MEDIA COPY

IN THE GAUTENG NORTH HIGH COURT OF SOUTH AFRICA

HELD AT PRETORIA

Case No: **CC113/2013**

In the matter:

THE STATE

Versus

OSCAR LEONARD CARL PISTORIUS **THE ACCUSED**

STATE'S HEADS OF ARGUMENT

A. INTRODUCTION

1

The accused, Oscar Leonard Carl Pistorius, stands charged with four counts:

- Count 1: Murder
- Count 2: Contraventions of Section 120(7) and an alternative count of contravening Section 120(3)(a) of the Firearms Control Act, 2000 (Act No. 60 of 2000)
- Count 3: Contraventions of Section 120(7) and an alternative count of contravening Section 120(3)(a) or 120(4)(a) of the Firearms Control Act, 2000 (Act No. 60 of 2000)
- Count 4: Contraventions of Section 90 of the Firearms Control Act, 2000 (Act No. 60 of 2000)

2

The main charge against the accused is that of murder in that he shot and killed the deceased, Reeva Steenkamp, during the early hours of the morning of 14 February 2013.

3

The crime scene was a toilet cubicle inside the bathroom of the home of the accused, more specifically the bathroom linked directly to the accused's main bedroom via a

passageway of approximately 5,3m. She was shot whilst standing, facing the accused, behind the locked toilet door in that cubicle.

4

The accused fired four shots with a powerful handgun, through the locked toilet door, of which at least three of the shots hit the deceased. The accused used high performance Black Talon ammunition. The bullets ripped through her body causing major tissue trauma and her subsequent death.

5.

The deceased died on the scene as a result of "*multiple gunshot wounds*".

6

There were only two people in the house at the time of the murder and, since the accused is the sole survivor, he is the only person able to recount a version of the events to the court.

7

The accused also faces two counts of negligently discharging his firearm in a public place.

8

In January 2013 the accused was with friends in a restaurant during the busy lunch hour. He asked his friend, Mr Fresco, to pass him his firearm under the table. A shot went off hitting a floor tile.

9

Shrapnel from the shattered tile hit Mr Lerena on his leg, injuring him.

10

The accused discharged the firearm in a restaurant full of patrons. Perhaps more disconcerting is the fact that the accused asked his friend to pass him a firearm under the table whilst there was a child seated at the table right next to him.

11

It is the State's case that on another occasion, during September 2012, the accused fired a shot through the sun roof of the vehicle he was travelling in on a public road. Samantha Taylor, who was his girlfriend at the time and his friend, Mr Fresco, were in the vehicle at the time.

12

The accused was in unlawful possession of ammunition belonging to his father for which the accused had no relevant firearm licence or permit.

13

The aforementioned will be discussed in detail later but at this stage the State would like the court to take note of the fact that the accused has, from the shooting incident in September 2012 until the shooting of the deceased, displayed a blatant disregard for the law and for the lives of others.

14

The accused behaved recklessly and in the instances mentioned above his recklessness involved firearms.

15

The State will reveal to the court in these heads of argument that the accused, in keeping with his profession as an athlete, was faced during his trial with a race, and the opportunity to run with the baton of truth. The State will expose how he stumbled over his lies and deceit and in the process was unable to complete the race.

16

It is the State's case that the accused was a deceitful witness and that the court should have no difficulty in rejecting his core version of events, not only as not reasonably possibly true, but, in essence, as being absolutely devoid of any truth.

B. GENERAL

17

It became, with respect, clear that the accused is incapable of taking responsibility for any wrongdoing and in fact his attitude is that he was the "*victim*" of circumstance.

18

The accused pleaded not guilty to all the counts. It is perhaps apposite to summarise the accused's defences to some of the counts, and to indicate how the accused refused to take any responsibility and would always place the blame for his actions somewhere else.

This is not an attempt to analyse or discuss his defences but rather to illustrate and emphasise his attitude towards life which clearly exhibits an external locus of control as portrayed by his following stances:

- I cannot be blamed for firing the four shots through a locked toilet door that killed the deceased. I am unable to say why I shot but I cannot be blamed
- Although I had the firearm in my possession when "*a shot went off*" in the Tashas Restaurant, I did not fire the shot and Darren Fresco is to blame for handing me a loaded firearm
- The witnesses are lying. I never fired a shot through the sunroof of a car and although ammunition was found in my house I blame my father – it is his ammunition

19

The State will argue that not only was the accused a deceitful witness, but that he in fact tailored his evidence, and used well calculated and rehearsed emotional outbursts to deflect the attention and to avoid having to answer questions.

20

The failure of the Defence to corroborate essential elements of the version of the accused, viewed in light of their extensive preparation, substantiates the contention that the accused tailored his evidence. Although expert witnesses were called in respect of sound, the Defence failed to present evidence that supports the following statements:

- "…*if Mr. Pistorius is really anxious and he screams, when he pitches his voice, and we will call a witness in that regard, if I put it to you it sounds like a woman…*"

Page 81 lines 11-13

Page 338 lines 16–18

- the similarity between the sounds made by "…*let us assume that was a cricket bat hitting a door so hard…that sounded…like gunshots …*"; and

Page 373 lines 21–22

- *"….what I put to you…you can scream and get a female to scream in that toilet, you cannot hear it at your house when she is in the toilet…*"

Page 295 line 21-25

Page 296 lines 1–3

21

It is, with respect, trite law that statements by the Defence to state witnesses that certain evidence will be adduced during the Defence's case, and which were subsequently not adduced, should be totally disregarded.

22

The answer by the State witness, denying "*facts*" put to them, remains evidence and the Defence's inability to adduce counter evidence in fact corroborates the State's version.

23

This is especially so where the statements are not true or where there is no explanation of why they were never pursued.

C. THE ACCUSED'S PLEA

24

During the bail application the accused explained his actions as follows:

> "…*I felt extremely vulnerable, I knew I had to protect Reeva and myself. I believed that* ***when*** *the intruder or intruders came out of the toilet we* ***would*** *be in grave danger. I felt trapped as my bedroom door was locked and I have limited mobility on my stumps. I fired shots at the toilet door and shouted to Reeva…*" (*State's emphasis)*
>
> **Exhibit "B" page 65 (2)**

25

In his statement in terms of section 115 of the Criminal Procedure Act, 1977 (Act No 51 of 1977) he stated:

"*Whilst I admit that I inflicted the fatal gunshot wounds to Reeva this occurrence was indeed an* ***accident*** *in that I had mistakenly believed that an intruder or intruders had entered my house and posed an* ***imminent threat*** *to Reeva and me*" (*State's emphasis*)

Page 6 lines 20–24

"*The discharging of my firearm was precipitated by a noise …believed to be the intruder or intruders coming out of the toilet to attack Reeva and me*."

Page 7 lines 20-25

26

To highlight the accused's very vague and unconvincing attempt to create a version of the events we have to refer to his evidence in chief:

"…*and then I heard a noise from inside the toilet what I perceived to be somebody coming out of the toilet. Before I knew it, I had fired four shots at the door…"*

Page 1475 lines 7–9

27

The accused avers that the court needs to understand what caused him to fire the shots. His attitude to this count is that he is not culpable. He neither intentionally fired shots nor was he negligent in firing the shots.

We asked the question: Why did he shoot? We anticipate that the Defence might rely on the evidence of Professor Derman and therefore we pause to illustrate the glaring contradiction of the version of the accused with the evidence of Professor Derman about the all-important sound startle. It became clear that Professor Derman viewed the three sound startles as important.

28

Over and above the fact that it is our view that the evidence of Professor Derman was unconvincing and, in the main, irrelevant, one cannot but be amazed that he was unable to describe the “all-important” third sound startle in more detail.

29

The broad nature of Professor Derman’s evidence was clearly illustrated by his unconvincing explanation of the paragraph in his report dealing with the third startle. He clearly stated:”…*he heard a third sound (which he subsequently believes to have been the magazine rack)*…”

Page 2822 lines 1-3

He sidesteps around the clear meaning of the words so as to not prejudice his client who may initially not have identified the magazine rack as the source of the sound.

His evidence that he would not have "*investigated*" the nature of the sound is so unconvincing that the court will reject it as unprofessional and even negligent conduct by an expert or just as an untruth.

We argue that he was intent on identifying a third startle and did not anticipate any cross examination on this point.

30

Although the accused's version is littered with contradictions it is apt to refer to a specific version where the accused clearly indicated he had never deliberately fired shots into the toilet door:

"*You never purposefully fired shots into the door?...No My Lady, I did not*"

Record 1561 lines 1–2

31

The accused then continued with his explanation of the murder of the deceased as an "*accident*".

32

In his attempts to tailor a version to support his plea explanation **(Page 6 lines 20–23)** he tangled himself into a web:

> "*What was the accident?...The accident was that I discharged my firearm in the belief*…" and

Page1554 line 23

> "…*The discharge was accidental, My Lady. I believed that somebody was coming out…*"

Page 1560 line 25

33

We respectfully submit that the accused confused both himself and the State, creating uncertainty as to exactly what his defence is supposed to be.

34

The accused's vacillation between defences is much like saying to the court that you were not on the scene of the crime but if the court finds you were, then you rely on an added defence , that of self defence.

35

What is his defence?

Is it putative self defence? Is it an act of sane automatism? Did he have criminal capacity to act? Or was it all an accident as in Tashas Restaurant where he had the gun in his hand and it purportedly discharged itself.

36

It is, however, our case that the accused has failed to furnish a credible or reasonably possible true version and that the court will have no option but to reject his version.

37

This will, with respect, leave the court to evaluate the objective facts and the circumstantial evidence.

D. THE WITNESSES

38

The State called the following witnesses:

- Ms Michelle Burger – **Pages 26 -157**
- Ms Estelle van der Merwe – **Pages 157-176**
- Mr CP Johnson – **Pages 177-229; 259-307**
- Dr JS Stipp – **Pages 309-389**
- Ms S Taylor – **Pages 390-422**
- Mr PJ Baba – **Pages 422-455**
- Professor Gert Saayman – **Pages 458-540**
- Mr D Fresco – **Pages 541-610**

- Colonel JG Vermeulen – **Pages 611-743 and Pages 1284-1296**
- Colonel GS van Rensburg – **Pages 744-891**
- Mr SP Rens - **Pages 892-909**
- Warrant Officer BM Van Staden – **Pages 911-1017**
- Captain C Mangena - **Pages 1018-1074**
- Colonel IG van der Nest - **Pages 1074-1089**
- Colonel Michael Sales – **Pages 1089-1100**
- Ms A Stipp – **Pages 1101-1194**
- Captain FS Moller – **Pages 1195-1278**
- Warrant Officer HA Maritz - **Pages 1279-1283**

39

The Defence called:

- Dr JBC Botha – **Pages 1300-1357**
- Accused: OLC Pistorius – **Pages 1358-1948**
- Mr RD Dixon – **Pages 1949-2136**
- Mr J Stander - **Pages 2139-2171**
- Ms CB Viljoen – **Pages 2171-2199**
- Mr MR Nhlengethwa – **Pages 2201-2235**
- Ms EH Nhlengethwa – **Pages 2236-2246**
- Ms RM Motshuane – **Pages 2246-2256**
- Dr AC Lundgren – **Pages 2258-2294**

- Ms YI van Schalkwyk - **Pages 2294-2319**
- Mr TFH Wolmarans – **Pages 2320-2494**
- Dr M Foster – **Pages 2492–2523 and 2525-2537**
- Dr GA Versfeld – **Pages 2581-2623**
- IYC Lin – **Pages -2691**
- PJD van Zyl – **Pages 2692-2739**
- Professor EW Derman – **Pages 2748-2985**

40

It is apposite to discuss the relevant legal principles which prescribe the approach which should be followed in determining the outcome of a trial:

- It is trite law that the State must prove its case against the accused beyond reasonable doubt. Likewise it is trite law that there is no onus on the accused. If the version proffered by the accused is reasonably possibly true, then the accused is entitled to his acquittal.

  As was pointed out in ***State versus Van Der Meyden 1999(2) SA 79(W)*** at 80 H –

  > "*These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives*". The reason for the onus being formulated in this manner is the natural and constitutionally correct desire to preclude the innocent from being convicted and unjustly punished.

- Where there is a conflict of fact between the State's and the Defence's cases, the proper approach is for the court to apply its mind, not only to the merits and demerits of the evidence of the state witnesses and the defence witnesses, but also to the probabilities of the case

  State versus Singh 1975(1) SA 227(N) at 228 F – H

- We respectfully argue that the court summarised the correct approach in ***Stellenbosch Farmers Winery Ltd and Another versus Martell CIE and Another* 2003 (1)SA11(SCA)**. At paragraph 5 it was held:

  "…*To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities…"*

  The court proceeded to provide guidelines and then found:

  "…*The hard case which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all is equipoised probabilities prevail"*.

- The court did not deal with the value of circumstantial evidence in the ***Stellenbosch Farmers Winery*** matter (*supra*) but in ***State versus Sikhosana 1960(4) SA 723 (A)*** at 729 D it was stated that there is no limitation on the kind of evidence that may adequately confirm a confession or prove the commission of the offence charged. Proof of either or both of these may be purely circumstantial, but may conceivably be so utterly conclusive as to be far more satisfactory than the testimony of a person who purports to have been an eye witness.

41

We wish to emphasise the well-established principle entrenched with the judgment of ***R versus Dhlumayo and Another 1948(2) SA 677(A)*** that the trial court, steeped in the atmosphere of the trial, is best placed to take into account the witnesses' demeanour and personality. We respectfully submit that the court clearly applied the principle of observing the demeanour of the witnesses and with this added advantage, the court will most certainly be able to use this advantage in reaching a credibility finding.

42

In our argument we take into account the principles intrinsic to the evaluation of circumstantial evidence and in particular will keep in mind the approach of the Supreme Court of Appeal in ***State versus Hadebe 1998(1) SACR 422 (SCA)*** at 426 g-h:

"*…the court must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a <u>mosaic of proof</u>. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. The doubts may be set at rest when it is evaluated again together with all other available evidence…it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees*." *(States emphasis)*

In **this** trial each separate piece of circumstantial evidence, viewed in isolation, may be argued to weigh only as much as a feather, but all the "feathers" together on the scale will convincingly balance the scale in favour of the State.

E. <u>THE FACTS</u>

43

The objective facts that are common cause are the following:

- The accused fired the shots that killed the deceased
- The deceased was shot and killed whilst in the toilet cubicle
- The deceased was shot and killed after 03:00 on the morning of 14 February 2013
- There was a good grouping of the shots in the toilet door

- Bullet hole “A” was the first shot fired and the deceased was close to the toilet door facing the accused when she was shot in the hip
- The deceased was fully clothed when she was shot
- The accused fired four shots
- The accused used Black Talon ammunition
- There was screaming (who screamed is, however, an aspect of contention)
- The door of the toilet cubicle was locked from the inside
- The door of the toilet cubicle was broken down with a cricket bat **(Exhibit no “1”**)
- The deceased’s phone was found in the bathroom (**Exhibit “E” photo 104**)
- The accused’s phone was found in the bathroom (**Exhibit “E” photo 108 and 109**)
- The accused used his other phone to make phone calls from the bedroom area and later from the kitchen area
- The accused said to people who arrived on the scene that he thought she (the deceased) was an intruder
- The accused was on his stumps when he fired the shots
- The firearm was found in the bathroom
- Mrs Van der Merwe heard a woman talking as if arguing at 01:56 on the morning of the murder

- During the post mortem Professor Saayman discovered that the stomach of the deceased contained approximately 200 millimeters of partially digested food residue with the appearance of primarily vegetable matter
- The bathroom light was on (when exactly it was switched on is a contentious issue)
- The accused carried the deceased from the bathroom downstairs to the foyer of his house
- The accused spoke to Mr Baba on the phone

F. THE ACCUSED'S VERSION

44

We respectfully argue that the objective facts form a rather gruesome mosaic of events.

The State and the accused are obliged to provide shape to the mosaic with their respective versions. In this attempt the mosaic may be destroyed and the version rejected.

We will argue that the accused destroyed his mosaic with his unconvincing and contradictory evidence.

It is our respectful submission that the accused was an appalling witness. We cannot argue that he was the worst witness ever; that honour belongs to someone else. The accused was, however, demonstrably one of the worst witnesses we have ever encountered.

45

We will deal with his version in more detail but in summary we argue that it was vague, his responses argumentative and that his mendacity was perhaps best exemplified with his evidence that, although he recalls the detail of his encounter with the Mercedes on the highway, he cannot recall who fetched him from Rhapsody's.

46

The accused did not present as someone striving to give a truthful version, but rather as someone who was tailoring a version and was more concerned with the implications of his answers than with the truth thereof. Professor Derman exhibited similar tendencies.

The accused was more concerned about *“defending for his life*” than entrusting the court with a truthful account of his conduct on that fateful morning.

47

The most devastating aspect of the accused’s evidence is his inability and failure to contest the veracity of the scene photographs and the evidence of both Col van Rensburg and W/O van Staden as to the condition of the scene prior to the commencement of any investigation. Equally devastating is the vagueness of his version as to how and when the police would have tampered with the scene.

48

He failed to “demonstrate” that the scene was “contaminated, disturbed and tampered with”.

Page 1537 lines 18-25

Page 1542 lines 11-13

49

The version of the accused will be served a fatal blow should the court accept the evidence of Col van Rensburg and W/O van Staden.

50

If the court accepts that the scene as depicted in **photograph 55** is a true reflection of the scene discovered by van Rensburg, the court will have no option but to reject the accused’s version.

51

If the fan was in front of the door; if the duvet was on the floor; and if the denim jeans were lying on top of the duvet, the accused's mosaic would lack any cohesion.

52

If the court accepts Mrs Stipp's evidence that the bathroom light was on immediately after the first set of sounds, and if the court accepts Professor Saayman' s evidence that the deceased had had something to eat within two hours prior to her being killed, the accused's mosaic is reduced to nothing more than a smudged canvas.

53

We will deal in a little more detail with the major discrepancies, contradictions and, in our view, deceitfulness occasioned during the accused's evidence.

54

Not every untruth that was told during his evidence is significant but we do intend to point out how the accused was obligated to present incongruities and deceits to support a tailored version.

55

The accused's admission that his evidence consists of a combination of what he could remember, and a reconstruction based on what he has read from records furnished by

the State and gleaned from the evidence of the state witnesses, should be a “warning” that his evidence should be approached with circumspection.

Page 1515 lines 7–8

56

Again we argue that the accused did not approach his evidence as an opportunity to share with the court what he could remember but rather, as he terms it, as someone who was “*defending for my life*”.

Page 1548 line 4

He, however, made it clear that: “*From the time that I went to sleep to the time that I took Reeva’s life, there was no reconstruction*”.

Page 1516 lines 2-10

57

The incongruities, deceit and tailoring of his version are so significant that we have decided to number these issues. We have identified so many significant incongruities but have decided to restrict ourselves to the proverbial “baker’s dozen”.

Number 1: The accused's answer to questions pertaining to the video is indicative of his evidence as a whole. Initially he confidently testified that he has no idea what a "*Zombie-Stopper*" is.

Page 1499 line 9

Upon realising that he may be about to be caught out in a lie, he attempted to vitiate the possible damage by alleging that he cannot "*recall*" if he has ever used the term. Furthermore, he would have the court believe that he has no idea what it even means.

Page 1499 lines 13-16

He later concedes that it was his "*voice saying those words*" on the video.

Page 1508 line 24

He then admits that he said the words: "*It is a lot softer than brains but it is like a zombie stopper*."

Page 1514 lines 16–17

It is incomprehensible that the accused would have no idea of the meaning of words which are clearly in his vocabulary and which he evidently has used. His evidence is simply fallacious. In this instance he never foresaw that the State would produce this video.

58

Number 2: The accused realised that he needed to be inside his bedroom to rely on a sound in the bathroom but forgot his version under oath in the bail application.

The accused was adamant that he never went onto the balcony to retrieve the fan and that he was not on the balcony when he heard a sound but "*I was at the amplifier when I heard the window open".*

Page 1521 line 6 – Page 1522 line 16

The accused made it clear that: *"If somebody said I went onto the balcony to fetch the fans that would not be true".*

Page 1521 line 25

Page 1522 lines 1-4

Although the accused attempted to argue away the clear contradiction, his attempts failed dismally because it was impossible to answer why Adv Roux would not challenge the investigator to test his version that he was on the balcony when he heard the sound.

Page 1531 lines 17–25

The accused, however, bounced back after the spectacular crash of his version and then resorted to blaming his counsel for the contradiction.

Page 1532 lines 17–19

It was not convincing but it is not uncommon amongst accused who find themselves in a quandary.

Not only did he blame his counsel, but he also pretended to have misunderstood the question. He went as far as to conjure up a version of his cross-examination whereby he was purportedly being confronted with someone having seen him on the balcony.

Page 1523 lines 9–14

59

Number 3: The accused needed to create time to allow the deceased to get to the toilet, and because he had to be inside the room to hear the sound in the bathroom he created a version which introduced the second fan.

The bail application deals with one fan and the plea explanation with more than one.

This version - that he had to bring in or move two fans - also destroyed some of the pieces of the accused's mosaic. He had to adapt his version because there was no space for a further electrical plug in the extension cord. This is a significant indication of the accused's deceitfulness as it offers objective proof that his version is impossible and cannot be even reasonably possibly true.

Page 1546 lines 21-25 - Page 1547 line 1

The accused not only resorted to my "*memory is not very good at the moment*" and *"I do not have an independent recollection*" but also to calling it "*insignificant*".

Page 1548 lines 3-9

Page 1547 lines 19-20

Eventually he came up with a version that "*it is possible that when I ran to the balcony to call for help that I tripped over a fan cord*…."

Page 1550 lines 18–23

It is, however, with respect, significant and a clear indication of how the accused tailored a version to fit his defence.

60

Number 4: With the mosaic pieces failing from the canvas, the accused created a version that finally turned his version of events into a farce. He purportedly moved the fans to where the duvet is currently visible on **photograph 55 of Exhibit E.**

Page 1691 line 9 – Page 1692 line 22

One will be able to argue at length as to why this version is not only improbable but also untruthful, but the main argument must be the failure of Adv Roux to put this specific version to the state witnesses, and the accused's failure to identify this aspect as clear tampering with the scene. The accused failed to do so both during his evidence and when he was specifically invited to do so during cross examination.

Page 1679 lines 2-14

This is yet a further example of tailoring of his version. The accused had to ensure that there was a sufficient lapse of time between him getting up and the deceased reaching the bathroom. So he had to move the "fans" quite a distance.

He also had to create a version that would make it possible for him to go onto the balcony to shout for help.

The snowball effect of a lie becomes quite evident.

The accused admitted that, even on his own tailored version, the fans would have obstructed his access to the balcony.

Page 1753 line 19 – Page 1755 line 19

61

Number 5: It is our respectful submission that tailoring of evidence must have a domino effect. If the one piece of the mosaic is moved, the rest also have to be moved, in order to keep the picture intact.

Having moved the fans to where the duvet is depicted on **photograph 55,** he had to create a version about the duvet. He had to tailor a version about where the duvet was and why it could not have been where it is shown on the photograph.

Page 1676 lines 13–25

62

Number 6: The accused then had to attempt to explain why the police would have moved the smaller fan into the corner of the room. Not only that, they also moved both fans. In a display of astounding foresight, they then threw the duvet onto the floor and then the denim (*infra)* onto the duvet and created a blood spatter pattern from the carpet onto the duvet.

The police have therefore on the accused's version, tampered with the scene and moved four major objects:

- the bigger fan
- the smaller fan
- the curtains, and
- the duvet

This they did during the morning, but before the photographs were taken at 05:58.

The SAPS did this without having any idea what the accused's version of the incident would be. The accused confirms that neither the police nor anyone else knew his version.

Page 1551 lines 21-25

Page 1552 lines 1-10

It is, with respect, inexplicable why the Defence would take W/O van Staden to task on the cricket bat that may have been moved a millimeter but not indicate how the police had "*contaminated, disturbed and tampered*" with the scene by moving the large objects described *supra*.

If the previous paragraph is inexplicable then it is incomprehensible that the major changes to the scene were not canvassed with Col van Rensburg.

The only reasonable inference is that the accused tailored a version as he continued with his evidence.

63

Number 7: Predictably the failure to deal with the duvet on the floor led to the accused having to adapt his version to placing the duvet on the bed which in turn led to a contradiction (number 8) in his account of when he last saw the deceased.

64

Number 8: Initially the accused claims that he did not see the deceased when he got up –"*I did not look down. I had my hand ….my head in my hands*…"

Page 1672 lines 9-12

As an explanation of why he did not see the deceased get up he answered that "…*it was pitch black and it was behind me.*"

Page 1674 lines 8–9

Without even blushing, the accused tailored a version to explain why the duvet was not in the position as it is in **photo 56**. His new version was that the duvet was on the bed. When the accused realised how unconvincing his evidence was, he reverted to: *"I do not remember where on the bed*". He bounced back to explain that "*Reeva had the duvet over the bottom part of her legs*" and he had to move the duvet over when he got out of the bed.

Page 1680 line 1 - page 1681 line 18

In his attempts to prevent the domino effect on the mosaic pieces, the accused changed his version to "*I could see the duvet going up, that is all I could make was a silhouette… I presume that it was her legs under it*…"

Page 1681 lines 6-12

Either it was pitch black and he could see nothing, or he could see because it was not pitch black. Not only is this a clear contradiction but an adapted version.

The reality of these contradictions regarding the fans, duvet and denim (this will be discussed later) will, in the absence of him convincing the court that the police moved it all, inevitably lead to a rejection of his version.

We will argue that the court reject his version that he heard a sound which he perceived to be an intruder. We argue that there was no moving of fans. The fan was in the doorway, the curtains open and the deceased fled to the toilet with her cellphone.

Without the moving of the fans and the closing of the curtains, the accused's version is not only not reasonably possibly true but, in fact, false.

With respect, what will follow is a finding that the larger of the two fans was in front of the door, the curtains were open and, at the very least, the balcony light would have illuminated the room.

If the accused's elaborate false version is rejected, the court will have no option but to accept that the accused knew the deceased was in the toilet and fired four shots with *dolus directus* to kill her.

Number 9: It is our argument that the accused's version about him wanting to cover the blue LED light emitting from the amplifier is so improbable that it cannot be reasonably possibly true.

Page 1736 lines 17-20

He had to ensure that he remained with his back to the bed in an attempt to explain why he did not see the deceased leave the bed.

He woke up and moved the fans (on his version). On his own version he was not bothered by the blue LED light. Why would he want to cover the light if that was not the reason for him waking up? It was never his version that he struggled to sleep, that he woke up and closed the doors.

66

Number 10: This time and position adaptation created a further domino effect that is more devastating to his version than he could have foreseen.

It must be impossible in his version for the denim, which he had in his hands, to land on top of the duvet if the duvet had not already been on the floor.

It is still our argument that it is clear from the photographs that the denim is lying on the duvet. We reiterate our arguments on **page 1747-1748** here.

See photographs 183 and 185

The court made a finding that: "…*From the photographs it looks as if the denim is on top*."

Page 1749 lines 18-19

This is an aspect that the accused, cannot explain. It is, however, significant because it is perhaps the straw that breaks the camel's back as far as the tailoring of the evidence to fit his version is concerned.

It is significant that when the accused is confronted with the question of why the police would have picked the denim up and put it on top of the duvet, the accused referred to the movement of the cricket bat and the incident where "*the firearm had been picked up and replaced…*"

Page 1743 lines 1-10

The court has not heard why the accused did not confront the witnesses with his version that major manipulation of the scene occurred.

Number 11: It is, with respect, inconceivable that the accused would have failed to mention in the bail application that he spoke to the deceased when he got up.

His version that the deceased spoke to him is, with respect, nothing other than a tailored version to avoid a negative inference from the improbable version that he woke up and did not ascertain where the deceased was and to explain why he contends that he heard the sounds in the bathroom after he got up.

It is worth mentioning that all the couples who testified in this trial predictably woke their partners up to discuss sounds that they had heard.

The accused acted contrary to his nature. The un-contradicted evidence of Samantha Taylor is that he went as far as waking her up on more than one occasion to ask her if she had heard something.

Page 421 lines 5–24

It is our respectful argument that normal human behaviour dictates that one will discuss a disturbing sound with one's partner especially if one is intent on protecting that person. You would at least look at the person and ensure that she is safe.

The accused's version - that he approached the danger without a conversation with the deceased - is not only improbable but in fact devastating for a defence of putative self defence. A court will not entertain a version by an accused that he deliberately places himself in danger and then acts in self defence.

This principle is discussed in Snyman, Criminal Law, 5th Edition at page 113 where the learned writer refers to it as "*provoked private defence*".

68

Number 12: Predictably the previous adaptation led to further adaptations. In following our theme, the mosaic pieces have to follow each other to ensure that a picture remains intact. One imperfectly placed piece inevitably spoils the picture.

At first the accused allegedly whispered to Reeva, however, this changed to – "*I did not whisper at her Milady. I said it in a soft manner*."

The accused, having testified in his evidence in chief that he "whispered for Reeva to get down…", became adamant in his answers during cross examination that – *"no M'lady I did not whisper… I spoke to her in a soft manner*..."

Page 1471 lines 20-22

Page 1739 line 7 - Page 1741 line 9

The significance of this contradiction lies in the reason why he changed his version.

He was confronted with the unreasonableness and improbability of his alleged actions and the fact that, on his version, he did not wait for a response. He realised that "*whisper*" would imply closeness as part of the normal meaning of the word.

This contradiction may be indicative of the accused's disrespectful attitude towards the court.

69

Number 13: The accused's unconvincing evidence about the activation and deactivation of the alarm may not be significant, viewed in isolation.

Viewed in the light of all the other inconsistencies and contradictions, it becomes significant, with the real question being why the accused would even have bothered to deactivate the alarm.

In the light of the traumatic events (his own version), a reasonable person would not have wasted time looking for a remote or deactivating the alarm. In fact, triggering the alarm would have been advantageous in the situation as it would have conceivably ensured the expeditious arrival of assistance.

We argue that the deactivation of the alarm and the accused keeping his cellphone with him indicates at least a degree of calm and collected thinking, which is irreconcilable with his version.

It may also be that he is lying about deactivating the alarm. They were awake and they had not activated the alarm. If the alarm had been activated he would have been confident that the area leading from the bedroom to the rest of the house was secure.

By taking cover behind the wall of the door leading from the bedroom and drawing Reeva behind him, he would have had a secure position from which to defend them both. He would have had a clear field of fire down the passage towards the bathroom should any threat have emerged from the bathroom into the passage.

The gastric content found during the post mortem and the evidence of van der Merwe and Stipp points to the accused and deceased having been awake not long before the shooting.

The accused testified – "…*I deactivated my alarm just before I left my room to go and open the front door*…"

Page 1710 lines 12-14

Pressed on this issue it turned into a reconstruction – "…*the only reason… because the alarm never went off*…"

Page 1710 line 9 - page 1712 line 10

The accused described the contradiction as a mistake, but it is more than a mistake, it is a clear indication that the accused had no respect for the truth during his evidence.

Pressed further the accused resorted to the very unconvincing, but rather predictable response often relied upon by persons who find themselves unable to explain their evidence – "…*I am tired M'lady*…"

Page 1712 line 6 – page 1714 line 7

In summary the court will, with respect, have no option but to reject the accused's version about his actions in the bedroom.

The court will, with respect, reject his version as improbable, untruthful and at the very least as not reasonably possibly true measured against the objective facts of the crime scene discovered on the morning of 14 February 2013.

70

We have dealt with the principles regarding the onus of proof and now pause to deal with the approach a court should take in evaluating what inferences are "*possible*".

- In ***State versus Sauls and Others 1981(3) SA 172 (A)*** at 182 H the Appellate Division unanimously held:

  > *"The state is, however not obliged to indulge in conjecture and find answers to every possible inference which ingenuity may suggest or to seek speculative explanations for conduct which on the face of it is incriminating. And when the accused misleads the court by lying, arguments based on improbable inferences are not calculated to impress a trial Judge"*

- In ***Sauls*** (*supra*) the court endorsed the passage in ***State versus Mlambo 1957(4) SA 727 (A)*** at 738 A –D:

  > *"In my opinion there is no obligation on the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for*

the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary man after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.

Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so"

- The ***Mlambo*** decision (*supra*) was reaffirmed by the Supreme Court of Appeal in an unanimous judgment per Olivier JA –

"…an accused's claim to the benefit of doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inference which are not in conflict with, or outweighed by, the proved facts of the case…"

- In ***State versus Essack and Another 1974(1) SA 1 (A)*** at 16 D the court confirmed the principle that inferences must be carefully distinguished from conjecture or speculation, and remarked –

"…if there are no positive proved facts from which the inference can be made, the method of inference falls and what is left is mere speculation or conjecture …"

F. THE ACCUSED'S DEFENCE

71

If the accused's defence is one of putative self defence, we respectfully argue that he has insurmountable obstacles to overcome before the court can even start to apply the principles to the facts.

In our respectful view the legal principles regarding putative self defence are well settled and in most cases, including this particular case, it is the application of the principles to the facts that are most important.

In ***State versus Engelbrecht 2005 SACR 41(W)*** at para 238 the court accepted the following definition for private defence:

> *"… A person acts in private defence, and her act is therefore lawful if she uses force to repel an unlawful attack which has commenced or is imminently threatening, upon which her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is not more harmful than necessary to ward off the attack…"*

The material elements in determining whether or not a person acted in self defence or putative self defence are similar in so far as the following are concerned:

- There must be an unlawful attack against the aggressor
- The aggressor must have had reasonable grounds for thinking that he was in danger of death or serious injury
- The means of self defence used were not excessive in relation to the danger
- The means used by the aggressor were the least dangerous or only means whereby he could have avoided the danger

See ***R versus Attwood*** **1946 AD 331**

State versus Goliath 1972(3) SA 1(A)

The main difference between private defence and putative private defence lies in the tests to be applied to ascertain if the conduct of the accused fell within the bounds of such a defence. In evaluating putative private defence the court will apply a subjective test as opposed to private defence which is an objective test.

In putative private defence, it is not lawfulness that is in issue, but culpability.

In relation to putative self defence Smallberger JA (as he then was) said in **State *versus De Oliveira 1993 (2) SACR 59 (A)*** at 58 e…. that:

> *"……if an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence."*

The court continued to discuss the inference that the accused acted with *dolus eventualis* at 65 i– j:

"The only reasonable inference to be drawn from the evidence, as well as the appellant's failure to testify, is that he must have foreseen, and by necessary inference did foresee, the possibility of death ensuing ... but reconciled himself to the event occurring…"

In the evaluation of the accused's conduct it is, in our respectful view, important to give effect to the Appellate Division's direction that the intention to murder may be inferred from the weapon used. *In casu* we have the accused firing four shots into a very small cubicle using the deadly "*Black Talon*" ammunition.

See ***R versus Ngcobo 1928 AD 372***

By his own account, he and the deceased had a relaxing evening. There was nothing that transpired that evening, according to him, to have given him a sense of anxiety and thus his actions that night cannot be attributed to a heightened sense of fear or vulnerability. If the court considers his actions from the time he heard the bathroom window open until he fired the shots, the court will, with respect, be inclined to find that he was thinking coherently, that his every action was thought out and calculated and that his actions were not that of a reasonable man faced with the circumstances depicted by the accused.

72

Objectively evaluated, there was no imminent attack on the accused. Subjectively evaluated, the accused failed to describe the perceived imminent attack as something tangible.

73

The perceived imminent attack was nothing more (on his version) than a sound. The door was locked. There was no evidence that there was even an attempt to open the door from within the toilet cubicle.

74

It is our submission that the court would first need to accept the accused's version as reasonably possibly true before the court can commence with evaluating his defence.

75

It is our argument that, on his own version, the accused acted so unreasonably that his version could never be accepted as reasonably possibly true.

76

Even in the event that the court were to accept the accused's version, it is submitted with respect that he cannot escape a finding that he acted with *dolus eventualis* by arming himself and, whilst approaching the "danger", foresaw the possibility that he may shoot and kill someone but reconciled himself with this possibility by walking into the bathroom and then without objective or subjective cause, fired four shots into a small toilet cubicle whilst anticipating that someone was in the cubicle and likely to be killed.

Page 1763 lines 9-20

Page 1769 lines 9-15

The previous paragraph sets out the best case scenario for the accused. The irresistible inference is that even on his own version he stood in front of the door and with *dolus directus* fired shots at the door with intent to kill the "*intruder*".

77

Perhaps the most damning aspect of the accused's evidence is his inability to back-up his defence by admitting that he fired with the intention to kill or hurt the person/s he allegedly perceived to be attacking him.

His actions were never intended to protect him against the perceived attack.

78

It needs no argument that if he did not aim at the perceived threat then he cannot rely on putative self defence.

79

To even consider the accused's defence the court will need to accept that:

- the deceased decided to relieve herself and did so without saying a word to the accused
- for no apparent reason she opened the bathroom window
- she took her cellphone with her to the bathroom
- she decided not to switch on any of the lights
- she did not utter a word whilst the accused was screaming, not even when he was in the bathroom

Page 1781 lines 1-10

- the deceased got up from the toilet to close and lock the door
- the deceased dressed herself before she was shot
- the deceased did not hide as a result of all the screaming but stood upright facing the danger

80

Objectively viewed the accused shot and killed the deceased.

He elected to testify and furnish an explanation of why he did so.

The version furnished, however, was so far-fetched that it can never be found to be reasonably possibly true.

81

Why did the accused shoot?

During his evidence in chief he testified –"…*I heard a noise from inside the toilet what I perceived to be somebody coming out of the toilet. Before I knew it I had fired four shots at the door."*

Page 1475 lines 1-10

During the bail application the version was:-"*I heard movement inside the toilet… I felt trapped…I fired shots at the toilet door…*"

Page 65 lines 10-22

82

The accused's version that he never intended to shoot anyone destroys any reliance or hope of success of a defence of putative self defence.

83

We will mention just a few of the accused's contradictory versions.

"…*I never intended to shoot anyone…I got a fright from a noise*"

Page 1555 lines 10-13

"…*I did not shoot at anyone. I did not intend to shoot at someone. I shot out of fear…*"

Page 1556 lines 13-16

"*…I did not intend to shoot into or …I did not intend to shoot at anyone…"*

Page 1560 lines 21-22

"*you never purposefully fired shots into the door?...no My Lady, I did not*"

Page 1561 lines 1-2

"*…so you never wanted to shoot at robbers, intruders coming out of the toilet…that is correct…"*

Page 1661 lines 10-13

84

His evidence then changed to him having fired at "*what I perceived as a intruder coming out to attack me…*"

Page 1663 line 10 - Page 1664 line 7

85

We anticipate that the Defence may argue that the court should accept the evidence of Professor Derman about the third startle.

86

The first hurdle would be to convince the court that there was a noise; the second hurdle would be to explain the noise.

On Derman's evidence it was the noise of a magazine rack.

The accused himself testified: "…*it sounded like wood…wood moving*" but significantly he thought that he heard the door opening.

Page 1788 lines 1-20

It was not only a startle but – "*I heard a noise … from inside the bathroom… which I thought or perceived as someone coming out to attack me*".

Page 1789 lines 1-20

During his evidence the accused adapted his version by means of a reconstruction to indicate that "…*it sounded like the magazine rack was moving*…"

Page 1911 lines 2 - 5

He testified "…*in retrospect, it could have been the only thing I heard in the bathroom. It was the only loose object in the bathroom*…"

Page 1911 line 1 - page 1913 line 25

The accused, however, indicated to the court that it was not the sound that made him fire the shot but –"…*because I thought the door was opening*…"

Page 1914 lines 1–4

We have earlier dealt with Professor Derman's bias and unconvincing explanation for his remark *"…(which he subsequently believes to have been the magazine rack)*…"

Page 2870 lines 4–15

Page 2913 lines 21–23

Page 2914 lines 1–11 and lines 20-24

We reiterate that he succeeded in clearly illustrating his "bias" and his unwillingness or inability to objectively and/or truthfully testify as an expert.

87

A proper reconstruction of the events will, however, lead to a finding that it is improbable that the magazine rack moved before the first shot.

All experts agree that bullet hole "A" was the first shot and that it struck the deceased on her right hip.

On the accused's version he heard a noise and fired. With the magazine rack against the furthermost wall from the door, the deceased could not have moved it to cause the purported sound, which was the catalyst which initiated the shooting, and virtually simultaneously move to the position immediately behind the door in time for the first shot to hit her as it did.

88

It is, however, significant that on the State's reconstruction of the shooting, bullet holes "C" and "D" may have been aimed at the noise the magazine rack made when the deceased fell against it after having her hipbone shattered by shot "A".

The angle of the shots is important.

See photo 24 and 25

Page 1025 lines 15-24

89

The accused was so intent on tailoring a version that he even attempted to convince the court that "… *the movement was the magazine rack*" and that the door opening was an inference.

Page 1915 lines 1-11

90

Although the accused's version in the bail application was that he "… *heard movement inside the toilet*…" he had to create a sound that could serve as a startle during his evidence which led to all the different versions.

Page 65 lines 10-11

91

We argue that there was no sound of either a magazine rack moving or a door opening because the deceased was standing in front of the door facing the accused and conversing with him when he shot and killed her.

92

The accused identified a sound as having emanated from the magazine rack. The purported sound could only be attributed to the magazine rack having been moved as it cannot make any sound on its own. That suggests that only the deceased could have caused such a movement which made the consequential sound.

The accused's version is that he fired immediately upon hearing the sound. At that stage the deceased was standing upright and facing the door which was directly in front of her. The magazine rack was not in her proximity and it is therefore physically

impossible for her to have caused the movement which would create any sound before the first shot.

This version is so improbable that no court would ever accept it. We argue that this is in fact impossible.

93

Even after being confronted with the objective evidence as depicted in **photographs 122, 123, 180, and 181** – the accused testified that the magazine rack ”…*was to the far right against the two walls…*”

Page 1924 lines 1-16

This is again a tailored version to create a possibility that the magazine rack moved from the middle of the wall to the corner.

The accused was so intent on creating the sound of the magazine rack before he fired the first shot, that it caused him the embarrassment of his two experts (Dixon and Wolmarans) contradicting his version.

Page 2419 lines 10-21

94

We do not anticipate that there will be an argument to support this version of the accused. It is, however, worth mentioning that the accused was adamant on this point and did not display his usual “I think so” attitude.

Page 1859 lines 17-19

We do likewise not anticipate that there will be a serious argument made out that the court should accept (where it contradicts the State’s evidence) the evidence of Mr Dixon and/or Mr Wolmarans. We respectfully argue that they must have been two of the worst “experts” that have ever testified in the High Court. We will, however, be in a position to deal with their credibility should the Defence attempt to place any reliance on their evidence.

95

We submit, with respect, that the court will have no option but to find that this was another instance of tailoring by the accused to support a version that he heard a sound.

96

We argue that there was no sound or startle. It was just the accused firing four shots through the door with the direct intention to kill. Furthermore, if we accept that the accused shouted at someone to get out of his house prior to the shooting, as he

demonstrated with vigour, replete with profanity, to the court, we submit that the accused was in fact shouting at the deceased.

Page 1833 lines 1-2

We submit that these loud utterances are what one may expect during the course of a heated domestic argument. The accused felt compelled to give a version of why he made them as he was uncertain what his neighbours, who were yet to testify as defence witnesses, may have overheard.

This will explain why he became emotional when he gave this evidence. Why would this have made him emotional? He did not testify about the deceased or him firing the shots. This may have been the one instance in the trial where the feelings of guilt finally caught up with the accused.

G. <u>SCREAMING</u>

97

We will deal with the deceased's screams later but at this juncture, will pause to deal with the inexplicable and, with respect, totally improbable evidence of the accused in his attempts to "explain" the screams.

98

Although it was put to the witnesses that the Defence will prove that the accused sounds like a woman when screaming, and although the accused testified that his screams were recorded, there was not even an attempt (except from the female neighbour) to prove this.

Mr Lin's evidence was different and he indicated that the most important factor to be taken into account in evaluating sound (screams) is the uniqueness of the listener and his/her *"… perception and of [a] actual audible event*"

Page 2640 lines 2-19

He could take the question – *"Can one reliably differentiate between a male and female scream …"* – no further than: *"… While it is possible to differentiate human or a perception of a typical male and female scream … we found no studies or evidence to support that assumption …"*

Page 2642 lines 7–12

It was made clear later in his evidence that he made no finding *"... on somebody's ability to differentiate between a male and a female scream at any of the distances …"*

Page 2685 lines 19–21

He, however, conceded that – *"… more often than not, we would be able to identify a woman and a male's voice screaming. But we cannot say it is absolutely certain …"*

Page 2668 lines 2–5

It is not our intention to discuss Mr Lin's evidence in detail. Suffice to argue that his evidence cannot be interpreted to cast any doubt on the "*listening*" by the "*listener*" (state witnesses).

99

It's telling that the defence would ask a female neighbour to demonstrate the screams of a man she says she heard that night but fail to ask the accused to do so and fail to produce the results of the tests by the "experts". They also inexplicably failed to confront the witnesses with the recording of the accused's screaming like a woman.

100

It is significant that the accused screamed whilst breaking down the door but not thereafter. There is no evidence of panic stricken screams when he saw her lying in the toilet cubicle in her own pool of blood.

101

We argue that normal human behaviour dictates that the shock of being confronted with such a scene would have evoked screams of panic and grief. The accused had to ensure that his evidence fitted in with those of the state witnesses who did not hear screams after the shots. He therefore provided an improbable version that he stopped screaming with the last blow of the cricket bat.

Page 1928 line 10 - Page 1929 line 25

102

The accused's version about when, what and how he screamed has an impact on the evidence of Professor Derman. Although Professor Derman based his evidence on the independent startles he has failed to indicate what response the second startle elicited.

103

In his absolutely one-sided testimony Professor Derman could remember three distinct startles. The first sound identified is the window being opened. There is no reasonable explanation for why the deceased would have done this at that time of the morning. He could not explain the last startle in more detail than– "*it was the magazine rack*".

Page 2966 line 20 - Page 2968 line 25

Although he described the second startle he never described what response it caused. It will be unfair to blame him for this inability as, in fact the door was slammed shut by the deceased as she fled the accused and therefore this sound was not an unexpected startle.

104

He could not say if it was the magazine rack moving and even testified *"I cannot recall what he (the accused) thought about the sound*". It is with respect regrettable that a "*self-proclaimed expert*" would be unable to recall what the accused thought about the sound.

Page 2697 lines 19–20

Page 2698 lines 22–24

105

More significantly the accused never told Professor Derman that he heard movement and/or that he heard the toilet door and/or that he thought the door was opening.

106

This total and inexplicable lack of detail about the sounds could only be explained with – "*My memory is very fuzzy on this. I think it is quite clear to the court*…" this from an "*expert*" who decided not to take notes of his consultations with the accused.

Page 2981 lines 2-11

107

It is our submission that the court should not view Professor Derman as an expert witness but rather as a biased and very poor witness who thought that his evidence would stand unchallenged and that he would not be called upon to support his evidence through applying his "*expertise*" to the facts.

108

As already stated, Professor Derman described the response to the first startle but could not explain the response to the second.

The response to the second startle was not screaming because the accused allegedly started screaming when he entered the passage – before the second startle. He allegedly screamed before the second startle, and his purported actions after the second startle would be more indicative of a person sufficiently in control of the situation and on a mission to deal with the person in the toilet.

Page 1764 lines 1-12

In evidence in chief he described the incident "*I heard a door slam which could only be the toilet door…and for me it confirmed that there was a person or people inside the toilet…*"

Page 1472 lines 7-14

To even take note of Professor Derman's explanation of the response to a startle the court will firstly have to be convinced that the second startle caused a significant response.

H. STATE WITNESSES AND SCREAMING

109

In anticipation of arguments that the state witnesses were not credible we think it apposite to deal with the court's approach to credibility.

It is respectfully submitted that the cardinal issue relating to the credibility of a witness is whether the story which the witness tells is a true one in its essential features.

Nicholas J, Credibility of Witnesses SALJ (1985) at 102 stated:

> "*The question is not whether a witness is wholly truthful in all that he says, but whether the court can be satisfied, beyond a reasonable doubt in a criminal case…that the story which the witness tells is a true one in its essential features"*

Also see ***State versus Oosthuizen 1982(3) SA 571 (T)*** at 576H – 577 B

In ***State versus Mafaladiso and Another 2003(1) SACR 583 (SCA)*** at 585 a – c the court held as follows on the issue of inconsistencies in the evidence of a witness:

> "*Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non–material deviations are not necessarily relevant.*
>
> *Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regards to the reliability and credibility of the witness…"*

110

As an introduction we have to emphasise that the state witnesses Burger, Johnson, Van der Merwe and the Stipps are all independent witnesses.

111

None of them have ever met the accused or the deceased. Furthermore it can safely be argued that, other than where these witnesses are each other's spouses, they have never met each other.

112

They have made their statements independently and the level of corroboration is exceptional. Not only do they corroborate each other's versions but the objective facts and circumstantial evidence corroborates detailed aspects of their evidence.

113

We argue that the demeanour of the state witnesses was such that it exhibited an unblemished view that they came to court with no other intention but to tell the truth.

114

We respectfully submit that they remained steadfast during their evidence, regardless of counsel having put a different version to them. The Defence's version remains unproven thereby strengthening the evidence of the State witnesses.

115

The Defence did not only put the version of the accused to the witnesses but put to them that tests were done to prove that the accused sounds like a woman when screaming. The Defence, in fact, put to Johnson that there is "…*no way that even*

standing on the balconies…that you would have been able to hear someone…" but this supposed "*fact*" was never presented as evidence.

Page 296 lines 16-21

116

The court will accept that witnesses in general and particularly professional persons will take counsel's attack on their evidence which is based on scientific evidence very seriously.

They all remain steadfast and even explained why they didn't believe it was a man they heard screaming.

117

Mr Lin, the Defence's expert, failed to corroborate the "*fact*" submitted by counsel. Moreover, the patently enhanced sounds which were reproduced and handed up through Mr Dixon were, at best for the Defence, totally unconvincing.

118

The admissible self-corroboration elicited by counsel in as far as the notes that Mr Johnson had made before he was consulted by any policeman is incredibly strong corroboration for his version of the events.

119

It also serves as corroboration for the witness's (Burger/Johnson) approach to the matter – they did not want to become involved nor did they "*want to choose*" sides

Page 278 line 20 – Page 279 line 25

Exhibits O1, O2 and O3

120

It is not our argument that the evidence of the state witnesses was perfect. Imperfections and possible imperfections are to be expected of honest people who witnessed an event unaware that they would much later be cross examined about minute details and it clearly indicates the absence of a conspiracy to prejudice the accused.

121

In summary the evidence of Burger and Johnson was:

- They were woken by a "*woman's terrible screams*"

Page 28 line 179

- It was just after 03:00 in the morning
- The main bedroom window which faces Silverwoods Estate was open
- Mr Johnson rushed out onto the balcony and whilst there heard a woman scream followed then by a man screaming "*help, help, help*"

Page 180 lines 15-23

- Mr Johnson made a phone call at 03:16

Page 216 lines 5-10

- After the phone call Mr. Johnson ran to the balcony and they heard gunshots

Page 182 lines 5-12

- Mrs Burger heard 4 gunshots whilst Mr Johnson did not count the shots
- There was a pause between the first and the subsequent shots

Page 3 lines 7–20

Page182 lines 22–25

- This very important description of the shots was corroborated by Capt Mangena in his convincing reconstruction of the scene

- They relayed their version of events to their friends and colleagues before it was rumoured that it was the accused who had been involved in the shooting

123

We respectfully argue that not only the independent corroboration, but also the demeanour of the witnesses were impressive and supports the argument that they are credible witnesses and that the court should therefore accept their evidence. A further example of their truthfulness is to be found in the behaviour of Mr Johnson who, although subsequently knowing that there were only four shots fired, stuck to his recollection of events of more shots as recorded in his notes and statement. No attempt was made to tailor his evidence.

124

This particular fact must, with respect, provide an outright assurance of his truthfulness.

Page 507 lines 5–19

125

It is our respectful submission that the Stipps were impressive witnesses. We are dealing with ordinary, albeit professional people, living in a security estate, who heard gunshots and screams but nevertheless decided to assist.

126

They subsequently made statements to the police and during evidence were called upon to recount in the utmost detail, and in fact provide a minute by minute account of exactly what they did.

127

We respectfully argue that the ultimate question must be whether the court is convinced that they were truthful.

128

We respectfully approach the question of the credibility with a fundamental question – Why would they lie?

If they for some reason decide to lie why would they not have supported each other's versions in every minute detail? Mrs Stipp stuck to her evidence that she is convinced that the toilet light was on, even after being confronted with Mr Stipp's contradictory version.

This does not detract from the evidence that the light in the bathroom was on.

129

If the argument is that they are not lying but merely mistaken, we ask – how is it possible that there is so much objective corroboration for their "*mistaken*" versions?

130

In summary, Annette Stipp was awake when she heard three gunshots. She looked and saw that the bathroom lights (scene of crime) were on. She described it as –"…*almost a simultaneous observation*".

Page 1102 lines 12-17

131

Directly after the last shot she heard a woman screaming.

132

Johan Stipp was awoken by the sound of gunshots which caused him to get up and walk onto the balcony. Moments later he heard screams of a woman.

133

Both the Stipps noticed that the bathroom lights were on immediately after the sound of "*shots*".

Page 313 lines 1-6

Page 321 lines 18-25

Page 1106 lines 12-25

134

Both the Stipps testified how they heard a woman's scream intermingled with a man's voice.

Page 322 lines 1-14

Page 1105 lines 1-7

135

They were both sure that it was a woman screaming.

136

They heard three shots again and the screaming stopped.

137

Based on the evidence of Burger, Johnson and the Stipps, we respectfully submit that the court will find that:

- There was no screaming before the first noises, described as gunshots but there was screaming before the shots in the region of 03:17

- A woman's "*petrified and bloodcurdling screams*" were heard before the gunshots (second sounds on Stipp's evidence). It was a woman screaming intermingled with a man screaming

- There were no screams after the gunshots (second series of sounds)

- The light in the bathroom was on at the time of the first sounds
- The screaming started moments after the first sounds

- Mr Johnson made a call at 03:16 and the shots were fired shortly thereafter

- Mr Stipp made a call at 03:15

- The Johnson and Stipp couples heard the shots fired in the region of 03:17 and those were the shots that killed the deceased

138

If the court finds that the bathroom light was on immediately after or, even worse, before the gunshots, then the accused's version will crash dramatically.

The court, with respect, has no reason to find that the Stipps were mistaken about the lights being on.

139

It is inconceivable that the accused's version of him screaming before he fired the shot could be true, if the Defence would argue that the first sounds heard by the witnesses were the shots and the second sounds were the door being broken.

Mrs Stipp was awake before the first sounds. Significantly it was never put to her that the accused screamed before he shot and killed the deceased in a bathroom of which the window was open.

140

To argue that the first sounds were the shots and the second sounds were the breaking open of the door will, of course, make it difficult for the Defence to argue why the Nghlengethwas missed a series of sounds (the purportedly equally loud breaking down of the door).

I GASTRIC CONTENT

141

Estelle van Der Merwe testified that she woke up at 01:56 on the morning of 14 February 2013 because she heard a woman's voice and she inferred that she was involved in an argument.

Page 159 lines 1-3

142

She heard four “*gunshot*s” which she described as “*Bang, Bang*“

Page 160 lines 19-23

She did everything she could to block out the noise but remained convinced that she heard a woman’s voice.

143

After the shots there was total silence.

Page 161 lines 4-6

144

It cannot be a mere coincidence that, on the same morning that the accused shot and killed the deceased, van der Merwe heard a woman’s voice as though engaged in an argument which ended with the gunshots.

This is a good example of something that seems insignificant when viewed in isolation but which becomes significant when evaluated with the other evidence.

145

She never attempted to link it to the deceased or the accused. A further noteworthy "*co-incidence*" is that a year later on 21 February 2014 she heard voices again. This time she established that it came from the vicinity of the house of the accused.

Page 164 lines 5-10

Page 175 lines 4-5

146

What is not a co-incidence but a remarkable similarity is that on both occasions she first looked in the direction of Farm Inn indicating that she thought that the voices came from the same direction. It is an undisputed fact that on 21 February 2014 the voices came from the house of the accused. This supports the inference that the voice heard on 14 February 2013 also came from the house of the accused.

147

If, however, the court accepts Professor Saayman's evidence that – "…*the food in the stomach of the deceased had been introduced within approximately two hours of her death or less*", then the co-incidence turns into corroboration of the version that it could only have been the deceased who was heard arguing. The only reasonable inference to be made is that she was awake and in all probability eating shortly before her death.

Page 520 lines 16-22

148

As the court held in ***Hadebe*** *supra* the trial court has to step back and evaluate the mosaic as a whole. We respectfully argue that the court will not find that the arguing woman and the deceased's gastric content are mere coincidences which occurred on the same morning that the deceased was shot and killed.

149

Although the Defence put it to the witness that they had done tests and that they would produce evidence to show that "… *you could not hear the screaming*", evidence pertaining to these tests was never heard.

Page 167 lines 2-16

150

It is not envisaged that the Defence will attempt to argue that Professor Saayman was not an excellent witness.

151

The Defence had Dr Perumal attend the post mortem and could have called him if they had wanted to place anything regarding the post mortem and Professor Saayman's evidence in dispute.

152

Instead, they tellingly decided to call Professor Botha who had not had the benefit of attending the post mortem and who was, at best a very unconvincing witness.

153

It will do the evidence of Professor Saayman an injustice to attempt to summarise it and we would rather refer the court to his brilliant exposition at **pages 517 line 7 to 520 line 25**.

154

His conclusion was: "… *I can offer the court as a summation of my entire experience in this field and my reading of the literature and my anecdotal observations, given the nature of the meal, the appearance thereof in the stomach, was that I would suggest that we are dealing with a period of approximately two hours*…"

Page 539 lines 2-8

155

It became clear that Professor Lundgren did not even know that the stomach content had been measured.

156

We respectfully argue that it may seem irresponsible to venture an "*expert*" opinion about a pathological finding if you are not a pathologist and more so if you do not have all the facts.

157

Whilst we are dealing with the evidence of Professor Saayman we pause to refer to his evidence that not only would it have been possible for the deceased to scream but that in his view "…*it would be somewhat abnormal if one does not scream when you sustain a wound of this nature, or wounds of this nature*…"

Page 537 lines 23–25

158

Professor Botha conceded that the deceased, if she was in mortal fear or primed, would have screamed.

Page 1347 line 13 – page 1349 line 18

159

Professors Botha and Lundgren agreed that Professor Saayman's approach to gastric emptying and the possible conclusions to be drawn are correct

Page 1320 line 13 – page 1322 line 13

Page 2269 line 1 page 2271 line 13

160

Although Professor Lundgren identified possible factors that may delay gastric emptying, she had to admit that, apart from the fact that the deceased was a pre-menopausal woman and that (on the accused's version) was sleeping, these factors were not present.

We anticipate that the argument may be that there are other possible explanations for the gastric content but we argue that a court should only take into account reasonable possibilities and not any possibilities that ingenuity may suggest.

161

Professor Lundgren was at a loss to explain her own report when confronted with the fact that *"…the stomach contains 200 millimeters of partially digested food residue".*

Page 2275 lines15-22

162

We argue that the value of Professor Lungren's evidence fades into insignificance when cognisance is taken of the fact that digestion does not stop post mortem.

Page 2276 line 11 – page 2279 line 21

163

Her responses to the proposition that whatever the content of the stomach it should at least be recognisable after eight hours were less than satisfactory.

Page 2276 lines 7-10

164

Professor Saayman's expert opinion that the deceased had eaten two hours or less before she was killed is strengthened by the fact that he identified 200 millimeters of stomach content during the post mortem, and that post mortem digestion continued at least until 11:45 when the body was handed over to the mortuary.

165

If the court "*step(s) back and consider(s) the mosaic as a whole*" the following conclusive inferences are to be made:

- There is no evidence that the deceased ate something in the bedroom
- If follows that if she had eaten something it must have been downstairs in the kitchen
- This will place her closer to the van der Merwe's residence which will corroborate Mrs van der Merwe's evidence
- These inferences will also shed light on the accused's struggle to deal with the de-activation of the alarm. The only reasonable inference to be made is that the alarm had not been activated at all

166

We respectfully argue that the court will have no option but to find that the deceased had eaten between 01:00 and 03:17 on the morning of 14 February 2013.

167

The finding in itself does not only corroborate the inference that Mrs van der Merwe heard the deceased's voice from around 01:56, but it destroys the accused's version of the loving couple going to bed at approximately 22:00.

J. THE RELATIONSHIP

168

In this matter the State succeeded in giving the court a glimpse of the "*real*" relationship that existed between the accused and the deceased.

169

The Defence led the accused and Mr van Zyl and will rely on the opinion of Dr Scholtz as to the nature of the relationship.

170

Dr. Scholtz's opinion is merely that: his opinion.

He has, however, not consulted with the person whose relationship with the accused preceded the commencement of the relationship between the deceased and the accused.

171

The WhatsApp messages between the deceased and the accused focused on during the trial provides the court with some insight into how the deceased experienced the relationship.

172

The Defence has and will again argue that 90% of all the messages were of a loving nature but we can do no better than to quote Mr Carr, a clinical psychologist, who publically commented that it roughly equates to arguing that only 10% of your body has cancer. It is the 10% that matters. (Radio Jacaranda sound clip on 15 July 2014)

173

The testimony of Mr van Zyl allowed the state to hand in an email written by the accused to the Taylor family (**Exhibit "XXX3").**

174

The email is significant. The accused never objected to it being handed in as an exhibit and it provides an insight into his relationship with Ms Taylor.

175

It clearly indicated, however, that, unlike the image the accused was at pains to portray that "*Reeva was the one",* he had in his own words indicated that Samantha was the one for him and that he wanted her in London.

This was in August 2012 for the London Olympics.

176

During the trial we dealt with the content of the messages in detail but we wish to emphasise the <u>dates of the messages.</u>

177

The deceased sent a WhatsApp message on 27 January 2013. This message is significant as she stated that: "…*I am scared of you sometimes and how you snap at me and how you will react to me…"* as little as three weeks before she was killed she went on to state that they cannot make each other happy and that she is very unhappy.

Page 1208 line 13 – page 1210 line 16

178

It is conceivable that the Defence will argue that all relationships experience ups and downs and we concede this. However, this relationship was different to the norm in that it culminated in the accused shooting the deceased.

179

There seems to have been very little improvement in the relationship as she felt it necessary to send a WhatsApp on 7 February 2013. She again complained about how he treated her and again that he had criticised her, this time loudly and in front of others.

180

The accused has given the court his interpretation of the WhatsApp messages. It is indeed unfortunate that the deceased is unable to do the same. The court, however, may take into account the content of the two WhatsApp messages referred to previously, and the fact that the accused wanted to spend the night of 13 February with friends and had to be convinced by the deceased to return to Pretoria.

181

On the accused's version, we are presented with the impression of a loving couple who spent a quiet evening together on the eve of Valentine's Day without even a suggestion of intimacy.

182

We argue that the circumstantial evidence of the argument overheard by Ms van der Merwe, viewed together with the WhatsApp messages, in facts paints a different picture of the nature of the relationship and what actually transpired.

K OTHER CHARGES

183

We have dealt with the facts and the irresistible inferences pertaining to count 1 and will now deal with our main arguments on counts 2 to 4 and the alternatives.

184

It is, however, worth pointing out that the accused's attitude towards the other charges is similar to his attitude towards the murder charge. He is incapable of taking responsibility for his actions and seeks to lay the blame at the door of everyone else but himself.

185

In summary, he avers that he has done nothing wrong as far as count 3 is concerned. His stance is that the two witnesses gave false evidence against him. He will argue that they conspired to give false evidence against him.

As far as count 2 is concerned he will admit he had the gun in his hand, he will accept that the gun cannot fire without the trigger being pulled but nevertheless, claims that it did. In this instance he would have the court believe that the impossible inexplicably occurred.

His attitude towards the law and the court became evident with his version in count 4. Here his stance is that the safe is his. There was ammunition in the safe for which he does not possess a licence but nevertheless he is not guilty – the ammunition belonged to his father. The question the court would want answered is why his father never admitted it? In any event, with regard to this charge, the ownership of the ammunition is irrelevant, it is the possession of the ammunition which is the crux of the issue and not who owned it.

COUNT 2

186

The accused pleaded not guilty to a charge of contravening Section 120(7) of the Firearms Control Act, 2000 (Act No. 60 of 2000).

187

We do not argue that there were no contradictions in the evidence of Samantha Taylor and Darren Fresco. It is, however, our argument that they corroborate each other's evidence in all material aspects.

They both testified that:

- The accused had an argument with a metro police official after the policeman had handled the accused's firearm
- The accused fired a shot through the sunroof of the car and laughed about it
- On the day in question they had visited an address where the accused had seen someone about a gun or had had to sign papers relating to firearms

188

It is the accused's version that they are both lying and that the incident did not take place.

The accused denied the fact that they had visited someone's house where he had to sign firearm-related papers, although the best he could do in this denial was to testify that he cannot remember having done so.

Page 1653 lines 11-21

189

It is, with respect, an instance where the court will either accept the version of the state witnesses and convict the accused or, alternatively, accept the accused's version and acquit him.

190

As has been discussed *supra*, the court will evaluate the probabilities of the two contradictory versions.

191

We respectfully submit that on the evidence of Mr Fresco the shot was fired in a public place.

192

It is, however, significant that the accused's conduct with his firearm during the course of that particular day can only be described as grossly negligent.

- He left his firearm, which was loaded with a round in the chamber, in the boat under a towel whilst he was swimming

Page 1639 lines 12-16

Page 1642 lines 6-11

- He left his firearm on the front seat of the car, clearly visible, where the metro police official found it and had free access to it

Page 1643 lines 22-23

193

We argue that it was, with respect, clear that the state witnesses did not conspire to furnish a version to prejudice the accused:

- Samantha Taylor testified that she was uncertain where the shooting incident took place, where they were pulled over by the metro police official and where the house was that they visited. She made it clear that she did not know the area
- She contradicted the evidence of Mr Fresco on the sequence of events. Did the shooting incident happen before or after their visit to the house?
- We acknowledge that Mr Fresco did not corroborate Ms Taylor's evidence that the accused had wanted to shoot at "*robots*"

But we argue that the incident happened. The state witnesses gave their recollection of an event months after it had happened. They corroborated each other on the material facts.

194

We respectfully argue that the contradictions in fact provide a guarantee of truthfulness. If the witnesses had conspired to falsely incriminate the accused the court would expect no contradictions in their evidence.

195

It was never put to either witness that they in fact conspired to falsely incriminate the accused.

COUNT 3

196

This particular charge clearly indicates the accused's inability to take responsibility for his actions and his customary habit of hiding behind the phrase "*I can't remember*", tailoring of versions and even blaming his own counsel.

197

He stands charged of contravention of Section 120(7) of the Firearms Control Act, 2000 (Act No 60 of 2000) and two alternative counts.

198

There is very little in dispute between the State and the accused:

- The accused admitted in his plea explanation that – *"… whilst I was in possession as alleged, a shot went off…"*

Page14 lines 1–4

- The accused admitted that: "…*we were both negligent My lady, I should not have taken the firearm under the table…"*

Page 1603 lines 6–22

- The accused admitted that: - "…*the gun was discharged in a restaurant full of patrons. There were lots of people there ---That is correct, My lady"*

Page 1604 line 4 – 6

- He further acknowledged that there were children sitting at the table next to theirs

Page 1604 lines 7–8

199

At first the accused stated that –*"…I did not discharge the firearm…that is why I pleaded not guilty…".* He expanded by testifying that he – *"…physically did not discharge the firearm …the firearm went off when it was in my possession…do not remember having my finger on the trigger"*

Page 1602 lines 9–20

This, however, changed to – *"**…** I know that my finger was not on the trigger…".*

Page 1603 lines 10–14

200

The undisputed evidence by Capt Mangena and Mr Fresco is that this firearm cannot discharge a shot unless the trigger is pulled.

Page 553 lines 2–6

Page 1051 lines 6–18

201

The accused may argue that anything is possible and without referring to ***State versus Sauls*** *supra* again we emphasise the glaring failure to test Capt Mangena on the possibility of the gun firing without a finger on the trigger. He in fact denied it.

This failure leads to the familiar fallback position of blaming counsel.

Page1608 line 3 – page 1609 line 19

202

Perhaps even more significant is the fact that the owner of the firearm testified that the gun will not fire if the trigger is not pulled.

Page 553 lines 2-6

He (Fresco) was not cross examined on the inexplicable and unbelievable contention that a shot went off without the accused pulling the trigger.

203

In evaluating this evidence it will be foremost in the mind of the court that the accused is a firearm enthusiast and a competent firearm licence holder. He has written and passed the firearm competency test twice, the first being when he applied for his licence for the gun with which he killed the deceased and the second when he purchased several firearms a mere few months before the murder of the deceased.

204

One would have expected the accused to have immediately told everyone that the gun had just discharged itself for no apparent reason. As a firearm enthusiast one would have expected him to have discoursed with Mr Fresco and others on this extraordinary and potentially hazardous phenomenon. But, instead, the accused was more focused on keeping the facts out of the media. There is no evidence that he ever mentioned to any one present during the incident that he did not discharge the firearm and that it had fired itself. It is our submission that the accused fabricated his version after the event.

Page 1618 lines 9-25

This tailored version made it very difficult for the accused to explain his defence that the gun just went off.

The accused did his best to avoid a response to the question whether it bothered him that the gun had just gone off without him having pulled the trigger. The following tells the story:

- "… *it must have bothered you that the gun went off…on its own? --- yes it did bother me*…"

Page 1612 lines 11–12

- When pressed on the improbability that he did not discuss it with others his version changed to: *"… It did not bother me that the gun went off by its own…"*

Page 1612 line 13–16

- He avoided the question and responded *"…it bothered me that the gun went off in my possession…"*

Page 1613 lines 7-8

- Pressed further: *"… I do not think I ever thought of it as the gun going off without me pulling the trigger…"*

Page 1613 lines 6–10

- After all that the accused returned to: "Did it bother you that the gun went off on its own? - yes it did…"

Page 1613 lines 20–25

Although the accused tried to avoid answering the question whether it bothered him, he definitely failed to explain why he did not mention it immediately after the incident or discuss it with anyone.

The more likely response would be that he was amazed that the gun had gone off on its own but the accused elected to allow Fresco to lie and so doing diverted any adverse attention from him.

COUNT 4

205

In considering the charges and evaluating the evidence we have to re-iterate that the accused is a gun owner, gun enthusiast and a firearm licence holder.

206

We deal with this count in a bit more detail because the accused's attempt to blame his counsel was, in our respectful view, indicative of his deceitfulness when testifying. He would give an answer that would suggest that he had discussed his views with counsel and that counsel agreed but when tested, his deceit would become apparent.

207

The following are not in dispute:

- The accused admitted that the .38 ammunition was found in his safe

Page 1626 lines 17-20

- The accused admitted that: "*At all times relevant to this count. I had not been issued with a license to possess .38 caliber rounds of ammunition*."

Page 14 lines 7-9

208

The accused's version, which does not amount to a viable defence, is that the ammunition belongs to his father and that he had agreed (gave permission) that his father could put the ammunition in his safe.

Page 1627 line 1 - Page 1628 line 2

209

Although he wrote and passed a competency test, he alleges that he was under the impression that it was legal to allow someone to store ammunition in your safe.

210

It is significant that he gave his father permission to store the ammunition in his safe although they have not communicated for "*many years*". His father also failed to testify or depose to an affidavit in this regard.

211

The accused's "understanding" becomes clearer when he testified - "…I *said the ammunition was never for my purpose*…" and

Page 1632 lines 17-22

212

"*…But the ammunition was not for my purpose, it was in my safe…"*

Page 1635 lines 20-23

213

We do not anticipate that there will be argument put forward that you are only prohibited from possessing ammunition if it is for your own use or purpose.

214

The Act is clear: it prohibits possession.

215

The accused discussed his understanding of the law with counsel and replied that - "*he confirmed my thoughts*".

Page 1628 lines 9-12

After being put to task, the accused had to admit that counsel never concurred with him that he was lawfully allowed to keep his father's ammunition in his safe.

Page 1629 lines 3-7

But he was not done. Later he vacillated to testifying that counsel agreed that he was entitled to keep his father's ammunition in his safe.

Page 1629 lines 15-19

The accused eventually hid behind the answer that counsel never used "*those*" words.

Page 1630 lines 2-9

216

We respectfully argue that the accused was undoubtedly unlawfully in possession of the ammunition in contravention of section 90 of the Firearms Control Act, 2000 (Act No 60 of 2000).

CONCLUSION

217

It is our intention to bring conclusion to our heads of argument without duplicating any of our arguments but inadvertently might do so.

We set out hereunder our respectful submissions to assist the court in making its findings.

We return to the metaphor used in paragraph 15 *supra* and argue that the accused's choice of deceit over the truth has caused him to stumble and drop the baton. Akin to an athletic relay team that will be disqualified for dropping the baton, so will the accused, if the court finds that the accused has finished the trial without his baton, thereby having to reject his version as not reasonably possible true and "disqualify" his case.

His race in explaining the common cause facts is lost.

218

If the court rejects the accused's version of events and relies on the objective (common cause) facts and the circumstantial evidence a conviction on murder with *dolus directus* is inevitable.

- The accused and deceased were alone in the house

- The accused shot and killed the deceased just after 03:00 on the morning of 14 February 2013

- The accused fired four shots with deadly Black Talon ammunition

- The shots were grouped at the deceased

- The deceased locked herself into the toilet and was fully clothed when she was shot

- The first shot hit her whilst she was standing upright facing the accused

219

We argue that even in the event of the court accepting the accused's evidence that he thought there was an intruder in the toilet, he cannot escape a conviction on murder with *dolus directus*.

- Objectively assessed there was no imminent attack on the accused

- Subjectively assessed, the accused armed himself and approached the danger by walking down the passage towards the bathroom ready to shoot. Upon reaching the bathroom and then realising that the intruder

was in the toilet, he continued to fire four shots into the toilet cubicle. We argue that there was no reasonable event that would have caused a perception that an attack was imminent

- In the alternative, the accused will not escape a finding that he acted with *dolus eventualis*. He fired four shots into a small toilet cubicle and must have foreseen that he will hit and kill the person inside the toilet with 9mm Black Talon ammunition

- He reconciled with this realisation and went ahead. He proceeded to fire not one, but four shots

220

We respectfully contend that should the court accept the accused's version of events as reasonably possibly true, the accused cannot escape a conviction on culpable homicide.

- A reasonable man, armed with a firearm, facing a closed door would not have fired four shots through the door if "provoked" only by a sound

221

It is our argument that the accused committed a premeditated murder.

- In the matter ***State versus Montsho (Case No: CC31/13),*** Judge Thulare defined premeditated as *"to think out or plan beforehand*". The Judge went on to explain that this concept "*suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances*"

- At page 9 of the judgment the court deals with the concepts of planned or premeditated murder and found: " … *the period of time between the accused forming the intent to commit murder and carrying out this intention is obviously of cardinal importance but, equally, does not provide a ready-made answer to the question of whether the murder was planned or premeditated …"*

- The common cause facts include:
    - The accused thinking of and remembering where he concealed his firearm
    - The accused moving towards the place of concealment, uncovering and then extricating the firearm
    - Un-holstering the firearm

- Getting the firearm ready to fire, by at least disengaging the safety mechanism
- Walking/running more than 5 metres with the firearm at the ready
- Taking up a position
- Firing four shots into the toilet cubicle
- Maintaining a good grouping while firing

- We respectfully argue that the actions of the accused demonstrate pre-planning in that he armed himself, moved towards the toilet and killed the person in the toilet

222

Our conclusions in the previous paragraphs are based on the objective facts. If the court accepts that the deceased had eaten within two hours of her death and that her voice was heard by van der Merwe, then finding of murder *dolus directus* will be even more inevitable.

If the court accepts that the bathroom lights were on when the accused fired the shots, we respectfully argue that he cannot escape a conviction of murder.

223

We respectfully argue that the accused should be convicted on all four counts as charged.

Signed on this 30th day of July 2014 by the prosecutors

_____ _____

Gerrie Nel **Andrea Johnson**