IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: CC113-2013

DATE: 2014-09-11, 12

In the matter between

THE STATE

and

OSCAR LEONARD CARL PISTORIUS Accused

BEFORE THE HONOURABLE MS JUSTICE MASIPA

ASSESSORS:	ADV J HENZEN DU TOIT ADV T MAZIBUKO
ON BEHALF OF THE STATE:	ADV GERRIE C NEL ADV ANDREA JOHNSON
ON BEHALF OF THE DEFENCE:	ADV BARRY ROUX SC ADV KENNY OLDWAGE
INTERPRETERS:	MS F HENDRICKS

JUDGMENT
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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: CC13/2013

DATE: 2014-09-11
2014-09-12

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In the matter between

THE STATE

and

OSCAR LEONARD CARL PISTORIUS Accused

J U D G M E N T

MASIPA J: In 2013 the accused stayed at house number 286 20Bushwillow Street, Silverwoods Country Estate, Silver Lakes. The house with a double storey with the main bedroom on the first floor, the accused slept in the main bedroom which had en suite facilities, that is a bathroom and a toilet.

To reach the bathroom from the main bedroom one had to walk through a passage, although there was no door separating the main bedroom. From the bathroom there was a door to the toilet that opened to the outside that is into the bathroom. The toilet was a small cubicle.

The main bedroom had a sliding door that led onto a balcony. There were blinds on the windows and thick curtains which hung on the windows and the sliding door. When the blinds were closed and the curtains were drawn, the main bedroom was dark.

On 13 February 2013 the accused spent the evening in his home with his girlfriend, Reeva Steenkamp. In the early morning hours of 14 February 2013 the accused shot and killed Steenkamp, the deceased. At the time the shots were fired the deceased was inside the locked toilet. As a sequence to the above the accused was charged with the murder of Reeva Steenkamp, read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997. In addition, he was charged with the following counts:

Count 2: Contravention of Section 120(7) of the Firearms Control Act 60 of 2000 – in that the accused is guilty of the offence of contravening the provisions of Section 120(7) read with Sections 1, 103, 120(1)(a), Section 121 read with schedule 4 and Section 151 of the Firearms Control Act 60 of 2000, discharge of a firearm in a built-up area or any public place.

The indictment carries on, in that on or about 30 September 2010 and while travelling in a vehicle with other passengers on a public road at or near Modderfontein in the district of Kempton Park, the accused did unlawfully discharge a firearm without good reason to do so, by firing a shot with his own 9mm pistol through the open sunroof of the car they were travelling in.

Alternative to count 2: Contravention of Section 120(3)(b) of the

Firearms Control Act 60 of 2000 – That the accused is guilty of the offence of contravening the provisions of Section 120(3)(b) read with Sections 1, 103, 120(1)(a), Section 121 read with schedule 4 and Section 151 of the Firearms Control Act 60 of 2000 – reckless endangerment – in that on or about 30 September 2012 and at or near Modderfontein in the district of Kempton Park the accused, in the circumstances mentioned in count 2 above, discharged a firearm to wit his 9mm pistol with reckless disregard for other passengers in the car and/or people in the vicinity.

Count 3: Contravention of Section 120(7) of the Firearms Control Act 60 of 2000 – That the accused is guilty of the offence of contravening the provisions of Section 120(7) read with Sections 1, 103, 120(1)(a), Section 121 read with schedule 4 and Section 151 of the Firearms Control Act 60 of 2000 – discharge of a firearm in built up area or any public place – in that during January 2013 and at Tasha's restaurant, Melrose Arch in the district of Johannesburg, the accused unlawfully discharged a firearm, to wit a Glock 27 pistol, without any good reason to do so. Tasha's restaurant is a public place.

First alternative count to count 3: Contravention of Section 120(3)(a) of the Firearms Control Act 60 of 2000, that the accused is guilty of the offence of contravening the provisions of Section 120(3)(a) read with Sections 1, 103, 120(1)(a), Section 121 read with schedule 4 and Section 151 of the Firearms Control Act 60 of 2000 – negligent damage to property – in that on or about January 2013 and at or near Tashas restaurant, Melrose Arch in the district of Johannesburg, the

accused negligently used a firearm to wit a Glock 27 pistol and caused damage to the floor of the restaurant.

Second alternative to count 3: Contravention of Section 120(3)(b) of the Firearms Control Act 60 of 2000 – that the accused is guilty of the offence of contravening the provisions of Section 120(3)(b) read with Sections 1, 103, 120(1)(a), Section 121 read with schedule 4 and Section 151 of the Firearms Control Act 60 of 2000 – reckless endangerment – in that on or about January 2013 and at or near Tasha's restaurant, Melrose Arch in the district of Johannesburg, the accused discharged a firearm to wit a Glock 27 pistol at a table in the restaurant among other patrons in a manner likely to endanger the safety of the people at his table and/or other patrons and the property of the restaurant. The accused had, in discharging the firearm mentioned, shown a reckless disregard for the safety of the patrons or property of the restaurant.

Count 4: Contravention of Section 90 of the Firearms Control Act 60 of 2000 – that the accused is guilty of the offence of contravening the provisions of Section 90 read with Sections 1, 103, 117, 120(1)(a), Section 121 read with schedule 4 and Section 151 of the Firearms Control Act 60 of 2000 and further read with Section 250 of the Criminal Procedure Act 51 of 1977 – possession of ammunition – in that on or about 16 February 2013 and at or near 286 Bushwillow Street, Silverwoods Country Estate, Silver Lakes in the district of Pretoria, the accused did unlawfully have in his possession ammunition to wit 38 times 38 rounds without being a holder of:

a) a license in respect of a firearm capable of discharging that ammunition;

b) a permit to possess ammunition;

c) a dealer's license manufacturer's licence, a gunsmith's license, import, export or in-transit permit or transporter's permit issued in terms of this Act;

d) or is otherwise authorized to do so.

The accused pleaded not guilty to count 1 and handed in an explanation of plea in terms of Section 112 of the Criminal Procedure Act 51 of 1977. He also pleaded not guilty to counts 2, 3 and 4 and the alternative counts. The accused was represented by Mr B Roux (SC) and KC Oldwage. Mr G Nel and Ms A Johnson appeared for the state. I sat with two assessors, namely Ms J Henzen-du Toit and Mr T Mazibuko.

Explanation of plea: In his explanation of plea in respect of count 1, the accused described the incident as a tragic one which occurred after he had mistakenly believed that an intruder or intruders had entered his home and posed an imminent threat to the deceased and to him. The following extract is from the explanation of plea:

"4.1 During the early hours of the morning I brought two fans in from the balcony. I had shortly spoken to Reeva who was in bed besides me.

4.2 Unbeknown to me, Reeva must have gone to the toilet in the bathroom, at the time when I brought in the fans, closed the sliding doors

and drew the blinds and the curtains.

4.3 I heard the bathroom window sliding open. I believed that an intruder or intruders had entered the bathroom through the bathroom window which was not fitted with burglar bars.

4.4 I approached the bathroom, armed with my firearm so as to defend Reeva and I. At that time, I believed Reeva was still in bed.

4.5 The discharging of my firearm was precipitated by a noise in the toilet which I, in my fearful state, knowing that I was on my stumps, unable to run away or properly defend myself physically, believed to be the intruder or intruders coming out of the toilet to attack Reeva and me."

There was no explanation of plea in respect of counts 2, 3 and 4.

Admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977 (the CPA): Admissions in terms of Section 220 of the CPA were handed in by agreement between the parties. In respect of count 1, the admissions made by the accused concerned inter alia the identity of the deceased, the date, the scene and the cause of death. The accused also admitted that the gunshot wounds were inflicted by him; that the body of the deceased sustained no further injuries from the time of death until the post-mortem examination was conducted on the deceased's body and that Dr Saayman conducted the post-mortem

examination and correctly recorded his findings on EXHIBIT B.

There were no admissions made in respect of count 2. In respect of count 3 the accused admitted that a shot went off while the firearm was in his possession. In respect of count 4 the accused made an admission that at all times relevant to the count he had not been issued with a license to possess .38 calibre rounds of ammunition.

I now deal with the summary of events. In respect of count 1 the state case was that the accused and the deceased had had an argument and that the accused had then intentionally shot and killed the deceased who had locked herself in the toilet. To support his case the state called a witness – Ms Estelle van der Merwe, resident at the same complex as the accused – who awoke a few minutes before 02:00 in the morning to hear what she thought was a woman's voice. To her it sounded as if the woman was engaged in an argument with someone. She could not however locate the voice nor tell what language was being spoken or what was being said. Shortly after three o'clock in the morning, she heard what she thought were gunshots.

Mr Charl Peter Johnson and Ms Michelle Burger, husband and wife, stayed in an adjacent complex about 177 metres away from the house of the accused. They both heard screams that they interpreted as those of a woman in distress. Ms Annette Stipp who stayed in the same complex as the accused, about 80 metres away, explained that she heard three sounds that she thought were gunshots. A few minutes later she and her husband, Stipp, heard someone crying out loud and a man shouting for help.

Mr Michael Raymond Nhlengethwa and his wife, Eontle Hillary, were immediate neighbours to the left of the accused's house. Ms Nhlengethwa woke her husband up to report that she had heard a bang. Soon thereafter they both heard a man crying very loudly. Ms Nhlengethwa heard a man crying: 'Help! Help! Help!' At 03:16:13 Mr Nhlengethwa called security to report the loud crying, but did not get through. He tried again at 03:16:36 and the call lasted 44 seconds.

Clarice Viljoen Stander was another witness. She woke up and heard dogs barking. Thereafter she heard a man shout: 'Help! Help! Help!' According to her this was approximately five minutes before her father, Johan Stander, received a call from the accused at 03:19. Ms Rea Motshuane is another neighbour of the accused. When one is facing the house of the accused, she is the immediate neighbour on the right. She awoke to hear a man crying out very loudly. She did not look at the time, but estimated that it could have been 03:20 when she woke up.

The accused denied the allegations that he killed the deceased intentionally. He also denied that there was premeditation. The essence of the explanation of plea as well as the evidence of the accused was that when he armed himself with his firearm and fired through the toilet door he was acting in the mistaken belief that the deceased, who was then unknown to him in the toilet, was an intruder who posed a threat to his life and to that of the deceased. He believed that the intruder or intruders had come in through the open bathroom window. He had earlier heard the window slide open. At the time he had his back to the

bed just after he had awoken to bring in two fans from the balcony and to draw the curtains. He was therefore unaware that the deceased had left the bedroom to go to the toilet.

Common cause facts or facts which are not disputed: The following are common cause facts which relate to count 1 only. It is common cause that:

- on 14 February 2013 shortly after 3 in the morning, screams were heard from the accused's house;
- that the accused, while on his stumps, fired four shots at the toilet door;
- that at the time the shots were fired the deceased was inside the toilet;
- that the door of the toilet was locked from the inside;
- that the door of the toilet opened to the outside that is into the bathroom;
- that three of the four shots struck the deceased;
- that the deceased sustained a wound on the right thigh, a wound on the left upper arm, a head injury and a wound on the web of the fingers and
- that the deceased died from multiple gunshot wounds.

Also common cause is that:

- soon after the shots had been fired the accused called for help;
- that he used a cricket bat to break down the door;
- removed the deceased from the toilet to the hallway downstairs;
- that he was very emotional soon after the incident and

- that he was seen trying to resuscitate the deceased.

The issues: It is clear therefore that the issues are limited to whether at the time the accused shot and killed the deceased he had the requisite intention, and if so, whether there was any premeditation. Notwithstanding the limited issues, a lot of evidence was led and counsel argued extensively over two days. It shall not be possible nor will it serve any purpose to rehash the evidence in detail, hence the summary of the evidence above. It should also be fruitless to attempt to repeat every submission by counsel. This court has, however, taken all the evidence, and that includes all the exhibits and all submissions by counsel, into consideration.

I may add that there were a number of issues which arose during the course of the trial. These issues took a lot of the court's time and correctly so, as at the time such issues were important to the parties. The issues concerned were inter alia whether or not the police contaminated the scene, the length of the extension cord that went missing from the accused's bedroom and the authenticity of photographs of items depicted in various exhibits. Having regard to the evidence as a whole this court is of the view that these issues have now paled into significance when one has regard to the rest of the evidence. The reason for that view will become clearer later in this judgment.

I proceed to analyse the evidence. I deal first with count 1. There were no eye-witnesses. The only people on the scene at the time of the incident were the accused and the deceased. Notwithstanding this fact, there was no [indistinct 10:01:08] of witnesses who were willing to assist

this court to determine what could have happened on the morning in question.

Several witnesses gave evidence regarding what they heard or what they thought they heard at the time of the incident. A few could, in addition, tell the court what they observed after the incident. This court is indebted to all those witnesses and this includes expert witnesses who sacrificed their time and resources to come and assist in this matter.

The record of the evidence runs into thousands of pages. Thankfully the nub of what is an issue can be divided into three neat categories as set out hereunder: Gunshots, sounds made by a cricket bat striking against the door and screams in the early hours of the morning. For purposes of this judgment, gunshots, sound made by a cricket back striking against the door and screams will be discussed together as they are to an extent inextricably linked.

It is common cause that on the morning of 14 February 2013, shortly after 3 o'clock various people heard gunshots, screams and other noises that sounded like gunshots emanating from the house of the accused. As stated before, various state witnesses heard screams that they interpreted as those of a woman in distress. They heard noises that sounded to them as gunshots.

The defence admitted that there were shots fired that morning, but added that there were also sounds of a cricket bat striking hard against the toilet door, and that the noises sounded similar and could easily have been mistaken for shots. This was not contradicted. During

the course of the trial it became clear that some of the sounds that witnesses interpreted as gunshots were actually not gunshots, but sounds of a cricket bat striking against the toilet door. It was also not contradicted that the shots were fired first and that the striking of the door, using a cricket bat, followed thereafter.

That there was a misinterpretation of some of the sounds is clear from the following: It is common cause that only four gunshots were fired by the accused that morning, yet some witnesses stated that they heard more than four shorts while others heard less than four. This can only mean that some of the sounds that were heard and interpreted as shots could have been from the cricket bat striking against the door. It could also mean that some of the witnesses missed some of the sounds that morning, either because they were asleep at the time or their focus was elsewhere. For example, a witness could have been on the phone at the time.

Significantly Ms Burger refused to concede that she could have missed hearing the first sounds – that is the shots – as she might have been asleep at the time and that what she heard was a cricket bat striking against the toilet door. The evidence of this witness as well as that of her husband, Mr Johnson, is sought to corroborate her evidence, was correctly criticised in my view as unreliable. I do however think that they were unfairly criticised for having made almost identical statements to the investigating officer, Captain van Aardt. After all, they did not write their statements and had no say in the format of the statements. They merely related their version to Captain van Aardt who has his own

style of writing and his own vocabulary. The witnesses could not have been expected to know why he wrote in the manner that he did and why he used certain words and in what sequence. Captain van Aardt was the only one who could have explained that. He was not called to do so. That omission therefore cannot be used against the witnesses.

I do not think that Mr Johnson and Ms Burger were dishonest. They did not even know the accused or the deceased. So they had no interest in the matter. They also did not derive any pleasure in giving evidence. They stated that they were at first reluctant to come forward to give evidence until after the bail application, because they thought it was the right thing to do. They simply related what they thought they heard. They were, however, genuinely mistaken in what they heard as the chronology of events will show.

In view, it is absurd to conclude that the evidence of witnesses must be rejected in its entirety merely because the witnesses failed to describe the events in exactly the same way. In any event, contradictions do not automatically lead to the rejection of the witnesses' evidence as not every error negatively affects his credibility. Before determining the credibility of a witness who contradicted himself or herself, a court has to evaluate all the facts, taken into account the nature of the contradictions, their number, their importance and bearing on the rest of the evidence (see *S v Mkohle* 1990 (1) SACR 95 (A)).

It is easy to see why the witnesses would be mistaken about the events of that morning. The distance from which Burger and Johnson heard the noises put them at a distinct disadvantage. Both of them and

the Stipps were adamant that they, in addition to the shots, heard screams of a woman in distress. So sure was Johnson and his wife that a couple had been attacked in their own home, that Johnson got up early that morning to do something about improving his own security at his home.

However, this court has approached the evidence of every witness in this matter, not only that of Johnson and Burger, with the necessary caution. There is a very good reason for this. Factors such as how long a witness has known a suspect, if at all, proximity, visibility, mobility of the scene, the opportunity for observation and duration of the incident play an important role and are always taken into consideration by our courts (see *S v Mthethwa* 1972 (3) SA 766 (A)).

In the present case we are here dealing with sounds, identification and voice or scream identification as well as interpretation that experts referred to as intelligibility, something that is even more tricky in my view. There is no reason why the same guidelines used in identifying the features of a suspect should not be applicable to voice identification.

In *casu* none of the witnesses had ever heard the accused cry or scream, let alone when he was anxious. That in itself poses a challenge as the witnesses had no prior knowledge or a model against which they could compare what they had heard that morning. Even Ms Samantha Taylor who confidently stated that when the accused was anxious or agitated he sounded like a man and not like a woman, had to concede that she had never heard him scream when he was facing a life-

threatening situation. In any event, the evidence of Mr Lin, an acoustic engineer, cast serious doubt on whether witnesses who were 80 metres and 177 metres away respectively from the accused's house would be able to differentiate between a man and a woman's screams, if the screams were from the toilet with closed windows.

Also militating against the conclusion that it was a woman's scream that was heard that morning is the following:

1. At the time of the incident there was no one else in the accused's house except the accused and the deceased. Therefore it could only
10 have been one of them who screamed or cried out loud.
2. According to the post-mortem examination report the deceased suffered horrendous injuries. Professor Gert Saayman who conducted the post-mortem examination on the body of the deceased and compiled the post-mortem examination report, marked ANNEXURE GW715, noted four gunshot wounds. These were on the head, one on the right upper arm, one in the right groin and one in the right hand between two fingers.

In his evidence Professor Saayman described the wounds individually as follows: The nature of the wound on the right hip was such that:
20 'there would have been almost immediate instability or loss of stability pertaining to that limb or hip.' He explained that a person could transport weight onto the opposite limb and stand only on one leg, but the probabilities were that the injured person would become immediately unstable. It would clearly also be a particularly painful wound.

As whether the two injuries, that is the arm injury and the groin

injury, were serious he explained that both the injuries were so serious that either of them could have killed the deceased. The injury to the arm was particularly devastating as the shot had fractured and shuttered the right upper arm. Describing the head wound, Professor Saayman stated that that would have been an 'immediately incapacitating injury'. A person sustaining a wound of that nature would be almost immediately incapable of voluntary action of any kind. He or she would probably also be immediately unconscious. The respiratory functions would have been compromised substantially. There was also damage to the brain as well as substantial fracturing of the base of the skull, but minimal blood in the airways. This suggested that the deceased probably did not breathe more than a few seconds after sustaining this wound.

The shots were fired in quick succession. In my view, this means that the deceased would have been unable to shout or scream, at least not in the manner described by those witnesses who were adamant that they had heard a woman scream repeatedly. The only other person who could have screamed is the accused.

The question is: why did he scream? His version is that he screamed after he had fired the shots when he realised that the deceased was not in the bedroom. That version has not been contradicted. The time of the screams and the reasons for the screams make sense when one has regard to the chronology of the events of that morning. The screams were heard just after four shots were fired and before the three sounds from a cricket bat were heard.

I continue to explain why most witnesses got their facts wrong.

The fact that this case attracted much media attention, especially soon after the incident and the fact that it became a topic in many homes, also did not assist. Almost every witness who was asked under cross-examination if he or she had followed the news relating to the events of 14 February 2013 or the bail proceedings or the trial proceedings, responded positively.

A few witnesses conceded that they discussed the case with others before they took the witness stand. Mr Darren Fresco for example, who gave evidence for the state in counts 2 and 3 stated that when someone called him the day before he was to give his testimony, to inform him that his name had been mentioned in court, he was curious and wanted to know the details. He therefore took the witness stand with foreknowledge of what he might be asked.

I venture to say that Mr Fresco was not the only witness with such a disadvantage. I refer to it as a disadvantage, because it does affect the credibility of a witness as a witness might unwittingly relayed what he or she had heard elsewhere as though he or she had personal knowledge of the events. I am of the view that the probability is that some witnesses failed to separate what they knew personally, from what they had heard from other people or what they had gathered from the media.

The last reason why this court had to approach the evidence of each witness with caution is that the incident happened in the early hours of the morning when most of the witnesses who gave evidence were in bed. Ms van der Merwe was in and out of sleep. Mr Johnson,

Ms Burger as well as Dr and Ms Stipp were aroused out of sleep by either screams or what sounded like shots. Ms Burger described it as a confusing night while Dr Stipp got his times clearly wrong. It was not disputed that Dr Stipp heard the first sounds, heard screaming or shouting, heard the second sound, went to the accused's house and assisted Mr Stander to call 911 in that order.

Counsel for the defence submitted correctly that the evidence of Dr Stipp was unreliable as to the times when different events in this matter unfolded. He submitted further that Dr Stipp's evidence in some instances was tailored with the objective of assisting the state's allegation. I do not agree with this submission. Dr Stipp had no interest in the matter and would therefore have no reason to tailor his evidence to assist the state. I do not believe that he coloured his evidence against the accused.

On the contrary, he showed no bias against him. He told this court that when he arrived at the accused's house he observed a destroyed accused attempting to resuscitate the deceased. That he was praying to God to save the deceased, that as soon as the accused learnt that he was a doctor he employed him to do something. When asked if he thought the accused's distress appeared genuine to him, he did not hesitate to respond positively. The facts above have been set out to demonstrate the difficult terrain that this court had to traverse to arrive at its conclusion.

It follows from the above that it would be unwise to rely on any evidence by the witnesses and this includes those witnesses called by

the defence who gave evidence on what they heard that morning without testing each version against objective evidence.

Human beings are fallible and they depend on memories which failed over time. Thankfully as it shall be clear from the chronology of the events, this court is in a fortunate position in that it has objective evidence in the form of technology which is more reliable than human perception and human memory and against which all the other evidence can be tested.

Phone records which tell us exactly who made the call, from which cell phone to which cell phone and at what time, were made available to this court and we took full advantage of that. There is also a record of the duration of each call. It is significant that although most of the timelines were initially introduced into evidence by the state, it was the defence which analysed the timelines as set out hereunder and addressed the court on each.

When I asked state counsel if the timelines were common cause, his response was that only the recordings of the various calls were common cause, giving an impression that the rest of the timelines was disputed. However, there was no address forthcoming from the state to disturb the timelines as set out hereunder.

In any event, one can safely use the phone records which were made between 03:15:51 and 03:17 as a base to arrive at the approximate times when the shots were fired, when the screams were heard as well as when the sounds of the cricket bat was striking against the door were heard. In addition, the accused's phone records are also

available. A perusal of this record show that at 03:19:03, which was minutes after the sounds caused by a cricket bat were heard which was approximately 03:17, the accused was on the phone calling Stander. A minute later he called 911. Thereafter, one and a half minutes later, he called security.

I now proceed to set out the chronology of events:

1. At 02:20 security activated guard track next to the house of the accused.
2. Approximately between 03:12 and 03:14 first sounds were heard. These were shots.
3. Approximately 03:14-15 accused was heard shouting for help.
4. Approximately between 03:12 and 03:17 screams were heard or screaming was heard.
5. Approximately 03:15 accused was seen walking in the bathroom.
6. 03:15:51, the duration was 16 seconds, Dr Stipp telephoned the Silver Lakes security.
7. 03:16, the duration was 58 seconds, Mr Johnson called and spoke to Strubenkop security.
8. 03:16:13 Mr Michael Nhlengethwa made his first call to security. This call did not go through.
9. 03:16:36, the duration was 44 seconds, Mr Michael Nhlengethwa made his second call to security.
10. 03:17 Dr Stipp attempted to make a call to 10111.
11. 03:17 second sounds were heard. These were cricket bat striking against the door.

12. 03:19:03, the duration was 24 seconds, the accused called Johan Stander.

13. 03:20:05, the duration was 66 seconds, accused called 911.

14. 03:21:33, the duration was 9 seconds, the accused called security.

15. 03:22:05, duration 12 seconds, Peter Baba, the security, called the accused.

16. 03:22 Baba, the security, arrived at the house of the accused.

17. Approximately 03:22 Johan Stander and Clarice Viljoen arrived at the house of the accused.

18. Approximately 03:23-24 Dr Stipp arrived at the house of the accused.

19. 03:27:06 Johan Stander's call to 911 in the presence of Dr Stipp.

20. 03:27:14 Dr Stipp attempted to call security. This call did not get through.

21. 03:41:57 an ambulance arrived at security gate of Silverwoods Estate.

22. Approximately 03:50 paramedics declared the deceased dead.

23. Approximately 03:55 police arrived at the accused's house.

The chronology above gives a feel of where various witnesses corroborate one another's evidence and where they contradict one another. An analysis of the evidence using the timelines as a basis will also assist this court to determine whether the state has proved beyond reasonable doubt that the accused had direct intention and premeditation to kill the deceased.

The first sounds between approximately 03:13 and 03:14 it

seems to me from the analysis of the evidence that the first sounds which were identified by the defence as the shots fired by the accused, and which fact was not seriously disputed by the state were heard between approximately 03:13 and 03:14. What is also clear is that the screams that were heard shortly after the shots were fired and before the second sounds which turned out to be the sounds of the cricket bat striking against the door, could not have been those of the deceased as she had then suffered devastating injuries.

Ms van der Merwe woke up around 01:56 to hear a one-sided argument, later heard four gunshots in close succession. Her estimation was that it was about three o'clock. Soon thereafter she heard someone crying out aloud. It seemed to her that it was a woman's voice, but her husband told her that it was the accused crying. Although it was not established how her husband knew that it was the accused who was crying, this piece of evidence is enough to throw some doubt on the evidence of the witnesses who are adamant that they had heard a woman scream.

Dr and Ms Stipp gave evidence that the screaming was heard between the first and the second sounds. Mr and Ms Nhlengethwa's evidence was that the crying out loud occurred shortly after the first sound. This version has a ring of truth.

I say this, because Mr Nhlengethwa called security at 03:16:36 to report the crying out loud. Lending credence to this is the evidence of Mr Johnson and Ms Burger which was that the screaming occurred between approximately 03:12 and 03:17.

Ms Stipp's time seem to be wrong as it does not accord with the times of other witnesses. She relied on her radio clock to estimate the time of the events as they unfolded. According to her when she woke up the clock showed 03:02. She stated that her clock would have been three minutes early. She was about to get up when she heard three sounds which sounded like gunshots. She communicated this to her husband who, having left the bedroom earlier to go to the big balcony, returned to the bedroom to make a phone call.

At 03:15:51 Dr Stipp made a call to security and then at 03:17 he attempted to call 10111. The timing of the call to security is important as it is an indication that the time when Ms Stipp heard the gunshots must have been much later than 03:02. I say this because from their evidence it is clear that both Mr and both Dr and Ms Stipp regarded the incident as an emergency which warranted prompt action, and there seems to be no reason why they would delay seeking help. Hence, as counsel for the defence correctly admit, it is unlikely that Ms Stipp would take as long as 13 minutes before she and her husband could respond to the emergency. It is more probable that the time Ms Stipp heard shots was much later than the time that she mentioned.

What is interesting is that Mr Johnson too made his first call at 03:16. This call was made to Strubenkop security. This time is closer to the time mentioned by the Stipps as the time Dr Stipp made a call to security. Johnson made the call soon after he and his wife, Ms Burger, had heard what they described as a woman screaming. They also heard a man shout 'help' three times. It was only after this that they heard

what they described as gunshots. It is clear from the rest of the evidence that these were actually sounds of a cricket bat striking against the toilet door.

Ms Motshwane, a neighbour of the accused, woke up to hear a man crying very loudly. In her statement she stated that when she heard a man cry out loud it was about 03:20. This estimation too, in my view, cannot be relied on as it was more like guessing as she did not look at the time when she got up. What is also interesting about the evidence of Ms Motshuane is that although she was an immediate neighbour of the accused she did not hear the shots, but woke up when she heard a man crying.

At the time the second sounds were heard Dr Stipp was on the phone trying to call 10111. He described what he heard as three loud bangs while Ms Stipp described the same sounds as three thud sounds. The number of these loud bangs or thud sounds as well as the time is consistent with the version of the accused that soon after he had realised that the person behind the toilet door might have been the deceased, he ran to the balcony from where he screamed for help, took the cricket bat and proceeded to the bathroom where he struck the toilet door three times with the cricket bat.

Having dealt with the gunshots and the cricket bat sounds, the next question is: can the version of the accused that he is the one who was screaming on the morning of 14 February 2013, reasonably possibly be true? It is important to recap the state's theory which was that the accused and the deceased had an argument in the early hours

of that morning, an argument that was heard by Ms van der Merwe that the deceased fled to the toilet, that the accused followed her there and in the heat of further argument the accused shot and killed her. In support of this theory state counsel pointed to the fact that amongst other things the deceased had a cell phone with her and had locked herself inside the toilet.

In my view, there could be a number of reasons why the deceased felt the need to take her cell phone with her to the toilet. One of the possible reasons may be that the deceased needed to use her cell phone for lighting purposes as the light in the toilet was not working. To try to pick just one reason would be to delve into the realm of speculation.

The state also led the evidence of Whatsapp messages that went to and fro the accused and the deceased a few weeks before the deceased was killed. The purpose of such evidence was to demonstrate to this court that the relationship between the accused and the deceased was on the rocks and that the accused had a good reason to want to kill the deceased. In a bid to persuade this court otherwise, the defendant or the defence placed on record more Whatsapp messages that painted a picture of a loving couple.

In my view, none of this evidence from the state or from the defence proves anything. Normal relationships are dynamic and unpredictable most of the times, while human beings are fickle. Neither the evidence of a loving relationship, nor of a relationship turned sour, can assist this court to determine whether the accused had the requisite

intention to kill the deceased. For that reason this court refrains from making inferences one way or the other in this regard.

There is also the matter of partially digested food that Professor Saayman found in the stomach of the deceased's body during the post-mortem examination of the deceased. Counsel for the state submitted that this fact was a strong indication that dinner was not at 19:00 the night before as alleged by the accused, but closer to the time when the deceased was shot dead. He argued that that would explain the 'argument' that was heard by Ms van der Merwe just after she had woken up at 01:56. This argument seems to lose sight of the following:

1. That the experts agreed that gastric emptying was not an exact science. It would therefore be unwise for this court to even attempt to figure out what the presence of partially digested food might mean as the evidence before this court is inconclusive. However, even if this court were to accept that the deceased had something to eat shortly before she was killed, it would not assist the state as the inference sought to be drawn by the state from this fact is not the only reasonable inference. She might have left the bedroom while the accused was asleep to get something to eat. What complicates this matter is that it is not even clear when and if the alarm was activated at any given time that evening or that morning.
2. That Ms van der Merwe had no idea where the voice came from, what language was being spoken or what was being said. Accordingly, there is nothing in the evidence of Ms van der Merwe that links what sounded like an argument to her to the incident at

the house of the accused. What is of significance, however, is that Mr Peter Baba, the security guard, was near the house of the accused at 02:20 on patrol. There is no evidence that Mr Baba heard or saw anything untoward at the accused's house at the time.

I now deal with the defence case. The accused's evidence is important as the accused is the only one who can tell this court how the incident happened. This evidence shall therefore be set out in detail. The accused's evidence was that on the evening of 13 February 2014 at about 19:00 he and the deceased had dinner at his house. Soon thereafter he had gone to bed early as he was tired. He estimated that the time was about 21:00.

In the early hours of the morning he woke up to find the lights switched off. However, the sliding door was open and the two fans in the doorway were on. He spoke briefly to the deceased. Then got out of bed to bring the fans inside, close the sliding door and draw the curtains. It was pitch dark except for a slender blue LED light that came from the amplifier. He picked up a pair of jeans belonging to the deceased and was about to place it on the blue light to block it out when he heard what sounded like the bathroom window sliding open and striking the frame. He thought it was an intruder gaining entry into his home, coming to attack him and the deceased. He was on his stumps and he felt vulnerable.

After arming himself with his firearm which he had removed from the left side of the bed where he had left it the night before, he told the

deceased to call the police, then proceeded to the passage which led to the bathroom. He shouted more than once to the intruders to get out, meanwhile he heard a door slam. The bathroom lights were off, but he could see from the entrance that the bathroom window was open while the toilet door was closed. There was no one in the bathroom. He did not know whether the intruder or intruders were on a stepladder outside the bathroom window or where inside the toilet. He had his firearm pointed in front of him.

He then heard a movement inside the toilet and thought that whoever was in the toilet was coming out to attack him. He gave evidence as follows:

> "Before I knew it, I had fired four shots at the door…"

He went back to the bedroom only to find that the deceased was not in the bedroom. It then occurred to him that the person he had shot at in the toilet, might have been the deceased. He returned to the bathroom and found the toilet door locked. He returned to the bedroom, opened the sliding door and screamed for help. He then put on his prostheses, returned to the bathroom and tried to open the door by kicking it. The door did not budge.

He went back to the bedroom where he removed a cricket bat. At the time he was screaming, shouting and crying out. Back in the bathroom he struck the door with the cricket bat three times. When the door panel broke, he removed the key which was on the floor and opened the door. The deceased was lying in a sitting position on the

floor with her head on the toilet bowl. After a brief struggle to lift up the deceased the accused finally managed to carry the deceased downstairs. He was descending the stairs when Mr Stander and his daughter, Ms Viljoen, walked in. Stander was responding to the accused's call for help that the accused had made earlier when he had spoken to him on the phone.

I now deal with the accused's defence. A perusal of the evidence of the accused shows a number of defences or apparent defences. On the version of the accused it was not quite clear whether he had intended to shoot or not. This was exacerbated by the fact that Dr Meryl Foster called on behalf of the accused, placed on doubt the accused's culpability at the time of the incident. Dr Foster's evidence was that the accused suffered from a General Anxiety Disorder which may have affected his conduct at the time of the incident.

Before dealing with the implications of Dr Foster's evidence however, it is convenient to scrutinize the evidence of the accused first which might shed light on this defence. I have selected a few extracts from the accused's evidence.

The shooting was an accident. The accused said he shot in the belief that the intruders were coming out to attack him. He did not have time to think. He never intended to shoot anyone. He pulled the trigger when he heard the noise. He fired into the toilet door. He did not purposefully fire into the door. He fired shots at the door, but he did not do so deliberately. He never aimed at the door. The firearm was pointed at the door when he discharged his firearm as he got a fright. He

remembered pulling the trigger in quick succession. However, he could not remember firing specifically four shots. He:

> "Fired before I could think, before I even had a moment to comprehend what was happening."

I pulled the trigger at that moment when I heard the noise. I did not have time to think about what was happening. He stated once more:

> "Before thinking, out of fear, I fired the shots."

The discharge of the firearm was accidental as he claimed that he did not intend to discharge his firearm in that he 'was not meaning to shoot at anyone'. He:

> "Shot because I was at that point, with that split moment, I believed somebody was coming out to attack me. That is what made me fire out of fear. I did not have time to think. I discharged my firearm."

When the accused was asked to explain what he had meant 'by accident' when he gave his evidence, he answered as follows:

> "The accident was that I discharged my firearm in the belief that an intruder was coming out to attack me.
>
> So, the discharge was not accidental or was the discharge accidental?"

His answer:

> "The discharge was accidental, M'Lady. I believe that somebody was coming out. I believed the noise that I heard inside the toilet was somebody coming

out to attack me or to take my life."

The accused stated that at no stage was he ready to discharge his firearm, though the firearm itself was in a ready mode. He confirmed that he had released the safety mechanism on the firearm in case he needed to use the firearm to protect himself. Responding to a question as to whether he had consciously pulled the trigger, he answered as follows:

> "I did not think about pulling the trigger. As soon as I heard the noise, before I could think, I pulled the trigger."

The accused stated that he never thought of the possibility that he could kill people in the toilet. He considered, however, that thinking back retrospectively it would be a probability that someone could be killed in the toilet. He stated that if he wanted to shoot the intruder he would have shot higher up and more in the direction where the opening of the door would be to the far right of the door and at chest height. I pause to state that this assertion is inconsistent with that of someone who shot without thinking. I shall revert to this later in my judgment.

Counsel for the defence argued that while the accused had in fact approached the bathroom in a state of readiness to defend himself and the deceased against a perceived threat, he did not consciously discharge his firearm in the direction of the toilet door. He argued that from the evidence of the accused, it is clear that the conduct of the accused and the death of the deceased were an accident. [11:02 - 11:42]

In the same breath counsel for the defence submitted that the

fact that when the accused approached the toilet, he had the intention to shoot to protect himself did not imply that the accused intended to shoot without reason. If that had been his intention he would have discharged his firearm when he arrived at the entrance of the bathroom.

Defence counsel argued that the evidence of Professors Derman, Vorster, and Scholtz as a whole, was consistent with that of the accused when he stated that he discharged his firearm in reflex because he felt vulnerable and was fearful.

The above extracts and the submissions by defence counsel show without a doubt that we are here dealing with a plethora of defences. I proceed to deal with each of them in turn.

The first one is: Did the accused lack criminal capacity at the time that he killed the deceased?

This defence that the accused may have lacked criminal capacity or may have diminished his criminal capacity at the time of the incident, emerged during the course of the trial. The accused repeatedly told this court that he had no time to think before he fired the shots or before he knew it he had fired four shots at the door. This raised the doubt whether the accused could be held criminally accountable.

The inevitable question therefore was, amongst other things whether or not the accused could distinguish between right and wrong and whether he could act in accordance with that distinction.

Though not clearly expressed in so many words, the defence had the hallmarks of temporary non-pathological criminal incapacity. It

also sounded like the so-called irresistible impulse which was applied in our criminal law prior to 1977, when it was replaced by Section 78(1)(b) of The Criminal Procedure Act 51, 1977.

In support of the defence, as I said earlier, Dr Vorster gave evidence that the accused suffered from General Anxiety Disorder, which may have affected his conduct at the time of the incident. The implication of this evidence was that it became necessary for this court to refer the accused for psychiatric observation.

Referral for observation in terms of section (78)(2) of The
10 Criminal Procedure Act 51 of 1977, following an order referring the accused for psychiatric observation, a panel of experts was appointed. These were three psychiatrists, namely Dr Kotze appointed to assist the state, Dr Fine to assist the defence and Dr Pretorius to assist the court. In addition, a psychologist Professor Scholtz was also appointed to assist.

The psychiatrists compiled a joint report where they noted there findings. The report was submitted to the court and marked EXHIBIT PPP. The relevant portion of this exhibit is to be found in paragraph 6.C which reads thus:

20 > "At the time of the alleged offences, the accused did not suffer from a mental disorder or a mental defect that affected his ability to distinguish between rightful or wrongful nature of his deeds and a mental disorder, or mental defect did not affect his ability to act in accordance with the said appreciation of the

rightful or wrongful nature of his deeds."

Similarly the psychologist report marked EXHIBIT QQQ was submitted to court and formed part of the record. The relevant part of the record is on page 31 paragraph 6.1 and 6.2 which reads thus:

> "6.1. Mr Pistorius did not suffer from a mental defect or mental illness at the time of the commission of the offence that would have rendered him criminally not responsible for the offence as charged.
>
> 6.2. Mr Pistorius was capable of appreciating the wrongfulness of his act and/or acting in accordance with an appreciation of the wrongfulness of his acts."

Both state and defence counsel indicated to the court that they accepted the findings as set out on EXHIBIT PPP and EXHIBIT QQQ.

However, counsel for the defence still submitted that, in the face of the evidence of Professor Derman about the accused reaction to a startle, it could not be said that the accused was criminally liable.

Counsel submitted that in determining the issue of whether the accused was guilty of murder or culpable homicide, this court ought to consider that the accused lacked criminal capacity at the time, as he discharged his firearm because of an increase startled response. He pointed out that the startle response was reflexive. This meant that the accused could not be held accountable as he lacked capacity in the involuntary reflexive response.

He submitted that whether this reflex fell under the act *actus reus* or criminal capacity, made no difference as both negated liability. Counsel for the defence further submitted that a finding that the accused was guilty, could not be made as the accused could not be held liable for a reflex discharge,caused by the increased startled response.

I disagree with this submission. There is a huge difference as submitted by state counsel, between a reflex action and involuntary action. The latter concept has the hallmark of a defence of non-pathological insanity, as it gives the impression that the accused had no control over his action when he fired the shots at the door. That this cannot be, is clear from the steps that the accused took from the moment he heard the sounds of the window opening to the time he fired the four shots.

There was no lapse of memory or any confusion on the part of the accused. On his own version he froze, then decided to arm himself and go to the bathroom. In other words he took a conscious decision.

He knew where he kept his firearm and he knew where his bathroom was. He noticed that the bathroom window was open, which is something that confirmed his correctness about having heard the window open earlier. This is inconsistent with lack of criminal capacity. In any event, the experts have already pronounced on this defence and this court has not been given any reason not to accept their evidence.

Having regard to expert evidence and the evidence as a whole this court is satisfied that at the relevant time, the accused could distinguish between right and wrong and that he could act in accordance

with that distinction. It is also clear that the defence of non-pathological insanity has no foundation.

The second possible defence: Putative private defence. Counsel for the defence submitted that the accused intentionally discharged the shots in the belief that the intruder or intruders was, or were coming out of the toilet, to attack him and the deceased. In this regard he referred to the accused's testimony, which testimony was contradictory in my view. These are just some of the relevant extracts. He said:

> "… that split moment I believed somebody was coming out to attack me. That is what made me fire. Out of fear. I did not have time to think."

Later the accused testified:

> "I fired my firearm as I believed that someone was coming out of the toilet to attack me. I do not know how to put it in a different way."

Later still he said:

> "I thought that somebody was coming out to attack me."

In the same breath the accused stated:

> "I never intended to shoot anyone. I got a fright from a noise."
>
> "I did not shoot at anyone I did not intend to shoot at someone, I shot out of fear."
>
> "I did not intend to shoot into or I did not intend to shoot at anyone."

He was asked:

> “You never purposefully fired into the door?”

The answer was:

> “No M'Lady I did not.”

The question:

> “So you never wanted to shoot at robbers, intruders coming out of the toilet?”

The answer was:

> “That is correct.”

10 The essence of the accused’s defence is that he had no intention to shoot at anyone but if it was found that there was such an intention then he shot at what he:

> “...perceived as an intruder coming out to attack me.”

Counsel for the state, correctly in my view, submitted that if the accused never intended to shoot anyone, he cannot rely on a defence of putative self defence.

As stated above in evaluating putative defence the court will apply a subjective test, as opposed to an objective test, which is used in determining self defence. In the present case the accused version is 20 that he had no intention to shoot at anyone, let alone the deceased. Yet on his own version the accused armed himself with a loaded firearm and approached what he thought was danger, with a firearm ready to shoot. It would be absurd, for instance, to infer from the accused conduct, that he was going to hit the intruder over the head with it, as he could have easily used a cricket bat for that purpose.

This strange conduct of the accused was explained by Professor Derman as a fight, as opposed your flight response. This court accepts that the accused is a fight rather than a flight reaction person, as Professor Derman testified.

This court also accepts that a person with an anxiety disorder as described by Dr Vorster, would get anxious very easily, especially when he is faced with danger. It is also understandable, that a person with a disability such as that of the accused would certainly feel vulnerable, when faced with danger.

I hasten to add however that the accused is not unique in this respect. Women, children, the elderly and all those with limited mobility would fall under the same category, but would it be reasonable if without further ado, they armed themselves with a firearm when threatened with danger. I do not think so, as every case would depend on its own merits.

The accused clearly wanted to use the firearm and the only way he could have used it was to shoot at the perceived danger. The intention to shoot however does not necessarily include the intention to kill. Depending on the circumstances of each case an accused may be found guilty of *dolus eventualis* or culpable homicide. In this case there is only one essential point of dispute and it is this: Did the accused have the required *mens rea* to kill the deceased when he pulled the trigger? In other words, was there intention? The essential question is whether on the basis of all the evidence presented, there is a reasonable doubt concerning the accused's guilt.

The onus of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he or she is entitled to be acquitted, that is the accused, if it is reasonably possible that he or she might be innocent, see *S v van der Meiden* 1999 (2) SA 79 (W). In the same case the court warned against the danger of examining the version of the accused in isolation for purposes of either convicting or acquitting. The court emphasized the importance of looking at the evidence as a whole and not piecemeal and then proceeded.

10 The process of reasoning which is appropriate to the application of the proper test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind however, is that the conclusion which is reached, whether it be to convict or to acquit must account for all the evidence. Some of it might be found to be false, some of it might be found to be unreliable and some of it may be found to be only possibly false or unreliable but none of it may simply be ignored.

The accused as a witness: The accused was a very poor witness. While during evidence in chief he seemed composed and logical, with a 20result that his evidence flowed and made sense, while giving his version under cross-examination he lost his composure. Counsel for defence sought to explain the accused's poor performance on the witness stand thus: The accused was suffering from enormous emotional stress; had been traumatised by the incidents of 14 February 2013 and was under medication when he gave his evidence.

This argument does not make sense in my view. I say this for the following reasons: The accused's performance during during examination in chief could not be faulted. It was only under cross-examination that he contradicted himself and visibly felt uncomfortable. In any event, this court was not appraised of the fact, that the factors mentioned above might interfere with the accused's ability to give evidence.

It does not assist to mention them now when the trial is over. It is so that most witnesses do find giving evidence an uncomfortable experience, especially when they give evidence for the first time. It follows therefore that someone in the position of the accused, would find giving evidence a harrowing experience as he re-lives the incident.

However, what we are dealing with here is the fact that the accused was, amongst other things, an evasive witness. In my view there are several reasons for this. He failed to listen properly to questions put to him under cross-examination, giving an impression that he was more worried by the impact that his answers might cause, rather than the questions asked.

Often a question requiring a straight forward answer turned into a point of debate about what another witness did or said. When contradictions were pointed out to him or when he was asked why certain propositions were not put to state witnesses, he often blamed his legal team for the oversight.

Although the untruthful evidence of an accused is of importance when a court determines the guilt or otherwise of an accused, caution

must be exercised and courts ought to avoid attaching too much weight to such untruthfulness.

The conclusion, that because an accused is untruthful he is therefore probably guilty, must be guided against, as a false statement does not always justify the most extreme conclusion. In the present case the deceased was killed under very peculiar circumstances.

There are indeed a number of aspects in the case which do not make sense, such as:

- Why the accused did not ascertain from the deceased when he heard the window open, whether she too had heard anything.
- Why he did not ascertain whether the deceased had heard him since he did not get a response from the deceased before making his way to the bathroom.
- Why the deceased was in the toilet and only a few metres away from the accused, did not communicate with the accused, or phone the police as requested by the accused. This the deceased could have done, irrespective of whether she was in the bedroom or in the toilet, as she had her cell phone with her. It makes no sense to say she did not hear him scream, 'get out'. It was the accused version that he screamed on top of his voice, when ordering the intruders to get out. Another question is:
- Why the accused fired not one, one shot but four shots, before he ran back to the bedroom to try to find the deceased.

These questions shall unfortunately remain a matter of conjecture. What is not conjecture, however, is that the accused armed himself with

a loaded firearm when, on his own version, he suspected that an intruder might be coming in through the bathroom window. He was not truthful when asked about his intentions that morning, as he armed himself with a lethal weapon. The accused was clearly not candid with the court when he said that he had no intention to shoot at anyone, as he had a loaded firearm in his hand, ready to shoot.

However, as stated above, untruthful evidence does not always justify the conclusion that the accused is guilty. The weight to be attached thereto must be related to the circumstances of each case. (*S v Mtswene* 1985 (1) SA 590 (A)).

There is also the question of onus. No onus rest on the accused to convince this court of the truth of any explanation that he gives. If he gives an explanation, even if that explanation be improbable, the court is not entitled to convict, unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false.

If there is any possibility therefore of his explanation being true then he is entitled to his acquittal. (See *Diffort* 1937 (AD) 370). The onus is on the state throughout to prove beyond reasonable doubt that the accused is guilty of the offence with which he has been charged. Should the accused's version or evidence be found to be reasonably possibly true, he would be entitled to his acquittal.

In count 1 the accused is charged with pre-meditated murder. In respect of this charge the evidence is purely circumstantial. That evidence is in essence about shots, about the screams and about sounds of the cricket bat.

The fundamental rule in considering circumstantial evidence is that in order to justify an inference of guilt, a court must be sure that inculpatory facts are incompatible [indistinct] the innocence of the accused and incapable of explanation on any other reasonable hypotheses. The simple explanation from the accused is that shooting the deceased dead was a genuine mistake, as he thought he was shooting at an intruder behind the toilet door.

The timelines as set out in the chronology of events tip the scales in favour of the accused's version in general. Viewed in its totality the evidence failed to establish that the accused had the requisite intention to kill the deceased, let alone with premeditation. I am here talking about direct intention.

The state clearly has not proved beyond reasonable doubt that the accused is guilty of premeditated murder. There are just not enough facts to support such a finding.

Counsel for the state submitted that even if the court were to find that the accused shot the deceased, thinking that he was firing the shots at an intruder, this would not assist him as he had intended to kill a human being. This was so because all the elements of the crime of murder had been met, it was argued.

On the other hand counsel for the defence submitted that the state was attempting to reintroduce the concept of transferred malice, which was not part of our law. This brings the question whether we are really dealing with the question of transferred malice.

It might be convenient at this stage to say something briefly

about two concepts which often are confused, namely: *aberratio ictus* and error in personae or error in *objecto*. [12:12 - 12:21]

Abbaratio ictus (the going astray of the blow). *The abbaratio ictus* means the going astray of the missing blow or missing of the blow. In *abbaratio ictus* A intends to kill B but misses him and kills C. It follows that A has intentional respect of C only if he foresees of foresaw the possibility of C's death, in which event he would be guilty of murder *dolus eventualis* or for culpable homicide.

If C's death was reasonably foreseeable, in which event he would be guilty of culpable homicide. On the other had error in *objecto* cares where A, intending to kill B shoots and kills C whom he mistakenly believes to be B. In these circumstances A is clearly guilty of the murder of C. (*C de Wet and Swanepoel* 142 JRL Milton has stabbed in the dark a case of abberratio ictus 1968 (85) SA LJ 115-118. See also Glenda Williams 138). His intention is directed at a specific predetermined individual, although he is in error as to the exact identity of that individual. In other words A intends to kills the individual irrespective of whether the name of the individual is B or C.

There is thus in the case of error in *objecto* so to speak an undeflected *mens rea* which falls upon the person it was intended to affect. The error as to the identity of the individual therefore is not relevant to the question of *mens rea.* It is so that the *abberatio ictus* rule derived support from two appellate division decisions namely: *R v Kutswayo* 1949 (3) 761 (A) and *R v Khoza* 1949 (4) 555 (A). In terms of the rule then, because of A's intention to kill, A is guilty of the murder of

C without the prosecution's having to establish an intention to kill C specifically. Recent case law however moved away from Leratio in Kuswayo and Khoza on the basis that that *[indistinct 12:24:54]* was founded on the outworn doctrine of Versari in *re illicita* and could no longer be supported.

The current South African Law regarding criminal liability as set out in *S v Mtshiza* 1970 (3) SA 747A. On page 752 Holmes JA explains the legal position as follows, I leave out something:

> "… nowadays criminal liability is not regarded as attaching to an act or a consequence unless it was attended by *mens rea*. Accordingly if A assaults B and in consequence B dies, A is not criminally responsible for his death unless:
>
> a) He foresaw the possibility of resultant death, he had persisted in his deed, reckless, whether death ensued or not, or
>
> b) He ought to have foreseen the reasonable possibility of resultant death.
>
> In a) the *mens rea* is the type of intent known as *dolus eventualis* and the crime is murder.
>
> In b) the mens rea is *culpa* and the crime culpable homicide."

My view is that we are here not dealing with *aberratio ictus* as there was not deflection of the blow. It would therefore serve no purpose to say anything more about it.

We are clearly dealing with error in *objecto* or error in *persona*, in that the blow was meant for the person behind the toilet door, who the accused believed was an intruder. The blow struck and killed the person behind the door. The fact that the person behind the door turned out to be the deceased and not an intruder, is irrelevant.

The starting point however, once more is whether the accused had the intention to kill the person behind the toilet door whom he mistook for an intruder.

The accused had intention to shoot at the person in the toilet but states that he never intended to kill that person. In other words he raised the defence of putative private defence.

In *S v Adair Oliveira* 1993 (2) SACR 59(A) at 63 and 64 a distinction was drawn between private defence as a defence, excluding unlawfulness, which is judged objectively and putative private defence which relates to the mental state of the accused. In that case Smalberger JA stated:

> "From a juristic point of view the difference between these two defences is significant. A person who acts in private defence, acts lawfully provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limit. The test for private defence is objective: Would a reasonable man in the position of the accused have acted in the same way? In putative private defence it is not lawfulness that is in issue but culpability…

> If any accused honestly believes his life or property is in danger but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If, in those circumstances, he kills someone, his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending on the precise circumstances) exclude *dolus* in which case the liability for the persons death based on intention will also be excluded. At worst for him, he can then be convicted of culpable homicide."

In murder the form of culpability required intention, the test to determine intention is subjective. In the present case the accused is the only person who can say what his state of mind was at the time he fired the shots that killed the deceased.

The accused has not admitted that he had the intention to shoot and kill the deceased or any other person for that matter. On the contrary, he stated that he had no intention to shoot and kill the deceased. The court is however entitled to look at the evidence as a whole and the circumstances of the case to determine the presence or absence of intention at the time of the incident.

In the present case, on his own version the accused suspected that an intruder had entered his house through the bathroom window. His version was that he genuinely, though erroneously, believed that his life and that of the deceased was in danger.

There is nothing in the evidence to suggest that this belief was

not honestly entertained. I say this for the following reasons: The bathroom window was indeed open, so it was not his imagination at work when he thought he heard the window slide open. He armed himself with a loaded firearm and went to the direction of the noise. He heard a door slam shut. The door toilet was indeed shut when he fired four shots at it, after he heard a movement inside the toilet. On his version he was scared as he thought the intruder was coming out to attack him. There is no doubt that when the accused fired shots through the toilet door, he acted unlawfully. There was no intruder. In fact, the person behind the door was the deceased and she was dead.

I now deal with *dolus eventualis* or legal intent. The question is:

1. Did the accused subjectively foresee that it could be the deceased behind the toilet door and
2. Notwithstanding the foresight did he then fire the shots, thereby reconciling himself to the possibility that it could be the deceased in the toilet.

The evidence before this court does not support the state's contention that this could be a case of *dolus eventualis.*

On the contrary the evidence shows that from the onset the accused believed that, at the time he fired shots into the toilet door, the deceased was in the bedroom while the intruders were in the toilet. This belief was communicated to a number of people shortly after the incident.

- At 03:19 the accused disclosed this to Johan Stander when he requested him to come quickly to his house.

- At 03:22 he told his version to Clarice Viljoen on her arrival, in the company of her father Stander.
- A few minutes later the same information was related to Dr Stipp when he arrived at the accused house and lastly:
- It was told to the police at about 04:00 in the morning the same day.

Counsel for the defence correctly argued that it was highly improbable that the accused would have made this up so quickly and be consistent in his version, even at the bail application before he had access to the police docket and before he was privy to the evidence on behalf of the state at the bail application.

The question is: Did the accused foresee the possibility of the resultant death, yet persisted in his deed reckless whether death ensued or not? In the circumstances of this case the answer has to be no.

How could the accused reasonably have foreseen that the shots he fired would kill the deceased? Clearly he did not subjectively foresee this as a possibility that he would kill the person behind the door, let alone the deceased, as he thought she was in the bedroom at the time.

To find otherwise would be tantamount to saying that the accused's reaction after he realised that he had shot the deceased was faked; that he was play acting merely to delude the onlookers at the time.

Doctor Stipp, an independent witness who was at the accused's house minutes after the incident had occurred, stated that the accused looked genuinely distraught, as he prayed to God and as he pleaded

with him to help save the deceased.

There was nothing to gainsay that observation and this court has not been given any reason to reject it and we accept it as true and reliable. It follows that the accused's erroneous belief that his life was in danger excludes *dolus*. The accused therefore cannot be found guilty of murder *dolus eventualis*. That however, is not the end of the matter, as culpable homicide is a competent verdict. [12:37 - 14:16]

I now deal with negligence in culpable homicide cases. In terms of Section 258 of the CPA, culpable homicide is a competent verdict to a charge of murder. In determining whether the accused was negligent in causing the death of the deceased, this court has to use the test of the reasonable man.

In *Burchell & Hunt*, Principles of Criminal Law, 4th Ed. the test to be applied to prove negligence is set out as follows:

"(a) Would a reasonable person in the same circumstances as the accused have foreseen the reasonable possibility of the occurrence of the consequence or the existence of the circumstance in question, including its unlawfulness.

(b) Would a reasonable person have taken steps to guard against that possibility and

(c) Did the accused fail to take the steps which he or she reasonably would have taken to guard against it." (Page 409.)

Only if these requirements above have been met, would the accused be guilty of negligence. Although the test for negligence is objective, certain subjective factors are applied.

In *S v Ngema*, 1992 (2) SACR 651 (D) the following appears in the headnote:

> "While it is clear in applying the test of the reasonable man in determining whether or not certain conduct was negligent, the days of fullblown objectivism (see for example *R v Nbombela,* 1933 AD 269 at 272) are passed and some evidence of subjectivising the test for negligence is apparent. There is no warrant for departing holus bolus from the old and well established reasonable man test. The reasonable man himself, of course, evolves with the times. What was reasonable in 1933 would not necessarily be reasonable today. What has happened in practice however, is that the reasonable man is now to be placed in the position of the accused. It is not clear from decided cases, however, what is to be included and what is to be excluded from this position. A balance between the various ideas of what is to be included and what excluded from the test, should be sought along the lines of reasonableness. One must test negligence by the touchstone of the reasonable person of the same background and educational level, culture, sex and race of the accused. The further individual peculiarities of the accused alone, must be disregarded."

It was submitted on behalf of the accused that there could be no doubt that disability did not form part of individual peculiarities and that

therefore, it must be taken into account in the concept of the reasonable person representing:

> "A particular group of persons who are in the same circumstances as he is, with the same ability and knowledge."

Counsel for the defence once more tried to persuade this court that the accused's disability, among other things rendered him vulnerable hence his reaction that morning when he armed himself with a firearm and that therefore he could not be found guilty of negligence.

As stated earlier, vulnerability is not unique as millions of people in this country can easily fit into that category. In my view regardless of what category of people we are dealing with, the answer to whether a particular act is reasonable or unreasonable, has to depend on the particular case of each case.

It was pointed out by counsel for the defence that the conduct of the accused that morning, was brought about by a number of factors. For example: His bathroom window was not fitted with burglar proofing. Once again, that is not a unique feature as there are many people in this country without form of security at all. Of course, as a fight rather than a flight response person, the accused would not have been expected to run from the danger. However, there were other means available to him to deal with what he considered a threat to his life. Security personnel are there to deal with such stress or emergencies. All the accused had to do was to pick up his cell phone to call security or the police. He could have run to the balcony and screamed in the same way he had

screamed after the incident. He was able to call security after the incident. There is no reason or no explanation why he could not do so before he ventured into the bathroom with a loaded firearm. Calling security, calling Stander and running to the balcony to scream for help and to attract attention, probably would have taken as much time, if not less, as it took to go to the bathroom and to discharge those four shots. It is also significant that at the time that the accused had the window slide open, he was nearer to the balcony than to the bathroom.

Counsel for the defence urged this court to consider the peculiar circumstances of the accused when determining the question whether the accused, by firing the shots, acted negligently. Growing up in a crime-riddled environment and in a home where the mother was paranoid and always carried a firearm, placed the accused in a unique category of people. This would explain the conduct of the accused that morning, when he fired shots at what he thought was an intruder, it was argued.

I agree that the conduct of the accused may be better understood by looking at his background. However, the explanation of the conduct of the accused is just that: an explanation. It does not excuse the conduct of the accused. Many people in this country experienced crime or the effects thereof, directly or indirectly at some time or another. Many have been victims of violent crime but they have not resorted to sleeping with firearms under their pillows.

It also has to be borne in mind that the determination of what is reasonable and what is not reasonable, would depend on the facts of

this particular case. If the accused for example had awoken in the middle of the night and in darkness saw a silhouette hovering next to his bed and had in a panic grabbed his firearm and shot at that figure, only to find that it was the deceased, his conduct would have been understandable and perhaps excusable.

In such a case, he would not have been expected to call security first as he would have been faced with a real emergency. In this instance however, this was not the case. The accused had reasonable time to reflect, to think and to conduct himself reasonably.

10 On the facts of this case I am not persuaded that a reasonable person with the accused's disabilities in the same circumstances, would have fired four shots into that small toilet cubicle. Having regard to the size of the toilet and the calibre of the ammunition used in the firearm, a reasonable person with the accused's disability and in his position, would have foreseen that if he fired shots at the door, the person inside the toilet might be struck and might die as a result.

Evidence was led as to how far or how near the deceased may have been from the door when she was struck by the shots. There was also a debate about what calibre ammunition was used. In my view, all 20 that is not really relevant to the issue at hand.

The accused knew that there was a person behind the toilet door and chose to use a firearm which was a legal weapon. He was

competent in the use of firearms as he had undergone some training.

I now revert to the relevant questions.

First: Would a reasonable person in the same circumstances as the accused, have foreseen the reasonable possibility that, if he fired four shots at the door of the toilet, whoever was behind the door, might be struck by a bullet and die as a result?

The second question is: Would a reasonable person have taken steps to guard against that possibility?

The answer to both questions is yes.

The last question is: Did the accused fail to take steps which he should reasonably have taken to guard against the consequence?

Again the answer is, yes. He failed to take any step to avoid the resultant death

I am of the view that the accused acted too hastily and used excessive force. In the circumstances it is clear that his conduct was negligent.

I am now dealing with count 2. The summary or the evidence of substantial facts in terms of Section 144(3)(a) of Act 51 of 1977, reads as follows :

> "In January 2013 the accused, while having lunch with friends at a restaurant in Melrose Arch in Johannesburg, handled the firearm of one his friends and a shot was discharged. This shot narrowly missed his friend and hit the floor of the restaurant. The friend referred to in this paragraph is Kevin Lerena."

The state called two witnesses to prove this count. Samantha Taylor. I will have to rephrase, I am not talking about count 2. Count 3. I am

talking about count 3. I will have to rephrase. I am talking about count 2, instead of count 3.

The summary of substantial facts in terms of Section 144(3)(a) of Act 51 of 1977 reads as follows :

> "On a separate occasion on 20 September 2010, the accused who is the licensed owner of a 9 millimetre pistol fired a shot through the sunroof of a car while travelling on a public road. There were other passengers in that car."

The state called two witnesses for this count, namely Samantha Taylor, former girlfriend of the accused and Darren Fresco who was a friend of the accused. Both these witnesses were present in the vehicle when the incident referred to in this count, occurred.

Ms Taylor's evidence briefly was that she, Darren Fresco and the accused, were returning from a visit at the Vaal River one afternoon, when the vehicle they were travelling in was stopped by traffic officers for speeding. Fresco was the driver at the time. While the traffic officer was writing an infringement ticket, the accused who occupied the front passenger seat, stepped out of the vehicle to see what was happening with Fresco. A second officer had, in the meantime, walked to the front passenger seat where the accused had left his firearm. The officer picked it up asking whose it was, and whether the owner had a licence and, in the process ejected a bullet into the vehicle. The accused returned and had a verbal altercation with the officer. After they had searched for and found the bullet, they left the scene. Both the accused and Fresco who was still driving, were irritated by the officers and

minutes later, they joked about whether they should or should not shoot at a robot. The accused took his firearm and shot through the open sunroof of the vehicle. Both Fresco and the accused laughed about the incident. Ms Taylor could not say where the incident happened, as she was not familiar with the vicinity.

Mr Fresco confirmed that the incident took place, although his version was very different. He, the accused and Ms Taylor were travelling in one vehicle on the way from an outing at the Vaal River. He was the driver. The accused sat in the front passenger seat, while Ms Taylor occupied the back seat. He confirmed that they were stopped by traffic officers twice, once for speeding. He was asked by the officer to step outside, which he did and while the officer was writing him a ticket, the accused left his seat to join him. Another officer went to the front passenger seat where he found the accused's firearm, picked it up and ejected the bullet in the process. This action irritated the accused, who rebuked the officer for handling 'another man's firearm'.

He told called the officer that his fingerprints were all over the firearm and if anything were to happen he the officer, would be held responsible. They left the scene soon thereafter. Without warning the accused took out his firearm and fired a shot into the air through the open sunroof. He asked the accused what he was doing. That is Fresco asked the accused what he was doing, but he laughed at him. He denied that the incident happened in the manner described by Taylor. His version was that he was very angry at what the accused had done, as his left ear was left bleeding as a result.

The accused denied that he had said anything to the officer about fingerprints on the firearm. He stated that he had explained to the officer that he had left the firearm on the seat, simply because he did not want to approach the police officer with a firearm on him. The police officer who had ejected the bullet from his firearm, was the one who was irritated and not him. The accused also denied that he fired a shot through the open sunroof.

The assessment of the evidence: In respect of count 2 it was pointed out by counsel for the accused that Taylor and Fresco contradicted each other regarding the allegation that the accused had fired a shot through the sunroof of the vehicle. For that reason none of the evidence led by the state in this regard was reliable, it was argued. On the other hand, state counsel disagreed submitting that there was no reason why Fresco or Taylor would want to falsely implicate the accused.

To deal with the submissions above it is necessary to scrutinise the evidence of the two witnesses. Both Fresco and Taylor gave evidence implicating the accused. They both said that on their way from the Vaal, the accused fired a shot through sunroof while the vehicle was moving. However, there the similarities ended. They were both there with the accused at the time of the incident. Yet their version on where the incident happened, how it happened and why it happened, are so dissimilar that one may be tempted to think that they were in fact talking about different incidents. I shall proceed with each of these witnesses in turn.

Fresco was not an impressive witness at all, when he gave evidence regarding this count. In fact he was proved to be a dishonest witness. He gave evidence that on their way to the Vaal on the day of the incident, the accused had driven the vehicle at a speed in excess of 200 kilometres per hour and alleged that he had taken a photograph of the speedometer at the time. Under cross-examination it emerged that in fact, he is the one who drove at an excessive speed of 260 kilometres per hour and there was an image captured on his phone, to prove it. The effect of those lies must not be misunderstood.

Mendacity on one aspect of an witness's evidence, does not necessarily mean that the rest of the evidence will be tainted. It simply means that caution is warranted. In this case, however, there is more reason for the exercise of caution. Firstly, Fresco could not with certainty say where the incident happened. During evidence in chief, he stated that he was able to point out the specific spot where the incident had happened to the police and made reference to what was depicted in photographs 1143 to 1146.

Under cross-examination however, he stated that when he was taken to the scene to point out the exact spot where the incident had happened, he was able to point it out only after Captain van Aardt had driven past the location, on no less than four occasions. Secondly, he told an unlikely story that while they were driving back from the Vaal after their vehicle had been stopped by Metro Police, the accused who was a passenger at the time, without any warning had fired a shot through the sunroof. When he asked him what he was doing, he just

laughed at him.

Taylor was the former girlfriend of the accused. It is common cause that the relationship between the two did not end amicably. Taylor alleged that the relationship ended when the accused was unfaithful to her. The accused also made a similar counter accusation. It was clear from the evidence of Taylor that she had been hurt by the manner in which the relationship had terminated.

The above, however, does not necessarily mean that she was out to falsely implicate the accused. It simply means, like the evidence of Fresco, Taylor's evidence needs to be approach with a certain degree of caution and this court has certainly done that. According to Taylor after the three of them had left the place where their vehicle had been stopped by Metro Police, Fresco and the accused laughed and they said they wanted to shoot at a robot and :

"Then Oscar shot a bullet out of the sunroof."

Unlike Fresco's version that without saying anything, out of the blue, the accused simply shot out of the sunroof, Taylor's version has a ring of truth.

In a criminal case, however that is never the end of the matter. the question is always whether the state has proved its case against the accused, beyond reasonable doubt. The accused denied the incident. Defence Counsel correctly stated that even if it were to be found that the accused was a poor witness, that fact would not assist the state case as the court would then be faced with three poor witnesses. This court does not have to believe the accused's version. He bears no onus to

prove his innocence. Rather it is the state which has to persuade this court that the accused is guilty beyond reasonable doubt of the crime with which he is being charged.

The state witnesses contradicted each other, on crucial aspects namely the circumstances under which the shot was fired; when and where exactly the shot was fired. The evidence placed before the court falls short of the required standard for a conviction in a criminal matter. This court's conclusion is that the state has failed to establish that the accused is guilty beyond reasonable doubt of this count, and has to be acquitted.

I am now dealing with count 3. Paragraph 7 of the summary of substantial facts in terms of Section 144(3)(a) of Act 52 of 1977, reads as follows :

> "In January 2013 the accused while having lunch with friends at a restaurant in Melrose Arch in Johannesburg, handled the firearm of one of his friends and a shot was discharged. This shot narrowly missed his friend and hit the floor of the restaurant. The friend that is being referred to in this case, is Kevin Lerena."

It is not in dispute that the firearm, a Glock Pistol which belonged to Fresco, discharged while in possession of the accused after he had asked Fresco to pass him his firearm under the table.

Kevin Lerena, a boxer, gave evidence that he heard Fresco, as he handed over the firearm, tell the accused that there was "one-up." Meaning there was a bullet up in the chamber. Within seconds the

firearm was discharged. The shot damaged the floor very close to him and his toe was injured by shrapnel. However, the accused was concerned at that moment that someone might have been hurt, and apologised. He asked if everyone was fine. He then asked Fresco to take the blame for what had happened as he wanted to avoid bad publicity in the media.

Fresco in his evidence confirmed that the accused had asked to see his firearm and confirmed that he also passed it on to him under the table, that as he did so, he told the accused that there was "one-up." That the accused took the firearm and that soon thereafter, the firearm discharged. Fresco also confirmed that the accused asked him to take the blame for the discharge of the firearm. When the owners approached their table to seek an explanation, he told them that his firearm had discharged when it got caught in the leg of his tracksuit and fell on to the floor.

Mr Loupis, the owner of Tasha's Restaurant, gave evidence that on the day of the incident, the restaurant was full with approximately 220 people. It was lunchtime at the time and he was busy with patrons, when he heard a loud bang that sounded like a gunshot. When he went to investigate, Fresco apologised and told him that his firearm had accidentally fallen off his trouser. Soon thereafter the group paid the bill. The accused and those in his company apologised and left.

The accused admitted that he took the firearm from Fresco, after he had asked for it. He had wanted to see it as he was planning to buy a similar model. His version was that at the time he took it, he did not

realise that the firearm was loaded or that it had a magazine in it. He wanted to make it safe, when a shot went off accidentally.

Counsel for the defence sought to explain his submission, what might have caused the firearm to discharge. In my view, it really does not matter what caused the firearm toe to discharge, as that will not assist this court in determining whether the accused was negligent. No one has submitted that there was an intention on the part of the accused.

What is relevant is that the accused asked for a firearm in a restaurant full of patrons and that while it was in his possession, it discharged. He may not have intentionally pulled the trigger. However, that in itself does not absolve him of the crime of negligently handling a firearm in circumstances where it creates a risk to the safety of people and property, and not to take reasonable precautions to avoid the danger.

The version of Fresco was supported in material respects by that of Lerena. Although Lerena did not know why the firearm was passed from Fresco to the accused, he heard Fresco tell the accused there was 'one-up'. After the firearm had discharged, he also heard the accused ask Fresco to take the blame for the incident.

The accused's version, on the other hand, was that he was angry with Fresco for having handed him a loaded firearm. He reprimanded him for doing so, as people could have got hurt. It is strange that this portion of the accused's version was never put to either Lerena or to Fresco. An inference is irresistible that no such

conversation took place at all.

Lerena was a good witness and I did not detect any indication of bias against the accused. This court was given no reason to reject his evidence and that evidence is accepted *in toto* as true and reliable. It follows therefore that this court also accepts the evidence of Fresco in this regard.

From the evidence led through Mr Rens in respect of count 1, the accused was sufficiently trained in the use of firearms and that would include the responsible handling of firearms. He should not therefore have asked for a firearm in a public place such a restaurant full of people, let alone handle it. In my view the state has proved beyond reasonable doubt that the accused contravened section 120(3) (b) of the Act.

In respect of count 4, the state alleges that the accused contravened Section 90 read with other relevant sections of the Firearms Act, by unlawfully possessing 38 x 38 rounds of ammunition at his house at 286 Bush Willow Street, Silver Lakes Country Estate, Silver Lakes with any right to possess the said ammunition.

It is convenient at this stage to deal first with the relevant law. Section 90 of the Firearms Control Act, 60 of 2000 (the Firearms Act) provides :

> "90. Prohibition of Possession of Ammunition.
>
> No person may possess any ammunition unless he or she
>
> (a) Holds a licence in respect of a firearm, capable

of discharging that ammunition;

(b) Holds a permit to possess ammunition;

(c) Holds a dealer's licence, manufacturer's licence, gunsmith's licence, import/export or in transit permit, or transporter's permit issued in terms of this Act; or

(d) Is otherwise authorised to do so."

Section 120(1)(a) of the Firearms Act, provides as follows :

"1. A person is guilty of an offence if he or she contravenes or fails to comply with any :

(a) provision of this Act."

The accused made admissions in terms of Section 220 of the CPA, that he did not possess a licence to possess the ammunition found at his house, but denied that he contravened the Act. Counsel for the defence submitted that possession means there must be the physical detention and an intention to possess at the same time. In other words there must be, in addition to detention, *animus*.

In support of this submission, he relied on the matter of *S v Qwanda*, 2013 (1) SACR 137 (SCA). In that matter the appellant appealed against the dismissal by a High Court, of an appeal against his conviction on charges of possession of arms and ammunition in contravention of Sections 32(1)(a) and 32(1)(e), of the Arms and Ammunitions Act, 75 of 1969. At the time of his arrest, he was the driver of a vehicle that was conveying him and two others to rob a bank. Sitting next to the appellant in the vehicle there was another man who

carried an MK-47 Rifle and ammunition. It was not clear whether the appellant was aware of the firearm in his companion's possession. The companion absconded during the course of the trial. The only question was whether the state had established that the appellant possessed the firearm jointly with his companion. The court held accepting that the appellant had conspired with his companions to commit robbery and were even aware that some of his co-accused possessed firearms for the purpose of committing the robbery. Such knowledge on his part was not sufficient to establish that he had the intention to jointly possess the firearm and ammunition. Accordingly the conviction on the firearms charges, were set aside.

From the above it is clear that the state must prove that the accused had the necessary mental intention (*animus*), to possess the firearm before there can be a conviction. I will re-read that. From the above it is clear that the state must prove that the accused had the necessary mental intention (*animus*) to possess a firearm, or ammunition before there can be conviction. That it is quite possible to possess a firearm innocently, is clear from the fact that if a person who has no licence to possess a firearm were to pick up a firearm from where the owner had forgotten it solely with the intention to return it to its owner, it will be an aberration of justice if he were to be convicted of possession of a firearm, as he clearly lacked intention to possess it in the legal sense. In this regard see *S v Majikazana*, 2012 (2) SACR 107 (SCA).

In the present case counsel for the state made much of the fact

that the accused's father refused to make an affidavit, confirming that the ammunition found in the possession of the accused, belonged to him. In my view that does not assist the state. The accused's version is that the ammunition belonged to his father and that he had no intention to possess it. The fact that there is no corroboration for the accused's version, does not assist at all. Accordingly what the state needed to do, was to introduce evidence to the contrary. It did not do so. The accused's version therefore remains uncontroverted. The state has failed to prove that the accused had the necessary *animus* to possess the ammunition. He therefore cannot be found guilty on this count.

In conclusion, I would like to recap on the four counts that the accused has been found guilty of.

Count 1: In respect of count 1 the allegation was that the accused and the deceased had an argument. That the deceased ran and locked herself in the toilet and that the accused followed her there, and fired shots at her through the locked door. Three shots struck her and she died as a result.

Evidence led by the state in respect of this count was purely circumstantial. It was not strong circumstantial evidence. More over the evidence of various witnesses who gave evidence on what they heard, in what sequence and when, proved to be unreliable.

The accused denied the allegations. Notwithstanding that he was an unimpressive witness, the accused gave a version which could reasonably possibly be true. In criminal law that is all that is required for an acquittal as the onus to prove the guilt of an accused, beyond

reasonable doubt, rests with the state throughout.

The version of the accused was that he fired shots at the toilet door, because he thought there was an intruder inside the toilet. The sequence of events namely the shots, the screams, the shouts of help, the sound of a cricket bat striking against the toilet door, the calls made by various witnesses to security to report screams and or shots, are more in line with the version of the accused.

Although it is not necessary for the state to prove motive, there is no basis on which this court could make inferences of why the accused would want to kill the deceased. In addition there is objective evidence in the form of phone records. This too supports the version of the accused. Furthermore the conduct of the accused shortly after the incident, was inconsistent with the conduct of someone who had intention to commit murder. He acted promptly in seeking help soon after the incident. He shouted for help. He called a friend, Stander. He called 911. He called security, although he could not speak as he was crying. He prayed to God to save the deceased's life. He was seen trying to resuscitate the deceased and he pleaded with Dr Stipp to help and he was distraught.

From the above it cannot be said that the accused did not entertain a genuine belief that there was an intruder in the toilet, who posed a threat to him. Therefore he could not be found guilty of murder *dolus directus*. This court has already found that the accused cannot be guilty of murder *dolus eventualis* either, on the basis that from his belief and his conduct, it could not be said that he foresaw that either the

deceased or anyone else, for that matter, might be killed when he fired the shots at the toilet door. It also cannot be said that he accepted that possibility into the bargain.

I might just add that in respect of the first leg of the test in *dolus eventualis,* Burchell & Hunt*:* General Principles of Criminal Law, states the following on page 371 :

> "The courts have warned against any tendency to draw the inference of subjective foresight too easily."

For example in *S v Bradshaw*, 1977 (1) PH860 (A) Wessels JA stated :

> "The court should guard against proceeding too readily from 'ought to have foreseen' to 'must have foreseen' and thence to 'by necessary inference in fact foresaw' the possible consequences of the conduct being enquired into. The several thought processes attributed to an accused must be established beyond any reasonable doubt. Having due regard to the particular circumstances which attended the conduct being enquired into."

In *S v Sigwatla*, 1967 (4) SA 566 (A) Holmes JA expressed the degree of proof in the following terms :

> "Subjective foresight like any other factual issue, may be proved by inference to constitute proof beyond reasonable doubt. The inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so and

even if he probably did do so."

Evidential material before this court however, show that the accused acted negligently when he fired shots into the toilet door, knowing that there is someone behind the door and that there was very little room in which to manoeuvre.

A reasonable person therefore in the position of the accused, with similar disability would have foreseen that possibility, that whoever was behind the door might be killed by the shots and would have taken steps to avoid the consequences and the accused in this matter failed to take those consequences.

I am dealing with count 2 in a summary form. In this count the state alleged that in September 2012, while driving in a vehicle with other passengers on a public road, the accused unlawfully discharged a firearm without good reason to do so, by firing a shot with a 9 millimetre pistol, through the open sunroof.

The alternative count is that the accused discharged the firearm to whit, his 9mm pistol with disregard for the other passengers in the car and or in the vicinity. In this count the state failed to prove the guilt of the accused beyond reasonable doubt.

In respect of count 3: the state alleged that in January 2013 at Tasha's Restaurant, a public place, the accused unlawfully discharged a firearm to wit: a Glock 27 pistol without any good reason to do so.

The first alternative is that at the same place on the same day, the accused negligently used a firearm to wit: a Glock 27 pistol and caused damaged to the floor of the restaurant.

The second alternative to this count, is that at the same place and the same day, the accused discharged a firearm to wit: a Glock pistol at a table in the restaurant among other patrons in a manner likely to endanger the safety of the people at his table, and or other patrons on the property of the restaurant. The accused erred in discharging the firearm mentioned, showing a reckless disregard for the safety of the patrons on the property of the restaurant.

Count 4: The allegation was that on or about 16 February 2013 at or near 286 Bush Willow Street, Silver Lakes Country Estate, Silver Lakes in Pretoria, the accused was unlawfully in possession of ammunition to wit 38, .38 rounds without being the holder of a licence in respect of a firearm capable of discharging that ammunition, a permit to possess ammunition, a dealer's licence, gunsmith licence, import, export or in transit permit, or transporter's permit, issued in terms of the Firearms Control Act, 60 of 2000, or is otherwise authorised to do so. In respect of this count the state failed to prove beyond reasonable doubt, all the elements of the charge.

Mr Pistorius, please stand up. Having regard to the totality of this evidence in this matter, the unanimous decision of this court is the following:

Count 1: Murder, read with Section 51(1) of the Criminal Law Amendment Act, 105 of 1997, the accused is found not guilty and is discharged. Instead, he is found guilty of culpable homicide.

Count 2: Contravention of Section 120(7)7 of the Firearms Control Act

60 of 2000 and the alternative count, that is contravention of section 120(3)(b) of the same act, the accused is found not guilty and discharged.

Count 3: Contravention of Section 120(7), alternatively section 120(3)(a) and further alternatively section 120(3)(b) of the Firearms Control Act 60 of 2000, the accused is found guilty of the second alternative that is the contravention of Section 120(3)(b).

Count 4: Contravention of Section 90 of the Firearms Control Act 60 of 2000 the accused is found not guilty and discharged.

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