estimation of approximately 10 minutes between the time of her waking up and the Mini Cooper arriving at the scene, shows the crying out occurred approximately ten minutes before **03:22**.

214.11 The timing of more than 5 minutes and not more than 10 minutes before **03:22** takes the time when she woke up, to a time between **03:12** and **03:17.**

214.12 This is consistent with the estimation of the time of the first sounds to have occurred between approximately **03:12-03:14**.

THE TIME OF SHOUTING, "HELP, HELP, HELP"- APPROXIMATELY 03:14/15

215. **MR JOHNSON**

215.1 When he was on the balcony he (also) heard a male person shouting, *"help, help help."* (Record 180, lines 19-23).

215.2 The shouting *"help help help"* on his version was after approximately **3:12** but before **3.16.** If regard is had to his movements, the shouting occurred between approximately

03:12 and 03:15 as his evidence was that after hearing the *"help, help, help"* his wife called him back into the bedroom to call Security (Record 180, lines 24-25 and 181, line 1). He called security at **03:16**. This accords with his notes (Exhibits O1-O3)

216. **MRS BURGER**

216.1 Her hearing the shouting *"help help help"* falls in the same time bracket as testified to by Mr Johnson, namely approximately **03:12** to **03:15**. (Record 28, lines 21-24)

217. **DR STIPP**

217.1 He heard a man screaming prior to **03:15:51.**

217.2 He heard a man shouting, *"help, help, help"* after he had allegedly spoken to Security at **03:27** (Record 314, lines 4-5).

217.3 Dr Stipp's evidence is factually incorrect and in conflict with the evidence of Mr Johnson, Mrs Burger, Mrs Nhlengethwa and Carice Viljoen.

217.4 It will be demonstrated below that his evidence is not only contrary to the evidence of the witnesses referred to above, but also that at the time suggested by Dr Stipp (after **03:27)**, he (Dr Stipp) was already at the house of the Accused. The unreliability of Dr Stipp's evidence in relation to, *inter alia,* the time

chronology is dealt with in detail below.

217.5 However, if regard is had to the fact that Dr Stipp's evidence was that he had heard *"help, help, help"* just after he had spoken to security on the telephone (Record, 363, lines 6-9), it could only mean that Dr Stipp heard the *"help, help, help"* just after **03:15:51**.

217.6 The objective evidence is that the only call of Dr Stipp which went through to security was at **03:15:51** (Call Register Exhibit Q). The telephone conversation at **03:15** was confirmed by Peter Baba who went to Dr Stipp's house as a result of Dr Stipp's phone call. (Record 427, lines 1-6) Thereafter Peter Baba went to the Accused's house. He arrived at the Accused's house at **03:22**.

217.7 If Dr Stipp heard *"help, help, help"* at about **03:15** it would be consistent with the evidence of Mrs Burger, Mr Johnson, Carice Viljoen and Mrs Nhlengethwa as to when they had heard the man screaming for help.

218. **MRS NHLENGETHWA**

218.1 Shortly after she had woken up because of a 'bang' noise, her husband left the main bedroom to check on the safety of their daughter and the interior of the house.

218.2 Shortly thereafter she heard a male shouting help three times.

218.3 Shortly thereafter her husband made a call to Security at **03:16**.

218.4 If regard is had to the movements of Mr Nhlengethwa as referred to in his evidence, the shouting for help three times must have taken place at approximately **03:14/03:15.**

219. **MRS C VILJOEN**

She heard someone shouting help three times. She estimated the shouting to have occurred approximately 5 minutes before **03:19**, which supports the estimated time of shouting to be approximately **03:14/03:15**.

THE SCREAMING- APPROXIMATELY ANY TIME BETWEEN 03:12 – 03:17

220. We deal in detail with the *"screaming"* below, screaming being *"shouting, screaming, crying out loud"*. For present purposes we deal with the *"screaming"* in relation to the chronology or time lines.

221. **MRS VAN DER MERWE**

221.1 After the shots at around **03:00,** she heard that somebody was crying out loudly. It appeared to her to be a woman's voice but her husband told her that it was the Accused (Record 161, lines 24-25, 162, line 1).

221.2 According to her version the four shots occurred shortly after **03:00** and the crying out loudly followed thereafter.

221.3 It was demonstrated above that the crying out loudly she had heard was at the same time that other witnesses had heard the screaming or crying out loud.

222. **DR STIPP**

222.1 Dr Stipp was woken up by three loud bangs, as a consequence of which he went to the bigger balcony (Record 309, lines 1922).

222.2 He heard a female screaming three or four times and also heard a man screaming (Record 309, lines 23-25 and 322, lines 3-11).

222.3 He went into the bedroom before he made the call to Security at **03:15:51**. He then tried to call 10111 at **03:17** at which time he heard the second sounds.

222.4 If regard is had to his movements the screaming was approximately 1-2 minutes before **03:15:51**.

222.5 On his evidence the screaming was from about **03:14** and he heard no screaming after **03:15**.

223. **MRS STIPP**

223.1 According to Mrs Stipp, the time on her clock radio was **03:02**

when she woke up. She was in the process of getting up when she heard three sounds, which sounded like gunshots (Record 1102, lines 813). Her clock radio could be three minutes early (Record 1104, lines 6-7).

223.2 After the shots she heard a woman screaming and also a man screaming (Record 1105, lines 1-7).

223.3 This was before **03:15** and it continued until **03:17** (Record 1105).

223.4 If regard is had to her movements the screaming was about 1 – 2 minutes before **03:15:51,** which is consistent with the estimated time of **03:12 – 03:17**.

224. **MR NHLENGETHWA**

224.1 Mr Nhlengethwa's wife woke him up and told him she had heard a bang.

224.2 He went to his daughter's room to make sure that she was safe. He checked the house quickly (Record 2209, lines 2-3) then went back to the main bedroom, where he peered through the blinds.

224.3 Thereafter, he heard a man crying very loudly in a high pitched voice (Record 2210, lines 5-7). This was heard before he made

the calls to Security at **03:16** and whilst he was on the phone (Record 2211, lines 24-25, 2212, lines 20-23).

224.4 If regard is had to his movements, the screaming started a few minutes before **03:16**, which is consistent with about **03:12 – 03:17**.

225. **MRS NHLENGETHWA**

225.1 She woke up because of a 'bang' noise. She woke her husband up. Her husband left the main bedroom to check if their daughter was safe and if it was safe in the house.

225.2 She heard a male shouting *"help, help, help,"* shortly after her husband had left the main bedroom.

225.3 Not long thereafter she heard a male crying very loudly in a high pitched voice.

225.4 She heard the crying out loud before her husband called security (at **03:16**) to report the loud crying.

225.5 If regard is had to her evidence, the screaming started a few minutes before **03:16**, which is consistent with the estimated time of **03:12 – 03:17**.

226. **MR JOHNSON**

226.1 In all three editions of the notes, he estimated that *"it was around **03:12**"* when he woke up and heard a woman screaming. (Exhibit's O1-O3).

226.2 Shortly after hearing a woman screaming and a man shouting *"help"* three times he made a call to security at **03:16** which lasted 58 seconds (Record 180, lines 19-25, 181, lines 1-25 and 216, lines 7-10).

226.3 If regard is had to his evidence and his movements, the screaming was at about **03:12 – 03:17**.

227. **MRS BURGER**

227.1 Mrs Burger testified that she woke up just after **03:00** from a woman's screams (Record 28, lines 9-11).

227.2 She heard a woman screaming and a man shouting *"help"* three times. She called her husband, who was on the balcony, to return to the bedroom. Her husband then telephonically, spoke to (Strubenskop) Security at **03:16** for the duration of 58 seconds. (Record 28, lines 1-25, 29, lines 21-25, 30, lines 1-13 and 140, lines 3-5)

227.3 The screaming stopped at **03:17** or faded immediately

thereafter.

227.4 If regard is had to her movements in relation to her waking up and the telephone call at **03:16**, the estimated time of about **03:12** to **03:17** for the screaming to have occurred.

228. **MRS MOTSHWANE**

228.1 She woke up hearing a man crying loudly in a high pitched voice. She described it as a cry of pain as if one of the security guards had been shot. (Record, 2250, lines 12-18

228.2 After some time she heard a *"car passing by"*. She looked through the window facing the house of the Accused. She saw the Mini Cooper. She told her husband, *"I just seen the Mini Cooper that has just stopped there."* (Record 2252 , lines 12-15)

228.3 She said from the time she had heard the crying for the first time to the time of the Mini Cooper stopping was *"more than five minutes. Plus minus ten minutes, not more than ten minutes…"* (Record 2253, lines 16-23)

228.4 The Mini Cooper of Carice Viljoen arrived at the Accused's house at about **03:22** as stated above.

228.5 On her evidence the estimated time of the screaming to be between **03:12 – 03:17** seems correct.

THE ACCUSED WAS SEEN WALKING IN THE BATHROOM - APPROXIMATELY 03:15

229. According to Mrs Stipp's statement (exhibit "YY") she was on the balcony when she saw a man walking in the bathroom of the Accused. Very soon thereafter, Mrs Stipp and Dr Stipp went back into the main bedroom for Dr Stipp to make a telephone call. She heard three thud sounds. At that time Dr Stipp was on the telephone trying to call 10111. It is not in dispute that Dr Stipp tried to call 10111 at **03:17**.

230. However, in her evidence she testified that she did not see the man walking in the bathroom but that she was told by Dr Stipp that he had seen him. This was just before Dr Stipp went back into the bedroom to make the telephone calls. She said, *"thereafter, he (Dr Stipp) went inside, as we decided to get help,"* (Record 1103, lines 23-25, 1104, line 1 and 1105, lines 8-13) and he tried to call 10111.

231. Mrs Stipp, in trying to explain the contradiction between her affidavit and her evidence with reference to her seeing the man walking, testified *"I think the night that we took down the affidavit, that is just <u>what I could recall</u>"* (Record, 1163, lines 11-12). It does not make sense that she could recall (not too long after the incident) that she had seen a man walking if she did not in fact see him. *(Emphasis added)*.

232. When she consulted with Mr Nel and Captain van Aardt, she told them, *"that I have thought every second through of that night, and I know that I*

did not see the man myself". (Record 1163, lines 13-15).

233. This about turn in version still does not explain why, when she deposed to her affidavit, she recalled having seen a man walking.

234. It exposes the unreliability of her evidence as she was not positioned on the bigger balcony and could not have *"recalled seeing a man walking in the bathroom"* (Record, Dr Stipp, 353, lines 14-21 – deals with her not being on the big balcony).

235. The evidence confirms that it could only have been the Accused who was seen walking in the bathroom from right to left. Dr Stipp described the person as one with a fair silhouette. The Accused had no shirt on and the Deceased had a black top on.

236. Dr Stipp moved from the (bigger) balcony into the main bedroom to call security. He called security at **03:15:51** and he attempted to call 10111 at **03:17**. It was during this attempted call to 10111 that he had heard the second sounds.

237. It is clear from Mrs Stipp's statement and her evidence that the Accused was seen by Dr Stipp in the bathroom just before Dr Stipp went back into the bedroom to make the call to security at **3:15:51** and the attempted call to 10111 at **3:17**.

238. However, according to Dr Stipp, he saw the Accused (a person) in the bathroom at approximately **03:30** which was (according to him) after he

had made the second call to security at **03:27**.

239. According to his evidence security arrived a *"few minutes later"* at his house (Record 314, line 7).

240. He went out onto the other balcony watching them as they went. He then saw that someone was walking in the bathroom from the right to the left (Record 314, lines 18-19) (according to his evidence this would be at a time after **03:30**).

241. We will demonstrate hereunder that the time given by Dr Stipp as approximately **03:30** is incorrect, as at that time Dr Stipp was at the house of the Accused and the Accused was downstairs with the Deceased in the immediate presence of Carice Viljoen.

242. To further demonstrate that Dr Stipp's evidence that he saw the man walking in the bathroom after about **03:30** is untrue, we refer to the evidence of Mrs Stipp. Mrs Stipp testified that when security came to their house, she indicated to the Accused's house and told security *"that is where he (Dr Stipp) saw the man walking (in the bathroom)"* (Record 1171, lines 1-7).

243. This means that when security arrived at the Stipp's house Mrs Stipp already knew about Dr Stipp having seen the man walking in the bathroom.

244. This contradicts the evidence of Dr Stipp that he only saw the man

walking in the bathroom after security had left his house.

245. However, if regard is had to the fact that Dr Stipp in reality spoke to security on the telephone at **03:15:51** and that Peter Baba as a result thereof came to Dr Stipp's house (before **03:22** as he was at the Accused's house at **03:22** after speaking to Dr Stipp), then it confirms Mrs Stipp's evidence that Dr Stipp saw the man walking just before he spoke to security at **03:15:51**.

246. We will also indicate why Dr Stipp tailored his evidence to, *inter alia,* create the time of approximately **03:30,** instead of approximately **03:15** when he saw the man walking in the bathroom.

<u>03:17- THE SECOND SOUNDS</u>

247. Mr Johnson made a phone call to Strubenskop Security at **03:16** which lasted for **58 secs**, as per his statement and telephone data. (Exhibit N)

248. Both Mrs Burger and Mr Johnson heard the second sounds shortly after the above-mentioned phone call. According to their evidence, Mr Johnson ran back to the balcony after the phone call. Having returned to the balcony, he heard screaming and then *"gunshots"* (Record 182, lines 5-12) (Record 30, line 16).

249. The aforegoing means that the second sounds must have sounded very shortly after the **03:16** phone call, which coincides with Dr Stipp hearing *"three loud bangs"* when he was on the phone trying to call 10111 at

03:17. (Exhibit P).

250. Mrs Stipp confirmed the time of **03:17** as the time when she heard the three thud sounds when Dr Stipp was on the telephone trying to call 10111 at **03:17.**(Record 1104, lines 5-8, 1143, lines 13-17, 1168, lines 1-11, 1179, lines 4-8)

03:19:03 (TIME OF ACCUSED'S PHONE CALL TO JOHAN STANDER)

251. At **03:19:03** the Accused called Johan Stander and said *"Oom Johan please, please, please, come to my house. Please. I shot Reeva. I thought she was an intruder ..."* (Record 2143, lines 1-3). The call duration was **24 secs**. (Exhibit ZZ8)

03:20:05 (THE ACCUSED MADE A CALL TO NETCARE 911)

252. At **03:20:05** the Accused called Netcare 911. The call duration was **66 secs.** (Exhibit ZZ8).

03:21:33 (THE ACCUSED MADE A CALL TO SECURITY)

253. At **03:21:33** the Accused called security, which call was answered by Peter Baba. The call at **03:21:33** is corroborated by the Accused's detailed billing records received from Vodacom and confirmed by the State. It is also shown in the FSM charts attached to Capt Moller's statement. (Exhibit's R and S and ZZ8)

03:22:05 (TIME OF SECURITY'S RETURN CALL TO THE ACCUSED AND ARRIVAL OF SECURITY AT THE ACCUSED'S HOUSE)

254. At **03:22:05** Peter Baba called the Accused (Exhibit R and S). At that time Peter Baba had just arrived at the house of the Accused (Record 428, lines 7-10) from Dr Stipp's house.

03:22/03:23 (ESTIMATED TIME OF JOHAN STANDER AND CARICE VILJOEN'S ARRIVAL AT THE SCENE)

255. At **03:19** Johan Stander received the call from the Accused**.** As stated before, Johan Stander and his daughter, Carice Viljoen testified that they rushed to the house of the Accused, and that it would not have taken them longer than approximately three minutes to arrive at the house of the Accused, after having received the phone call. (Record 2178, lines 21-23)

256. Accordingly, Johan Stander and Carice Viljoen would have arrived at the Accused's house at approximately **03:22**.

257. Their arrival time at approximately **03:22** is confirmed by Peter Baba as he (Baba) made a call to the Accused at the time when he arrived at the Accused's house from Dr Stipp's house. This call was at **03:22:05**.

258. Upon their arrival, all three of them observed the Accused carrying the Deceased downstairs (Record Baba 429, lines 11-12; Record Johan Stander 2143, lines 14-16 and Record Carice Viljoen 2180, lines 1-4).

APPROXIMATELY 03:23/3:24 (DR STIPP ARRIVED AT THE HOUSE OF THE ACCUSED)

259. Mr Nhlengethwa made a call to security at **03:16.** Shortly thereafter, he witnessed security guards arriving at the Stipp's home (Record 2213, lines 5-7).

260. The evidence shows that it was Peter Baba.

261. Shortly thereafter he observed the security guards and Dr Stipp (in different cars and on different routes), driving to the house of the Accused.

262. The security guard in the car was Peter Baba, who arrived at the Accused's house at **03:22**.

263. Dr Stipp arrived shortly thereafter (Record Mr Nhlengethwa 2215, lines 21-25).

264. According to Dr Stipp's evidence and that of Johan Stander and Carice Viljoen, Dr Stipp examined the Deceased at the house of the Accused in the presence of the Accused.

265. Thereafter, Dr Stipp went outside and met with Johan Stander, who then called 911 at **03:27:06** in Dr Stipp's presence. (Record Dr Stipp 318, lines 3-15 and 365, lines 6-8 and Johan Stander 2146, lines 5-8)

03:27:06 (TIME OF JOHAN STANDER'S CALL TO NETCARE)

266. At **03:27:06** Johan Stander made a call to Netcare 911.

267. Dr Stipp was present when Johan Stander made the phone call to 911. Dr Stipp gave Johan Stander the number for Netcare. (Record Dr Stipp 318, lines 3-15 and 365, lines 6-8 and Johan Stander 2144, lines 9-11)

03:27:14 (TIME OF DR STIPP'S SECOND ATTEMPTED CALL TO SECURITY)

268. Dr Stipp tried to call security for the second time. (Exhibit Q) This call was made from the house of the Accused. It was probably to inform them about the Emergency Services coming to the house of the Accused. The call was not answered as shown on the telephone data (Exhibit Q).

269. According to Mr Stander's evidence, he asked one of the security guards who was present to radio the gate and urgently get the police just after he called for the ambulance (Record 2145, lines 14-16). He may have instructed the security guard to do so after Dr Stipp could not get hold of security at 03:27 when Dr Stipp attempted to call security.

03:41:58 AMBULANCE ARRIVED AT THE SECURITY GATE OF THE SILVERWOODS ESTATE

270. Photo Exhibit "YYY" depicts the time of the paramedics arriving at the main entrance gate to Silverwoods Estate.

APPROXIMATELY 03:50 (ACCUSED WENT UPSTAIRS)

271. Carice Viljoen testified that when the Deceased was pronounced dead by the paramedics the time was **03:50**(Record 2187, lines 6-12). This accords with the arrival of the paramedics shortly after **03:41**.

272. The paramedics needed to see the identity document of the Deceased in order to fill out and sign the "Declaration of Death" form. The Accused went upstairs to fetch the Identity Document of the Deceased and returned with her handbag.

APPROXIMATELY 03:55 (THE POLICE ARRIVED AT THE HOUSE OF THE ACCUSED)

273. According to Colonel Van Rensburg he arrived at the Accused's house at approximately **03:45**(Record 747, lines 9-11). This could not be correct, as the Police were not there when the Accused went upstairs at approximately **03:50** to fetch the Identity Document of the Deceased.

274. Van Rensburg testified that upon his arrival the paramedics had already declared the Deceased dead (Record 748, lines 11-18).

275. Accordingly, the Police must have arrived after **03:50**. The translation of Van Rensburg's evidence is that Van Rensburg arrived at **03:55.**

276. Reference was made above that other police members arrived at more or less the same time.

DR STIPP AND THE CHRONOLOGY OF EVENTS

277. We indicated above that we would deal with Dr Stipp's evidence in relation to the time when material events occurred, to demonstrate that Dr Stipp's evidence is unreliable and in some instances false.

278. Dr Stipp's evidence relevant to:

278.1 hearing the first sounds;

278.2 hearing screaming/shouting between the first sounds and the second sounds;

278.3 hearing the second sounds;

278.4 going to the Accused's house; and

278.5 assisting Johan Stander to call 911,

is not in dispute.

279. However, his evidence as to when certain events took place is unreliable, and in some instances tailored with the objective of assisting the State's allegations.

280. We deal in detail with the instances where his evidence is unreliable and/or tailored in relation to the time of the events in an annexure marked as Annexure A : "Dr Stipp and the Chronology of Events". We

also deal in the annexure with further contradictions in his evidence (unrelated to the time of events).

281. We show conclusively in the annexure that Dr Stipp was wrong in the following aspects:

281.1 that his first call to security did not go through;

281.2 that his second call to security did go through;

281.3 that the Accused shouted help after 03:27, i.e. after he had called security for the second time, as at that time Dr Stipp was already at the Accused's house and the Accused was in the presence of other people;

281.4 that he saw the Accused walking in the bathroom after 03:30 as at that time Dr Stipp was at the Accused's house and the Accused was downstairs;

281.5 in his time estimation between the first and the second sounds;

281.6 in seeing the lights were on in the Accused's bathroom and the house of Mr Nhlengethwa, moments or shortly after the first sounds had occurred;

281.7 in hearing a woman screaming.

282. We also demonstrate in the annexure that Dr Stipp in some respects

tailored his evidence in an attempt to assist the State.

THE FIRST SOUNDS AND THE SECOND SOUNDS – SHOTS OR THE CRICKET BAT STRIKING THE DOOR

283. It is the version of the Accused that he fired four shots in quick succession and subsequently, when he realised it might have been the Deceased who was in the toilet, he struck the toilet door three times with a cricket bat. The door panels cracked as a result of which the Accused could remove some of the door panels so as to gain entry to the toilet.

284. Therefore, it is the Accused's version that the first sounds were caused by the gunshots and the second sounds were caused by the cricket bat striking the door.

285. It is not in dispute that the Accused fired four shots and that the four shots perforated the toilet door. It is also not disputed that the toilet door was struck by a cricket bat.

286. In his bail affidavit (Exhibit D), the Accused dealt with the first sounds as being the shots and the second sounds as being the sounds caused by the cricket bat striking the door.

287. When the Accused deposed to his bail affidavit, he was neither privy to the statements in the police docket nor to the evidence to be led at the bail application. He could not have known that Dr Stipp and Mrs Stipp would testify about the first sounds and the second sounds. This

underlines his credibility in this regard.

288. On an analysis of the timelines for the chronology of events, the first sounds would have occurred at any time between **3:12** and **3.14** and the second sounds at **3:17**.

289. It was only shortly after Dr Stipp had testified that the four shots would have fatally injured the Deceased and that she would not have been able to scream after the shots (Record 335, lines 10-15) that the State placed on record (for the first time) that the second sounds at **03:17** were the gunshots (Record 341, line 23).

290. This the State was *"forced"* to do as it was then evident that if the first sounds were the gunshots, the "female screaming" heard by Mr Johnson, Mrs Burger, Dr Stipp and Mrs Stipp, could not be true.

291. It is respectfully submitted that the State's election was opportunistic, but self-destructive. On the one hand the State's case is that there was an argument (female voice talking) then the shots. On the other hand the State's case is that there was a female screaming, then the shots.

292. Factually, the "arguing" before the shots relied upon by the State on account of Mrs van der Merwe's evidence and the female screaming before the shots, could not have occurred during the same time period.

293. Mrs van der Merwe heard the female voice before the first sounds, and the crying out after the first sounds(the State's allegations of "arguing"

and then the shots). Dr Stipp, Mrs Stipp and Mr and Mrs Nhlengethwa heard the screaming or crying out loud after the first sounds.

294. According to the time analysis (*supra*) Mrs Burger, Mr Johnson and Mrs Motshwane also heard the screaming/crying out loud after the first sounds.

295. On the State's case, through the evidence of Mrs van der Merwe, there was an argument and then the shots (being the first sounds) and then the screams. However, the State elected to make the second sounds the gunshots, contrary to Mrs van der Merwe's evidence.

296. Both sounds (the first and second sounds) could not have been the four gunshots.

297. According to Dr Stipp the first sounds sounded like gunshots and the second sounds sounded similar/identical (Record 330, lines 22-23). It was therefore not necessary to call an expert to *"prove"* that the sound of a cricket bat striking a door may sound to the layperson like gunshot sounds, as one of the sounds must have been gunshots and the other sounds the cricket bat striking the door.

298. Wolmarans (Record 2380, lines 19-22) and his report (Exhibit MMM, para 41.8) in any event testified that the cricket bat striking the door could resemble the gunshot sounds to a layperson.

299. The State suggested in the examination of some of its witnesses that the

interval between gunshots being fired, as opposed to a cricket bat repeatedly striking a door, could not be the same. However, apart from failing to call any witness to testify in accordance with this, the State called Dr and Mrs Stipp. The factual position is that Dr and Mrs Stipp were unable to distinguish between the sounds of, and intervals between gunshots and a cricket bat striking the door (Record 1102, line 13, 1104, line 8, 1114, lines 1-15, Exhibit YY).

300. The State has not presented any evidence or put any statement to the Accused as to what the first sounds would have been, if they had not been the gunshots.

301. The State must give an explanation for the first sounds, if they were not the shots, as the State cannot think the first sounds away. They were introduced by Dr Stipp, Mrs Stipp, Mrs van der Merwe and Mrs Nhlengethwa.

302. Mrs van der Merwe heard four shots in quick succession. It accords with the four shots and the version of the Accused.

303. Mrs Stipp and Dr Stipp heard three shots in quick succession. It is conceivable that they could have been wrong in the number of shots (the first sounds).

304. Dr Stipp's evidence is in any event not reliable with reference to a number of shots. He contradicted himself in regard to the number of

sounds in respect of the second sounds. In his statements he referred to two to three shots and in his evidence to three shots and then again to Johan Stander as four shots. It must also be borne in mind that Dr Stipp woke up because of the first sounds, and as such, a mistake in hearing the number of shots on waking up, is plausible. We have also shown that Dr Stipp's evidence was fraught with unreliable evidence.

305. The first sounds heard by Dr and Mrs Stipp caused Dr Stipp to call security at **3:15:51** to report the shooting. (Exhibit Q), (Peter Baba, Record 427, lines 17-20.) In addition, he attempted to call 10111 to report the shooting. This was at **03:17.**

306. Mrs Stipp had just woken up because of a bout of coughing. We will demonstrate below that, when dealing with the screaming, Mrs Stipp's evidence was unreliable in material respects and that her having heard the first sounds as only three shots, has no guarantee of reliability.

307. What is significant about Mrs Stipp's statement is that she described the first sounds she heard to be shots as sounding like gunshots and the subsequent sounds (at **03:17)**, although sounding like gunshots, as three thud sounds (Record 1167, line 25; 1168, lines 1-2 and 7-8). The three thud sounds (as described by Mrs Stipp) are consistent with the Accused striking the toilet door three times with the cricket bat at **03:17**.

308. Mr Johnson and Mrs Burger's evidence that they heard shots (i.e. the second sounds) does not assist in making the second sounds the

gunshots. Dr and Mrs Stipp's evidence was that the first and second sounds sounded similar.

309. Mr Johnson and Mrs Burger were ± 177 metres away when they heard the second sounds, which in itself could not account for a reliable identification. Furthermore, they are not persons experienced in (correctly) identifying gunshots (Record, Burger 153, lines 10-25 and 154, lines 1-8) (Record, Johnson 216, lines 1-4).

310. If the second sounds were the gunshots, there was in any event not enough time for the actions listed below, between the shots and making the call to Johan Stander at **03:19:03** as we will demonstrate hereunder.

311. According to Mr Johnson he called security at **03:16** and the duration of the call was 58 seconds. He then went back to the balcony. He heard screaming and then the shots. This means that the second sounds could not have been before **03:17:15**.

312. This accords with Dr Stipp's evidence that he tried to call 10111 at **03:17**. He had difficulties getting through. He then heard the second shots. Mrs Stipp looked at the bedside clock and saw that it was **03:17.**

313. Consequently, there was, at best 1 minute and 45 seconds between the second sounds and the call to Johan Stander at **03:19:03**.

314. We will demonstrate below that, on the acceptable facts, the following actions could never fit into a the 1 minute, 45 seconds time frame.

315. The Accused fired four shots at about **03:17:15**.

316. He went back into the bedroom. We ignore for present purposes that the Accused searched for the Deceased in the bedroom as his evidence may be disputed.

317. He attached his prosthesis, which would have taken him about 30 seconds. (Record 1903, lines 9-11)

318. The State's contention that he did not attach his prosthesis, but that he remained on his stumps when he struck the door with the cricket bat, has no substance. We summarise the concessions by Colonel Vermeulen in this regard and deal in more detail with his evidence in an annexure marked as **Annexure B : "Vermeulen"**.

318.1 Colonel Vermeulen conceded that the two marks on the door identified by him in court as matching with the cricket bat striking the door, when according to him, the Accused was on his stumps, also matched with the cricket bat when the Accused positioned on his prosthesis.

318.2 Colonel Vermeulen professed not to have read the Accused's version made at the bail application. This is contrary to all the other State experts (Capt Mangena and Colonel van der Nest) who had read the Accused's version, which was to be expected, to permit experts to consider the version of the Accused in the

context of their expert views and to furnish objective findings. When Colonel Vermeulen realised that his denial in this regard may not carry conviction, he alleged that he had only scanned pages of the Accused's version.

318.3 Colonel Vermeulen conceded that there was a third mark (the top mark) which showed that the door was stuck with the cricket bat.

318.4 He conceded that the top mark was too high to be reached with a strike of the bat if the Accused was on his stumps when striking the door, unless the Accused moved closer to the door, in which event his power to break down the door may be compromised.

318.5 He adapted his evidence to move the Accused closer to the door in order to reach the top mark to avoid having to confess that the top mark was too high if the Accused was on his stumps. He did this notwithstanding the fact that he had not even attempted to match the top mark with the cricket bat if the Accused was closer to the door.

318.6 Colonel Vermeulen matched the mark and took photos of the matching (Photos UU) but mysteriously omitted to include them in his photo album.

318.7 Dixon and Wolmarans testified that the top mark matched the cricket bat striking the door when the Accused was positioned on his prosthesis (Record, Wolmarans 1966, lines 23-25) (Record Wolmarans, 2351, lines 6-15).

318.8 When it was put to him that there would be evidence that the top mark matched the cricket bat, he replied *"M'Lady, if there is evidence to that effect, that is fine. The day that I did the investigation, I was happy to have proven that the cricket bat caused damage to the door and as reported in my affidavit"* (Record 1292, lines 10-14) Clearly, Colonel Vermeulen tried to avoid the top mark by saying that his instructions were to determine whether the cricket bat damaged the door (and not to account for every such mark).

318.9 In re-examination Vermeulen said that the top mark did not break the door to the same extent as the lower mark of the two did. (Record 1295, lines 2-5) This makes it clear that Colonel Vermeulen :

318.9.1 matched the top mark with the cricket bat;

318.9.2 took photos of it matching (Photos UU1-5);

318.9.3 knew that the strike of the top mark by the cricket bat caused some damage to the door;

318.9.4 removed photographs UU1-5 from his album as the top mark was too high to support his theory that the Accused was positioned on his stumps when he struck the door.

318.10 Dr Versfeld, in any event, made it clear that the Accused could not hit the door with the cricket bat when on his stumps, and if he was holding the bat with one hand, he would not have had sufficient force to cause any damage to the door. (Record 2596, lines 14-25 and 2597, lines 1-6) because he would *"over-balance and fall down ..."* due to the fact that he has difficulty balancing on his stumps if he is carrying or holding something with two hands.

318.11 Mr Nel did not dispute Dr Versfeld's evidence in this regard, nor did he ever ask the Accused during cross-examination to demonstrate how he struck the door whilst on his stumps, even though he asked him to demonstrate this whilst on his prosthetics.

319. The Accused kicked the door. The prosthesis footprint caused by the kicking was evident. (Dixon, Record 1965, lines 20-25 and 1966, lines 1-22; Photos JJJ2.10). Wolmarans testified as to when the sample of the footprint prosthesis was taken and handed to Dixon (Record 2381, lines 1-16). Colonel Vermeulen did not examine the kick mark as it was not part of his instructions. (Record, Vermeulen 669, lines 8-16),

320. He went back to the bedroom to fetch the cricket bat.

321. He went back to the bathroom and struck the toilet door three times with the cricket bat – this damaged the door.

322. He removed some of the panels of the door to allow him to see inside the toilet.

323. He looked for and found the key and unlocked the door.

324. He went inside the toilet and struggled to get the Deceased out of the toilet.

325. He tried to phone from the cell phone of the Deceased but could not as he did not know her pass code.

326. He went back to the bedroom to fetch his cell phones from the bedside table. The blood marks in the area of the bedside table support his version that he collected his phones from the bedside table and made the call to Johan Stander after he had opened the toilet door and pulled the Deceased out. The blood from his hands transferred (cast-off) to the left bedside table where the cell phones were. Colonel van der Nest stated that cast-off occurred when *"blood would move from your hands onto surrounding objects"*. (Record 1088, lines 1-12)

327. Clearly, even leaving aside the disputed movements by the Accused, the second sounds could not have been the shots as there was insufficient

time between ±**03:17:15** and **03:19:05** for all the actions referred to above to have taken place.

328. There is also a credibility problem in addition to reliability sufficiently so to indicate that Mr Johnson and Mrs Burger's evidence concerning the second sounds should not be accepted without caution and concern:

328.1 Mrs van der Merwe heard four shots, which is consistent with the four shots fired.

328.2 Mrs Burger was adamant that she had heard four shots. She even justified her hearing four shots because of her musical background. She testified that she had heard four shots very clearly as she started with music at a very young age, she could hear rhythm automatically and testified that, "*there was no doubt for me. I heard four shots".* (Record 91, lines 14-19).

328.3 Incredibly, in the edited Notes (Exhibits O1-O3) she recalled *"four or five shots"*, which exposes her allegedly accurately and precisely remembering four shots. This shows that Mrs Burger adapted her evidence from uncertainty about the number of shots (when the events were still recent) to an absolute resolution of four shots.

328.4 There is a marked difference between definitely hearing 4 shots as opposed to hearing *"about 4 to 5"* shots which in itself

exposes uncertainty apart from untruthfulness.

328.5 Mr Johnson conceded in his evidence that his wife had told him *"she counted four or five shots"* (Record 276, Mr Johnson, lines 14 and 15).

328.6 Mr Johnson heard a volley of shots (Record, 202, lines 2-3, 204, line 14). This was confirmed in his statement (Exhibit N, par 6) and in his notes (Exhibit O). Therefore, he was in no position to give any comfort to the Court that what he had heard, were in fact the 4 gunshots.

328.7 Moreover, no-one else heard four shots (as the second sounds):

328.7.1 The Accused struck the door three times;

328.7.2 Dr Stipp heard two to three or three shots;

328.7.3 Mrs Stipp heard three shots at a time she had a heightened state of awareness;

328.7.4 Mr Johnson heard a number of shots or a volley of shots

329. Captain Mangena, in his evidence, gave some support to Mrs Burger's evidence that she heard a shot, then a pause and then 3 further shots. He testified that the trajectories and wounding were consistent with a first shot being fired, then an interval, and then three further shots.

There is nothing in the trajectories of the first and second shots, which would justify an interval, nor is there anything in his report about it.

330. Although Captain Mangena was a good witness it does not mean that all his views must be correct.

331. We submit that it was simply not possible for him to say with any degree of certainty, by looking at the trajectories and wounding, that there was an interval between the first and second shot particularly if that interval was not heard by Dr Stipp and Mrs Stipp and Mr Johnson.

332. Furthermore, this part of Captain Mangena's evidence is inconsistent with the four shots in quick succession heard by Mrs van der Merwe.

333. It is highly improbable that the second sounds could have been the gunshots. We deal with the improbabilities hereunder.

334. The witnesses heard the Accused screaming/shouting for help after the first sounds as per the timeline analysis above.

335. It does not make sense and is highly improbable that the Accused would have shouted/screamed for help (before the second sounds)and in particular screamed as if being attacked (according to Mr Johnson and Mrs Burger), if he was threatening the Deceased and was about to kill her.

336. It does not make sense that the Accused would have been crying out

loudly as though *"it was a cry of pain"* (Mrs Motshwane, Record 2250, lines 11-12), and crying out loudly sounding as if one was very desperate for help, *"in danger"* (Record, Mr Nhlengethwa, 2209, lines 24-25 and 2210, lines 1-2) and who needed urgent help (Record, Mrs Nhlengethwa, Record 2238, lines 18-20), if he was threatening the Deceased and about to kill her.

337. It does make sense that he would have shouted for help after the first sounds, as he had by then fired the shots and that he would have screamed as by then he realised the true existence of the situation. It would not make sense that he would have shouted for help before shooting the Deceased.

338. It cannot be suggested that the Accused shouted for help after the second sounds as this would be contrary to the evidence of:

338.1 Mrs Burger;

338.2 Mr Johnson;

338.3 Mrs Viljoen;

338.4 Mrs Nhlengethwa.

339. Mr Johnson and Mrs Burger had telephone call data (objective evidence) to show the Accused shouted for help before **03:16** (i.e. before the second sounds at **03:17**).

340. Mrs Viljoen heard the shouts for help approximately five minutes before

asking Johan Stander what was wrong (which was straight after he received the call from the Accused at **03:19**).

341. Mrs Nhlengethwa's evidence that the shouting for help by the Accused was before **03:16,** is also confirmed by the telephone data of Mrs Nhlengethwa.

342. Dr Stipp's attempt to change the time of the Accused shouting for help from about **03:15** to about **3:30** has no credibility and reliability. Apart from contradicting the other witnesses, his evidence in this respect was simply not possible as dealt with above.

343. A further difficulty for the State is that Vermeulen's evidence, confirmed by Dixon and Wolmarans, is that the door was damaged by the cricket bat, after the shots had been fired. (Record, Vermeulen 657, lines 14-15), (Record, Wolmarans 2378,, lines 9-15), (Record, Dixon 1962, lines 11-14).

344. It is common cause that when the Accused fired the shots, he was on his stumps.

345. To strike the door with the necessary force, thus causing it to crack, the Accused must have been positioned on his prostheses. Dr Versfeld's evidence was that the Accused cannot strike the door with a cricket bat whilst on his stumps as he had no balance. (Record 2596, lines 21-25 and 2597, lines 1-6).

346. There is a further problem. Mrs Stipp testified that shortly before **03:17** her husband had told her he had seen someone moving from right to left in the bathroom.

347. It was the Accused walking in the bathroom. We have demonstrated above that he was on his prosthesis otherwise Dr Stipp would not have been able to observe his fair complexion and he would definitely not have seen him at all through the top half of the bathroom windows to the right.

348. To be able to see him through the top half of the right side of the bathroom window the Accused must have been on his prostheses. (See the measurements of Dixon at Record 1957, lines 2-5). To be able to see a fair complexion through the open window, the Accused must have been on his prosthesis. (Versfeld Record 2588, lines 1-6) The Accused, when he walks on his stumps is 144 cm in height due to the displacement of his left heel pad and 156 cm when he is standing). In this case, the Accused was seen walking. His “walking” height of 144 cm would only allow Dr Stipp to see his head through the left bathroom window, and certainly not a person, or silhouette, even less so through the top half of the bathroom windows on the right. (Dixon, Photos 2.4 – 2.7) (Record 1955, lines 6-25; 1956, lines 1-25; 1957, lines 1-5)

349. Whether the person (model) used in the photos was shorter than the Accused, makes no difference as according to Dr Versfeld the Accused was about 10 to 12 cms “shorter” when he walked due to the effect of his

left heel displacement. Furthermore, the height would make no difference to Dr Stipp's observations through the right top half of the bathroom window, as the top half of the window is substantially higher than the Accused on his stumps. The Accused would not have been visible through the top half of the window if he was on his stumps.

350. It must be borne in mind that Dr Stipp identified the person through the top half of the bathroom window as someone with a fair complexion. The Accused did not have a shirt on and his fair complexion would only have been visible through the top half of the right bathroom if he was on his prosthetic legs.

351. The Deceased was wearing a black top, whilst the Accused was wore no shirt at all.

352. It does not make sense that he was on his prosthesis shortly before **3:17**, but back on his stumps, when he fired the shots, which, according to the State, occurred very shortly thereafter at **3:17**.

353. It makes no sense that, if the Deceased was in the toilet behind a locked door between the first and the second sounds (approximately 5 minutes), she would not have used her cell phone to phone or message for help. She had ample time to hide behind the toilet wall to the left of the toilet door.

354. Her bladder was empty. No urine was found in her clothing/legs to

indicate that she had lost control of her bladder. According to Professor Saayman it is indicative that she emptied her bladder shortly before her death. (Record 538, lines 7-9) This is more consistent with the Deceased going to the toilet to relieve herself than her fleeing to the toilet to seek refuge.

355. The State has alleged that the Deceased was standing directly in front of the toilet door, talking to the Accused. If she knew her life was in danger and if he had been hitting the door with the cricket bat before firing through the door she would not have been standing right in front of the door.

356. We submit that it is not a matter of whether or not the Accused should receive the benefit of the doubt in relation to what the first sounds were and what the second sounds were. An analysis (supra) of the evidence, even if the evidence of the Accused is excluded, makes it clear that the first sounds were the gunshots and the second sounds the cricket bat striking the door.

THE SCREAMING : THE DECEASED OR THE ACCUSED

SYNOPSIS OF THE SCREAMING

357. We have assessed the evidence above to demonstrate that the first sounds were the gunshots. The inevitable consequence of that is it could not have been the Deceased who was screaming as she was fatally

wounded and would not have been capable of screaming after the four shots. See in this regard the evidence of Professor Saayman (Record 525, lines 12-20, Vol. 6), Dr Stipp (Record 335, lines 9-14, Vol 4) and Professor Botha (Record 1314, lines 1-3 and lines 14-20, Vol 16) referred to above.

358. Even if the first sounds were not the shots, the evidence on behalf of the State by Dr and Mrs Stipp, Mr Johnson and Mrs Burger in regard to the female allegedly screaming cannot satisfy the Court sufficiently so to draw the inference as the only reasonable inference, excluding any other reasonable inference that it was the Deceased who screamed, as their evidence:

358.1 was unreliable;

358.2 exaggerated;

358.3 contradictory;

358.4 inconsistent with probabilities; and

358.5 refuted by the evidence of Mr and Mrs Nhlengethwa, Mrs Motshwane and Mrs Van Der Merwe.

359. We refer hereunder to the evidence relevant to screaming to substantiate the aforegoing submission made by us.

360. It also makes no sense that a man was also screaming out and screaming for help prior to the second sounds if it was the Deceased who was being threatened. See the evidence of Mrs Johnson, Mr

Burger, Dr Stipp, Carice Viljoen and Mrs Nhlengethwa dealt with above.

361. Ivan Lin, the acoustic expert explained at page 3 and 4 of his Report (Exhibit UUU) that hearing is a physiological process of receiving audible sounds, but listening involves an interpretation by the brain. Any interpretation by the brain is subjective and influenced by many factors. Consequently, it may be risky to accept the reliability of a witness concerning the interpretation of screaming in the absence of supporting objective evidence[23].

362. There is no objective evidence to support the subjective interpretation of the screaming, heard by the witnesses.

363. Mr Lin explained that it would be incorrect to reliably assume, without exception, that a female scream could not sound like a male scream or vice versa (Exhibit UUU par 5.6 and 5.7).

364. It is clear from Mr Lin's report and evidence that a Court should be cautious to accept the reliability *per se* of witnesses who professed that they could discern between a male and a female scream. This becomes even more complicated (and unreliable) where they also heard a man screaming in circumstances where his screaming for help, as if he was in danger, does not fit in with the State's case that the Accused was the aggressor. The absence of objective evidence in this regard increases

[23] See pages 3 and 4 of the Acoustic Report by Ivan Lin (Exhibit UUU)

the risk of unreliability.

365. Mr Lin's evidence is clear, that if the person who was screaming, was in the toilet, the sound would have been 22 dBa, with an open bedroom window in the Johnson's house (177m away). This means that it was extremely unlikely for screams emanating from the toilet, to be audible.

366. More importantly, such alleged screams would definitely not have been intelligible which means that a witness in the bedroom ± 177 metres away would not have been able to discern between a male and female, as well as the emotions in the voice of such a person.

367. Even if another 10 dBa is added to the 22 dBa, it remains unlikely that it will be audible, whilst still not intelligible. Even at 32 dBA a witness could not discern between a male or a female scream, let alone identifying hearing emotions in the screams.

368. It was demonstrated in Court that when no-one was talking, the sound in the Court, mainly caused by the recording machines and a few people typing, was between 40 and 41 dBa (Record 2691, lines 10-11). That demonstrated convincingly that even the sound of 22 dBa up to 32 dBa could not have awoken Mr Johnson or Mrs Burger and the screaming emanating from the toilet could not have been interpreted or discerned by them, as the screams would definitely not have been intelligible.

369. This is important as on the State's case, the Deceased would have been

in the toilet at the time of her screaming. It is possible that, on the State's version the Deceased could have screamed on the way to the toilet, but that still does not explain the screaming and interpretation of the screaming before the second sounds, as she must have been in the toilet at that time.

370. This means that Mr Johnson and Mrs Burger could not have heard the screams in their bedroom intelligibly if the screams emanated from the toilet, which means that they would not have been able to reliably discern between a male or female voice, as well as the emotions thereof.

371. It is significant that Mrs Burger's description of the screams as *"petrified"*, bloodcurdling, life-threatening, etc., did not form part of the notes (Exhibit O1-3) or her statement.

372. It is not accepted that she heard all the emotions and was able to discern voices and emotions as she has alleged.

373. She remained in the bedroom and would not have been able to hear the woman's screams as being fearful (Record 83, line 1), petrified (Record 93, line 24), bloodcurdling (Record 35, lines 12-18), terrible (Record 28, lines 9-10 and 22), fear-stricken (Record 76, line 25 and Record 77, line 1) or life-threatening screams and thus describing the screams just before the shots as *"worse and more intense"* (Record 30, lines 14-19), *"climaxing"* (Record 31, lines 1-2) and then bloodcurdling, *"the anxiousness in her voice. The fear."* (Record 35, lines 17-18), *"very*

intense" (Record 63, line 5) and *"absolute petrified screams"* (Record 55, line 2).

374. It is clear from the acoustic evidence that Mrs Burger would not have been able to discern voices or emotions in her bedroom if the screams emanated from the toilet. Even if another 10 dBA be added to the 22 dBA in her bedroom, the screaming would still not have been intelligible.

375. Mrs Burger's ability to hear screams emanating from the toilet, let alone hear the screams intelligibility, becomes more suspect if regard is had to the fact that dogs were barking at the time (Record, Carice Viljoen, 2174 lines 1-3, Vol 25), as the barking of the dogs would have increased the ambient sound level, which would have made it "extremely unlikely to be audible" in her bedroom (if a scream emanated from the toilet) (Record, Lin 2658, lines 19-21). The audibility is not too relevant, as the screams would on any version not have been intelligible, which means she would not have been able to discern emotions as described by her.

376. What is significant is that Mr Johnson gave no description of the screams as being bloodcurdling or petrifying as per Mrs Burger's evidence. His evidence in this regard did not change during cross-examination.

377. When he was on the balcony he thought that people were being attacked in their house because the man and woman were calling for help and that the screams did not sound like fighting, but more like panic

and distress calls of someone being attacked (*emphasis added)*.

378. In his notes, affidavit, evidence in chief and cross-examination he did not give any description that the screams at that point in time were petrifying, bloodcurdling or terrifying. This once again exposes the unacceptability of the evidence of Mrs Burger, who remained in the bedroom, but professed to be able to discern between emotions, contrary to the evidence of Mr Johnson and that of the acoustics expert.

379. Mr Johnson's evidence was that, whilst in the bedroom, he lifted his head to listen carefully that he had indeed heard screams. He went to the patio to hear if he could hear any detail (Record 212, lines 10-14, Vol 3). If he had to listen for detail in the screams on the patio, it shows that the screams were not clear in the bedroom. It defies Mrs Burger's evidence that she could clearly in the bedroom hear all the emotion and intensity of the screams.

380. It does not assist the State to suggest the screaming heard by Mr Johnson came from the bedroom, the bathroom and then from the toilet:

380.1 The Deceased was allegedly only heard screaming after the first sounds. Dr and Mrs Stipp said that the first sounds were similar to the second sounds. The State did not (and could not) present evidence that the first sounds came from a different location, contrary to the above evidence.

380.2 As the evidence of Mr Johnson and Mrs Burger was not that the screaming was louder at first (because it came from the bedroom and bathroom) and thereafter softer (because it then came from the toilet);

380.3 It cannot be argued that the Deceased was not in the toilet from at least 03:15 onwards on the State's contentions. On the contrary, the State's case is that she fled to the toilet, which would have left a very short time for screaming to occur outside the toilet. The evidence suggests that the screaming lasted for some time.

381. However, if the shouting took place from the balcony and the screaming from the bedroom and bathroom, then the screaming would have been audible and possibly intelligible in Mrs Burger and Mr Johnson's bedroom. See in this regard the Results Summary in Exhibit UUU.

382. The Accused's version was that he shouted for help from the balcony, and screamed on the way to the bathroom, as well as in the bathroom.

383. As stated above, Mrs Burger could only have been able to intelligibly hear the screams, if the screams emanated from the balcony, the bedroom and the bathroom.

384. The credibility and reliability of Mr Johnson, as a witness, are further compromised by the fact that it is clearly evident that he discussed his

evidence with Mrs Burger and adapted his evidence in order to seek to corroborate her evidence. This will be dealt with hereunder and in the annexure marked as **Annexure "C" : "Screaming**".

385. We have demonstrated above that the screams occurred between about **03:14** to **03:17**, which means that the screams heard by Mr Johnson were also the screams heard by Mrs Burger, Dr Stipp and Mrs Stipp.

386. The fact that Mr Johnson heard screams intelligibly, means that the screams emanated from the bedroom, bathroom and balcony and not from the toilet. This means that it could not have been the Deceased.

387. Moreover, as Dr and Mrs Stipp and Mr Johnson also heard the screaming at the same time, it must have emanated from the location which made it possible for Mrs Burger to hear intelligibly.

388. As stated before, if it was not emanating from the toilet, it could only have been the Accused screaming.

389. Mr Johnson, Mrs Burger and Dr and Mrs Stipp's evidence was that they heard a female and a male screaming.

390. If the Accused was about to kill the Deceased, there was no reason for him to scream in a fearful state as Johnson and Burger interpreted his screams to be as follows: *"I was convinced that that woman was being attacked, she and her husband were being attacked in their house. I was convinced it was an attack in the house through robbers"* (Record, Mrs

Burger, 62). In the notes Exhibits O1, O2 and O3 the screaming by the man and woman was interpreted by them *"that I was convinced those people were attacked in their home… especially because we heard a woman and a man calling for help….we were convinced that what we heard were the calls of help of people who were being attacked in their house."*

391. Furthermore, it is significant that the male screams were heard at different times.

391.1 Dr Stipp testified that he thought he had heard a male's voice intermingled with a female's voice, before he went inside to make the calls and that he had heard no other screaming after that (see Record 322, lines 3-8, 338, lines 24 and 25, 339, lines 1-2, Vol 4, 363, lines 1-5 and 366, lines 4-23, Vol 5). This was before 03:15.

391.2 Mrs Stipp testified that she had heard the man screaming just before the second shots (which was at 03:17 (Record 1105, lines 1-7 and 1132, lines 20-25, Vol 14).

391.3 It is evident that both of them heard a man screaming at different times that evening, which means that a male was screaming before 03:15 and also before 03:17.

391.4 Mr Johnson and Mrs Burger heard a man screaming/shouting for

help. [They described the man's screams as screams as though he was being attacked.]

392. This means that there was continuous screaming by a man, which is consistent with the Accused's version and inconsistent with the State's contention.

393. Mr and Mrs Nhlengethwa, as well as Mrs Motshwane, as the immediate neighbours and being in close proximity, heard a man crying out loud, and not a woman screaming, at the same time Mrs Burger, Mr Johnson and Dr and Mrs Stipp heard a female screaming.

394. Mrs Van Der Merwe heard the screaming as a crying out loud at the same time. She thought it was a woman, but her husband told her that it was the Accused.

395. The crying out loud heard by the immediate neighbours occurred at the same time as the screaming and was described as a male crying out in a high pitched voice. The voice of the Accused pitches when he gets anxious. This was clear from his evidence as per an extract that will be played in Court.

396. It does not assist the case to contend that the screaming was not the same as the crying out loud. The difference lies in its description and not in the screaming or crying out loud.

397. Mrs Nhlengethwa imitated in Court what she meant by crying out loud. It

resembled screaming in a high pitched voice (Record 2238, lines 23-25, Vol 26). She said that it was a male with a high pitched voice. The recording when she screamed in Court will be played at the presentation of argument hereof.

398. Mrs Motshwane also imitated in Court what she meant by crying out loud (Record 2251, lines 4 and 5, Vol 26). This clip will also be played in Court. It resembled screaming in a high pitched voice.

399. Mr Nhlengethwa explained that by using the word *"crying out loud"* he did not mean to describe crying as in weeping. He said it was rather a person *"who was very desperate for help"* (Record 2209, lines 20-25, Record 2210, lines 1-5, Vol 26).

400. When Mr Nel put it to Mr Nhlengethwa that he *"never heard anybody scream"*, Mr Nhlengethwa explained that in his language they use different words. By referring to crying in the context of what he had heard, he did not refer to weeping but to someone who was desperate for help.

401. Mrs van der Merwe thought it was a woman crying out loud, until her husband told her it was the Accused.

402. The crying was also referred to by Mrs Makhwanazi, who was employed by the Stipps. It most certainly cannot be suggested that it was at a different time as the screaming heard by Dr and Mrs Stipp. If so, one

would have expected Dr and Mrs Stipp to have said that after the screaming stopped, they heard a man crying.

403. Mrs Stipp's evidence pertaining to Ms Mkhwanazi, who was employed by her, is also of relevance:

403.1 Mrs Stipp testified that the following morning, when she woke up, she saw Ms Mkhwanazi who told her that she had heard screaming and that she had initially thought that it was a baby, but when she went outside to listen more carefully she determined that it was a woman (Record 1110, lines 3-9, Vol 14). This was not what Ms Mkhwanazi said in her statement made to the Investigating Officer.

403.2 In cross-examination it was put to Mrs Stipp that Ms Mkhwanazi's statement read as follows: *"I just fell asleep when I was woken up by crying. I first thought it was the baby next door. I listened and then I realised that it was a woman that was crying. I was still listening to the crying, trying to find out where it was coming from when I heard boom, boom, boom"* (Record 1174, lines 12-25 and 1175, lines 1-5, Vol 14). It was put to Mrs Stipp that throughout Ms Mkhwanazi's statement she referred to crying and Mrs Stipp's only answer to this was that she did not hear crying but that she had heard screaming. She did not, however, dispute the statement and could not repeat her previous evidence that Ms Mkhwanazi had told her that she had

heard screaming (and not crying).

403.3 What is significant, is that it was at the same time that Mrs Stipp heard the screaming. It shows that some people would refer to it as screaming and others as crying.

404. Mr and Mrs Nhlengethwa and Mrs Motshwane were clear in their evidence that they did not hear a woman screaming but rather a man crying out loud in a high pitched voice.

405. Mr Lin said the following in his report (Exhibit UUU, page 4, paragraph 5.3) regarding the perception of sound: *"as the act of listening involves a process of referencing to information available to the specific listeners, the actual perception of sound through the listening process may vary from one person to another, as each person may have different basis of information references, due to factors such as individual cultural background, languages spoken and upbringing."* (Emphasis added)

406. The above shows that witnesses interpreted the same screaming to be that of a female and a male in a high pitch. The voice of the Accused pitched when he was anxious. It is in that sense that the Accused screamed like a woman, as his screaming was interpreted to be the screaming of a woman.

407. Dr Stipp, in his evidence, was not confident enough to say that it was in fact a woman screaming. He said that the screams sounded female to

him (Record 309, lines 23-24, 337, lines 23-24, Vol 4). It was put to him that, *"who was screaming was Mr Pistorius. You can say it sounded to you like a woman."* He conceded that this was correct (Record 381, lines 2-4, Vol 5).

408. Dr Stipp did not describe the screams in either of his affidavits as anything other than a woman yelling/screaming. In his evidence prior to the lunch adjournment he gave no description of the screams.

409. After he returned from the lunch adjournment, Mr Nel's first question to Dr Stipp was to give a description of the screams. He then described the screams as follows (Record 324, lines 15-25 and 325, lines 1-2, Vol 4):

409.1 very loud;

409.2 she sounded extremely fearful;

409.3 they were the type of screams you would hear if someone was in fear of his or her life;

409.4 they were repeated screams, three or four times;

409.5 she sounded *"in severe motion anguish scared, almost scared out of her mind".*

410. It is unknown what motivated him during the lunch adjournment to be able to discern between the emotions contained in the screams.

411. Mrs Stipp conceded that it was correct when it was put to her that the screaming came from what she assumed to have been a woman (Record 1135, lines 24-25, Vol 14). When asked whether she was a hundred percent certain she testified that, *"in my* [her] *recollection"* she was absolutely one hundred percent convinced that it was a female and that in her mind she was absolutely sure that it was a female (Record 1136, lines 1-5, Vol 14). The fact that Mrs Stipp answered with the words, *"in my recollection"* indicates uncertainty.

412. Mrs Stipp, in her evidence said that it sounded as if the screaming was coming closer. She said to her husband *"is there someone not coming down the street screaming?"* Her husband told her that there was a man moving in the house on the left hand side so he thought that (it was that house) (Record 1103, lines 22-25, Vol 14).

413. Her statement and evidence regarding the screaming sounding closer shortly before **03:17**, is consistent with the version of the Accused that he screamed down the passage and also when he entered the bathroom. This would account for the fact that the screaming sounded to her, as if it was coming closer.

414. If it was the Deceased screaming, she would have been in the toilet at that stage, as it was shortly before the second sounds (**03:17**). Her screaming would not have sounded as if it was coming closer.

415. We deal in detail below with Mrs Stipp's unreliable evidence. We submit

that her evidence is not only unreliable, but it is also not credible.

416. Mrs Stipp's evidence was that she moved to the bigger balcony, when she heard the *"terrified screams".* This is untrue as it is clear from Dr Stipp's evidence that she was not on the bigger balcony, but that he had met her inside the main bedroom when he walked back into the main bedroom from the bigger balcony (Record, Dr Stipp, 353, lines 14-21, Vol 4) to make the call to security.

417. When Dr Stipp was asked whether his wife went to the balcony, he said that *"she was looking through her window and I heard the screaming…… I remember talking to her because I, you could actually hear her from her balcony where I was standing. So she was not with me initially when I heard the screams. She was still in the house. When I went inside again, I met her at the door. She was coming to meet me, I was coming in. So she was not standing beside me at the railing looking out."* (Record 353, lines 14-21, Vol 4).

418. Dr Stipp then walked back into the bedroom before 03:15 as he made a call to security (at 03:15:51) and then attempted to call 10111 (at 03:17). According to Dr Stipp he met Mrs Stipp at the door as she was coming from inside the house when he moved to the main bedroom to make the call (Record 353).

419. This means that her having heard the terrified screams when she was on the bigger balcony must be suspect as she was not where she

pretended to have been.

420. The reliability of her being able to discern the screams becomes more compromised, if regard is had to her evidence that after the second sounds (the three more bangs), her husband shouted at her to get away from the windows, and then the screaming stopped. (Record 1140, lines 17-20, Vol 14) This cannot be as the Deceased was fatally wounded and could not have screamed after the shots.

421. As such one must be very cautious to rely on her ability to have discerned the screams.

422. A further difficulty for the State is that Mr Johnson, Mrs Burger and Dr and Mrs Stipp's evidence was exaggerated and contradictory in material respects, which in itself creates doubt as to the reliability of their evidence. The doubt increases if regard is had to the good quality of the evidence of Mr and Mrs Nhlengethwa and Mrs Motshwane, which contained no contradictions.

423. Ms Taylor in examination in chief said :

423.1 she had heard the Accused screaming a few times (Record 393, lines 105, Vol 5);

423.2 she had seen him being very anxious (Record 393, lines 7-8, Vol 5);

423.3 and that when he screamed he did not sound like a woman but like a man (Record 393, lines 2-3, Vol 5).

424. She had not ever heard him screaming when he was anxious, and her evidence is restricted to him shouting at her and that it sounded like a man. (Record 393, lines 9-11, Vol 5).

425. She said she had heard him screaming or shouting at her sister, her best friend and another friend of theirs (Record 396, lines 12-16, Vol 5).

426. The alleged shouting at her or her sister or friends was not an alleged incident where he screamed because he was really anxious.

427. In cross-examination she conceded that she had heard him screaming in situations where he had perceived his life to be threatened. (Record 400, lines 1-7)

428. This is contradictory to her evidence in chief.

429. Her evidence did not contribute to assist the State that his voice would have sounded like a man when he screamed that night.

430. We annex the detailed analysis of the evidence of the State witnesses relevant to the screaming hereto marked as Annexure “C” : “Screaming”, for ease of reading and reference. Annexure “C” exposes the unreliability and in some instances the untruthful evidence of State witnesses in regard to the screaming and aspect relevant thereto.

RELATIONSHIP BETWEEN THE ACCUSED AND THE DECEASED

431. The State tendered in evidence electronic communications between the Accused and the Deceased (Exhibit "DDD").

432. Captain Moller, the police official responsible for extracting the electronic communications, found three out of 1709 electronic communications showing some unhappiness on the side of the Deceased (Record 1242, lines 1-7, Vol 15). Moller agreed that more than 90% of the electronic communications were of a loving nature between the Accused and the Deceased. (Record 1213, , lines 19-22, Vol 14)

433. The electronic communications in Exhibit "DDD", showing a loving relationship, started at 9 January 2013 up to 15:46 on 13 February 2013. In fact, on 13 February 2013 at 13:10:46 the Deceased *inter alia* (in the electronic communication) said *"You are an amazing person with so many blessings ..."*.

434. Notwithstanding, the State sought to rely on the 3 (out of 1700) electronic communications to seemingly justify a contention by the State:

434.1 that the relationship was all about the Accused; and

434.2 that the Deceased was scared of the Accused.

435. There are four difficulties with the State's approach:

435.1 The State seeks to read the three messages in isolation. However, if they are read in context with all the other messages, the three messages are typical between people in a relationship, especially those in a young relationship.

435.2 The unhappy incidents, which formed the basis of the tree messages, were quickly resolved between them.

435.3 There is no nexus between the messages and the death of the Deceased.

435.4 In the absence of a nexus, the messages constitute inadmissible character evidence. We deal with the legal position relevant to character evidence in an annexure marked as **Annexure "D" : Character Evidence**.

436. The first electronic communication referred to by the State, from the Deceased to the Accused, was on 19 January 2013. She referred to rabbit things in his house and that : *"… I wasn't a stripper or a ho … I certainly have never been prude and I've had fun, but all innocent and without harmful repercussions."* (Exhibit ZZ1, Record, Moller, 1207 lines 20-25 and 1208 lines 1-7, Vol 14).

437. The gist of it was that the Accused had been given a carving of a rabbit. The Accused often bought them as gifts for friends. With reference to the part where the Deceased said she was not a stripper or a ho, the

Deceased had come back from an overseas trip and told the Accused about smoking weed, which event gave rise to unhappiness.

438. The unhappiness reflected in the first message is totally irrelevant to proving the Accused's guilt on murder. It is significant that even though there was some unhappiness between the Deceased and the Accused, it was resolved within a very short period of time. At 15:52:23 on the same day, approximately 20 seconds after the Deceased had sent the message to the Accused about never having been a prude, she told him that she was watching the ceremony and asked him how far he was from entering (Exhibit ZZ1). This was a reference to the opening ceremony of the Confederations Cup where the Accused was part of the ceremony and the Deceased was watching the ceremony (Record, Accused, 1404 lines 22-25 and 1405 line 1, Vol 17). In a follow-up message (about 5 minutes later), the Accused invited the Deceased to his friend's 50th birthday.

439. The second electronic communication was from the Deceased to the Accused on 27 January 2014 at 16:17:34 (Record, Moller, 1208 lines 16-25; 1209 lines 1-25 and 1210 lines 1-16, Vol 14). It relates to the events at an engagement party.

440. The gist of the second communication was that the Accused and the Deceased had had a disagreement at a friend's engagement party because the Deceased was talking to someone that the Accused didn't know and this made the Accused feel neglected and a bit insecure or

jealous (Record, Accused, 1408, lines 1-17, Vol. 17). As a result, the Deceased was upset.

441. Whilst the Deceased had stated in the message that she was scared of the Accused sometimes and how he snapped at her, this needs to be seen within the context of the entire message and not that the Deceased was scared of the Accused in a physical sense.

442. The Accused apologized to the Deceased and told the Deceased that he wanted to resolve it. He explained what had upset him (see Record, Accused, 1409 lines 8-25 and 1410 lines 1-11, Vol 17 for this message). The unhappiness was resolved on the same day at about 18:34:28. The Deceased sent the Accused a message *"Xxx"* which means three kisses. There are many caring follow-up messages between the Deceased and the Accused.

443. The third electronic message was sent from the Deceased to the Accused on 7 February 2013 at 00:09:11. The gist of this message was that the Accused and the Deceased had had a disagreement at an event. When they were leaving the Accused asked the Deceased not to stop on the way out as he tried to avoid having to stop for photos as he wanted to train early the next morning. The Deceased stopped to talk to a friend on the way out which caused a delay of about 45 minutes. This resulted in an argument between the Deceased and the Accused afterwards (Record, Accused, 1415 lines 1-15, Vol l17).

444. The argument was resolved telephonically when the Accused phoned the Deceased shortly thereafter (Record 1415, lines 16-25, Vol 17). He apologised and the loving relationship continued. (Record 1415, lines 19-25, Vol 17).

445. The last of the so-called unhappy electronic communications was on 7 February 2013. Since then all the communications continued to show a loving and healthy relationship.

446. It is clear that a motive to cause the death of the Deceased is absent from the three messages.

447. We submit that the State knew that the three messages could never contribute to any such alleged motive, and that the State's real intention was to try and portray the Accused as being selfish and manipulative.

448. The Accused testified that he was not in the habit of sending text messages, and that this would account for the fact that he did not engage in arguments with others (more particularly the Deceased), by means of text messages. Rather, he indicated that he chose to discuss matters concerning difficulties in their relationship with the Deceased in person, as opposed to sending her messages by means of SMS (Record, page 1564, lines 17-19). A perusal of Exhibit ZZ8 (the Accused's cellular phone log) confirms the Accused's version. The cell phone call activity in ZZ8 is more prolific than the recordal of SMS text messages.

449. During cross-examination, Mr Nel put to the Accused that the Accused never wrote long messages to the Deceased in which he would have told her how he felt about her. Thus, the Accused's version that he rather spoke on the phone as opposed to having sent text messages to the Deceased, explains away what Mr Nel attempts to portray as having been an indifferent approach adopted by the Accused towards the Deceased (Record, page 1564, lines 5-19).

450. Apart from the fact that the alleged character traits are irrelevant, the facts referred to below show that the Accused is not selfish and manipulative.

451. Professor Scholtz, in his report (Exhibit QQQ) is of the view that : *"his style of conflict resolution is to talk through the situation or remove himself from the situation. He also has the ability to self-reflect afterwards, mostly leading to feelings of guilt and then apology from him"* (Exhibit QQQ) page 29, paragraph 5.3, lines 41-42).

452. Professor Scholtz is of the view that the Accused was not the rage-type killer or a person with a history of abnormal aggression or explosive violence (page 29, para 5.3).

453. Professor Scholtz also did psychometric testing and found:

453.1 that the Accused did not suffer from clinically significant aggression, anger or hostility (paragraph 3.2.6, page 15);

453.2 that the Accused had not attempted to malinger (paragraph 3.2.8, page 15).

454. Professor Scholtz found that:

454.1 The Accused was *"instantly taken with (the Deceased) and the relationship developed well"* (page 28, lines 35-36).

454.2 Differences occurred (between them) but were dealt with by talking them through (page 28, lines 36-37). The above was corroborated in the electronic communications, where we demonstrated that soon after the unhappiness, such unhappiness was resolved and the loving relationship continued.

454.3 *"There is evidence to indicate that Mr Pistorius was genuine with his feelings towards Ms Steenkamp and that they had a normal loving relationship."* (paragraph 5.6, page 30, 30-31)

454.4 *"Although their relationship was still young there were no signs of abuse or coercion like often found in these kinds of relationships"* (paragraph 56, lines 35-37)

454.5 Their relationship showed none of the characteristics associated with an abusive relationship (page 29, lines 3-5).

454.6 *"No evidence could be found to indicate that Mr Pistorius has a history of abnormal aggression or explosive violence. Abnormal*

aggression and violence was never incorporated into his personality, as borne out by psychometric testing and collateral information. He does not display the personality characteristics of Narcissism and/or Psychopathy that are mostly associated with men in abusive relationships and have been linked to rage-type murders in intimate relationships." (paragraph 5.3, lines 31-37)

454.7 *"His style of conflict resolution is to talk through the situation or remove himself from the situation."*

455. The State's contentions were also refuted by Exhibit 3.

456. Exhibit 3 is the CCTV footage of the Accused and the Deceased in an Engen Garage Shop which was equipped with a CCTV camera for security purposes. The Accused and Deceased were unaware of the CCTV camera recording their movements in the Engen Shop. They spontaneously kissed and hugged in the shop. This event transpired on 4 February 2013. (Record 1256, lines 10-25; 1257, lines 1-10, Vol 15).

457. The Court allowed Exhibit 3 provisionally. We deal with the admissibility of Exhibit 3 in an annexure marked as *"Annexure "D" : "Exhibit 3"*.

458. We have shown in **Annexure E : Exhibit 3** that:

458.1 if the video is relevant, it should be admitted;

458.2 if a witness recognises a scene or a person in the video, it should be admitted, even if he did not take the video or was not present when it was taken;

458.3 it does not matter if the video is not the original video.

459. Moreover Captain Moller was experienced in the purpose of CCTV footage. He had no reason to raise any concern :

459.1 that the footage was manipulated or defective;

459.2 that the footage was not that of the Accused and the Deceased in the Engen Shop on 4 February 2013;

459.3 that the footage did not show the Accused and the Deceased acting spontaneously in a loving relationship which proves relevant to the case.

460. The relevance of the footage was (correctly so) never in issue. The footage is highly relevant, particularly in view of the State's contentions in cross-examining the Accused that the relationship was all about the Accused.

461. We respectfully submit that Exhibit 3 should be admitted as evidence and its probative value be considered within the context of all the other evidence.

462. The State's contention is also refuted by the Valentines card from the

Deceased to the Accused (Exhibit HHH) stating : *"I think today is a good day to tell you that ... I love you."* (Record 1947, lines 4-14, Vol 122).

463. The State did not call any witness, other than Ms Taylor, whose evidence is irrelevant in regard to the relationship between the Accused and the Deceased, notwithstanding its Reply to the Further Particulars (Ad paragraph 4.4) where the State purportedly envisaged to rely on the evidence of Kim and Gina Myers and Miss Greyvenstein in relation to the conduct of the Deceased during the relationship. However the State did not call Gina and Kim Myers or Miss Greyvenstein. The State's failure to call Miss Greyvenstein is significant.

464. The State handed the record of the bail application in as Exhibit D. The affidavit of Miss Greyvenstein forms part of the bail application and was read into the record on behalf of the Accused. (Exhibit D, pages 77-80).

465. The State introduced the record of the bail proceedings as a *"true reflection of the proceedings and the evidence led"* (Record 17, lines 21-25, Vol 1). As such, Ms Greyvenstein's affidavit was introduced by the State via the bail application and made relevant in the State's Reply to the Further Particulars (Ad paragraph 4.4 thereof).

466. It is true that her affidavit constitutes hearsay evidence. We submit that the Honourable Court should exercise its discretion to allow the affidavit in the interest of justice as is envisaged in Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1995. We deal in an annexure hereto

marked as **Annexure F : "Hearsay"** with Section 3(1)(c).

467. We submit that it is in the interests of justice to admit into evidence the affidavit by Ms Greyvenstein in the bail application:

467.1 The probative value thereof is a matter for the discretion of the Court.

467.2 The State sought to rely on Ms Greyvenstein in its Reply to the Further Particulars, in relation to the conduct of the Deceased.

467.3 The State is bound by its Further Particulars.

467.4 The State introduced the bail application, without excluding Ms Greyvenstein's affidavit.

467.5 The state alleges the Accused was manipulative and selfish in the relationship.

467.6 Ms Greyvenstein's affidavit is relevant to the State's allegation about the relationship between the Accused and the Deceased.

468. In her affidavit, she *inter alia* stated as the best friend of the Deceased *"Reeva confided in me that even though she and Oscar had not been together for very long she really loved Oscar and she could see a future with him. She told me that if Oscar asked her to marry him she would probably say yes."*

469. The facts referred to above overwhelmingly show that the four electronic communications, showing that the Deceased was unhappy with the Accused about certain incidents, could not be elevated to any relevance or motive to kill the Deceased, but are incidents to be expected in a young relationship.

470. Our submission above becomes more cogent when regard is had to the report of Professor J G Scholtz, as part of the Section 78 referral for observation (Exhibit QQQ).

471. The report (Exhibit QQQ) is evidence before the Court (Record 2740, lines 9-25, 2745, lines 9-15). The parties elected not to cross-examine Professor Scholtz.

472. Ms van Schalkwyk is a qualified and experienced social worker and probation officer. At the bail application the Court Manager asked her to accompany the Accused during the entire duration of the bail application (Record 2293, lines 1-3).

473. Ms van Schalkwyk came forward as a witness as she was upset as to how the Accused was portrayed in the print media and wanted to share with the Court her observations of the Accused at the bail hearing. She read in the media that he was not sincere about his feelings and that he cried so as to manipulate the situation (Record 2310, lines 3-5, Vol 27). It must be borne in mind that the State, in cross-examination, tried to portray the Accused as a selfish person in the relationship and that it

was always only about the Accused and not the Deceased.

474. Contrary to the purported portrayal by the State, Ms van Schalkwyk testified that in observing the Accused during the entire period of the bail application:

474.1 he *"was a man that was heartbroken about the loss. He cried, he was in mourning, he suffered emotionally. He was very very sorry about the loss, especially for her parents. The suffering they are going through. That was the theme through the whole period that I saw him ... it was mainly about Reeva, the loss. He loved her ..."* (Record 2296, lines 7-15; Record 2315, lines 15-20, Vol 27);

474.2 *"He cried eighty percent of the time ... He talked to me about what they planned for the future. His future with her, the loss that he never is going to see her again. Her family, her mother and father, what they are going through. That is what I saw, I saw a heartbroken man that suffering emotionally."* (Record 2299, lines 15-19, Vol 27);

474.3 *"He said to me he was sorry about what happened. The incident."* (Record 2312, lines 1-6, Vol 27);

474.4 she said his emotions were never about him, what was going to happen to him and whether he would get bail (Record 2313,

lines 15-20, Vol 27).

475. The evidence of Mr Peet van Zyl was also that he regarded the relationship as a loving and caring relationship and that the Accused was serious in his relationship with the Deceased (Record 2698, lines 1-4, Vol 34). The Accused purchased a house in Johannesburg to be closer to the Deceased. He made travel arrangements for the Deceased to join the Accused on his overseas trips.

476. What is clear from the above, even leaving aside the Accused's evidence, which is consistent with the above, is that:

476.1 The overwhelming inference from the electronic communications between the Accused and Deceased is that it was a loving relationship with no signs or indication or suggestion that the Accused would want to kill the Deceased;

476.2 After the incident the Accused was overwhelmed by emotions for the Deceased and her parents.

476.3 The Accused was genuine in his relationship with the Deceased.

476.4 The Accused does not have personality traits indicative of narcissism, explosive violence or abnormal aggression which could be associated with an abusive relationship or rage-type murders in intimate relationships.

476.5 It was not an abusive relationship or one where it was all about the Accused.

477. The facts above convincingly refute the State's allegation of any rage-type behaviour following an alleged *"argument"*.

COLONEL VAN RENSBURG

478. The State relied on Colonel van Rensburg to prove that the scene in the bathroom and bedroom was, as it had been observed by him, i.e. to refute any suggestion that the scene was changed in any manner.

479. He arrived on the scene at about 03:55. In his evidence he pretended that access control to the first floor was restricted. He first went upstairs with W/O Hilton Botha. Thereafter they accompanied the photographer W/O van Staden upstairs. W/O van Staden was alone when he took the photographs between about 06:00 and 07:00 on 14 February 2013, but for a time, when he and W/O Hilton Botha joined W/O van Staden. Only then did he allow other police officials to go upstairs.

480. We will demonstrate below that Colonel van Rensburg's version as stated above is, to his knowledge and that of the State, incorrect. To his knowledge and that of the State, other police officials were also on the first floor early that morning before the photographer arrived on the scene.

481. We deal with Colonel van Rensburg's evidence in detail in an annexure

marked **Annexure G : "Colonel van Rensburg and W/O Van Staden"**. We summarise the gist of his evidence below.

482. Colonel van Rensburg was not truthful when he said that the other police officials were only given access to the first floor after the photographer had taken photos between about 06:00 and 07:00.

483. It was not an innocent mistake. He deliberately deviated from his affidavit in this regard to attempt to conceal the presence of other police officials on the first floor.

484. Colonel van Rensburg was referred to affidavits of police officials, who were at the scene and who were upstairs before 06:00. These police officials were:

484.1 Sergeant Sebethe;

484.2 Captain Maluleke;

484.3 Detective-Sergeant Chauke;

484.4 Detective Mashishi.

485. The State failed to call the above witnesses as evidently, they would have refuted Colonel van Rensburg's evidence.

486. W/O van Staden, the photographer at first supported the evidence of Colonel van Rensburg, that the other police officials had only accessed

the first floor after he had taken photos between about 06:00 and 07:00.

487. However, W/O van Staden had to concede that the other police officials were indeed also on the first floor when he was there. He admitted that *inter alia* the following officials were present:

487.1 Colonel Motha;

487.2 Constable Msiza;

487.3 Colonel Makhafola;

487.4 W/O Shubane.

488. The State also failed to call these witnesses.

489. A difficulty with Colonel van Rensburg's (and W/O van Staden's) evidence is :

489.1 that it contains material contradictions;

489.2 his observations disclosed in his first affidavit were different from his observations given in examination in chief, in cross-examination and re-examination;

489.3 in evidence in chief he confirmed observations as depicted on photos shown to him, only to concede in cross-examination that he did not focus on everything;

489.4 he destroyed his notes made on the day.

490. The observations are particularly relevant to:

490.1 the position of the fans;

490.2 the position of the duvet;

490.3 the position of the denim trousers;

490.4 the position of the extension cord.

The fans and the extension cord

491. According to Colonel van Rensburg's first affidavit he did not see the fans when he first went upstairs.

492. According to his re-examination he saw one of the fans, but he did not know if the fan was on or off.

493. Although he said that he did not touch anything that morning, Photo "OO" (Exhibit 2 being the electronic version of Photo "OO") clearly shows his hand on a plug on the multi-plug of the extension cord. His explanation was that he was looking at the linkage or cable to the fan.

494. It is unknown which plugs (of the extension cord) he plugged in or unplugged.

495. According to Photo "OO", his cell phone had a cord on (seemingly to charge), it is unknown where that cord was plugged in.

496. He did not know what W/O Botha did in the main bedroom. This is

consistent with the disappearance of two of the wrist watches of the Accused. This is also consistent with Colonel van Rensburg's evidence *"I did not control the seizure of the forensic guys"*. (Record, 851, lines 8-12) (on 14 February 2013). There was also no inventory for the 14th February 2014.

497. We do not know if W/O Botha unplugged the fans or turned them off as there was at that time nothing to indicate to W/O Botha that he should not. He may have done so innocently when he was in the bedroom and saw that the fans were on.

498. We do not know what the other officials did in the main bedroom as Colonel van Rensburg endeavoured to conceal their presence, notwithstanding the existence of their affidavits and the concessions by W/O van Staden.

499. The extension cord disappeared on 14 February 2013 at a time that the scene was under the custody and control of the police.

500. The State handed in a statement by Constable Hendrik Willem Johannes le Roux that he used the extension cord to film in the bathroom and afterwards he left it at an unknown place in the main bedroom.

501. The police video on 14 February 2013 of the main bedroom refutes his statement that the extension cord was left in the main bedroom. We will deal with aspect in argument as we are awaiting information from the

State in this regard.

502. Colonel van Rensburg testified that items were also seized on 14 February 2013 by other police officials. He did not know what they seized. An inventory was only made on 15 February 2013 and not of the items “seized” on 14 February 2013.

503. Mr Nel in cross-examining the Accused about the fans premised his questions on the assumption that the extension cord could not move. There was no basis for the premises that the extension cord could not move. The premises also become suspect with the disappearance of the extension cord under the custody and control of the police.

504. W/O van Staden arrived much later (after W/O Both and all the other officials referred to above). He also tried to say that he was alone upstairs when he took the photos, only to be forced to concede that it was not the truth during cross-examination.

505. There is no certainty that the crime scene was intact by the time W/O van Staden arrived at the scene to take the photos.

506. All of the above shows that the conduct of the Police leaves one with no comfort or certainty as to what the positions of the fans were when the Police arrived at the scene.

507. The above contradictions and uncertainties and questionable conduct by the police does not assist the State in refuting the Accused’s version that

the fans were on at the time of the incident.

The duvet and the denim trousers

508. The same difficulties referred to above are relevant to the positioning of the duvet.

509. The State contended that the Deceased, in the process of her fleeing from the Accused, hurriedly left her denim trousers on the floor. Understanding photo deception, we are unable to agree that the denim trousers was on top of the duvet.

510. More importantly, Colonel van Rensburg's evidence was not that the denim trousers were on top of the duvet, but *"next to"* the duvet.

511. The State contended that the Deceased in her process of fleeing from the Accused hurriedly undressed herself quickly, took her jeans off quickly and then left them on the floor (Record 1915, lines 6-11, Vol 22)

512. It does not make sense that if she wanted to get away from the Accused as quickly as possible, that she would take her denim trousers off and put the Accused's shorts on.

513. The position of the denim trousers is more consistent with the Accused's version that he picked them up to cover the LED light. He heard the sound in the bathroom and probably dropped the denim trousers (Record 1470, lines 3-10, Vol 17)

514. The Accused testified that according to W/O H Botha's affidavit, the duvet was on the bed on the one side when he (Botha) was there. (Record 1541, lines 18-21, Vol 18) Notwithstanding, the State persisted in its failure to call W/O Botha.

515. It is submitted that the evidence of the State and the Accused in relation to the fans and duvet leave more questions than it provides answers, and it therefore makes it legally impossible for the Court to make any decisive finding in regard to the duvet, fans and the denim trousers.

516. As regards the extension cord, the Court also has a difficulty as to how far the extension cord could reach. This difficulty was created solely by the State.

THE ACCUSED

The version of the Accused during the bail application

517. On 13 February 2013 at approximately 22h00, the Accused and the Deceased were in the main bedroom of the Accused's home after they had consumed dinner, at approximately 19h10 (Exhibit D, page 62);

518. During the early morning hours of 14 February 2013, the Accused woke up, whereafter he *"went onto the balcony"* to bring the fan in, having done so, he closed the sliding doors, blinds and curtains. At that point in time, the Accused was on his stumps (Exhibit D, page 64);

519. He heard a noise emanating from the bathroom, which noise he associated with an intruder having accessed the bathroom (Exhibit D, page 64);

520. He was too afraid to switch on a light in the bedroom, and after he had said to the Deceased that she should phone the police, he approached the bathroom whilst screaming words to the effect that the intruder/s were to leave his house (Exhibit D, page 65);

521. At the entrance to the bathroom, he observed that the bathroom window was open and thus he believed that the intruder/s was/were at that stage within the confines of the toilet, which is situated within the bathroom (Exhibit D, page 65). It is common cause that the bathroom window was open;

522. He heard a noise emanating from the toilet and in his vulnerable state, believing that the intruder/s posed a serious threat of harm to his and the Deceased's safety, he fired shots at the toilet door, after which he shouted for the Deceased to phone the police. The Accused's vulnerable state, was exacerbated by his limited mobility, due to him being on his stumps and not having had the benefit of the use of his prosthesis (Exhibit D, page 65);

523. Subsequent to the discharge of his firearm, the Accused returned to the main bedroom, in search of the Deceased. Having not found the Deceased, he returned to the bathroom and found the toilet door locked

(Exhibit D, page 66);

524. The Accused returned to the main bedroom, and having opened the sliding door, he exited onto the balcony and screamed for help (Exhibit D, page 66);

525. He indicated that he was (at the time of the shooting incident), acutely aware of the prevalence of violent crime being committed by intruders entering homes and that he had in the past, been a victim of violent crime (Exhibit D, page 64).

526. At the trial, the Accused testified that he did not include every minor detail in the statement utilised in support of his bail application (Record, page 1520, lines 16-19). He also testified that he wanted to testify at the bail application to tell the full story, but he was advised not to. (Record 1517, lines 1-4, Vol 18).

The Accused's Security Concerns and Disability:

527. The Accused's safety concerns must be considered in the context of his vulnerability. His vulnerability is relevant to his physical disability and the slow burn effect of his disability.

528. He testified that he does not have balance whilst he is positioned on his stumps (Record, page 1373, lines 16-18 and page 1374, lines 17 and 18).

529. This evidence was never challenged by the State. Rather, Ms Taylor confirmed that the Accused experienced a lack of balance when not positioned on his prosthesis (Record, page 410, lines 22-24).

530. Furthermore, Dr Versfeld testified that whilst the Accused can walk for short distances without holding onto something, he nonetheless requires the use of his hands and arm movements, to balance himself (Record, page 2595, lines 7-11).

531. Professor Derman also confirmed that, due to the medical problems associated with the Accused's left stump, the Accused, when walking, would experience an imbalance, and that this would make physical balance and walking by the Accused difficult (Record, page 2764, lines 23-25 and page 2765, lines 1-3). The State did not dispute the evidence of Dr Versfeld, nor that of Professor Derman, in this regard.

532. The Accused confirmed that he had fallen victim to crime from a young age and that he had personally experienced a number of incidents of crime (Record, page 1384, lines 1-25, Record page 1385, lines 1-25 and Record, page 1386, lines 1-14).

533. He also confirmed that he was aware of crimes being committed within the Silverwoods Estate (Record, page 1389, lines 23-25), such incidents having been reported to him by Johan Stander. Stander (having been involved with the administration of the estate) confirmed that such incidents of crime had taken place within the estate and that he had

conveyed this information to the Accused (Record, page 2150, lines 6-8, page 1390, lines 11-15 and page 2150, lines 3-25, page 2152, lines 7-10).

534. Colonel van Rensburg testified that a security area, with a security gate and patrolling guards did not prevent crime, including that of armed robberies. (Record 827, lines 9-18)

535. The Accused also testified that he was threatened and intimidated by one Mark Batchelor, which incident had been reported to the Hawks. (Record 1728 lines 19-24). He also stated that Batchelor had been paid a sum of money by one Quinton van den Burgh, which funds were meant to incentivise Batchelor to cause him (the Accused) harm (Record 1731 lines 24-24 and Record 1732 lines 1-2).

536. During her evidence, Professor Vorster opined, that in her view, the Accused is and has been vulnerable on account of his physical disability (Record, page 2512, lines 14-17). She also confirmed, that the Accused's perception and experience of crime, contributed to his vulnerable state (Record, page 2503, lines 19-24).

537. Professor Scholtz reported that the Accused's increased state of vulnerability results from how he perceived crime and the effects that it may have on him (Exhibit QQQ, page 2742, lines 22-25 and page 2743, line 1).

538. Professor Scholz reported as follows:

538.1 Whilst dealing with the first developmental phase of the Accused, being 0-2 years, it is possible that a blueprint of mistrust, insecurity and being unsafe was already laid down at that stage of his personality development, because of a traumatic experience, his pre-verbal brain could not process and make sense of (Exhibit QQQ, p23 line 31-36);

538.2 Referring to the “two Oscar’s” ,

-One being a vulnerable, scared, disabled person,

- The other being a strong physical person achieving beyond expectation (Exhibit QQQ p25 line 8-22);

538.3 There is evidence to indicate that the Accused does have a history of feeling insecure and vulnerable, especially when he is without his prostheses (Exhibit QQQ p30 line 1-3)

539. Professor Vorster testified that:

539.1 As one is increasingly anxious, one feels more and more insecure about one’s personal safety, even though factually one’s safety may not be threatened, by having increased levels of anxiety, you perceive your surroundings as being threatening, when maybe they are not (Record 2508 line 11-19);

539.2 Whilst in South Africa, the Accused describes having increased levels of anxiety and worries about being followed as well as about the security of his home (Record 2508 line 20-25);

539.3 That the Accused experienced Batchelor's involvement as an on-going physical threat. (Record 2512 line 14-16).

540. Professor Derman testified as follows:

540.1 The markers of psychological distress, namely anxiety and depression, were higher in athletes with disability;

540.2 He found the Accused to be hyper-vigilant which translates into him scanning for potential threats with a purpose of removing himself from harm's way (Record 2771 line 16-18);

540.3 That the Accused presented with an excessively exaggerated startle response, in that, in response to a noise, the Accused would cover his head and ears and cower away until the cessation of the noise (Record 2772 line 2-7);

540.4 The levels of anxiety and fear, as well as the startle response, or the flight and fight response is increased in certain individuals afflicted by impairment or disability (Record 2773 line 3-1; Record 2776 line 23-25 and Record 2777 line 1-9);

541. Despite the presence of his dogs, and that same would present as a

safety feature at the Accused's home, the Accused confirmed that his dogs have a very placid temperament (Record, page 139, lines 23-24). Stander confirmed the Accused's evidence (Record, page 2149, lines 12-23).

542. Consequently, the dogs kept at the Accused's premises would not have presented much of an obstacle to intruders planning to access the Accused's home, at least not in the mind of the Accused.

543. He confirmed that he had purchased a home with enhanced security features in Johannesburg, a step taken by him to improve upon his own security arrangements (Record, page 1394, lines 8-15).

Accused's State of Mind During His Testimony

544. In assessing the evidence of the Accused, regard must be had to the state of mind of the Accused during his evidence.

545. The psychiatrists appointed by the Court found that the Accused presented *"with an adjustment disorder with mixed anxiety and depressed mood that developed after the alleged incident"* (Psychiatrist Report, Exhibit PPP).

546. There can be no doubt that the above disorder and depressed mood must have had an adverse effect on the quality of the evidence of the Accused in the witness box. It is uncertain to what extent it influenced the quality of his evidence.

547. Dr Fine, on behalf of the Accused, served on the panel of three psychiatrists for purposes of the so-called section 78 report. Dr Fine suffered a heart attack and could not give evidence (Record 2997, lines 16-20, Vol 38).

548. The defence wanted to consult with the other psychiatrist, Dr Kotze, who was appointed on behalf of the State to serve on the panel, and who was present at Court, to determine to what extent the disorder and depression would have impacted on the ability of the Accused in the witness box when under stress and pressure, particularly in view of the fact that the State did not intend to call Dr Kotze (Record 2994, lines 12-13, Vol 37). The application to consult was refused. As a consequence, the extent of the effect on the testimony of the Accused, could not be determined, but a reasonable inference is that it must have had an adverse effect on the Accused.

549. The above must be considered with due regard to the fact that the Accused caused the death of a person with whom he was in a loving relationship. The effect of that on the Accused was in Court and during his evidence (i.e. his vomiting, retching and crying).

550. The compromised state of mind of the Accused became evident in the report of Professor Scholtz (Exhibit QQQ), the independent psychologist appointed by the Court. He reported that:

550.1 The Accused's *"memory was compromised at times. His*

manner was respectful and cooperative. He reported that he had been using anti-depressant, anxiolyotics and sedatives since the events of 14 February, prescribed to him by a psychiatrist". (Exhibit QQQ, page 4, lines 35-40)

550.2 The Accused suffered from a Post Traumatic Stress Disorder and a Major Depressive Disorder as defined by the Diagnostic and Statistical Manual – 5 (DSM5).

550.3 The degree of anxiety and depression he presented with, was significant.

550.4 He was mourning the loss of the Deceased.

550.5 He was severely traumatised by the events of 14 February 2013; (Report, par 5.1, lines 18-23, page 29; para 5.6, lines 30-32, page 30) and

550.6 there was evidence to indicate that the Accused was genuine in his feelings towards the Deceased, and that they had had a normal, loving relationship.

551. The Accused, in evidence confirmed that he was on medication since about the third week in February 2013. He was using anti-depressants and a sleeping sedative (Record 1359, lines 9-18). The Accused experienced difficulty with sleeping (Record 1359, lines 19-25).

552. The above facts can leave no doubt that the ability of the Accused, in the witness box, must have been compromised.

553. The State chose to exploit his compromised state of mind by cross-examining the Accused:

553.1 in a combative and aggressive manner over an extended period of seven days also repeating questions consistently;

553.2 by introducing photos and resorting to allegations designed to evoke severe emotions from the Accused;

553.3 by calling him a liar on occasions where his evidence could not be branded as untruthful. It is in any event only the prerogative of the Court to decide whether or not the Accused is a liar.

554. We refer to some instance of such cross-examination to support the submission.

554.1 The State relied on the length of the extension cord to call the Accused a liar and to put to the Accused that his evidence was impossible. However, the length of the extension cord was never proven, so as to justify the accusations, and could never be proved, as the extension cord mysteriously disappeared at a time when it was in the custody of, and under the control of the police. We will in argument deal with the explanation furnished by the police (Record, 1554 lines 3-4).

554.2 Mr Nel put to the Accused that he was a liar when he said that the fans had been plugged into the extension cord. This was seemingly premised on the "length" of the extension cord and the available space on the multi-plug for plugs to be inserted into the multi-plug. However, Photo "OO" shows Colonel van Rensburg plugging in or unplugging a plug in the multi-plug of the extension cord. When he was asked about it, he said that he was *"testing the fan"*. Furthermore, the length of the extension cord was not proved, as it went "missing". We have dealt with this above.

554.3 Mr Nel drew the analogy between a watermelon and the head of the Deceased, and repeatedly demanded that the Accused should look at the post-mortem photo of the Deceased's head. This was clearly done to emotionally upset the Accused for purposes of cross-examination. (Record 1509, 1510 and 1513).

554.4 Mr Nel repeatedly put it to the Accused that he had *"killed"* the Deceased. This line of questioning and the manner in which it was put was not necessary, but designed to exploit the heightened emotions of the Accused. (Record 1498, lines 2-11 and 19-20; 1515 line 25; 1516 line 9; 1519 lines 14-15; 1563 lines 8-9 and 11-13; 1568 lines 10-13; 1666 line 3; 1768 lines 7-8; 1796 line 5; 1902 line 15; 1904 line 14; 1939 lines 1-3; 1940 line 14 and 1941 lines 12-13)

554.5 Mr Nel repeatedly called the Accused a liar, which is a finding only to be made by the Court exercising its prerogative to do so. This was done solely to unsettle the Accused.

554.6 Mr Nel put it to the Accused that the Deceased was standing right in front of the toilet door, talking to the Accused when he shot her. (Record 1786, lines 6-12). The State knew it had no facts upon which to premise such a statement, but that it utilised it as a strategy to unsettle the Accused, during cross-examination.

554.7 Mr Nel put it to the Accused that he had threatened to break Mark Batchelor's legs. This was done to introduce in cross-examination, evidence which did not form part of the State's case. (Record 1729, lines 24-25). The State may not, in cross-examination, rely on evidence not presented by the State. (Schmidt : Law of Evidence, 9-61).

554.8 Mr Nel put it to the Accused that his apology to the Steenkamp family at the beginning of his evidence, was all about the Accused and that the Accused had not thought about the Steenkamp family in the process. Mr Nel further accused the Accused of not being humble enough to do it in private and that it was done so as to create a spectacle in court and within the public domain, and that the Accused could not face them because that would mean having to take responsibility and that

he did not want to this. The Accused's response to this was that he had not had the opportunity to meet with the Steenkamp family because they indicated that they were not ready to meet with him. (Record, pages 1566 lines 1-25 and 1567 lines 1-18).

554.9 The following day, Mr Nel was obliged to place on record, at the request of Mrs Steenkamp, that the Accused had indeed been telling the truth concerning him having requested a meeting with the Steenkamp family prior to the trial, but that it was indeed true that they were not ready for such a meeting (Record, page 1697 lines 5-11).

555. The combined effect of the above must be taken into account when considering the evidence of the Accused.

556. The Accused's evidence must also be considered, with due regard to his security concerns in the context of his vulnerability and anxiety. His vulnerability is not only limited to physical disabilities, but also the slow burn effect of his disability over the years.

The Accused's version at the trial

557. Having arrived home at approximately 18h15 on 13 February 2013, the Accused had placed his firearm under his bed next to the pedestal on the left hand side of the bed (Record, page 1465, lines 21-25 and page 1466, line 1). The evidence of Ms Taylor is that the Accused ordinarily

placed his firearm next to his bed on the bedside table or next to his prosthesis on the floor (Record, page 392, lines 1-2).

558. The State, at no stage, challenged the Accused's version that he had placed the firearm on the left hand side of the bed where the Accused had slept on the evening in question, due to a shoulder injury that he had sustained.

559. The fact that the holster of the firearm was found on the left bedside table, serves as corroboration for the Accused's version as to where he had unholstered the firearm. See photo 75.

560. Exhibit BBB, same being an exchange of WhatsApp messages between the Accused and the Deceased, read into the record by Captain Moller at page 1249, lines 1-18, confirms that the Accused did indeed experience problems with his shoulder. This supports the Accused's version as to why he slept on the left hand side of the bed. Furthermore, the photograph at photo 1 depicts the Accused with the kinetic tape attached to his right shoulder which corroborates his version of the shoulder injury sustained by him.

561. Whilst the State contended that the Deceased had placed all of her personal belongings to the left of the bed, which implied that she would have slept on the left of the bed, it was never put to the Accused that his version with reference to 12 and 13 February (as to their positioning on the bed) was false.

562. On the Accused's version, dinner had been consumed by him and the Deceased shortly after 19h00 on 13 February 2013 (Record, page 1460, lines 5-6). This version by the Accused was never disputed by the State.

563. The Accused's version in this regard, is corroborated by Exhibit WW (the recording of the iPad activity) from which it becomes apparent that during the hours of 19h10 to 20h00 on 13 February 2013, no website activity was recorded. Consequently, Exhibit WW serves as corroboration for the Accused's version that dinner was consumed during the aforementioned times, which explains why no website activity appeared on the iPad (Record, page 1460, lines 2-11).

564. After dinner, the Accused went to the main bedroom. He opened the balcony door as it was a very humid evening and the air-conditioning unit was not functional (Record, page 1461, lines 7-12).

565. The Accused testified that, *"I opened the sliding doors onto the balcony"* (Record, page 1461, line 21). The above description of how the doors were opened by the Accused, is incorrect in the sense that the door is in fact a sliding door and that it simply slides along the wall of the bedroom as opposed to such door opening outwards onto the balcony.

566. This aspect of the Accused's evidence is significant in that he erroneously described having opened the door *"onto the balcony"*, whereas, his evidence should have been that he merely opened the door of the balcony.

567. The significance of this is to be found in the fact that the Accused stated that, *"I did not go onto the balcony. I picked the fan up which was on the balcony and I brought the fan in"* (Record, page 1529, lines 7-8). Clearly, the Accused perceived the one fan to have been on the balcony, as the one leg of the fan was on the balcony. This was misconstrued by Mr Nel who suggested that the Accused had lied with reference to him having gone *"onto"* the balcony as stated in the bail application. The mistake made by the Accused is merely as a consequence of his *"manner of speaking".*

568. Once the curtains are drawn in the main bedroom, the inside of the room is dark and there is hardly any visibility (Record, page 1462, lines 21-25).

569. In her evidence, Ms Taylor confirmed that once the curtains had been drawn, the room would be filled with darkness (Record, page 399, lines 11-12). Dixon confirmed the aforegoing evidence.(Record, page 1951, lines 4-25 and page 1952, lines 1-8).

570. Consequently, the lack of visibility in the main bedroom is corroborative of the fact that the Accused, once he had drawn the curtains, would in all probability not have observed the Deceased making her way to the bathroom, more so, if he was facing in a different direction at the time.

571. That he was in the habit of locking the bedroom door every night, and that having done so, he positioned the cricket bat between the door and the sunglass cabinet so as to serve as a secondary security measure as

he believed that the lock mechanism on the door was not very strong (Record, page 1463, lines 13-15). These aspects of the Accused's version were not challenged by the State. His evidence confirms his fear of possibly falling victim to criminals entering his home at night.

572. The Accused testified that he had activated the alarm on the night in question (Record, page 1703, lines 23-24). However, he conceded that he does not have an independent recollection of switching the alarm off (Record, page 1711, lines 1-9).

573. The Accused had removed his prosthesis and placed them in close proximity to the sliding doors (between the bed and the sliding doors) prior to him going to bed so as to allow them to be aired (Record, page 1464, lines 16-22).

574. Whilst Mr Nel suggested that the fan was positioned as it is depicted in photograph 55, he could not dispute the evidence of the Accused that the fan could not have been in that position as that position had already been occupied by his prosthesis (up until the time that the Accused attached his prosthesis) following the shooting. Therefore, it is clear that the fan could not have been in the position as is depicted in photograph 55.

575. The Accused testified that he fell asleep between 21h00 and 22h00 on 13 February 2013. Before he fell asleep, he had asked the Deceased to bring in the fans, and to lock the sliding door before she fell asleep.

576. He woke up during the early morning hours of 14 February 2013, and noticed that the fans were still running and that the sliding door was open (Record, page 1469, lines 12-15).

577. The Deceased asked him, *"Can you not sleep my baba?"* (Record, page 1469, lines 12-16). In cross-examination, the State challenged the Accused on this version and it was put to him that he had invented the discussion with the Deceased (Record, page 1758, lines 13-15). The Accused denied that he had invented such a discussion as alleged (Record, page 1758, lines 15-19).

578. Having collected the fans (from the balcony), he placed the small fan just inside the room and the larger fan in close proximity to the front of the bed, whereafter he closed and locked the sliding doors and drew the curtains. He confirmed that at that stage, the fans were still running (Record, page 1469, lines 19-25).

579. Colonel Van Rensburg testified that upon his arrival at the scene, none of the fans were switched on (Record, page 777, line 1). However, during cross-examination, Van Rensburg conceded that upon him first entering the main bedroom, his focus was not on whether the fan was switched on or off (Record, page 888, lines 11-12). In re-examination he admitted that he could not say if the fan was on or off. We have dealt with Colonel van Rensburg's evidence above.

580. Having closed the curtains, the only source of light in the bedroom was

that of the little LED light, on the amplifier. This light source made it possible for the Accused to observe the Deceased's jeans lying on the floor (Record, page 1470, lines 1-6).

581. He picked up the jeans from the floor so as to cover the LED light. As he was doing so, he heard what sounded the window sliding open and striking the frame *"as if it had slid to a point where it cannot slide anymore"* (Record, page 1470, lines 6-10 and page 1738, lines 16-18).

582. He interpreted the noise emanating from the bathroom as that of a burglar gaining entry into his home (Record, page 1470, lines 20-21).

583. A distinction can be drawn between the incident in question and an incident on a previous occasion referred to by Ms Taylor. On a previous occasion, the Accused had heard a noise downstairs, the danger perceived by him did not prove to be as immediate as was the case on the morning in question. This being so due to the bathroom being situated within close proximity to the main bedroom.

584. A further distinguishing feature in Ms Taylor's evidence, is that the Accused was not the only male present in the house at that time, as a friend of his had also slept over that particular night. (Record 412 lines 14-16).

585. Having heard the noise coming from the bathroom, he froze, his first thoughts were that he should arm himself so as to protect the Deceased

and himself. In doing so, he rushed to collect his firearm from under the left hand side of the bed (Record, page 1471, lines 2-10).

586. The Accused stated that he felt vulnerable not having had the benefit of having his prostheses attached, hence him having armed himself with his firearm (Record 1760 lines 11-14).

587. Having armed himself, and as he left the bed, he whispered to the Deceased to *"Get down and phone the police"* (Record, page 1471, lines 20-21). During cross-examination he testified that:

587.1 he did not whisper, but had communicated with the Deceased in a soft manner (Record, page 1740, line 25); and

587.2 he confirmed that it was correct when Mr Nel put it to him that he had in fact whispered (Record, page 1835, line 3).

587.3 It is respectfully submitted that this minor contradiction is not material and certainly not indicative of the Accused having told an untruth.

588. He recalled slowing down his pace before he entered the passage leading to the bathroom as he was afraid that at that time, the intruder/s was/were already positioned in the passage. He had his firearm extended in front of him (Record, page 1471, lines 13-18).

589. As he entered the passage, he was overcome with fear and shouted for

the intruder/s to get out of his home, he also shouted for the Deceased to phone the police (Record, page 1471, lines 24-25).

590. During cross examination, Mr Nel put it to the Accused that if he had spoken to the Deceased, the two of them could have taken “lots of other steps”, namely that they could have gone to the balcony, or hide behind the bed (Record 1768 lines 15-12 and Record 1769 lines 1-8).

591. The Accused stated that instead of cowering and running away, when he heard the noise made by the bathroom window, he wanted to put himself between the Deceased and the danger. (Record 1769 lines 2-6).

592. The Accused, having acknowledged the possibility that him and the Deceased could have fled via the main bedroom door, he did not follow that route as he has very limited mobility (whilst on his stumps) on a hard surface, such as tiles (Record 1767 lines 17-23). The evidence of Dr Versfeld confirms the aforegoing.

593. He heard a door slam. This he understood to have been the toilet door slamming closed, which to him, confirmed that there was someone inside the toilet, or at the very least inside the bathroom (Record, page 1472, lines 8-13).

594. In cross-examination, he testified that he thought that there was either somebody going into the toilet, or someone having kicked the toilet door in the process of fleeing the house (Record, page 1773, lines 10-17).

595. Having positioned himself at the entrance to the bathroom, he observed that, *"(T)here was no light in the bathroom"* but light from the outside made it possible to see in the bathroom (Record 1774, lines 2-9, Vol 20). He observed that the bathroom window had been opened.

596. At that time he was unsure of whether there were people/intruders inside the toilet or whether they were on a ladder that they could have used to gain access to the bathroom, or whether they were *"around the corner at that point"*, meaning them being positioned within the bathroom. At that point in time, he had his firearm pointed in front of him (Record, page 1474, lines 6-16).

597. Whilst at the entrance of the bathroom, he again screamed for the Deceased to phone the police. In his mind, he was not sure whether someone was going to exit the toilet to attack him, or whether someone was going to climb up the ladder and attack him by shooting at him (Record, page 1474, lines 6-14).

598. He heard a noise from inside the toilet and he perceived this to be someone coming out of the toilet. He furthermore testified, *"Before I knew it, I had fired four shots at the door …"* (Record, page 1475, lines 7-9).

599. The Accused suggested that the sound of wood moving, resembled the door being opened (Record 1788 lines 5-8). He testified that the door made a knocking noise when it opened (Record 1788 lines 19-20).

600. He returned to the bedroom and searched for the Deceased. Having been unable to find the Deceased, he returned to the bathroom and found the toilet door locked. It dawned upon him that it could have been the Deceased in the toilet, when he realized that she was not on the bed (Record 1892 lines 14-17).

601. He returned to the bedroom, opened the sliding door and screamed *"Help, help, help"*. Mr Johnson confirmed having heard a male voice shouting for help prior to him making a call at 03h16 (Record, page 180, lines 22-23). Mrs Burger also confirmed the aforegoing (Record, page 28, lines 21-25). Mrs Nhlengethwa also testified that she had heard the same screaming for help prior to her husband making a call to security at 03h16 (Record, page 2238, lines 6-10).

602. It is respectfully submitted, that the aforegoing evidence not only refutes the State case as to the timing of the shooting, at 03h17, it is incomprehensible that the shouting for help would have occurred prior to the shooting, as alleged.

603. He attached his prostheses, returned to the bathroom and attempted to open the door by kicking it. He returned to the bedroom and fetched the cricket bat whilst screaming, shouting and crying out (Record, page 1477, lines 7-8). The Accused stated that his voice could be of a high pitch when shouting, or screaming out loud (Record 1868 lines 16-20). It was patent in his evidence that his voice pitches when he is anxious.

604. Dixon confirmed that the mark found on the door, as depicted in photo JJJ2.10 to JJJ2.11 had indeed been caused by a hard, forceful object moving in an upward motion against the door (Record, page 1965, lines 1-25 and page 1966, lines 1-25). Dixon was of the view that the mark as aforesaid, was consistent with a mark found on the sole of the right prosthesis, as depicted in photo JJJ2.12 and that such mark was in all probability caused by the prosthesis having been applied with force against the door.

605. What is apparent from this evidence is that the Accused had his prosthesis attached at the time when he kicked against the door, prior to having struck same with the cricket bat, thus it axiomatically follows that the Accused had his prosthesis attached at a time when he struck the door with the cricket bat.

606. This evidence contradicts the State's allegation that the Accused was on his stumps at a time when he struck the door with the cricket bat, as referred to *supra*.

607. He does not have a recollection of having switched the light on in the bathroom; he however recalls that the light had been on at a time when he kicked the door (Record, page 1477, lines 16-19).

608. As demonstrated above, it is clear that the person seen walking from right to left through the bathroom window, was in fact the Accused, who at that time had his prosthesis attached whilst walking in the bathroom.

This evidence refutes the State's case that the shooting took place at 03h17 as it was common cause that he was on his stumps at the time of the shooting.

609. In accordance with his recollection, he struck the door three times with the cricket bat, whereafter he broke out a panel of the door and found the key lying on the floor inside the bathroom. He unlocked the door and opened it (Record, page 1477, lines 19-25 and page 1478, lines 1-6).

610. He testified that he was screaming out the Deceased's name whilst striking the door with the cricket bat (Record 1868 lines 11-12), and that he struck the door off centre to the right and on the frame as he was concerned that one of the planks would strike the Deceased if she was in the toilet (Record 1917 lines 18-15).

611. Mrs Stipp described the second sounds heard by her as *inter alia "thud"* sounds in her written statement (Exhibit YY). Considering the timeline of events, the second sounds were heard at 03h17.

612. He denied that the magazine rack was found as it is depicted in photograph 123 (Record 1923 lines 10-16). He testified that he found the magazine rack to the far right (facing the toilet door) of the toilet against the two walls (Record 1924 lines 5-11). Dixon, with reference to photo 123 and the blood imprint made by the magazine rack, showed this recollection of the Accused to be incorrect. Understandably, at that time the Accused was extremely stressed and emotional as it was at the time

when he found the Deceased in the toilet and his observations could have been compromised.

613. The Accused left his firearm in a cocked position in front of the toilet which shows his anxiety consistent with his version.

614. The Accused phoned Johan Stander at 03:19:33, Netcare at 03:20:05 (Exhibit ZZ8) and security at 03:21.

The fans

615. He was confronted in cross-examination concerning his reference to the one fan on the balcony, which he had brought in, as referred to in the bail affidavit, whilst mentioning two fans at the trial.

616. This contradiction must be considered in view of his evidence that *"As I have said earlier, the one fan's leg was on the balcony and the other fan was between the two legs of the tripod fan and it was on the carpet. So that (sic) not outside. I brought the fan that was on the balcony inside". And further, "What I can say here, is that this talks about bringing in the fan. There was one fan that was not inside the house".*

617. The aforegoing furnishes an explanation as to the reference to the fan in the bail statement which made reference to only one fan being brought into the bedroom from the balcony.

618. During cross-examination, he was questioned about the allegation in the

plea explanation, that tampering had taken place on the scene. It had been indicated that *"(T)he fan's cord had moved"* (Record, page 1535, line 18).

619. Responding to a question by Mr Nel, as to how the fans were disturbed, he responded by stating that the fans had been tampered with, but not disturbed (Record, page 1539, lines 24-25 and page 1540, lines 1-2). At a later stage he testified that *"The fans were also moved at different points around the room"* (Record, page 1540, lines 10-11).

620. The Accused was adamant that the fan could not have been in the position as is depicted on Photo 55, as it would have obstructed his access to the balcony when he ran out onto the balcony to call for help (Record 1684 lines 9-16).

621. He testified that, *"The fans are plugged into the extension cord that is … Behind the bed on the right hand side of the bed there is a plug. I am not sure what is plugged in there. I am not sure if it is a double plug. I know that the extension cord is … That is where the power source was for the extension cord".*

622. Consequently, it is clear that the evidence of the Accused as to where the extension cord had been plugged in makes it apparent that such extension cord would have been capable of reaching further than the position at which Mr Nel suggested that it did (on the assumption that it could not be moved).

623. In fact, the Accused testified that the extension cord with the multi-plug could have moved and thus the fan could have been placed in the position as suggested by him (Record 1693 lines 23-25 and Record 1694 lines 1-25) Mr Nel put to the Accused: *"No, no. I say for certain. I say take it as a given. If the multi-plug did not move, that is what I am saying, answer that question."*(Record 1695 lines 14-20). (Emphasis added)

624. What Mr Nel put to the Accused, raises the question as to whether he could have put such a definitive statement to the Accused without evidence as to the length of the extension cord.

625. However, if he did know the length of the extension cord and that it exceeded the reaching point suggested by him, then he misled the court. What proves to be more sinister is the fact that the extension cord has now disappeared.

626. Initially he testified, *"I plugged the fans into that extension cord"* (Record, page 1546, lines 21-22). However, at a later stage, he testified that it was possible that the plug for the small fan could have been plugged into the plug socket located behind the television cabinet, (which evidence was not disputed).

627. However, as far as he could recall, both fans were plugged into the multi-plug power source. However, he indicated that he did not have an independent recollection of exactly where the plug of the small fan had

been plugged in (Record, page 1547, lines 8-20).

628. Concerning the aforegoing, the Accused testified, *"I have not thought about where I plugged in what fan. I know that both the fans were working. … If the one fan's length of the one cord is not long enough to fit in a power source, then it is obvious that both of them were in the extension cord."* (Record, page 1548, line 25 and page 1549, lines 1-4). The purpose with which the extension cord had been utilised, was to extend the reach of both fans within the confines of the main bedroom, this was in accordance with his evidence (Record, page 1549, lines 20-22).

629. He stated that he had not unplugged either of the two fans, but that he may have pushed the fan aside in his frantic movements although he has no recollection of having moved the fans (Record, page 1550, lines 20-23).

630. Upon being confronted with the fact that he could not recall that he previously testified that both fans had been plugged into the extension cord, he testified that *"My memory is not very good at the moment"* (Record, page 1548, line 3).

631. This is a manifestation of his disorder and condition to which we referred above.

The duvet

632. As to the location of the duvet, the Accused testified: *"You could make out the silhouettes of the bed and of some of the objects on the floor. It was at that point that I saw the jeans on the floor and there was enough light that I could bring … pick up the fan and place it on the floor."*

633. He testified that he did not recall having seen a duvet on the bed following the shooting incident; (Record, page 1886, line 19)

634. However, he testified that he would not have walked over the duvet, because the duvet was not on the floor (Record, page 1676, lines 14-15 and line 25). He recalled that the bedding had been on the bed (Record, page 1677, line 7; page 1679, lines 9-11 and lines 13-14 and page 1685, lines 9-12).

635. He stated that the duvet was on the bed and that he had in fact moved the duvet towards the middle of the bed (Record, page 1684, lines 1-8). However, he also testified that following the shooting incident, he could not remember whether the duvet was on the bed (Record, page 1886, lines 19-20). Furthermore, he conceded that when he got to the bed after the shooting, there was nothing on the bed (Record, page 1887, lines 18-19).

636. It is submitted that the failure of the State to call W/O Botha who was on the scene and could give evidence about the position of the duvet, justifies a negative inference, that he would not have advanced the State's case. W/O Botha was in the main bedroom. When Colonel Van

Rensburg left, he probably remained behind.

637. This becomes more prominent if regard is had to the Accused's evidence that the affidavit of W/O Botha disclosed that the bedding was on the one side of the bed. The bedding could only be the duvet (Record 1577, lines 4-9).

638. We dealt with Colonel van Rensburg and W/O Van Staden's unreliable evidence, relevant to who accessed the first floor.

639. The Accused conceded that certain aspects of his evidence was not entirely consistent with earlier versions testified to by him, when compared to the version advanced by him during the bail application. He explained that he did not tailor his version during the trial so as to render it fully compatible with his version during the bail application, despite him having had the opportunity of doing so (Record, page 1516, lines 18-23).

640. In regard to the Accused's version of the events which unfolded subsequent to the Accused having discharged his firearm, Mr Nel submitted that:

> *"But that, as I said, Mr Pistorius, that what happened after the shooting, apart from this piece of information we are exactly … in fact happened."*
>
> (Record, page 1938, lines 1-3).

And furthermore,

> *"As far as your version is concerned that you broke down the door, that you picked her up and carried her down is not in dispute and that is what your … There is very little improbability because that in fact happened."*
>
> (Record, page 1932, lines 20-23)

641. Consequently, the State does not dispute the Accused's version insofar as it relates to the events which unfolded subsequent to the shooting incident.

642. Mr Nel never asked the Accused if he would have shot if he thought that the Deceased might have been in the toilet. The reason for not asking is clear, Mr Nel knew that the Accused would not have discharged his firearm.

643. Clearly, had he been alerted to the Deceased's presence in the toilet, he would not have discharged the firearm (Record, page 1662, lines 13-16).

644. What is of the utmost importance is that:

644.1 he did not want to shoot the Deceased;

644.2 he did not foresee or reconcile himself with any possibility that it might have been the Deceased in the toilet as he believed that

she was in the bedroom;

644.3 the Accused's failure to foresee and reconcile himself with the possibility that the Deceased was in the toilet is evident from his insistence that the death of the Deceased was an accident as he believed that she was in the bedroom and not in the toilet.

THE SHOOTING

645. The following was testified to by the Accused, with particular reference to him having discharged the firearm:

645.1 The shooting incident was an accident, he shot in the belief that an intruder/s was/were coming out to attack him (Record, page 1554, lines 23-25);

645.2 He never intended to shoot anyone (Record, page 1555, lines 10-11);

645.3 He shot because he believed someone was coming out to attack him and he did not have time to think (Record, page 1556, lines 9-12 and lines 24-25; page 1557, lines 1-3 and page 1558, lines 7-8);

645.4 He pulled the trigger when he heard the noise (Record, page 1558, line 19);

645.5 He fired into the toilet door … (Record, page 1560, lines 5-7 and

lines 19-22);

645.6 He did not purposefully fire shots into the door (Record, page 1561, lines 1-2);

645.7 That, whilst he acknowledged having fired shots at the toilet door, he denied having done so deliberately (Record, page 1561, lines 1-25 and page 1562, lines 1-7);

645.8 He testified that he never aimed at the door (Record 1847 lines 16-19). The firearm was pointed at the door, when he discharged his firearm as he got a fright (Record 1848 lines 22-24 and Record 1874 lines 18-19).

645.9 He remembers pulling the trigger in quick succession, however he does not remember firing specifically four shots (Record, 1659 and 1660);

645.10 He *"fired before I could think. Before I even had a moment to comprehend what was happening"* (Record, page 1558, lines 2-3);

645.11 *"I pulled the trigger at that moment when I heard the noise, I did not have time to think about what was happening."* (Record 1558, lines 19-21)

645.12 He stated *"Before thinking, out of fear I fired the shots"* (Record,

page 1559, lines 8-9);

645.13 He testified that it was an accident, in that he "discharged the firearm in the belief that an intruder was coming out to attack me" (Record, page 1554, lines 24-25);

645.14 That the discharge of the firearm was accidental, he did not intend to discharge his firearm and that he *"was not meaning to shoot anyone"* (Record, page 1555, lines 22-23);

645.15 He *"shot because I was at that point with that … that split moment I believed somebody was coming out to attack me, that is what made me fire my … out of fear. I did not have time to think. I discharged my firearm"* (Record, page 1556, lines 11-12);

645.16 Further, when asked to explain what is meant by "accident", as it was referred to in the plea explanation, the Accused answered as follows:

> *"The accident was that I discharged my firearm in the belief that an intruder was coming out to attack me, M'Lady. --- So the discharge was not accidental? Or was the discharge accidental? --- The discharge was accidental, My Lady. I believed that somebody was coming out. I believed the noise that I heard inside the toilet was somebody coming out*

to attack me, or to take my life.(Record, page 1554, lines 23-25 and page 1555, lines 1-4)

645.17 He testified that at no stage was he ready to discharge his firearm (Record 1761 lines 19-21), but it was in a ready mode (Record 1830 lines 14-15);

645.18 He confirmed that he had released the safety mechanism on the firearm, in case he needed to use the firearm to protect himself (Record 1762 lines 2-23);

645.19 Responding to a question as to whether he consciously pulled the trigger, he answered as follows: *"I did not think about pulling the trigger. As soon as I heard the noise before I could think, I … pulled the trigger"* (Record, page 1945, lines 1-2).

645.20 He never thought of the possibility that he could kill people in the toilet (Record 1875 lines 12-13). However, he conceded that thinking back retrospectively, it would be a probability that someone could be killed in the toilet (Record 1875 lines 15-21);

645.21 He testified that if he wanted to shoot the intruder, he would have shot higher up and more in the direction of where the opening of the door would be, to the far right of the door and at chest height (Record 1881 lines 16-19).

646. Whilst the Accused had in fact approached the bathroom in a state of

readiness to defend himself and the Deceased against a perceived threat, he did not consciously discharge his firearm in the direction of the toilet door, with the ensuing tragic result. In short, the conduct of the Accused and the death of the Deceased is indeed an accident.

647. The fact that the Accused, when he approached the toilet, had the intention to shoot to protect himself and the Deceased, does not imply that the Accused intended to shoot without reason. If so, he would have discharged his firearm when he arrived at the entrance to the bathroom.

648. From the perspective of viewing Professors Derman, Vorster and Scholtz's evidence as a whole, referred to hereinbelow, it is respectfully submitted that the version of the Accused as to the circumstances which prevailed both prior to and during the discharge of his firearm came about as a result of him having, in a fearful and vulnerable state discharged his firearm in reflex during the episode of an exaggerated startle response.

649. We deal hereunder with:

649.1 dolus directus;

649.2 dolus eventualis;

649.3 error in persona;

649.4 doctrine of transferred malice/intent

649.5 capacity;

649.6 culpable homicide.

DOLUS DIRECTUS

650. The gist of the Accused's version is that he thought there was an intruder (or intruders) in the toilet behind the closed toilet door and possibly an intruder/s on the ladder outside the open bathroom window.

651. He did not know that the Deceased was in the toilet as he believed she was in the bedroom. He also did not foresee the possibility that it was the Deceased in the toilet.

652. He was scared as he believed that the intruder/s could come out and attack them.

653. When he heard a noise resembling a movement inside the toilet, he interpreted the noise at that split second as the intruder/s coming out of the toilet to attack them.

654. Before thinking and out of fear, he discharged the shots. He did not count the shots.

655. In discharging the shots, he did not (subjectively) reconcile himself with the possibility that it was the Deceased in the toilet.

656. The above version that he thought that it was an intruder in the toilet and that he did not intend to discharge the shots at the Deceased is not a recent fabrication, it was in fact disclosed to :

656.1 Johan Stander at 03:19 on 14 February 2013;

656.2 Carice Viljoen shortly after 03:22 on 14 February 2013;

656.3 Dr Stipp at about 03:25 on 14 February 2013;

656.4 the police at about 04:00 on 14 February 2013.

657. It was also disclosed in more detail at the bail application, at a time when the Accused did not have access to the statements in the police docket and the State had not at that time presented its case in the bail application.

658. We will deal hereunder with the Accused's evidence in relation to his alleged direct intent to kill the Deceased to demonstrate that the Accused did not want to kill the Deceased.

659. The State's reliance on direct intent is premised on the alleged argument, which allegedly resulted in the Deceased fleeing to the toilet and screaming anxiously.

660. We have demonstrated above, that the State did not prove an alleged argument or that it was the Deceased screaming. Still less did it prove the existence of the alleged argument and alleged screaming by the Deceased as the only reasonable inference, excluding all other inferences.

661. The Accused's evidence refutes any intention to kill the Deceased.

662. After adducing the evidence of all the State witnesses, there is not an iota of evidence as to why the Accused would have wanted to kill the Deceased. On the contrary, the electronic communications between them refute any motive to kill the Deceased.

663. The psychometric testing and psychological examination of the Accused by an independent psychologist refutes any suggestion that the Accused would, because of rage in an argument, kill the Deceased.

664. His alleged intent to kill is irreconcilable with his version very shortly after the shooting, that he thought it was an intruder (in the toilet).

See: Johan Stander at 03:19
C Viljoen at ± 03:22
Dr Stipp at ± 03:24/25
Colonel van Rensburg at ± 03:55
Hilton Botha at ± 05:00

665. The probabilities also negate any suggestion that the Accused had wanted to kill the Deceased.

666. If the Accused wanted to kill the Deceased, he would not have been on his stumps, having remaining at the entrance to the bathroom, and having fired four shots at a relatively low level into the bathroom door. If he had an intention to kill the Deceased, it is more probable that he would stand right in front of the door (after being unable to open it) and fire shots at a height which would be expected to be fatal.

667. After the shooting the Accused would not, at a time he believed the Deceased was still alive, take all possible steps to save her life. (The call to Johan Stander and 911 and the evidence of Carice Viljoen and Dr Stipp). By saving her life, she would have been able to expose his alleged murderous actions.

668. His alleged intention to kill is irreconcilable with him shouting for help and screaming on more than one occasion, as if he was being attacked. Rather, his shouting and screaming before the second sounds are consistent with him screaming and crying out after realising it was the Deceased in the toilet.

669. His alleged intentional killing is irreconcilable with his loving relationship with the Deceased, his personality (Professor Scholtz) and his psychometric testing (Professor Scholtz).

670. On the State's version, the Deceased must have been in the toilet from about 03:12 to 03:17. If the Accused was threatening to shoot her, she had ample time, in the approximate five minutes:

670.1 to hide behind the wall next to the toilet;

670.2 use her cell phone to call for help or send a message;

670.3 open the window of the toilet and call for help.

671. Her empty bladder is consistent with someone who had voided her

bladder very shortly before her death (Professor Saayman, Record 538, lines 6-9), which is consistent with the Accused's version that she must have gone to the toilet when he brought the fans in, and thereafter closed the sliding door and curtains.

672. Captain Mangena's evidence that the Deceased moved to assume a seated position on the magazine rack after the first two shots, even if it were to be correct, does not assist the State in proving an intention to kill, as the Deceased was behind a closed toilet door and the Accused was positioned at the entrance to the bathroom. He could not have known what the Deceased's positioning was in the toilet.

673. Captain Mangena never used the magazine rack whilst conducting his tests, as he did not have access to the magazine rack. (Record 1029, lines 11-15).

674. When Captain Mangena was invited to test the magazine rack in relation to the injuries (as the magazine rack was not available to him) he said *"... I do not think I can do that now"* (Record 1056, lines 13-25; Record 1057, lines 7-11 and 1060, lines 13-17).

675. The Deceased could in any event not have moved to the back to assume a seated position on the magazine rack. Professor Saayman testified that the first shot (which was agreed to have caused the injury to the hip) would have been an incapacitating injury (Record, Dr Saayman 523, lines 3-25 and Record 524, lines 1-2). Professor Botha described

the injury as one which would have caused a virtual collapse of the right hip and the Deceased would have fallen rapidly (Record 1355, line 25, 1356, line 1).

676. Captain Mangena justified his theory of the Deceased moving back and then sitting on the magazine rack by testifying that the bullet, which hit point E and ricochet to point F, injured the Deceased at two places on her back, whilst she was in a seated position on the magazine rack (Record, 1038, lines 9-18).

677. It is not in dispute that:

677.1 the bullet which impacted at point E, ricochet to point F;

677.2 that the other 3 bullets penetrated the body of the Deceased; were accounted for; and could not have impacted at “E” and “F” and could not have caused an injury on the back of the Deceased.

678. Wolmarans demonstrated conclusively that the bullet (at E and F) could not have caused the injuries on the back of the Deceased:

678.1 the bullet or its remains (the core), after impacting at E and ricocheting to F was found by Wolmarans in the toilet bowl (Exhibit MMM, Record Wolmarans, 2328, lines 4-16);

678.2 the spent bullet core found in the toilet bowl could not have

come from the other 3 bullets as Wolmarans weighed virtually all the fragments of the spent bullets (the jackets and cores found at the scene) to show that the other three bullets were accounted for (Wolmarans, Report, Exhibit MMM, para 36.6).

679. Wolmarans testified that:

679.1 the bullet which impacted at point E and ricochet to point F, cracked 3 stone tiles at point F (photo 12, Exhibit MMM, p 17), had spent all its energy after impacting at point F. Consequently, the spent bullet would not have had sufficient energy to cause the two injuries (Record, 2371), (Report, Wolmarans, MMM, par 37.10)

679.2 apart from the fact that the core of the spent bullet had insufficient energy to travel from point F to cause the injuries on the back of the Deceased, that bullet could in any event not have caused the injuries, as in order to have done so, that bullet had to travel downwards and then turn upwards to cause the injuries, which was not possible (Record, 873, lines 14-21). This was depicted on the sketch by Dixon, to illustrate what the trajectory of the bullet must have been if Captain Mangena's evidence in this regard was correct, i.e. to have travelled downwards and then change direction upwards. (Record, Dixon 1989 - 1995), (Sketch, Dixon JJJ, 2.33)

679.3 the injuries on the back of the Deceased were not consistent with having been caused by the core of the spent bullet, found by him in the toilet bowl;

679.4 Professor Saayman testified that the injuries on the back would be consistent with the Deceased making contact with a blunt contact surface, i.e. an edge of a chair or anything of that nature or caused by a missile, which did not have sufficient energy to penetrate the skin (Record 503, lines 1-6).

679.5 The magazine rack has edges, as referred to by Professor Saayman, and the injuries would correlate with the Deceased falling backwards because of the injury to her hip. (Professor Botha, Record 1313, lines 2-5)

680. With respect, although Captain Mangena was in principle a good witness, he was wrong in the two respects raised above.

681. The State contended that Wolmarans' evidence was that the Accused aimed with one of his shots. Wolmarans did not say that the Accused aimed intentionally when he fired the one shot. His evidence in cross-examination was that hole B shows sight alignment (Record 2466, lines 3-4). He also said there was no sight alignment (Record 2494 lines 8-11). None of the holes could in any event demonstrate sight alignment as having constituted an aim.

682. However, in reality no person could say with sufficient certainty (let alone beyond a reasonable doubt) what happened behind the closed toilet door. It is also not that relevant which projectiles made contact, and which projectile missed, as it is common cause that the Accused would not have been able to see what was going on behind the closed toilet door. In particular, he would not have known the Deceased's location in the toilet or in what position she was. It must also be borne in mind that the Accused was not standing directly in front of the toilet door, but rather he was positioned at the entrance to the bathroom.

683. Accordingly, Captain Mangena's evidence does not contribute to proving or disproving *dolus directus*.

684. It is clear from the above that there is no merit in the State's contention of direct intent; let alone that the evidence proved direct intent as the only reasonable inference excluding all other inferences.

DOLUS EVENTUALIS

685. The question is whether the Accused acted with *dolus eventualis* or legal intent in relation to the death of the Deceased.

686. In **S v Humphreys**[24] the Supreme Court of Appeal (SCA) confirmed the test for *dolus eventualis* to be :

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[24] 2013 (2) SACR 1 (SCA) par 12

"(a) Did the appellant subjectively foresee the possibility of the death (of his passengers) ensuing from his conduct; and

(b) did he reconcile himself with that possibility (see eg S v De Oliveira 1993 (2) SACR 59 (A) at 65i – j)?"

687. In **Humphreys** the SCA dealt with the first leg of *dolus eventualis* as follows:

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

(Emphasis added)

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

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

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

mental state in regard to the foreseen possibility which characterises dolus eventualis and which is absent in luxuria.'

[16] The question is, therefore, whether it had been established that the appellant reconciled himself with the consequences of his conduct which he subjectively foresaw. The court a quo held that he did. But I have difficulty with this finding. It seems to me that the court a quo had been influenced by the confusion in terminology against which Jansen JA sounded a note of caution in Ngubane. That much appears from the way in which the court formulated its finding on this aspect, namely — freely translated from Afrikaans — that the appellant, 'appreciating the possibility of the consequences nonetheless proceeded with his conduct, reckless as to these consequences'.

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

688. In **S v Tonkin**,[25] the SCA confirmed that the second leg of *dolus eventualis*, that the accused must have reconciled himself with the foreseen possibility, was again referred to. The SCA reiterated that the second leg is also a subjective application of the Accused reconciling himself. The SCA said the following in this regard:

"[11] This statement, as I see it, potentially exposes the magistrate to

[25] 2014 (1) SACR 583 (SCA) par 11

the criticism that, despite his express reference to the element of reconciliation as an essential ingredient of dolus eventualis, he never actually enquired into the presence of that element at all. In consequence, he fell into the trap against which this court recently reiterated a note of warning in S v Humphreys 2013 (2) SACR 1 (SCA) paras 15 – 17. Reconciliation, so this court emphasised in Humphreys, involves more than the perpetrator merely proceeding with his or her proposed conduct, despite the subjective appreciation of the consequences that ensue. If the perpetrator genuinely believed — despite the unreasonableness of that belief — that the foreseen consequences would not materialise, the element of reconciliation cannot be said to be present. The form of fault in this instance would be luxuria or conscious negligence, but not dolus eventualis (see eg S v Ngubane 1985 (3) SA 677 (A) at 685A – H).”

689. In **S v Ngema**,[26] the Court stated:

“In modern South African criminal law it is accepted as axiomatic that before intention can exist there must be a subjective intention to commit the offence concerned.”

690. Therefore the question is:

690.1 Did the Accused subjectively foresee that it could be the Deceased in the toilet; and

690.2 Notwithstanding, did he then fire the shots, thereby reconciling himself to the possibility that it could be the Deceased in the toilet.

691. Clearly, the facts show that the Accused believed that the Deceased was in the bedroom. He had in fact told her to phone the police and when he

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[26] 1992 (2) SACR 651 (N) at 655 d

was at the bathroom door he shouted for her to call the police.

692. Immediately after the shooting he was looking for the Deceased in the bedroom. It was only then that he realised the Deceased might have been in the toilet.

693. His (subjective) belief that the Deceased was in the bedroom and an intruder(s) in the toilet, is further supported by his spontaneous disclosure, very soon after the shooting, that he thought it was an intruder (see the call to Johan Stander at 03:19 and the disclosure to Carice Viljoen (± 03:22), Dr Stipp at ± 03:25 and the Police at ± 04:00.

694. His version at the bail application (before he had access to the police docket, and before he was privy to the evidence on behalf of the State at the bail application), was consistent with his belief that the Deceased was in the bedroom and an intruder(s) in the toilet.

695. It did not assist the State to put to the Accused in cross-examination that it could have been anyone in the toilet, as in the context of the case, that *"anyone",* in the Accused's mind, could not and did not include the Deceased, as his version remained unaffected that he thought the Deceased was in the bedroom.

696. Significantly, the State at no stage asked him if he would have discharged the firearm, if he thought it could possibly have been the Deceased in the toilet, as the State knew that the answer could only

have been a resounding no.

697. Therefore, in applying the test of *dolus eventualis*, it could never ever be suggested that the Accused foresaw the possibility and reconciled himself with the possibility that the Deceased could have been in the toilet.

698. The failure to foresee and/or the failure to reconcile one with the foreseen possibility may, depending on all the facts, give rise to a possible conviction of culpable homicide, which we will deal with below.

Error in persona

699. In the summary of substantial facts in terms of Section 144(3)(a) of the CPA, the State contended:

> *"The accused said to witnesses on the scene that he thought she was an intruder. Even then, the accused shot with the direct intention to kill a person. An error in persona, will not affect, the intention to kill a human being."*

700. *"Error in persona"* (mistake about the identity of the person) only finds application where an accused intended to kill the identified *"specific predetermined individual"* but made a mistake as to the identity of that individual. His mistake will not constitute a defence.

701. "Error in persona" does not apply to the present case. Rather, what the State seeks to do is to introduce the doctrine of transferred intent/malice, which does not form part of our law. We deal with the doctrine of transferred malice/intent below.

702. We illustrate the above, with reference to three examples:

Example 1

702.1 The mother of a three year old little girl, her only child, heard a noise in the house early one morning. Her husband was away on business. She was a victim of a house robbery about 6 months before.

702.2 She armed herself with her licensed firearm and walked to the front of the house to determine the cause of the noise.

702.3 Her little girl, who slept in the room next door, woke up and went to her mother's bedroom. She closed the door behind her.

702.4 The mother heard the main bedroom door closing and feared that an intruder had entered her bedroom. She believed her daughter was still asleep in her own bedroom.

702.5 She heard a noise inside the main bedroom and feared that the intruder was coming out to harm them. It had previously

happened to her in the house robbery.

702.6 She fired a shot into the door. Unbeknown to her, her daughter stood behind the door. The shot fatally wounded her daughter.

703. On the State's reliance on error in persona, the mother is guilty of intentionally murdering her daughter as she wanted to kill the intruder or foresaw and reconciled herself that the intruder could be killed. According to the State, it is irrelevant that she definitely did not have the intention to kill her daughter and that she did not foresee or reconcile herself that her daughter was in the bedroom.

704. It offends against legal principles, our legal conviction and common sense, that in the absence of intent to kill her daughter, the mother must be convicted of murdering her daughter. (Her possible negligence is irrelevant in considering intention for purposes of murder.)

Example 2

705. X wanted to kill Y. X knew that Y frequented a certain club at about 18:00 every Saturday. X armed himself and went to the club. He saw a person approaching the entrance door to the club. He mistakenly identified the person as Y. However it was not Y but Z. He fired the shot with the intention to kill the person he had identified as Y. The shot is fatal.

706. He is charged with the murder of Z.

707. In the second example X's intention was directed at the very person he mistakenly identified and aimed at. He was also charged with the murder of that very person.

708. It does not offend the legal or moral conviction that he be convicted of murder as he had the intention to kill the very person he had mistakenly identified and shot at.

709. It is for exactly this reason that Professor Burchell[27] makes it clear that error in *persona* applies only when the intention is directed at an identified, specific predetermined individual.

710. Professor Milton[28] confirms the views expressed above by stating that the *"intent to kill must relate to the very person killed"*.

711. The Accused did not intend (in any form) to kill the Deceased. He did not shoot at the Deceased mistakenly thinking she was the intruder. He did not shoot at the intruder mistakenly thinking he was the Deceased.

712. Consequently, one must be careful to generalise references to error in

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[27] South African Criminal Law and Procedure, Fourth Edition, at page 412

[28] South African Criminal Law and Procedure, Third Edition, at page 324

persona in order to seek to apply it to instances other than where the intention was directed at an identified, specific person or the very person, with whose death he is being charged.

Example 3

713. A intended to kill B, by firing a shot at B. The shot missed B and killed C who was two metres from B (*aberratio ictus scenario)*. A can only be guilty of the murder of C, if he foresaw the possibility of C's death when he shot at B, and he reconciled himself with the foreseen possibility. He may be guilty of culpable homicide, if he failed to foresee C's death or failed to reconcile himself with the foreseen possibility, in circumstances where C's death was reasonably foreseeable.[29]

714. The Accused:

714.1 did not direct his intention at the Deceased, thinking she was the intruder.

714.2 He had no intention to shoot the Deceased as she was not the specific predetermined individual whom he directed his shooting at.

714.3 He did not foresee the possibility that it could be the Deceased in the toilet, nor did he reconcile himself with such a possibility.

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[29] Burchell, *supra,* p 413

714.4 He did not intend to shoot at the intruder, in the toilet, knowing that the Deceased could be in the toilet, and accepting (reconciling) that his shot could kill the Deceased.

715. What the State is in reality attempting to reintroduce in our law is the doctrine of transferred malice/intent which formed part of our law about 70 years ago.

DOCTRINE OF TRANSFERRED MALICE/INTENT

716. The State's argument is that even if the State did not prove the fundamental requirement that the Accused subjectively foresaw the possibility that the Deceased could be killed, he ought still to be convicted of murder in respect of the Deceased.

717. The above approach is a manifestation of the doctrine of transferred intent/malice, which is premised on the doctrine of *versari in re illicita*[30], which no longer forms part of our law.

718. We show hereunder that all the authoritative authors on criminal law (Burchell, Snyman, and Milton) reject the doctrine of transferred malice/intent. Their views accord with our case law.

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[30] Burchell(supra) at 410 fn. 31 *"The doctrine of "versari in re illicito (which had its origin in the Canon Law of the Middle Ages and provided that a person who committed an unlawful act was criminally liable for all the consequences irrespective of mens rea in regard to the unlawful. consequences) has now been conclusively rejected in South African law, see below 446-7"*

719. Snyman, Criminal Law, 5th edition, *supra*, at 197 distinguishes between the "transferred intention" approach and the "concrete figure" approach.

720. Snyman points out that the transferred intention approach negates intention, which is a requisite for murder. On the other hand, the "concrete figure" approach, requires intention.

721. Snyman rejects the "transferred intention" approach, as not being part of our law and states as follows in support of the "concrete figure" approach:

> *"In order to determine whether X had the intention to kill Z, the question is not simply whether he had the intention to kill a person, but whether he had the intention to kill that particular concrete figure which was actually struck by the blow. Only if this last mentioned question is answered in the affirmative can one assume that X had the intention in respect of Z. According to this approach, what is crucial is not an abstract "intention to kill a person" but an intention "to kill the actual concrete figure struck by the blow"."*(Emphasis supplied)

722. Snyman points out that the doctrine of transferred intent amounts to an application of the doctrine of *versari in re illicita*, which is no longer part of our law. He also points out that the doctrine of transferred intent originated at a time in the history of English Law which has no further application.

723. Milton[31] at 324 states the following relevant to the above:

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[31] South African Criminal Law and Procedure, 3rd Edition, *supra*

> *"X's intent to kill must relate to the very person killed. This does not mean that X must know the identity of the intended victim. It means that cases of aberratio ictus are not murder, for our law rejects the doctrine of 'transferred malice'; if X shoots Z intending to kill him and not foreseeing the possibility that the shot may kill Y instead, X has no intent to kill Y, and cannot be convicted of murdering Y. If in the situation X foresees that his bullet may kill Y (notwithstanding that he has no desire, in the emotional sense, to kill Y) X has intent to kill Y and is guilty of murder."*

724. Burchell[32] says the following about the above:

> *"If the possibility of C's death could not reasonably have been foreseen, A would not be liable at all. If A foresaw the death of C as a real possibility, A would be guilty of the murder of C if he or she accepted the risk into the bargain; but if he or she did not foresee that possibility, but the reasonable person would have foreseen it, A would be guilty of culpable homicide."*

725. And further at 410:

> *"It will be noticed that the sole question in these cases was whether the Accused had actual intention or dolus eventualis in respect of the eventual result which was the subject matter of the charge."*

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[32] South African Criminal Law and Procedure, Volume 1, 4th edition at 409 and 410

726. In **Mtshiza**,[33] Holmes J A found *"the sophistry of transferred malice is not part of our law either as to conviction or in the matter of sentence."*

727. In **Mtshiza** 751 E Holmes JA drew attention to the fact that previous decisions such as **Kuzwayo** and **Koza,** which held an accused liable in circumstances where the Accuse did not intend to kill the specific deceased, by transferring his original intent, were decided before the Appellate Division had moved away from the old doctrine of *versari in re illicita* and before the Appellate Division had finally formulated the principle of *dolus eventualis* in the form in which it is now applied.

728. The judgment of Holmes JA in **S v Mtshiza**[34] was applied in **S v Tissen**[35]and **S v Raisa**[36]. Moreover, it seems to have been finally accepted by the Appellate Division in **S v Mavhungu**[37]**.**

729. In **S v Mavhungu** the Appellate Division approved the judgment of Holmes JA in **S v Mtshiza.** In **Mavhungu** the Appellant conspired with others to kill a specific man but unbeknown to him a woman was killed instead. The Court confirmed that to be guilty of murder either in the form of *dolus directus* or *eventualis*, subjective intention was necessary. At 67 F-H the Court stated as follows:

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33 19790 (3) SA 747 (A) at 754 H

34 1970 (3) SA 747 (A)

35 1979 (4) SA 293 (T)

36 1979 (4) SA 541 (O)

37 1981 (1) SA 56 A at 67 G-H

"*In all those circumstances I do not think that the State proved that appellant had the requisite dolus alternativus or indeterminatus, either directus or eventualis, in respect of the deceased before or at the time he was killed.*

Strictly, this was not a true instance of aberratio ictus. But, even if the problem is regarded as being one of or analogous to aberratio ictus as far as the appellant himself is concerned (ie the mortal blow that he intended Ndou should direct at the mother-in-law having been deflected to the deceased), the conclusion is the same for like reasons. The State did not prove the initial, fundamental requirement that the appellant subjectively foresaw the possibility that Ndou, in carrying out the agreed common purpose of killing the mother-in-law, would instead kill someone else. See the judgments of RUMPFF JA in S v Nkombani and Another 1963 (4) SA 877 (A) at 887G - H and of HOLMES JA in S v Mtshiza 1970 (3) SA 747 (A) at 751D - 753A. Although the relevant dicta there appear in minority judgments in the sense that the other Judges concerned pursued different approaches, I think that those dicta relating to aberratio ictus accord with modern thought and the trend of recent decisions of this Court generally on the need for the abovementioned subjective test to be always satisfied before any accused can be convicted of murder (see, for example, De Wet and Swanepoel (supra at 143 - 146); Burchell and Hunt (supra at 141 - 144)). In Longone's case supra (1938 AD 532) the appellant supplied poison to A on his request for the purpose of murdering B (A's wife), but instead A murdered C. In the circumstances appellant was held not guilty of murdering C. (De Wet and Swanepoel (supra at 144) regard this case as being one of aberratio ictus.) The decision directly supports the above conclusion, a fortiori since in that case an objective test, instead of the now accepted, stricter, subjective test, was applied - see at 538 - 9.

(Emphasis supplied)

730. What is clear from the approach followed by the Appellate Division in **S v Mavhungu** is that it is not necessary to apply or consider transferred intent, only in regard to an *aberratio ictus,* but that a pure subjective approach for intention should be maintained as a prerequisite for liability.

731. In this matter, the Accused did not intend to kill the Deceased nor did he

foresee the possibility that she could be killed. He subjectively believed that she was in the bedroom when he discharged the shots. His actions and reactions after the shooting confirmed his subjective believe that the Deceased was in the bedroom at the time.

Criminal Capacity

732. There is a further reason why the Accused cannot be guilty of murder in respect of the Deceased. Criminal Capacity is one of the building blocks of criminal liability. *"Capacity means the capacity to appreciate the wrongfulness of conduct (cognitive function of the mind) and the capacity to act in accordance with that appreciation (conative function of the mind)"*[38].

733. Burchell deals with the cognitive and conative facets of criminal capacity and says the following about criminal capacity:[39]

733.1 *"The first part of this test of capacity pertains to the cognitive functions of the accused's mind- his or her capacity to appreciate the wrongfulness of his or her conduct. This enquiry is subjective. Factors such as youthfulness, mental illness, intoxication, ignorance, lack of education, illiteracy or even superstitious belief on the part of the accused may affect his or her perception, appreciation or knowledge and may, therefore,*

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38 Burchell *(supra)* at p 51

39 page 434 and 435

be relevant to the determination of his or her liability."

733.2 The conative facet of capacity is subjective *"in the sense that it allows the court to take into account that the accused may have lacked the capacity to control his or her conduct as a result of any subjective factor relevant to the first part of the capacity enquiry (except provocation or emotional stress as regulated under the Eadie rule)."*

734. Capacity, or incapacity in this regard must not be confused with an incapacity as a consequence of a mental disorder or defect, as envisaged in Section 78(1) of the CPA.

735. In **S v Eadie**[40] the Supreme Court of Appeal dealt with provocation, but also referred to non-pathological incapacity or an incapacity not caused by a mental disorder or mental defect. The SCA also dealt with those instances where an accused was unable to exercise control over his movements.[41]

736. The SCA dealt with the view expressed that voluntary conduct must be regarded as conduct controlled by the accused's conscious will and found *"(I)n my view the insistence that one should see an involuntary act unconnected to the mental element in order to maintain a more scientific*

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[40] 2002 (1) SACR 663 (SCA)

[41] at par 57

approach to the law, is with respect an over-refinement"[42]

737. The SCA thus found that it was possible to retain the ability to distinguish between right and wrong yet lose the ability to control one's actions accordingly.[43]

738. In cases of such inability, an accused would be able to distinguish between right and wrong, but would be unable to act in accordance with his appreciation of a distinction between right and wrong.

739. The SCA found that :

> "*When an accused acts in an aggressive goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone, that at some stage during the directed and planned manoeuvre he lost his ability to control his actions."*
>
> *(Emphasis added)*

740. What is clear from the above is that capacity consists of an appreciation between right and wrong and an ability to act in accordance with such appreciation.

741. When the question (or defence) of incapacity is considered, the approach as to the existence of incapacity is subjective, but the Court is

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[42] par 58

[43] par 59

entitled to test the veracity of the defence against the Court's experience of human behaviour and social interaction.[44]

742. We will demonstrate below that a conspectus of Professor Derman, Professor Vorster and Professor Scholtz' evidence show that the Accused lacked the conative facet of capacity. Although he was goal directed and could distinguish between right and wrong, at the critical moment immediately before and at the shooting, he did not act voluntarily in the sense that he acted as a result of an increased startle reflex, which had the consequence that he did not act in accordance with his appreciation of right and wrong. The reflex may arguably impact on the *actus reus* or act.

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[44] Eadie, para 64 and 65.

"[64] "I agree that the greater part of the problem lies in the misapplication of the test. Part of the problem appears to me to be a too-ready acceptance of the accused's ipse dixit concerning his state of mind. It appears to me to be justified to test the accused's evidence about his state of mind, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social interaction. Critics may describe this as principal yielding to policy. In my view it is an acceptable method for testing the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence. The Kensley and Henry cases adopted this approach.

[65] To maintain the confidence of the community in our system of justice the approach of this Court, established over almost two decades and described earlier in this judgment, should be applied consistently. Courts should bear in mind that the phenomenon of sane people temporarily losing cognitive control, due to a combination of emotional stress and provocation, resulting in automatic behaviour, is rare. It is predictable that accused persons will in numbers continue to persist that their cases meet the test for non-pathological criminal incapacity. The law, if properly and consistently applied, will determine whether that claim is justified."

743. Dr Derman's evidence, read in conjunction with the evidence of Professor Vorster and Professor Scholtz demonstrated the cause and consequence of the startle response. He explained this as follows:

743.1 The hypothalamus, is part of the ancient midbrain. Certain regions of the hypothalamus are critical for a fight of flight response to an imminent threat or perceived imminent threat. (Record, 2802, lines 17-23; Record 2803, lines 11-21).

743.2 When there is a threatening stimulus, which can be auditory or visual, it creates a startle. (Record 2808, lines 2-7) (If this occurs in experiments, where a fear state is induced, it is referred to as a *"fear potentiated startle"*.

743.3 The startle is the initial reflexive physiological reaction/stimulus which triggers the amygdala (Record 2808, lines 2-4).

743.4 The amygdala has connections to the hypothalamus, and is the area of the brain that activates the fight or flight response (Record 2803, lines 11-12).

743.5 The startle is the immediate reflexive physiological response and a phenomenon that a person does not have control over (Record 2802, lines 21-23; Record 2803, lines 5-6).

743.6 A fight or flight response to a perceived threat is a reflexive phenomenon of the nervous system triggered by the startle

stimulus via the amygdala (Record 2802, lines 21-23.

743.7 As the startle and the fight or flight response are reflexive physiological reactions, they would be virtually instantaneous and virtually simultaneous, although the startle triggers the amygdala which triggers the fight or flight response.

743.8 The startle triggers the fight response and because both are instantaneous and reflexive and virtually simultaneous it would not be possible to calculate or determine the momentary time interval between the startle and the fight response. However, the reflexive effects of the startle and fight response will inevitable overlap.

743.9 Mr Nel posed the question "*if there is a startle and I act on the startle, are you saying that my action be (sic) automatic, whatever I choose. Or would I be able to think how I am going to deal with the startle?*" Professor Derman replied "*No, your startle is automatic*" (Record 2873 line 5-8).

743.10 When the startle occurs and the flight or fight response ensues, there is decreased thinking due to inhibition of the brain through the hippocampus, as well as less blood flow to that area of the brain, with the result that the functioning of the brain is inhibited and the thinking brain is inhibited. (Record 2874, lines 13-18).

743.11 The response triggered by the startle is a freeze, or a fight or flight response (Record 2816, lines 1-10). Therefore, the startle is the initial stimulus and the fight or flight response is the immediate response to the startle stimulus (Record 2778, lines 6-14).

743.12 As the fight or flight response is an immediate subsequent reaction to the startle, the response eventuates at a time when the thinking brain is inhibited. As the blood flow returns the inhibition dissipates gradually. It is not possible to determine the time period of dissipation.

743.13 Factually, the initial immediate fight or flight response is reflexive. A freeze is a good example. A person freezes instantaneously as a typical response following a startle. As the freezing is reflexive it is not controlled by calculated cognitive thinking. It is not possible to determine the time it will take for a person to come out of a freeze, i.e. for the reflexive response to dissipate.

743.14 The fight response is a reflexive response. It is not possible to determine when the reflexive fight response will dissipate. It dissipates when the perceived threat is over. The reflexive fight response will trigger the follow-up actions by a person up to a point when the blood flow has returned to normal.

743.15 Furthermore, Professor Derman explained the above physiological response as being, when the stimulus occurs, the effect it has on the hippocampal pre-frontal medulla cortex tract and other parts of the brain is that the functioning of the brain is inhibited and the thinking brain stops. Consequently, when a flight and fight kicks in, less blood flow to the thinking brain occurs and consequently less thinking occurs at that time (Record 2874 line 3-8).

744. The above demonstrates that:

744.1 The reflexive impact of the startle is very transient. If the shooting occurred within the reflexive state of the startle, and the fight response. The shooting will be involuntary in the sense that the Accused may not have the cognitive and/or conative capacity or the ability to act.

744.2 The cognitive impairment of the functioning of the brain at the onset of a fight response, is at its greatest. If the shooting occurred within that period of cognitive impairment, the Accused may not have the cognitive and/or conative capacity or the ability to act.

745. It is in this regard that the peculiar circumstances of the Accused must be considered to determine whether or not he had a startle and a fight or flight or freeze response and whether he had the necessary criminal

capacity at the time of the shooting.

746. Professor Derman referred to research showing that individual differences in the structural integrity of the amygdala of the sub-conscious brain and pre-frontal or conscious pathways were related to trait anxiety. Thus, people with high trait anxiety have less cortical or conscious brain modulation ability over their amygdala during fearful situations (Record 2807 line 21-23);

747. The stimulus/startle (in his case the sound) is increased or more pronounced in persons who present with anxiety. (Record 2808, lines 20-21). He testified that : *"It is further held that evidence is presented showing that anxious patients are overly sensitive to threatening context"*. And further *"Fear potentiated startle but not baseline startle differed in the low and high fear subjects. The magnitude of the fear potentiated startle was larger in the high fear group, as compared with the low fear group"*. (Record 2808, lines 20-24)

748. Consequently, Professor Derman opined that the higher the degree of fear being experienced by a particular individual, the more pronounced the reflective exaggerated startle and fight or flight response would be (Record, page 2807, lines 23-24; page 2808, lines 1-5 and lines 18-21 and page 2810, lines 3-6).

749. Professor Derman's evidence was that due to the Accused's disability, the slow burn effect of his disability, his vulnerability, as well as his

anxiety, his reflexive startle and fight response would be exaggerated and that the Accused indeed presented with an excessive startle response. (Record 2772, lines 5-6).

750. It is respectfully submitted that the Accused presented with symptoms of vulnerability not only because of his disability and the effects thereof, but also as a consequence of his experiences of incidents of crime, and how he believes criminal acts may negatively impact upon him.

751. Professor Derman testified that the Accused presents with anxiety, coupled with fear which resulted in a significant fight and flight response. He is also hyper-vigilant, has an exaggerated startle response, and is hyper sensitive to sound. Furthermore, besides his disability, he has a lifetime of real and learnt vulnerability as a consequence of his disability. He has experienced multiple traumatic events and losses in his early life." Record 2832 lines 2-12 and Exhibit ZZZ2 par 50)

752. Professor Vorster stated that a factor compounding the Accused's anxiety would be his fear of crime in South Africa(Record 2515 lines 1-3).

753. Professor Derman confirmed that the Accused's fearfulness has been present since childhood, with episodes involving his mother and perceptions of his family being victims of crime (Exhibit ZZZ2 par 51).

754. Professor Scholtz reported as follows: *"Mr Pistorius' appraisal of a*

situation is that he might be physically threatened, a fear response follows, which might seem extraordinary when viewed from the perspective of an able bodied person but normal in the context of a disabled person with his history".

755. Responding to a question as to whether his athletic start training could lead to a person exposed thereto becoming *"conditioned"*, Professor Derman responded as follows: *"Yes, it does give rise to reaction, in fact, one is teaching the athletes to be highly aware and vigilant during that time in order to then respond to the gunshot or to the sound that induces the start response"* and further, responding to a question as to whether such *"conditioning"* could be analogous to the facts of this matter (the shooting incident), Professor Derman responded as follows: *"For the common denominator in both situations is a sound which triggers the startle response, that is all I can say about that.*

756. Further, Professor Derman testified: "His training for athletics needs to be considered as he is primed during start training to react to an auditory stimulus, which leads to a physiological response. Indeed, athletic coaches use gunshots and/or a loud clap of the hands during training to elicit a startle response, which engages the athlete to perform. Such training is repeated time and time and time again and the athlete is taught not to anticipate but to react."

757. Professor Derman also testified that, *"Furthermore, this incident occurred during the early hours of the morning and in a very dark setting,*

both of which factors potentiate the startle response.", and, "that the startle reflex is accentuated in the dark". This has been shown conclusively in a scientific study, which study as included in Exhibit ZZZ.2.

758. Professor Derman, in arriving at his conclusion, testified that: *"physiological responses under stressful conditions, all of which render it probable that his version, having experienced auditory stimuli, which he perceived to be life threatening to both himself and Ms Steenkamp, resulted in a significant startle and the flight and fight response, as he is not able to flee, due to his disability, his fight response dominates his behaviour, as it has in the past, and he approaches the perceived danger. Further sounds then lead to further potentiated startles and in the setting of the complexities mentioned above, resulted in an exaggerated fight response, which culminated in this horrific tragedy."* (Record 2847 line 11-23).

759. Professor Derman's evidence that when the Accused armed himself he had the intention to kill means in the context of his evidence that it was in reaction to a fight response. That intention is not to unlawfully kill, but to put himself in a position to defend himself and the Deceased.

760. Whether the intention will manifest would depend if the circumstances necessitated a shooting. This is evident in the Accused's evidence that he:

760.1 shouted for the *"intruder/s"* to leave the house;

760.2 did not simply discharge shots into the toilet door when he arrived at the entrance to the bathroom.

761. Neither the evidence of Professor Vorster, nor Derman was disputed by the State, and the State did not elect to cross-examine Professor Scholtz. The failure to cross-examine or to present (expert) evidence to the contrary, has the consequence that the evidence of Professor Scholtz, as referred to above, remains cogent.

762. The Accused's evidence is that he heard the first sound in his vulnerable and fearful state and froze. It accounts for the first significant or increased startle and freeze response.

763. The freeze response was followed by a fight response, as the Accused did not have a real option of flight.

764. Professor Scholtz also commented as follows: *"He would also investigate if he thought there was something strange or curious, a "go to" rather than "get away from" approach".*

765. Professor Derman, upon being asked to explain the anomaly (that despite the existence of a vulnerability, on the part of the Accused, he nevertheless approached the perceived danger), replied that, such approach after a startle of the kind experienced by the Accused, is consistent with the flight and fight response. (Record 2817 lines 2-16)

766. Professor Derman further testified that, “Mr Pistorius’ significant disability, when he is left without the benefit of his prostheses, does not allow him sufficient mobility to balance or protect himself and take flight” (Record 2822 lines 15-18, Exhibit ZZZ2 at par 49).

767. Professor Derman said that fleeing was not an option available, as the individual does not have lower legs. Therefore, when one finds oneself without the ability to flee, the other option is to fight. Thus, Professor Derman opined that the approach towards danger is an understandable physiological phenomenon (Record 2819 lines 1-6).

768. On the way to the bathroom there was a further sound startle (i.e. the slamming of the door), which would have triggered a fight response.

769. The evidence of Professor Derman was that he believed that the second sound that occurred, (being the slamming of the door), was the acoustic stimulus for the second startle (Record 2910 lines 20-22 and Record 2911 lines 3-5).

770. The significance of this startle is that it caused the effect of the initial flight response to either remain or to be stimulated again or both.

771. When the Accused pointed his firearm at the door, the third sound startle occurred (the movement interpreted by him as the intruder/s coming out of the toilet).At this point in time he was in a heightened state of fear (Record, 2968 lines 18-19 and Record 2969, lines 15-16).

772. The third startle led to a reflexive fight response as is clear from his evidence referred to above. As stated above, both responses are reflexive, instantaneous and principally simultaneous.

773. Professor Derman emphasised that, when the amygdala is triggered, "*speed is what the amygdala uses at the expense of accuracy*". The response is automatic and it is immediate (Record 2955 line 5-18; Record 2956 line 17-19).

774. Professor Derman explained that if there is the expectation of a sound, then such person is in control of that sound and the startle response is not the same as someone's response to an unexpected sound (Record 2972 line 19-21). A person acting in a fearful state, would exhibit an exaggerated fear-potentiated startle (Record 2974 line 10-12; Record 2975 line 1-3).

775. Mr Nel asked the Accused whether, after having heard the noise emanating from inside the toilet, he wanted to shoot the person coming out. The Accused responded that he did not want to shoot them, that he got a fright and did not have time to think (Record 1848 lines 17-25). The Accused confirmed that at the time when he discharged the firearm, he did not think (Record 1849 lines 1-5).

776. Mr Nel put the following to the Accused: "You see, "I was not thinking" is not good for you, Mr Pistorius. "I was not thinking", is so reckless, at least I was not thinking, I just fired" (Record 1862 lines 5-7).

777. Professor Derman testified that the reference to “thinking” refers to the new brain, the neo-cortex, where executive function and thinking takes place, and that what we know from science is that when the flight and fight response kicks in, there is decreased cortical activation and then there is less cortical input into the function that ensues with the flight and fight response (Record 2818 lines 1-21).

778. In arriving at a finding that the Accused had an exaggerated startle and fight response, Professor Derman explained that the Accused informed him that at the time of the event, all his muscles were tense, he was sweating and he was incredibly scared. Such physiological response is consistent with a finding that the Accused indeed had an exaggerated startle and fight response (Record 2892 line 20-2; Record 2909 line 6-8 and 13-15).

779. The reflexive response / reaction of the vulnerable disabled Accused impacted on his incapacity to act in accordance with his appreciation of right and wrong or possibly on his ability to act and caused the discharge of the firearm.

780. In cross-examination, Mr Nel, put it to Professor Derman *“His last action of shooting and killing the Deceased would be outside the domain of the fight response”.* Derman replied *“I cannot conclude that, M’Lady. Because how do we know that. <u>One would need to know that the fear and the whole sympathetic nervous system was withdrawn at that point in time</u>.”* (Record 2890 line 13-17).

781. Mr Nel attempted to draw a time line between the startle and the fight response which is not possible as explained above, as they are instantaneous and virtually simultaneous and their effects overlap.

782. The increased startle and fight response justify the probable inference that the shooting was reflexive and, accordingly, that he did not have the necessary criminal capacity.

783. Even if the inference of incapacity is not probable, but only reasonably possible, the defence ought to be upheld as the onus to prove capacity is on the State.[45]

784. A proper basis was laid for the defence and the State did not present any evidence to refute the defence.[46]

785. The presumption of sanity does not assist the State as the defence of incapacity in this matter has no relevance to insanity or a mental disorder or mental defect.[47]

786. It is understandable that a Court would be loath to accept a defence of incapacity in general, particularly where the person involved has no known impediments and disabilities.

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[45] **S v Ritmann** 1992 (2) SACR 110 NMHC. See also Du Toit *et al: Commentary on the Criminal Procedure Act* p. 13-7

[46] **S v Wiid** 1990 (1) SACR 560 (A)

[47] **S v Cretien** 1981 (1) SA 1097 (AS) at 1106 B-C
S v Camples 1987 (1) SA 940 (A) at 958 I-J

787. However every case must be decided on its own merits or as the SCA put it in **Eadie** *"It is predictable that accused persons will in numbers continue to persist that their cases meet the test for non-pathological criminal incapacity. The law, if properly and consistently applied, will determine whether that claim is justified."*[48]

788. However, in this matter the evidence of the reflexive response is well substantiated by experts without any gainsaying evidence. It also accords with the version of the Accused relevant to the discharge of the shots.

PUTATIVE PRIVATE DEFENCE

789. If the Honourable Court were to find that the Accused did not discharge the shots in a reflexive response, consequent upon an exaggerated startle, which made him incapable of acting in accordance with his appreciation of right and wrong, or incapable of acting, then the alternative finding can only be that the Accused intentionally discharged the shots, in the belief that the intruder/s was/were coming out of the toilet, to attack the Accused and the Deceased.

790. The Accused testified *"... that split moment I believed somebody was coming out to attack me, that is what made me fire ... out of fear ... I did not have time to think ..."* (Record 1556, lines 9-11)

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[48] at 691, par 65

791. He also testified *"... I fired my firearm I believed that someone was coming out of the toilet to attack me ... I do not know how to put it in a different way."* (Record 1558, lines 15-18) and further *"... I thought that somebody was coming out to attack me"* (Record 1558, lines 21-22).

792. **S v de Oliveira** 1993 (2) SACR 59 (A) is a case dealing with putative private-defence and *dolus eventualis*. The Court stated if an accused honestly believes that his life or property was in danger, but objectively viewed it was not, the defensive steps he took could not constitute private defence. If in those circumstances he killed someone, his conduct was unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus*, in which case liability for the person's death based on intention would also be excluded; at worst he could then be convicted of culpable homicide.

793. The dicta of **Oliveira** above was referred to and applied in the unreported SCA judgment of Mkhize v S (16/2013) [2014] ZASCA 52 (14 April 2014) at par 13.

794. Although the test for private defence is objective - would a reasonable man in the position of the accused have acted in the same way (S v Ntuli 1975 (1) SA 429 (A) at 436E), the test for putative private defence it is not the lawfulness that is in issue but culpability in which event his subjective intention is considered in offences requiring intent.

795. As stated above, the incorrect belief that a person acted in self-defence needs not to be reasonable, as the test remains subjective in regard to offences requiring intent. If he acted in an unreasonable manner he may be exposed to culpable homicide.

796. In short, if the Accused *bona fide* but mistakenly believed that he acted in self-defence (private defence) he could not be held liable on account of murder as he lacked the requisite intention to commit a murder.[49]

797. Professor Burchell[50] succinctly summarises the legal position by stating as follows:

> *"Since intention is tested subjectively, the question of whether the accused knew he was exceeding the bounds of private defence must be determined by examining the state of mind of the accused himself and especially his perceptions and beliefs relating to the attack and his defence. Thus, if, as a result of mistake, the accused himself genuinely believed the attack was unlawful, or that his life was in danger, or that he was using reasonable means to avert the attack, he should escape liability for a crime requiring intention on the ground that he did not intend his conduct to be unlawful. However, where the accused has killed in private defence, the fact that he believed that he was acting lawfully will*

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[49] Burchell at 135

[50] at 417

not prevent him from being convicted of culpable homicide."[51] (If of course the Accused acted contra to the reasonable person, dealt with below).

CULPABLE HOMICIDE

798. In terms of Section 258 of the CPA culpable homicide is a competent verdict to a charge of murder.

799. In order to determine whether or not the Accused was negligent in causing the death of the Deceased, our courts have traditionally applied a three-part test:[52]

"(a) Would a reasonable person, in the same circumstances as the accused, have foreseen the reasonable possibility of the occurrence of the consequence or the existence of the circumstance in question, including its unlawfulness?

(b) Would a reasonable person have taken steps to guard against that possibility?

(c) Did the accused fail to take the steps which he or she should reasonably have taken to guard against it?"

800. If all three parts are confirmed then the Accused's conduct would be

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[51] Hunt 417

[52] Burchell : at p 426

regarded as negligent.

801. Although the test for negligence is objective, certain subjective factors are applied as a modified form of blameworthiness.[53]

802. In Harrington No and Another v Transnet Ltd t/a Metrorail and Others 2010 (2) SA 479 (SCA) at p492 Heher JA stated:

"The observations of Wessels CJ 17 uttered 75 years ago in South African Railways v Bardeleben 1934 AD 473 at 480 still have force:

In judging whether there is culpa, the Court must, as nearly as it can, place itself in the position of the engine driver at the time when the accident occurred and judge whether he showed that ordinary care which can reasonably be expected from a reasonable man under all the circumstances. The Court must not in any way be affected by the tragic consequences of the accident, nor, on the other hand, must it excuse any carelessness on the part of engine drivers. It must not expect superhuman powers of observation or an impeccable discretion on the B part of engine drivers, nor must it say to him after the event - if you had done this or that more quickly or more accurately, or if you had perceived this or that more readily, you might possibly have avoided the accident. It is so easy to be wise after the event."

803. In S v Manamela and Another (Director-General of Justice Intervening)

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[53] Burchell 427

2000 (1) SACR 414 (CC) O'REGAN and CAMERON AJ found:

"The difficulties of applying a purely objective test in a diverse society have been acknowledged by our courts and have led some commentators to suggest that the test for culpa in our law should be subjective. Whatever the merits of this suggestion, it is clear that in applying the 'objective' element in the determination of reasonable cause, the court does not ignore the material circumstances in which the accused found himself or herself. In R v Mbombela 1933 AD 269, one of the early authoritative cases establishing the objective criterion, the Court held that -

'[a] reasonable belief, in my opinion is such as would be formed by a reasonable man in the circumstances in which the accused was placed in a given case'. 80 (Emphasis added.)

[75] The approach in Mbombela's case has been followed repeatedly. 81 In S v Van As 1876 (2) SA 921 (A), Rumpff CJ explained the origin and application of the frequently-invoked standard of the 'careful head of a family', the diligens paterfamilias. He stated:

'In our law since time immemorial we have used the diligens paterfamilias as someone who in specified circumstances would behave in a certain way. What he would do is regarded as reasonable. We do not use the diligentissimus (excessively careful) paterfamilias, and what the diligens paterfamilias would have done in a particular case must be determined by the judicial officer to the best of his ability. This diligens paterfamilias is of course a fiction and is also, all too often, not a pater (father). In the application of the law he is viewed "objectively", but in essence he must apparently be viewed both "objectively" and "subjectively" because he represents a particular group or type of persons who are in the same circumstances as he is, with the same ability and knowledge. If a person therefore does not foresee what the other people in his group in fact could and would have foreseen, then that element of culpa, that is failure to foresee, is present.' (Our translation.)

(Emphasis added)

804. *In S v Ngema 1992 (2) SACR 651 (D)* the following appears in the

headnote:

"While it is clear, in applying the test of the reasonable man in determining whether or not certain conduct was negligent, that the days of full-blown objectivism (see, for example, R v Mbombela 1933 AD 269 at 272), are past, and some evidence of subjectivising the test for negligence is apparent, there is no warrant for departing holus-bolus from the old and well-established reasonable man test. The reasonable man himself, of course, evolves with the times: what was reasonable in 1933 would not necessarily be reasonable today. What has happened in practice, however, is that the reasonable man is now to be placed 'in the position of the accused'. It is not clear from the decided cases, however, what is to be included and what is to be excluded from this position. A balance between the various ideas of what is to be included and what excluded from the test should be sought along the lines of reasonableness. One must test negligence by the touchstone of the reasonable person of the same background and educational level, culture, sex and race of the accused. The further individual peculiarities of the accused alone must be disregarded.

(Emphasis added)

805. There can be no doubt that disability does not form part of *"individual peculiarities"* and therefore it must be taken into account in the concept of the reasonable person representing *"a particular group of persons who are in the same circumstances as he is, with the same ability and knowledge"*[54]

806. To deny disability in determining reasonableness, would mean that disability is unreasonable.

807. *"Criminal capacity"* as dealt with above is also a prerequisite for liability

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[54] Van As *supra*

in the case of culpable homicide.

808. We have submitted in respect of criminal capacity (*supra)* that the Accused, in discharging the firearm did so because of an increased startle response. The startle response was reflexive, for which the Accused could not be held accountable as he lacked capacity in the involuntary reflexive response. Whether this reflex falls under the *"act" (actus reus)* or *"criminal capacity"* makes no difference as both negates liability.

809. We also pointed out that the startle response was exaggerated or increased due to the *"slow burn"* effect of his disability and consequent vulnerability as well as his concomitant anxiety.

810. We submitted*(supra)* that the Accused should not be held liable for a reflexive discharge caused by the increased startle response. It equally applies to culpable homicide.

811. In the event of the Court finding that the Accused had the requisite criminal capacity, we submit that the following factors which found application in persons with disability, must be taken into account as being relevant to the reasonable person with a similar disability:

811.1 The slow burn effect of the disability leaves a person in a vulnerable, fearful and anxious state.

811.2 The reaction of a person to a threat or perceived threat is limited

as generally he/she does not have the privilege of flight.

811.3 A person with disability has an increased startle response.

812. It is with the above in mind that we analyse the conduct of the Accused, measured against the reasonable person, in the same circumstances as the Accused, with the same disability.

813. During the early hours of the morning the Accused woke up and saw that the sliding door was still open, with the fans positioned at the sliding door.

814. Before he got up to bring the fans in and close the sliding door, he spoke to the Deceased.

815. After he had brought the fans in, he heard a noise which resembled the noise of the bathroom window sliding open. It is common cause that the bathroom window was found by the police to be open.

816. The noise caused a freezing startle, and evoked a fight response.

817. The fight response was a consequence of his disability in the absence of a real flight option.

818. Snyman[55] submits that *"there is no duty on the attacked party to flee. To recognise a duty to flee is to deny the very essence of the present*

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[55] p 109

defence (of private defence). Private defence deals with the defence of the legal order, that is, the upholding of justice. Fleeing is no defence; it is a capitulation to injustice. Why must justice yield to injustice?"

819. Burchell[56] *"Likewise, the inhabitants of dwellings are not expected to flee from their homes rather than resist the intrusion of a burglar or thief."*

820. Moreover, when a person's ability to flee is compromised by disability, it would be even more unjust to deny him the right to protect himself and the person he loves.

821. Accordingly, it is submitted that it was not unreasonable to arm himself and approach the bathroom so as to confront the intruder/s.

822. It was also not unreasonable to point his firearm at the toilet door, where the perceived danger was and from which he had to protect himself in the event of an attack on him.

823. The question is whether or not the Accused was negligent (as per the test to be applied for negligence) by discharging the firearm.

824. In considering the above, the disability and the effects of disability on the Accused, must be considered as the conduct of the Accused must be measured against that of the reasonable person with the same ability or disability and the effects of the disability on the reasonable disabled

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[56] p 139

person may also not be discounted.

825. One must with respect test the reflexive response of the Accused by discharging the firearm against the expected response of the reasonable disabled person in the same circumstances. This means one must place the reasonable disabled person, who would be vulnerable and be very anxious, at the entrance to the bathroom.

826. One must also take into account that the reasonable disabled person could have an increased startle reflex.

827. Consequently, the question is whether or not the Accused was negligent in his reflexive reaction to the noise of movement in the toilet, bearing in mind that the startle is controlled by primal instinct and not a considered thought process.

828. We respectfully submit that the Accused, in the peculiar circumstances and having regard to his disability and the effects of such disability, did not act negligently. The dire consequences of the shooting should not be taken into account in considering whether negligence has been established[57].

829. The wisdom in **S v Bohris Investments**[58] is a reminder that a Court must be cautious to judge negligence *ex post facto* with perfect hindsight

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[57] Metrorail *(Supra)*

[58] 1988 (1) SA 861 (A) at 866 J – 867 B

in a position of an armchair critic. Nicholas AJA said the following:

> *"In considering this question (what was reasonably foreseeable) one must guard against what Williamson JA called the 'insidious subconscious influence of ex post facto knowledge' (in **S v Mini** 1963(3) SA 188 (A) at 196E-F.) Negligence is not established by showing merely that the occurrence happened (unless the case is one where **res ipsa locitur** applies) or by showing after it happened how it should have been prevented. The **diligens pater familias** does not have prophetic foresight (**S v Burger** supra at 879D). In **Overseas Tankship (UK) Limited v Morts Dock & Engineering Co Limited (the Wagon Mount)** [1961] AC 388 (PC) [1961] 1 All ER 404 Viscount Simonds said at 424 (AC) and at 414 G-H (in All ER) 'after the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility'."*
>
> (Emphasis supplied)

B ROUX SC

K C OLDWADGE

Chambers
Sandton

31 July 2014