



NOT REPORTABLE

CASE NO: SA 59/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

WILLEM VISAGIE BARNARD

Appellant

and

THE STATE

Respondent

Coram: MAINGA JA, SMUTS JA and HOFF JA

Heard: 02 March 2020

Delivered: 07 May 2020

Summary: Appellant was found guilty of murder with direct intent of his wife by the High Court on 23 January 2018. He was sentenced to 18 years imprisonment with 10 years suspended on certain conditions. Appellant's application for leave to appeal was refused in the court *a quo* and he petitioned this court. This court granted him leave to appeal on 23 October 2018, however his appeal was confined to the issue as to whether there was a reasonable possibility that the deceased committed suicide.

In the court *a quo*, appellant had a two pronged defence. Firstly, he denied that he shot the deceased and secondly, in the event that it were to be established

beyond reasonable doubt that he had shot the deceased, he pleaded a lack of criminal liability due to temporary non-pathological insanity caused by excessive alcohol consumption combined with the prescribe scheduled drugs he was taking. Appellant has maintained that he could not recall the shooting and that the deceased could have shot herself.

To be determined in this court is whether the State discharged the burden of proof of establishing the guilt of the appellant beyond reasonable doubt. This is in relation to the discrepancies of terms of the alleged admission, as direct evidence, made by the appellant to his son-in-law Mr Leeb (as the State's key witness) on that fateful night in a telephone conversation. In his evidence, Mr Leeb - while noticing that the appellant was very drunk – stated that the appellant said to him 'I have shot your mother. I had enough of that'. Under cross-examination, Mr Leeb acknowledged that there was a discrepancy between the statement he (in his evidence) attributed to the appellant to those contained in two prior statements made by him – the first on 10 April 2010 and the second on 14 April 2010. In the first statement, words attributed to the appellant were 'Ek het nou genoeg gehad en het nou klaar gemaak met jou ma' ('I have now had enough and now finished with your mother'). Later in the course of the phone call, according to the first statement, the appellant upon an enquiry as to whether he was serious, stated that he 'is serious and that he shot his wife'. Mr Leeb's second statement differs in as much as the statement of having shot the deceased is made at the outset and does not follow an enquiry as to whether he was serious. Mr Leeb conceded that the appellant was very drunk – this was corroborated by most State witnesses who encountered the appellant at the scene. Mr Leeb stated in re-examination that when the appellant phoned him, he spoke 'confusingly'. He conceded in cross-examination that he could have said that 'your mother was shot', which the appellant alleged he could have said.

Held per Mainga JA:

That although Hermanus Leeb's evidence was not wholly satisfactorily, he remains an honest and credible witness, had no axe to grind with his father in law, and had

no reason whatsoever to implicate him in the commission of the offence. After all appellant's version is contradictory, the one moment he says, he recalls what he told him, and then says he cannot exactly recall what he told him.

That the words 'Your mother was shot' required further enquiries, like, who shot her and therefore the words are inconsistent with the words 'I had enough of that', which is the evidence of Hermanus Leeb. The words 'I had enough of that' are consistent with the assaults he endured from the deceased over the years.

That the alleged discrepancies in the two statements of Hermanus Leeb are not existent, it is the same words stated differently or different words that carry the same meaning

That the appellant was the only one who knew where he hid the keys of the safe. His version that deceased saw where he removed the keys when they returned from Upington, rejected for the reason that regard had to the constant fear of his wife he lived under, it is improbable that he could have left the keys where the deceased allegedly saw they were removed.

That an argument ensued. There was evidence *aliunde* that whenever the deceased was under the influence of liquor, she was very aggressive and that day could not have been exceptional. After all the police officers who testified about that he informed them that they were watching the televised burial of Eugène Terre'Blanche, would not have known of that fact, or suck it from their thumbs except that the is the one who informed them.

That the liquor he had taken at the time of the incident is exaggerated as it is not supported by the evidence. There was only one half full bottle found on the table in the kitchen. The state of intoxication he was found in later, there exists a possibility that after the incident he drank further.

That the evidence of Dr Marx is not conclusive. His evidence is that there exists a possibility that the liquor and the tablets he had taken could have caused a temporal loss of memory at some point during that day.

That proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to defect the course of justice. *Miller v Minister of Justice* (1947) ALL ER 372 at 373.

That there is no obligation upon the crown to close every avenue of escape which may be said to be open to an accused. *R v Mlambo* 1957 (4) SA 727 AD at 738A-B. In this case appellant is the only surviving witness of the incident.

That viewing the evidence holistically, the appellant was the one who shot the deceased.

That the fact that the court a quo, expressed itself incorrectly on the circumstantial evidence test, does not make its conclusion bad in law.

That there is no evidence on record that suggests that the appellant should be entitled to the benefit of the doubt.

That there is no possibility that the deceased could have committed suicide.

Mainga JA would have dismissed the appeal.

Held per Smuts JA (Hoff JA concurring):

That these statements and concessions, taken with the totality of the evidence including the appellant's evidence and the application of the cautionary rule with regard to the only direct evidence in the form of the alleged admission, give rise to a reasonable doubt and the reasonable possibility that the deceased could have committed suicide, thus entitling the appellant to an acquittal.

That the terms of the admission are of crucial and material importance being the only direct evidence of the *actus reus* tendered by the State. Contradictions as to its terms by the single witness to that alleged admission cannot be brushed aside. That contradictions do not necessarily lead to the rejection of a witness's evidence as a credibility issue. They may simply be indicative of an error.

That the credibility of Mr Leeb is not the issue but rather the reliability of his evidence of the terms of an alleged admission and in fact whether he made an error or could have been mistaken as to its terms.

That caution is to be followed in evaluating the evidence of a single witness – see *S v Noble* 2002 NR 67 (HC) and *R v Mokoena* 1932 OPD 79.

That the lack of clarity concerning the terms of the alleged admission, and the doubt which this gives rise to, are to be considered together with the appellant's explanation of denying the shooting and postulating suicide.

That applying this test to the facts of this matter, the weakness in the State's case resting upon an admission lacking in clarity where it is conceded that the hearer could have been materially mistaken and there being a reasonable possibility that the appellant's version may be true, it follows that the State has not proven the appellant's guilt beyond reasonable doubt and that he was entitled to an acquittal – see *S v HN* 2010 (2) NR 429 (HC).

The majority concluded that the appeal succeed and the appellant's conviction and sentence be set aside.

APPEAL JUDGMENT

MAINGA JA:

Introduction

[1] The present appeal is with leave of this court, *albeit* limited to the question whether there exists a possibility that the deceased, Annette Barnard the wife of the appellant, committed suicide.

[2] The appellant was arraigned on a single indictment of murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003. He pleaded not guilty to the charge, but after a long protracted trial (which spanned from October 2014 to 23 January 2018, when judgment was delivered) he was convicted as charged i.e. murder *directus* (read with the provisions of the Combating of Domestic Violence Act). Appellant appeals against that conviction.

[3] The facts leading to the demise of the deceased are very sketchy as the couple resided at Farm Choris, the murder scene, by themselves. What is known of that fateful day between the couple in the version of the respondent in a summary form is that, on 9 April 2010, at their residence on the farm, they were watching television. While watching television an argument ensued between the two about a South African politician, the late Eugène Terre'Blanche. The appellant shot the deceased in her head and called his son-in-law telling him that he shot his wife. The deceased as a result died of head injury due to the gunshot wound.

[4] Appellant's version is opposite to the version of the respondent. He denies murdering his wife. In his plea explanation, he stated that when they woke up on Friday morning 9 April 2010, as a normal routine they had coffee and porridge. He took his prescription medication, an Alzam tablet and then left to milk the cows. After milking, he mowed the lawn. A neighbor who brought a refrigerator and

groceries, which the deceased had ordered arrived. Among the groceries were two bottles of brandy and a carton (2.5 L) of Johannesburger wine. When the neighbour left around 11h00, he went to help feed a calf and thereafter went to finish mowing the lawn. At that moment, the deceased called him and informed him of the funeral of the late leader of the AWB which was being televised. He returned to the house, poured them some brandy and then watched the funeral service. The deceased made lunch. After lunch he took another tablet of Alzam. They continued watching television and continued indulging in drinking. His recollection is that they drank approximately four to five drinks (tots) of brandy. At 17h00 he left for the one post and returned home when it was almost dark. He indulged in some more brandy and they continued watching television. There was no quarrel, but the deceased was particularly quiet. At 22h00 he went to take a shower whereafter he took his sleeping and stomach pills and the Alzam tablet. He returned to the lounge and sat next to the deceased on the couch, on her left hand side and passed out. When he woke up or came to, he saw the deceased lying head down on the coffee table and saw a mark on the table. Initially he thought it was alcohol that was spilled on the table, but he then realised that it was a pool of blood. He became shocked.

[5] He saw the phone next to him, took the phone, saw the number of his daughter on the phone, dialed the number and his son-in-law answered the phone. According to his recollection, he informed his son-in-law that 'your mother was shot'. On the floor he saw the revolver lying between the two of them. He thinks his son-in-law said: 'leave everything as it is', and they are on their way. He recalls that he left the room and sat on a chair that was there (the underlined sentence

makes no sense). In evidence in chief it was clarified. He moved from the sitting-room to the kitchen. He sat there and had a smoke until his son-in-law arrived. He cannot recall who arrived first, who he spoke to first and what he spoke about and whether he drank any alcohol further. He cannot recall his physical state, nor can he tell how many police officers or persons were on the scene or with whom of the police officers he spoke to. He cannot recall what happened, he was only informed afterwards that he drove to Aranós Police Station with Commissioner Meyer. He has no recollection of how the revolver ended up on the floor between them. According to his recollection, he did not remove it from the safe. He never went to the safe as there was no time nor reason to do so when he went to start-up the machine.

[6] He cannot recall exactly what he said to his son-in law. He cannot recall ever handling the revolver that fateful night nor recall hearing a shot fired. They did not have an argument that day. During the morning they even spoke about making love that evening.

[7] As regards the drinks they had, he would pour double shots for the deceased and triple shots for himself.

[8] Under the circumstances (insobriety), he denied shooting the deceased as alleged by the State. He further states that medical evidence of Dr Gerhard Marx a duly qualified psychiatrist, would prove that, due to the timing, amount of and the contribution of psycho-active substance he took during the day of the incident together with the alcohol he consumed, at the time of the alleged incident, was

unable to appreciate, *inter alia* the moral and legal wrongfulness of his actions, if any, as he at the time suffered from a temporary non-pathological disorder as contained in the psychological report compiled by Dr Marx, which was attached to the plea explanation as annexure 'A'.

[9] He raised the defence of temporary non-pathological criminal incapacity, in the event that it may be proved by the State, beyond reasonable doubt, that he shot the deceased, which he denied.

[10] He made two admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977, namely:

1. That the deceased is one Annette Barnard, an adult female person to whom he was married and
2. That the deceased on or about 9 April 2010 died as a result of head injuries suffered due to a gunshot wound to the head.

[11] Dr Marx was requested by Mr Garbers of Garbers and Associates to provide an opinion on whether the amount and type of substances consumed by the appellant on 9 April 2010 could result in memory loss, for the event leading up to and culminating in the death of his wife on the day in question.

[12] Crucial in the report, (Annexure 'A' to the plea explanation) for the purposes of this judgment is the alcohol and drug history of the appellant, the interview with his son, Ockert Barnard, and the opinion of the doctor.

[13] Under the three headings the Doctor had this to say:

[1] 'Alcohol and Drug History

Mr Barnard has never used any illicit substances. He started using alcohol at about the age of 20. He explained that his consumption of alcohol increased over the years. He consumed most heavily in the three (3) months leading up to the death of his wife on the 9th of April 2010. The AUDIT Questionnaire he completed on 19/4/10 suggests that he might suffer from Alcohol Dependence at present. At that time it seems as if he and his wife tended to drink in a binge pattern, meaning they consumed up to two 750ml bottles of Brandy over a 48hour period when it was available. They would then go without alcohol for a couple of days as they live out on the farm and did not have easy and continuous access to alcohol. Mr Barnard never experienced withdrawal symptoms during the times without alcohol, but it might well be due to his regular Alprazolam use, which would have masked these symptoms.

At the time of his wife's death he was on a dose of 1mg three times per day of Alprazolam. On the night of the alleged offence he also took 7,5mg of Zopiclone, which is like Alprazolam, also a member of the Benzodiazepine family. This family of medication called Benzodiazepines is well known to cause memory impairment and states of confusion, especially when combined with alcohol. Alcohol and Benzodiazepines act on the same receptors in the brain and therefore when taken simultaneously could have a so-called "double whammy" effect. Both are sedatives and can cause impulsivity, memory loss and states of confusion.'

[2] 'Interview with Ockert Cornelius Barnard on 19/04/2010

I interviewed Ockert to obtain some collateral information around the risk of harm to self or others. . . . He informed me that he was not aware of any previous history of assault, aggression towards others or threats of violence, in the case of Mr Barnard. . .

He informed me that there have been (to the best of his knowledge) no incidents of violence from Mr Barnard towards his wife. He did recall three incidents of violence of his mother towards his father. According to Mr Barnard (jnr) she once fired 2 shots at him in their home, once tried to stab him with a knife and apparently tried to poison him. Those incidents were confirmed by Mr Barnard's daughter in a separate interview.'

[3] 'OPINION

My opinion in this matter will focus predominantly on the possible effect of psychoactive substances on the behaviour of Mr Barnard on the 9th of April 2010.

After carefully reviewing the sequence of events as described by Mr Barnard up until the point of having no memory for subsequent events, it seems highly likely that he would in fact suffer from memory loss for the latter stages of the 9th of April 2010.

He took 1mg Alprazolam after a breakfast consisting of weatbix and coffee on the morning of 9th April 2010. He started drinking brandy at around 12h00, while watching the funeral of Eugène Terre'Blanche on television with his wife. He took a further 1 mg of Alprazolam after a lunch consisting of chicken and potatoes between 12h00 and 13h00. By 17h00 he took off to start an engine some way away from the house. He remembers having had 5-6 drinks by the time he left. On a question regarding the strength of these drinks he reported that he did "oordoen dit 'n bietjie". On closer questioning it became apparent that it means "more than a double brandy". This seems to imply that we are talking about anything between 12 and 15 standard drinks (300 – 375 ml brandy in this case).

Once he returned home shortly before sunset he continued drinking brandy until about 22H00 when he went for a shower. He was unsure of the amount of alcohol he consumed between sunset and 22H00. After the shower he took 1 mg Alprazolam and added 75 mg Zopiclone.

He went back to the living room, but cannot remember anything from that point onwards until he woke up to find his wife lying in a pool of blood next to him.

Thus in summary, the amount and combination of Alcohol, Alprazolam and Zopiclone consumed on that day would be highly likely to cause memory loss for several hours.

Furthermore it seems very possible that Mr Barnard might not have been able to appreciate the moral and legal wrongfulness of his alleged actions due to the timing, amount and combination of psycho-active substances he and his wife consumed during the course of the day the alleged offence occurred. It is a well-known fact that Benzodiazepines, especially in combination with alcohol, can cause memory impairment, impulsivity, poor judgment and states of confusion. These side effects of Benzodiazepines are usually limited to the period of intoxication on the substance. In other words, Mr Barnard could possibly have been incapable of understanding the moral and legal wrongfulness of his alleged actions, only for the short period while being intoxicated on mentioned substances.'

[14] He repeated his plea explanation in his evidence in-chief. The only relevant additions to the plea explanation was that the deceased was the aggressive one in their relationship. She would assault him for no reason or unprovoked. She once stabbed him in the chest with a knife and fired at him with a revolver, the murder weapon in this case. It was at that incident that he started hiding the keys to the safe that stored the firearms. But she discovered where the keys to the safe were hidden when they returned from a trip they had undertaken to Upington. The deceased had also poisoned him. Despite the assaults, he maintained that he was in a good relationship and loved his wife. More than once he asked for a divorce, but the deceased would say she would rather kill him as she had nowhere to go. He further testified that the deceased's aggressiveness started after she underwent a hysterectomy operation or procedure. In his words, the operation put the deceased under pressure. She was depressed and

neglected her house chores which he took over. He took her to a psychiatrist in Windhoek. She was put on the Alzam tablet. She changed into someone else. She was sleepy and aggressive and the assaults on him occurred frequently. He denied murdering his wife as there was no reason to kill her. He suggested that she could have committed suicide.

The assaults on the appellant were confirmed by their daughter Maria Martina Leeb, also known as Ricky. She witnessed the stabbing of the appellant and she was the one who pushed the deceased from the appellant. The deceased had shown her the two bullets that went in the ceiling when she wanted to shoot the appellant. Her brother Ockert in the bail application also confirmed the aggressiveness of his late mother towards the appellant. He went further to testify that each time she called him as he resided in South Africa, she threatened to commit suicide. He further testified that on the day of the incident the deceased called him, greeted them and she said they should take care of the grandchildren.

[15] Dr Marx testified and confirmed the report which was annexure to the plea explanation.

[16] The other pieces of evidence, ie. that of the state which I deal with in more detail, is that of Hermanus Leeb the, son-in-law of the appellant and the deceased, Inspector Joodt, Sergeant Stoffel, Dr Ludik and Commissioner Meyer.

[17] Hermanus Leeb was awoken shortly after midnight by a telephone call from the appellant who told him that there is a problem, 'I have shot your mother I had enough of that'. He asked him whether he was serious. He responded to say

he was serious and he asked the witness whether he would phone the police or he should phone. He informed appellant to leave everything as it is, he was coming to the farm. He and his wife Maria Martina known as Ricky made haste and left for farm Choris accompanied by Hermanus' brother, Marcel Leeb. They arrived at 01H30. He left his wife in the vehicle. He and his brother proceeded to the house. He knocked three times before the appellant came staggering to open for them. He could see that he was unbelievably drunk, not steady on his feet. Once appellant had opened for them he asked him again, in his own narrative, 'father is it true what you told me over the phone and why did it happen'. Appellant answered in the affirmative and said it was true. He asked him where the deceased was. He said in the sitting-room. He asked him further as to the reason for the incident, he said there was no reason. In the sitting-room he felt the pulses of the deceased, there was none. He saw a revolver on the left side of the table on the edge. He picked it up with a pencil and placed it in the microwave. He took a blanket and covered the deceased. He went to the kitchen where he phoned Commissioner Meyer. He noticed a 750ml half full bottle of brandy on the kitchen table. He took the bottle and placed it in the fridge as the appellant wanted to pour from it. He returned to his wife at the vehicle and remained there until the two police officers from Aranos arrived and then Commissioner Meyer. He ushered the police officers into the house and returned to the vehicle again. He remained at the vehicle until the police vehicle that brought the coffin arrived. He went to assist the police officers to remove the body. At about 06h00 Commissioner Meyer left with the appellant to the Aranos Police Station. He finally confirmed that while appellant was under the influence of liquor, he communicated with him in short sentences and answers.

[18] In cross-examination he stated that the manner in which appellant was talking one could not make out what he was saying, was as if he was having a round tongue. He further stated he had seen appellant drunk in the past, but not as drunk as that day. He confirmed that he only saw the half-full bottle of brandy and did not see any empties anywhere in the house. This was also the evidence of his wife in the bail application. He also confirmed that when his in-laws had the opportunity to buy liquor, they bought two 750ml bottles of brandy and one box of wine. He could not confirm the evidence of Inspector Joodt in the bail application that there was very little wine left in the fridge and very little left in the bottle of brandy. He repeated to say the bottle was still half-full. He confirmed that both his in-laws were on some kind of medication, a calming pill for the deceased. Like the other members of the family, he confirmed that the deceased was not an easy person to live with, she was always aggressive when she was on medication or had taken alcohol. He witnessed an incident when she grabbed his wife violently – that his wife had to push her away. Her aggressiveness worsened as the years went by. On the contrary, the appellant never fought anyone and the two children loved their father more than their mother. He was taken through both statements he made to the police on 10 and 14 April 2010. In the one statement the appellant must have told the witness 'I snapped or lost control'. It was suggested to him why different versions from the one mouth – was it 'because you had difficulties to understand and get information from the accused in his extremely intoxicated state or what was the situation? The reply was, 'My lady I think it was the part when I struggled to communicate with him, I think it was also the part that the state did not

took a complete statement and that he came back again according to me my Lady the wording is the same there could be words that differs one from another'.

[19] The cross-examination continued in this form:

'Yes you see in effect apart from the words that differ as you said was because of you struggled to get information from him, state of confusion as you already testified. . . . It is one of the big reasons that happened.

Yes, and then at the end of the day one tries to, to try to put together a picture that is not necessarily correct at the end of the day is that correct? . . . That is correct.

You see because as I have indicated it is not just only words that differ in respect of what was the reason you supplied two destructing versions there was no reason and I lost control, ek het gesnap as a reason, you are in agreement with that? . . . That is correct.

You see because why this is important for you is the accused having regard to his state of intoxication, combination of alcohol and medication we will lead evidence as to that he said to us and he also testified that in the bail application what he believe he said to you is that my wife was shot. Is it possible that in respect of the confusion that existed you may (indistinct) at the end of the day be mistaken as to having regard to the putting of the picture together as to what you have heard? . . . My Lady to answer honestly every one of us today sitting in this court if you are waked 24:10 with such news you have a fright you are confused and what I have heard at the moment I shot your mother as I have also said the manner in which he talked to me it was difficult to understand so there exist a possibility that I could have misunderstood him that your mother was shot or I shot your mother.

You see because why I am asking you this is I mean we have, we will hear the other state witnesses also but just having regard to I have 2 statements in my possession of I already touched on his evidence in the bail application of the

police officer. Max Kastoor Joodt where he and this is A1 in the police investigation and having been disclosed to us as such there he indicates the following and that is My Lady and I believe we will hear his evidence and I will take him to task on this but he indicate in his statement how he came to the farm waited for the scene of Crime Unit to come and finalise their investigations and then in para 4 on his second page he says the following, the suspect the husband later known to me as William Visagie Barnard were in the kitchen para 5, I informed him about his rights not that I know what to with a person that is as drunk as a skunk or intoxicated but be that as it may but could observe that he is under the influence of alcohol and he could not give a proper explanation regarding the incident just to underpin your version that the accused was not mentally there, confusion is that correct? . . . That is correct.'

[20] In re-examination he was asked, despite whatever sequence is contained in the statement what did you hear? I heard over the phone that the accused said that 'I shot your mother'. He was reminded that during cross-examination on the suggestion made to him he agreed that the appellant spoke sluggishly, slowly and there was confusion, counsel for the State wanted to know as to what was the entire conversation when he picked up the phone from the appellant. The witness said 'as I have already testified' and he repeated that initial conversation as he testified in his evidence in-chief. Counsel further wanted to know if that was the entire conversation between two persons. His reply was 'I said right from the beginning the person was talking incoherently. Counsel followed on that reply to seek clarification whether it was the manner in which he spoke. His reply was, he was talking slowly and like a drunk person that cannot express himself clearly, the words counsel followed 'so that is the reasons to why you say he was confused', 'correct My Lady.

So it is the manner in which he spoke with a slurred speech?

That is correct'.

[21] Finally in re-examination he testified that both his in-laws abused drugs which are their prescribed medications and liquor.

[22] Inspector Max Kastoor Joodt testified that on 10 April 2010 at 02h21 in the morning he received a call from Commissioner Meyer, the Regional Commander of Hardap Region, who informed him that the owner of Farm Choris in Aranos area allegedly shot and killed his wife on the farm and they required police assistance, they must go and attend. He called Constable Reed to come to his house. When he arrived, they drove to Farm Choris which is 40km away from Aranos arriving at 03h25. They were met by Hermanus Leeb who took them in the house and in the sitting-room where the deceased was. In the kitchen they met appellant. Inspector Joodt introduced himself as W/O (as he then was) Joodt. Appellant did not say anything. In the sitting-room, deceased was still on the sofa covered with a blanket. He removed the blanket. He saw an open wound in the head. He opened the curtain and saw a hole in the window. There were no liquor bottles or empties in the sitting-room. He put back the blanket on the deceased and they went to the kitchen where appellant was. He introduced himself to the appellant again and informed him of his rights. Appellant only said okay. He asked him as to what happened – he did not say anything. He only said he had a quarrel with the deceased while they were drinking. He spoke in a slurred voice while smoking and he was smoking heavily and he could see that he was normal and calm. He stood up and went outside to call Commissioner Meyer and Sergeant Stoffel. He returned to the kitchen continued having a conversation with appellant. During the conversation, he asked appellant whether there were farm workers, at the farm.

Appellant replied to say he did not have farm workers but he will get somebody to look after the farm while he is in custody. When asked whether the conversation between them was normal or nonsensical, his reply was that his conversation made sense. Commissioner Meyer arrived first, he took him to the sitting-room and returned to the kitchen where they sat with appellant. When Sergeant Stoffel, the crime scene officer, arrived he took him in the sitting-room. Commissioner Meyer and Constable Reed remained in the kitchen. He returned to the kitchen and the appellant showed him a bottle of Klipdrift which was below half full and a Cellar Cask. After the scene was reconstructed, the body was taken to Mariental and appellant to Aranos Police Station. Appellant had to hold onto the walls as he walked, he could not walk on his own.

[23] The cross-examination which was vigorous and *ad neuseum* repetitive of appellant's insobriety did not impact on the Inspector's testimony – he stuck to his testimony, that was while appellant was intoxicated he struck a sensible conversation.

[24] I must interpose here to mention that during the cross-examination of Inspector Joodt, it transpired that appellant at the police station was found in possession of his sleeping and the Alzam tablets. Appellant testified that after he had taken his tablets he returned to the sitting-room where he passed out. According to appellant when he woke-up and after calling his son-in-law, he moved to the kitchen where he remained until the arrival of his son-in-law and the police officers. That discovery raises many questions, namely, were the tablets on him in the sitting-room at all times and why? If he collected them in the house, at

what point did he do so? If he collected them somewhere in the house did he at the level of intoxication as he described it, remember to take them to the police station? In the bail application he said the Alzam tablets were in his jacket, the grandpa and sleeping tablets were bought, but not clear as to who bought them as the sentence is incomplete. In the same sentence he says his children brought him cigarettes but not the pills. The Alzam tablets are a prescription by a doctor, they could not have been bought by someone else. Story short, how did they find their way in the cells at Aranos Police Station.

[25] Sergeant Stoffel in the early hours of 10 April 2010 received a call from Commissioner Meyer who informed him that there was a shooting incident in the area of Aranos on Farm Choris, allegedly that the appellant shot the deceased and that he must attend to the shooting incident. He left and arrived at the farm towards 04h00 in the morning. When he arrived, Commissioner Meyer and Inspector Joodt were already at the scene. He met Hermanus Leeb and appellant. Commissioner Meyer took him in the house through to the sitting-room where he showed him the deceased. He took photos, made rough sketches, marked points and conducted a residue test on the hands of both appellant and the deceased. The test kits that held the residue of the appellant and deceased were marked differently. He was shown the murder weapon in the microwave by Commissioner Meyer. He transported the corpse to the Mariental state mortuary. Later the same day, he went back to the scene and photographed the scene in daylight. Once the postmortem was performed on 14 April 2010, he took photographs, took blood samples for forensic comparisons and then sent all the exhibits to the National Forensic Laboratory (NFL). After all photographs were developed, he compiled a

photo plan for the court. Significant on the photo plan is photo 1 which depicts point A which the witness testified indicated the alleged position of the suspect (appellant) at the time of the incident. He motivated his assumption by tapping on his experience in other investigations by the direction of the projectile when it struck the deceased at point B, it went straight through the head and formed a line to point C which indicates the exit projectile through the curtain and the window. Photos 13 and 14 are the deceased's left and right hand respectively which had blood or blood spots on them. There was no injury on both hands.

[26] In cross-examination, he agreed to the suggestion made by counsel that regard had to the entry and exit wounds, the manner (whatever that is) in how it seems inflicted, where it went through the window, the picture can just as well fit in with a possible suicide. He also agreed with the suggestion that if appellant was in a standing position and the deceased seated one would not have had a diagonal travelling of the bullet through the skull and exit the window, but that it would have been a downward triangle travelling of the bullet. When asked on the cooperation of appellant when he requested him that he would take the residue, he had asked appellant whether he washed his hands and he replied that he did as the residue requires that after an incident of the nature in question one should not wash his/her hands. But there was no proof on the documents before court whether that question was asked to the appellant. It was finally put to the witness that appellant does not recall speaking to him and cannot recall that a residue test was done on him.

[27] Dr Paul Stephen Ludik received the primer residue kits and proceeded to analyse and produce results. He found that the deceased had primer residue on both hands and appellant only on the left hand. Depending on the ammunition, the firearm itself, the position of the shooter, bystanders and on obstacles that may be in the way of the design of the environment, primer residue may be picked up anywhere from 1metre-9metre. As a result, he testified that the hands of the appellant and the deceased could have been sufficiently adjacent to the event of firing or could have been close enough to the event of firing so that the particles would have deposited on the hands. Consequently, he could not identify the shooter.

[28] In cross-examination, he confirmed that the highest quantity of primer residue was on the left hand of the deceased. On the question whether it could safely be inferred on probabilities that the left hand of the deceased could have been the hand that handled the firearm, the reply was 'yes that is one hypothesis that could be indeed be supported by the findings'. The question was repeated, in reply the doctor stated that a revolver has more openings than a pistol and considering that the primer residue was collected correctly, in his narrative, 'I would read that that hand could have been the closest at the time of firing'. When pressed monotonously on the same question, the doctor's reply was 'on condition that the other hands were not shielded in any way or form by an object'. Asked that if a person handled a firearm and fired a shot, a sample residue test thereafter were taken correctly it should be expected beyond reasonable doubt that the hand that fired the shot would contain a concentration of primer residue. His reply was 'it must' and further stated 'unless the hand was covered in a glove or something like

that'. Counsel relentlessly seeking a concession that it was the deceased who fired the murder weapon, wanted to know regard had to the quantity found of primer residue on the hands of the deceased, one can say scientifically it is therefore three times more probable deceased used the firearm than the accused. The reply was 'not entirely' mathematically spoken. He further added 'but I would argue that the concentration does play a role all things being scientifically equal, there is significance not conclusively so'.

[29] In re-examination the witness was reminded of his response during cross-examination of the left hand as the hand that fired, as being one of the hypotheses. He said the other hypothesis which he had alluded to was where there is a glove or an obstacle on the way it would obviously skew the quantitative impact of the results. On the question of where one fires a shot and washes his hands, his reply was that the chances are diminished and that is why it is an instruction in their kit not to wash any hands. On the question whether when one is right handed, one cannot use one's left hand. His reply was one can but instinctively one would always go to the dominant hand especially when it requires skill.

[30] Commissioner Meyer was the Regional Commander of the Hardap Region then. On 10 April 2010 at 02h00 he received a call from Hermanus Leeb who informed him that there was a shooting incident at Farm Choris. He called Inspector Joodt and instructed him to proceed to the farm and conduct the necessary investigation. He also called Sergeant Stoffel and also instructed him to proceed to the farm and do his part of the investigation. He also left for the farm

where he was met by Hermanus Leeb and Inspector Joodt. He met appellant for the first time. He was seated at the kitchen table. Leeb took him to the sitting-room where he found the deceased on the sofa where she met her death.

[31] After making observations in the sitting-room, he went to the kitchen where appellant was seated. He could see that the appellant was severely under the influence of liquor. Without warning him of his rights he asked him as to what happened and he said he cannot recall, but said he could only remember that there was a conversation between him and his late wife about the death of the late Eugène Terre'Blanche, the former leader of AWB and he became annoyed about the conversation. He further asked him where he got the firearm. He stood up and walked to the bed-room, took keys on top of the safe and opened the safe. He walked on his own to the bedroom but he was unsteady on his feet, he held on the wall to strike balance. At the end of the investigation, he took him to the Aranos Police Station and he returned to Mariental.

[32] In cross-examination, he guessed that the telephone call came from Marshall Leeb. He disagreed with the question that appellant could not walk without assisting him and that he was so unstable to the point of falling down. When pressed that going to the bedroom alone with appellant did not happen, his reply was it happened. A question was put to the witness that regard had to the photographs, it was consistent with suicide, his reply was 'yes'. He was asked a double barrel question that 'he apparently due to his state of intoxication cannot recall that he on that evening spoke to you and if he spoke to you what he spoke to you about and he cannot recall that he ever took you to the safe, . . . cannot

recall that he travelled with you to Aranos, . . . he was informed at Aranos that he travelled with you. You already testified that according to you, the accused was intoxicated, is that correct. His answer was 'that is correct'.

[33] It would not be clear to which question was the response 'that is correct,' most probably to the intoxication of the appellant. Be that as it may. I interpose here to observe that the cross-examination of the witnesses as to what was contained in and not in his statement is so muddled up and without that statement being received as an exhibit it is difficult to say as to what was contained in the statement. Line 1 on p 329 of the record reads as if it is an instruction put to the witness, namely, 'he told you he did not know how he got hold of the revolver how it came into his hands. . . . It is completely different from what you told this Court is that correct? No, it is not correct. That is what he told me.'

[34] On a careful reading it seems it is contained in the statement of the witness, but he did not testify to it in his evidence in-chief. I must pause here again to observe that the cross-examination of State witnesses was characterised either by double barreled questions or long statements before leading questions were posed. At times that form of cross-examination confused witnesses or was not clear to which question or statement their answers were directed.

[35] The evidence of Mr Nambahu regarding the murder weapon is not in dispute, it was the murder weapon, in a proper working condition.

[36] Appellant's under the influence of drink or his temporary non-pathological disorder is not before this court. The grounds of appeal and heads of argument in that regard are irrelevant. In my opinion for the reasons the court below articulated in its judgment that defence is meritless. That said I turn my attention to the issue before court, namely, whether there exists a possibility that deceased committed suicide.

[37] Relying on para 54 of the court below's judgment, appellant argued that the learned judge erred in the law and/or on the facts to continue to, dispute the finding of the existence of a reasonable, possible inference that the deceased shot herself, conclude that the only reasonable inference to be drawn is that it was the appellant that shot the deceased. This finding is clearly premised on the incorrect application of not only the circumstantial evidence rule (test), but also the application of the burden of proof in criminal cases. Appellant makes reference to para 69 where among other things the court stated: 'taking the evidence as a whole, the only reasonable inference that can be drawn is that the accused is the one who shot the deceased'.

[38] Paragraph 54 reads as follows:

'It has also been suggested by counsel for the defence that there is a possibility that the deceased committed suicide because she had residue on both hands and that State witnesses testified that nothing was disturbed at the scene. With regard to the suggestion that the deceased had committed suicide because of the gunpowder residue that was found on both hands, this is not the only reasonable inference to be drawn from the proven facts. Dr Ludik, an expert witness testified

that there are other hypotheses possible. The doctor further testified that he could not identify the shooter.'

[39] The approach to be adopted on appeal of this nature was spelt out by Marais JA in *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645E-F and 646A-B this way:

' . . . there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary.

. . . the credibility findings and findings of fact of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly wrong. In assessing whether or not such is the case, the approach which commended itself in *Moshephi and others v R* (1980-1984) LAC 57 at 59F-H seems appropriate in the particular circumstances of the matter:

"The question for determination is whether, in the light of all evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical, examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step

back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.”

[40] I can only say when the learned judge stated that the only inference that can be drawn is that the accused is the one who shot the deceased, she expressed herself wrongly. In my opinion she should have said, taking the evidence as a whole I find that the accused is the one who shot the deceased. I say so for the reason that the evidence of Hermanus Leeb on which the court below based its finding is not circumstantial but direct, so is that of the police officers who visited the crime scene who testified to the insobriety of the appellant. That of appellant, his daughter is direct evidence, that of Dr Marx is expert evidence. The only circumstantial evidence in which the circumstantial evidence rule enunciated in *Rex v Blom* 1939 AD 188 at 202-203 would have been appropriate is that of Dr Ludik and Mr Nambahu. Not much of Mr Nambahu's evidence as it was common cause that the revolver found in the sitting-room was the murder weapon.

[41] Dr Ludik's evidence was neutral, he could not determine the shooter. Both appellant and the deceased he found were sufficiently adjacent to the event of firing or close enough to the event of firing. The only difference between appellant and the deceased is that appellant had residue on the left hand only and the deceased had it on both hands with more quantity of it on the left hand. It was the concentration of residue on the deceased's left hand that appellant pressed on Dr Ludik to say it was deceased who handled the firearm. The doctor could not be drawn into that submission by saying there are other hypotheses namely, a

shielded hand by any object or hand in a glove and on condition that the residue was collected correctly. In this case it is a mystery that appellant who claimed that he passed out in the sitting-room, his right hand did not contain residue. The question arises whether it was shielded or in a glove and if it was, why?

[42] The court below did not go so far to draw the inference that because appellant's right hand did not contain residue, he had a glove on. What the court said was that appellant failed to explain how the residue came to his left hand as that was the testimony of Dr Ludik. The court then said a link has been established between the firearm, the accused and the deceased. It was at that point the court drew the inference. If Dr Ludik's evidence was the only evidence resulting in the conviction, one would possibly argue that the court wrongly applied the circumstantial evidence rule. Paragraph 54 of the court below's judgment must only be understood in Dr Ludik's reply to the effect that the fact that the deceased's hands contained residue was not conclusive that she committed suicide, there are other hypotheses. As regards Dr Ludik's evidence, the court below was justified to draw inferences. The fact that the learned judge drew an inference in the penultimate paragraph of her judgment from the totality of the evidence does not render the conclusion she arrives at bad. The simple question is whether the guilt of the appellant was established beyond reasonable doubt. This is a case on the evidence of Dr Ludik, the court below could have considered that the deceased who also used the Alzam tablet was possibly also under the influence of drink, who was right handed could not have used her left hand to commit suicide. Dr Ludik testified that it was possible to use the left hand other than the dominant hand but instinctively one uses the dominant hand especially

where skill was involved. 'Not to speak of greater numbers, even two articles of circumstantial evidence though taken by itself weigh but as a feather join them together, you find them pressing on the delinquent with the weight of a millstone'. *S v Reddy & others* 1996 (2) SACR 1(A) at 8.

[43] I now turn to the keys of the safe. Appellant insisted that he lived in a happy marriage or until/before the deceased had a hysterectomy and that he loved her a lot. In the same vein he testified that more than once he asked for divorce but her reply was that she would rather kill him as she had nowhere to go. He endured beatings and assaults from her, in his own words, on a regular basis. He was never happy with the assaults on him. The day she stabbed him with a knife, her daughter and the person who brought them a fridge were present and he felt so bad. She once shot at him, stabbed him in the chest with a kitchen knife and attempted to poison him when her sister was visiting. He further testified that deceased never spoke suicide. The only member of that family who alluded to her threatening suicide was Ockert. In the bail application where he testified, he went to an extent of saying on the day of the incident, she called and said to him that he has a good wife, they must look after the grandchildren which his wife interpreted to mean he was greeting them. He never informed his dad (appellant) of those threats. Appellant only learnt of the threats after the death of the deceased.

[44] From the day she attempted to shoot him, he decided to hide the keys of the safe in different places in the house. But he further testified that on the day he was placing the passports back in the safe when they returned from Upington he presumes that she saw where he removed the keys. He was asked in cross-

examination, so you presume she saw where you hid the keys on that day when you returned the passports. The answer was, 'that is correct'. In his evidence in-chief on the question as to what happened to the key, this is after the deceased attempted to shoot him, his reply was, '. . . I was putting it in the back cabinet and sometimes upside in my cabinet where I have all the other things which are also lying or in any jacket which hang in my cabinet pocket.' When asked in his evidence in-chief that he hid the key from his wife after the incident of shooting him, his reply was, 'I absolutely tried to hide them my Lady because I have realised that there can be a problem? During cross-examination he denied being afraid of his wife, but was cautious, he had to watch his back. In the bail application in reply to cross-examination, he said he lived under constant fear.

[45] In the bail application he said, 'Yes I would hid it at different places, never almost at the same time if she wanted it she would have looked for it and found it, as it was only in the house.' At the trial he said he presumed she saw where he removed the keys when he placed back the passports in the safe. Now, what is the possibility that after he presumed or realised that the deceased saw where he removed the keys, he would have left them in that same place. Given this scenario in my opinion none, improbable and his version is false in that regard. He is the only one who knew where the keys of the safe were kept. Deceased could not have removed the murder weapon from the safe. It must be remembered that when appellant and Commissioner Meyer walked to where the safe was, the keys were retrieved on top of the safe. Could he have placed them on top of the safe, in the state of fear he lived in. Absolutely not.

[46] This takes me to the quantity of liquor that was consumed that day. Hermanus Leeb and the police officers who saw appellant undoubtedly testified that he was under the influence of liquor or rather very drunk. Leeb went on to say he had seen him drunk but not as drunk as that day. In his evidence in chief appellant said that from that afternoon when the liquor arrived they drank more than one bottle of brandy. That assertion is not supported by evidence. Hermanus Leeb and his wife and the police officers who were on the scene only saw one bottle of brandy or Klipdrift which was either half, below half or quarter full. Hermanus Leeb's wife in the bail application testified that 'I observed no alcohol bottles'. This means the half full bottle was the only one which the two would have consumed before and after the incident. Appellant remembers every little detail up to the point he alleges he passed-out. On his version, the incident must have taken place in the two hours that he passed out. Therefore he could not have been as drunk as he alleges at the time the incident happened. It is possible that at the time of the incident they both had only consumed half or a quarter of the bottle. As the court below correctly observed he continued drinking after the incident or when he woke up, or came to, for even when his son-in-law had arrived he wanted to drink some more. Secondly, on his evidence he and deceased were in the sitting-room and the bottle should have been in the sitting-room. When he left the sitting-room, he must have taken it with him. The witnesses who saw the bottle, saw it on the kitchen table and/or in the fridge. Hermanus Leeb who arrived first on the scene put it in the fridge when appellant wanted to pour from it. Commissioner Meyer who arrived third on the scene insists he saw the bottle on the kitchen table. So the level of his intoxication at the time of the incident could not have been worse as is described by the witnesses and himself. The court below was correct

to reject his version on that score. His intoxication is exaggerated, he was in sober and sound senses given the quantity of liquor he had taken, the use of the same type of liquor for a considerable period and his experience in drinking. The opinion of Dr Marx is not conclusive, it was dependent on what appellant informed him. He stated 'after reviewing the sequence of events as described by Mr Barnard up until the point of having no memory for subsequent events, it seems highly likely that he would in fact suffer from memory loss for the latter stages of 9 April 2010'. He further stated, 'In other words, Mr Barnard could possibly have been incapable of understanding the moral and legal wrongfulness of his alleged actions, only for the short period while being intoxicated on the mentioned substances'.

[47] The question is, which is that point that he lost his memory? He recalls everything from the morning up to the time he passed out. The time he alleges he did not witness or remember is the murder of his wife and the presence of the police officers and how he got at the Aranós Police Station. If 'pass out' references loss of memory he could not emphatically deny murdering his wife during the period he alleges he lost his memory. It is one thing to say because of the loss of memory I don't know whether it is me who committed the offence and another to say I know for a fact that is not me. It is not clear from Dr Marx's evidence as to what are the latter stages of 9 April 2010. Appellant's plea explanation seems suggestive of the 'pass out' being the reason he denied to have shot the deceased. That is so, regard being had to para 4 of the plea, which reads, 'I therefore, in the circumstances, deny that I shot the deceased as alleged by the state and put the state to the proof thereof'. In para 5 he continued to say medical evidence would show that due to the timing, the substances I took together with

the alcohol I consumed, I at the time of the alleged incident was unable to appreciate the moral and legal wrongfulness of my actions, if any, as at the time I suffered from a temporary non-pathological disorder.

[48] In both the bail application and the trial, he emphatically denied any wrongdoing. That, in my opinion, is contradictory and his version was correctly rejected once it was found that he was under the influence, but he knew what he was doing. The court below was correct to find that he was hiding behind the temporary non-pathological disorder.

[49] Notwithstanding the plea explanation which is suggestive that he could have committed the offence, but for his condition he could not be held responsible, it was submitted that the court below could not have relied on the evidence of Leeb in respect of what he heard over the telephone as his version is not clear and satisfactory in every material respect as is required by law, as the utterances were made by a person who clearly was not competent to do so due to his state of severe intoxication and confusion. It was further argued that he provided different versions in the two statements he made to the police. It was argued that when Leeb was confronted with the two statements he admitted that he struggled to get information from appellant, that he conceded that there exists a possibility that he could have misunderstood appellant and was possible that appellant said to him his mother (deceased) was shot. That from Leeb's evidence appellant was very drunk, spoke abnormally, and confusingly, he had to get support from furniture and other items to keep him upright, he was on point of falling, he was mentally not there and confused. It was further argued that Leeb was a single witness, he made

material concessions and there also existed material discrepancies in his evidence and as a result no or very little weight should be attached to his evidence.

[50] It is common cause that appellant called and Leeb answered the phone. Appellant says he recalls having told Leeb that 'your mother was shot', as against 'there is a problem, I have shot your mother I had enough of that'. Are you serious to which appellant responded he was serious? At that point appellant asked whether he (appellant) should call the police or Leeb was going to do that. Leeb then said to him leave everything as it is, they were on their way, which statement appellant confirms. In the plea explanation, he said he cannot recall exactly what he said to his son-in law.

[51] While the words 'Your mother was shot' seat in the same syntax with 'are you serious', they do not seat the same with the words 'I had enough of that'. On the synthax alone, what appellant recalls he told Leeb is false. Secondly what appellant is asking this court to believe or accept what he told Leeb in his alleged drunken state and reject what Leeb heard, who was sober at the time of the conversation is entirely fallacious. When Leeb arrived at the farm house, once appellant had opened for them, he repeated the question 'are you serious', what was the reason, there is no reason, where is my mother, 'in the sitting-room'. The words 'your mother was shot' would have required questions like who shot her? That was not the conversation. His reaction on his own version, when he came to or woke up does not support his version but that of Leeb. When he woke up, and saw blood on the table, he went for the phone and called. If he suspected someone else he would have checked for a break-in or at most determine whether

the weapon lying there was his or cry suicide there and then and communicate the same to his children.

[52] Yes, Leeb admitted to the possibility that he could have misunderstood the appellant. But as I have already stated, that answer was in cross-examination preceded by a long statement, barrage of words in between before the possibility was put to him. To paraphrase, his answer was, if you're awoken at an unholy hour of 24h10 with such news (of death) you get a fright and confused and then he repeated what he heard before he allowed the possibility.

[53] The alleged discrepancies in the two statements are non-existent. It is the same words stated differently or different words that carry the same meaning. It must be remembered that he spoke in Afrikaans and the police officer who took down the affidavit translated in English. It is possible that the police officer is Afrikaans orientated and his/her command of English is poor. It is settled law in this country that a statement of a witness is a skeleton and a witness is allowed to elaborate on it at the trial. The first statement was taken on 10 April 2010 and the second on 14 April 2010. The event was still very fresh in the mind of Leeb.

[54] Leeb had no reason whatsoever to implicate appellant in the commission of the murder except that what he said is what appellant told him. Even if we were not steeped in the atmosphere of the trial, it is evident from the record that Leeb was an honest and credible witness. It was put to him what his wife and his brother-in-law Ockert had said at the bail application about their father and late mother, but he would only say what he knows and reason thereof and nothing

more. On the record, he sounds so respectful to his in-laws and I see no reason why he would make up words implicating appellant. Appellant himself in the bail application said he has a good relationship with Hermanus. Commissioner Meyer was informed that appellant murdered his wife and that is the message the Commissioner passed on to his subordinates who he requested to attend the scene. On the sketch plan, Sergeant Stoffel marked point 'A' which indicated the alleged position of the suspect at the time of the 'incident'. Point A is the traditional sitting couch of appellant or where he sat that evening. In the bail application, his brother-in-law said this of him, 'Hermanus is a strong character, with him its only black or white he is not influenceable.' In this case he stood on his version notwithstanding his relationship with the appellant. In the bail application appellant was asked, so what Hermanus will tell the court, will not be a lie? His reply was, 'I believe he will not lie to court.'

[55] I respectfully share the sentiments of Nestadt JA in *S v Mkhohle* 1990 (1) SACR 95(A) at 98F-G where he says, 'contradictions *per se* do not lead to the rejection of a witness' evidence'. The learned judge of appeal refers to Nicholas J's (as he then was) observation in *S v Oosthuizen* 1982 (3) SA 571 (T) at 576B-C, 'they may simply be indicative of an error. And (at 576G-H) it is stated that not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence'.

[56] This is obviously what the court below did when regard is had to case law on point that court made reference to - Leeb in his replies in cross-examination he kept on saying the words he used in the two statements, mean the same thing and indeed they are. Even if I were to accept that Leeb's evidence was not entirely satisfactory, I am not prepared to reject his version, for the only reason that he allowed a possibility in his evidence, for as I already said, that possibility is inconsistent with the rest of the conversation. After all, appellant contradicts himself on the very same issue when he says, he recalls, what he told his son-in-law, does not exactly recall what he told him.

[57] It remains in this appeal to deal with whether appellant and the deceased had an argument. Appellant says there was no argument, but that is unlikely. The police officers would not even have known that appellant and the deceased watched the burial of Terre'Blanche. That information must have come from appellant, the officers would not have guessed it. Appellant admits that they watched the burial. In cross-examination he said that he drank more than usual that day because of that funeral. Unfortunately, the matter was not taken further to determine what was it between appellant and Terre'Blanche or the burial that made him drink more than usual that day.

[58] I must pause here to observe that in every factual situation that implicated appellant he has his own explanation notwithstanding his claims of intoxication. An innocent question from Inspector Joodt whether he had workers on the farm, he admits that he said he would look for someone while he is custody but says that he did not say that on the farm but at the police station when he was sober, the

version of Commissioner Meyer that he asked appellant where he obtained the firearm that was twisted to say, did he perhaps ask him where he kept all the firearms and then his version and Leeb. What the appellant is telling this court is that despite the overwhelming evidence from Leeb and his wife, Ockert and appellant himself that whenever the deceased was under the influence of liquor she was a very aggressive person, this particular day was an exception, no argument and they even spoke about making love that day. So from nowhere deceased must have stood up, went and looked for the keys to the safe until she found them, returned to her seat and shot herself. That is so false, an argument ensued about Terre'Blanche that resulted in the tragedy of that day.

[59] 'Proof beyond reasonable doubt does mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice'. See *Miller v Minister of Pensions* [1947] ALL ER 372 at 373.

[60] In the English headnote in the matter of *S v Glegg* 1973 (1) SA 34 AD it is put this way:

'The phrase "reasonable doubt" in the phrase "proof beyond reasonable doubt" cannot be precisely defined but it can well be said that it is a doubt which exists because of probabilities or possibilities which can be regarded as reasonable on the ground of generally accepted human knowledge and experience. Proof beyond reasonable doubt cannot be put on the same level as proof beyond the slightest

doubt, because the *onus* of adducing proof as high as that would in practice lead to defeating the ends of criminal justice.'

See also *S v Ngunovandu* 1996 NR 306 (HC) at 317I-318A-B.

[61] I respectfully agree with the sentiments of Malan JA in the minority judgment of *R v Mlambo* 1957 (4) SA 727 AD at 738A-B.

'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

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

(See also *S v Rama* 1966 (2) SA 395 (AD) at 401, *S v van Wyk* 1993 NR 426 (HC) at 438G-439A.)

[62] There is no evidence that suggests that appellant be entitled to the benefit of doubt. The fact that Dr Ludik, Commissioner Meyer and Inspector Joodt admitted without any basis that the scene was consistent with suicide takes appellant's case nowhere. It follows that the question before us should be

answered in the negative, namely that there is no possibility that the deceased could have committed suicide.

Order

[63] In the result the appeal is dismissed.

MAINGA JA

SMUTS JA (HOFFJA concurring):

[64] I have had the benefit of reading the judgment of my colleague, Mainga JA (the main judgment) and regret that I am unable to agree with both the reasoning and conclusion reached in it.

[65] On the contrary, I am of the view that the appeal should succeed and that the conviction and sentence should be set aside.

[66] The facts have been set out in some detail in my colleague's judgment. There is accordingly no need to provide my own summary of all the evidence save to refer to some items omitted from that summary and provide further context in other instances. I do however find it necessary to refer to some factual matters for the sake of coherence in explaining why I differ from the reasoning contained in my colleague's judgment and in the judgment of the High Court.

[67] The High Court on 23 January 2018 found the appellant guilty of the murder of his wife with direct intent. The appellant was sentenced to 18 years imprisonment with 10 years suspended on certain conditions.

[68] The High Court refused leave to appeal and leave was subsequently granted by this court on 23 October 2018 in respect of one aspect, namely on the question as to whether there was a reasonable possibility that the deceased committed suicide.

[69] This appeal thus concerns whether the State discharged the burden of proof of establishing the guilt of the appellant beyond reasonable doubt. The corollary to this is that the appellant is entitled to an acquittal if it is reasonably possible that his innocent explanation of the deceased committing suicide may be true.¹ Proof beyond reasonable doubt will thus only be established if a court is at the same time satisfied that no reasonable possibility exists that an innocent or exculpatory explanation put forward by the appellant might be true.²

[70] The High Court concluded:

‘Taking the evidence as a whole, the only reasonable inference that can be drawn is that the accused is the one who shot the deceased.’

¹ As succinctly expressed by Nugent J (as he then was) in *S v van der Meyden* 1999 (2) SA 79 (W) at 80H-I.

² *Id* at 80I. See also *R v Difford* 1937 AD 370 at 373.

[71] Earlier in the judgment, the court in dealing with the appellant's counsel's submission that there is a possibility that the deceased committed suicide, stated the following in para 54:

'With regard to the suggestion that the deceased had committed suicide because of the gun powder residue that was found on both hands, this is not the only reasonable inference to be drawn from the proven facts.'

[72] As the main judgment correctly points out, the inferential reasoning employed by the court below is unsound and misapplies the cardinal rules of logic spelt out in *R v Blom*³ concerning drawing inferences, consistently followed by the courts in this country. The main judgment correctly characterises the evidence of the appellant's son-in-law, Hermanus Leeb as to an alleged admission as direct evidence and correctly holds that there was thus no need to resort to inferential reasoning if that evidence were to be found to be satisfactory in all respects and when considered with the other evidence. The main judgment proceeds to find that the evidence taken as a whole establishes the appellant's guilt beyond reasonable doubt and on this basis rejected the appellant's explanation of the deceased committing suicide.

[73] The main judgment would appear to correctly accepting to the unsound application of the approach in *Blom* by the court below (in para 54 of its judgment), but unlike the court below has not pertinently addressed the appellant's explanation of suicide save to reject his version generally. The main judgment does not adequately address the assessment of the forensic expert witness called

³ 1939 AD 79 at 80.

by the prosecution that suicide is in essence a reasonable possibility. Nor the statement by Commissioner Meyer who arrived at the scene on the fateful night, that the scene itself was consistent with a suicide, except to state in passing that these statements take the appellant's case nowhere. I differ, with respect, and consider that these statements, taken with the totality of the evidence including the appellant's evidence and the application of the cautionary rule with regard to the only direct evidence in the form of the alleged admission, give rise to a reasonable possibility that the deceased could have committed suicide, thus entitling the appellant to an acquittal.

[74] Before turning to the evidence, it is apposite to refer to the appellant's defence to the indictment. It was a two pronged defence in which he firstly denied that he shot the deceased and secondly, in the event that it were to be established beyond reasonable doubt that he had shot the deceased, he pleaded a lack of criminal liability due to temporary non-pathological insanity.

[75] This defence was raised at the bail proceedings in 2010 and again in the appellant's plea explanation at the commencement of trial in 2014 and in his counsel's cross-examination, his own evidence and in counsel's closing argument.

[76] The main judgment refers to this two-pronged defence as contradictory. I differ from that view. The two components of the defence do not in the slightest contradict each other. They constitute an entirely permissible plea in criminal proceedings and are not mutually incompatible, particularly when considered on the basis of the appellant's case of not recalling the shooting because of excessive

alcohol consumption and the effect of that when combined with the prescribed scheduled drugs he was taking, as corroborated by the expert medical witness in the person of a psychiatrist, Dr Marx, who was called by the appellant and whose evidence on that point was not contested.

[77] In order to determine whether murder with direct intent was proven beyond reasonable doubt, the directly related question identified by this court when granting leave to appeal is to be considered namely: whether there was a reasonable possibility that the appellant's explanation that the deceased committed suicide might be true.

[78] Against that background, I turn to the facts.

[79] The key witness for the State upon whose evidence reliance is placed both by the court below and in the main judgment is Mr Leeb.

[80] As is correctly stated in the main judgment, Mr Leeb provides the only direct evidence incriminating the appellant with regard to the act of shooting the deceased (*actus reus*). This was in the form of an alleged admission to that effect made by the appellant to him.

[81] Mr Leeb received a phone call around midnight on 9 April 2010. In giving his evidence, Mr Leeb stated that he noticed that the appellant was very drunk and said to him 'I have shot your mother. I had enough of that'. In cross-examination, it was put to him that there was a discrepancy between the statement he, in his

evidence, attributed to the appellant to those contained in two prior statements made by him – the first on 10 April 2010 and the second on 14 April 2010. In the first statement, the words attributed to the appellant were ‘Ek het nou genoeg gehad en het nou klaar gemaak met jou ma’ (‘I have now had enough and now finished with your mother’). Later in the course of the phone call, according to the first statement, the appellant upon an enquiry as to whether he was serious, stated that he ‘is serious and that he shot his wife’. The second statement differs in as much as the statement of having shot the deceased is made at the outset and does not follow an enquiry as to whether he was serious.

[82] In the course of cross-examination, Mr Leeb acknowledged there were discrepancies in the following way:

‘My Lady to answer honestly everyone of us today in this court sitting in this court if you are waked 00:10 with such news you have a fright you are confused and what I have heard at the moment I shot your mother as I have also said the manner in which he talked to me it was difficult to understand so there exist a possibility that I could have misunderstood him that your mother was shot or I shot your mother.’
(*sic*)

[83] This was conceded in the context of being put to him that the appellant’s version was that he had stated or would have stated that his wife was shot (using the passive voice and not the active voice).

[84] This concession was made in the context of his evidence that the appellant was very drunk, corroborated by most State witnesses who encountered the appellant that night and the appellant’s own evidence and that of his daughter Mrs

M. Leeb. Mr Leeb said in re-examination that when the appellant phoned him, he spoke 'confusingly'. He testified that the appellant who was prone to drinking heavily, was in a state of intoxication he had not previously encountered. The manner in which he spoke was abnormal and that he was not mentally there and that he struggled to obtain information from him.

[85] Upon Mr Leeb's arrival at the scene soon afterwards, the appellant's state of intoxication was such that he needed to hold on to furniture and other items to stay upright when walking and was falling around and spoke incoherently.

[86] The terms of the admission are of crucial and material importance being the only direct evidence of the *actus reus* tendered by the State. Contradictions as to its terms by the single witness to that alleged admission cannot be brushed aside as the main judgment seeks to do with reference to *S v Mkohle*⁴ and *S v Oosthuizen*⁵. Both cases concerned contradictions of witnesses and their impact upon a witness's credibility. As was stated by both Nestadt JA in *Mkohle* and Nicholas J in *Oosthuizen*, contradictions do not necessarily lead to the rejection of a witness's evidence as a credibility issue and that they may simply be indicative of an error. In this matter, the credibility of Mr Leeb is not the issue but rather the reliability of his evidence of the terms of an alleged admission and in fact whether he made an error or could have been mistaken as to its terms. The opinion of another witness as to Mr Leeb's credibility takes the matter nowhere.

⁴ 1990 (1) SACR 95 at 98F-G.

⁵ 1982 (3) SA 571 (T) at 576B-C.

[87] What is pertinent in this case is whether Mr Leeb could have made an error on the crucial question as to what precisely was said to him. He conceded that he may be mistaken. The concession and contradictions in his statements as to what precisely was said relate to the very terms of the admission itself. Nor do the contradictions in the two statements only amount to what are termed as issues of syntax. They relate not only to the sequence but also whether the statement about the deceased being shot was in respect of a follow up question or at the forefront of the conversation. Indeed, Mr Leeb's statement concerning lack of coherence on the part of the appellant and struggling to make sense of what he was saying would negate any point made concerning the sequence of the contrary version of the appellant as lacking a logical sequence.

[88] These considerations are powerfully underpinned by the fact that Mr Leeb was a single witness as to the contents of the telephone conversation with the appellant. I agree with the sentiments expressed in *S v Noble*⁶ that caution is to be followed in evaluating the evidence of a single witness as articulated in *R v Mokoena*⁷. This constitutes a salutary and common sense guide that the evidence of a single witness is to be approached with caution and treated with circumspection.

[89] Approaching Mr Leeb's evidence with caution as a single witness on the only direct evidence in the form of an admission of the act of shooting, that evidence would need to be clear and satisfactory on what was said. He however

⁶ 2002 NR 67 (HC) at 71G-H. As is confirmed by Strydom CJ in *Hanekom v State* (SA 4/2000) [2001] NASC 2 (11 May 2001) unreported Supreme Court judgment.

⁷ 1932 OPD 79 at 80.

conceded that it is possible that the appellant said that the deceased 'was shot' as stated in the passive voice which accords with the appellant's version (as opposed to the vastly different active voice - 'I shot' the deceased). Once that concession is made, coupled with his statement that Mr Leeb struggled to make sense of what the appellant said who spoke in an incoherent and confused manner and was very drunk, there would plainly be doubt on the crucial question concerning the precise terms of the admission and as to whether the appellant committed murder with direct intent.

[90] That doubt is compounded when considering the related question as to whether the appellant's version – a denial of shooting the deceased and raising the spectre of a possible suicide. This possibility is supported by two witnesses for the prosecution and most crucially, the expert forensic witness Dr Ludik who testified that there was primer residue on both hands of the deceased and on the left hand of the appellant. He could not, with reference to the presence of primer residue, identify who fired the shot. But he indicated that the presence of primer residue on the deceased's left hand was three times the strength of that on the appellant's left hand and the deceased's right hand. He testified that the probabilities were that the deceased either fired the shot with her left hand or her hand was closest to the firearm (possibly being supported by her right hand) when the shot was fired, in the absence of the appellant using a glove for which there was no evidence whatsoever and not even the faintest suggestion of one put to the appellant in cross examination. Quite how the main judgment can speculate as to whether the appellant's right hand could have been shielded by a glove is not apparent. The main judgment's characterisation of Dr Ludik's evidence as 'neutral'

may be correct as far as it was unable to unequivocally identify the shooter, but it was certainly not neutral with regard to the appellant's explanation.

[91] The tenor of Dr Ludik's evidence was that suicide was a reasonable possibility. In view of his inconclusive evidence, the prosecution sought a postponement prior to closing its case for the stated purpose to secure another ballistic expert who could say with greater certainty who had pulled the trigger. But none was called upon resumption.

[92] Detective Stoffel of the Scene of Crime Unit Mariental who attended the scene in the early hours of 10 April 2010 conceded that the scene was consistent with a suicide when the possibility was put to him in cross-examination. Commissioner Meyer, who also attended the scene, likewise conceded that the scene was consistent with a possible suicide, with reference to the scene not been disturbed, the manner in which the deceased had come to rest, where the blood was located and regard being had to the entrance and exit wound being directly diagonal to each other. Furthermore, the deceased suffered from and was treated for depression. On the morning of the fateful day, the deceased had actually called her daughter-in-law in South Africa and 'greeted (her family) and. . .said that they should take care and (look) well after the grandchildren'.

[93] The appellant gave evidence which was consistent with both his evidence at the bail application some seven years before and his plea explanation, three years before. He said that he could not recall the shooting and stated that the deceased could have shot herself and denied having shot the deceased. He also

testified that their marital relationship was good until the deceased had a hysterectomy in 1993 and that her personality changed thereafter. She became aggressive both towards him and generally and physically attacked him on occasions, including stabbing him with a knife and firing shots at him with a revolver. This latter attack and her aggressive state were confirmed by their daughter. The appellant testified that the deceased was on medication for depression and, together with him would abuse alcohol as well, which compounded her aggression.

[94] On the fateful day, the couple engaged in excessive alcohol consumption which had commenced prior to lunch. According to the appellant, they finished a bottle of brandy and moved on to a second bottle and became inebriated in the course of the afternoon and evening. At about 22h00, the appellant testified that he had a shower and returned to the sitting room and passed out on the couch next to the deceased. He woke up some two hours later and noticed the deceased lying slumped over the table and assumed it was a consequence of their alcohol intake. He saw a red spot and first thought it was alcohol but realised it was blood and saw the revolver on the floor between them. It was then that he called his daughter's number (by pressing a single button as it was programmed on their cordless phone). He reached his son-in-law, Mr Leeb. He thought he said to him that 'your mother has been shot' and recalls his son-in-law stating that he should leave everything as is, pending his arrival. He could not remember opening the door for Mr Leeb or the primer test done on his hands by the police. Nor could he remember taking Commissioner Meyer to the safe or how he was transported to Aranos. For the most part, his testimony was unshaken in cross-examination.

[95] His confused state and inability to recall what transpired is firmly corroborated by Dr Marx who gave detailed evidence concerning the effect of excessive alcohol consumption when combined with the medication taken by the appellant. Memory loss or a patchy recollection were known and common consequences of combining excessive alcohol and the medication in question, as well as confusion arising when benzodiazepines are consumed with alcohol. Dr Marx's evidence was uncontested, despite the State having more than adequate notice of his testimony as his initial report to this effect was utilised in bail proceedings in 2010.

[96] The appellant being in a confused and drunken state accords with Mr Leeb's account of the telephone conversation and how he encountered the appellant upon arrival at the scene shortly afterwards. The police witnesses also testified that the appellant was highly intoxicated when they arrived on the scene.

[97] Warrant Officer Joodt testified that the appellant was so intoxicated that he could not give a proper explanation of the incident and that the appellant was incapable of indicating to him that he understood his rights when Warrant Officer Joodt sought to set them out. The appellant simply did not respond when he sought to inform him of his rights.

[98] Detective Sergeant Stoffel also gave evidence to the effect that the appellant was very drunk at the scene when he tested the appellant for primer residue.

[99] Commissioner Meyer also described the appellant as being severely under the influence of alcohol and was very unstable on his feet.

[100] The appellant's daughter, Mrs Leeb, who arrived with her husband, did not enter the house at first with her husband until the latter informed her that the appellant would be taken away. She then entered the house and observed her father being unable to stand up without holding onto the table and a cupboard for support. He tried to speak to her but was incoherent and she could not follow due to his drunken state and the effects of his medication. She also testified that on other occasions when he had consumed excessive alcohol and had also taken medication, he could not speak. He appeared to her as disoriented and was unstable on his feet.

[101] Mrs Leeb also gave evidence concerning the deceased's aggressive conduct towards the appellant, having witnessed how she had stabbed him and referred to other aggression toward him. The deceased had also related to her how she had attempted to shoot the appellant in the bathroom and showed her where the bullets had left their marks. Mrs Leeb said that the appellant was never aggressive towards the deceased and never retaliated and showed love and affection for the deceased. She also spoke of her mother's depression and despair.

[102] Despite the overwhelming and unanimous evidence of those who attended at the scene that the appellant was very drunk and which is also the express

finding of the High Court, the main judgment comes to a contrary conclusion merely because the bottle of brandy encountered at the scene was half or a quarter full. This despite the appellant's unchallenged evidence to the effect that two bottles of brandy and a box of wine had been delivered by their neighbour beforehand. The main judgment concludes on the basis of the half empty bottle of brandy encountered at the scene, that the appellant 'could not have been as drunk as he alleged at the time the incident happened'. This in the face of the appellant's unchallenged evidence to the contrary, corroborated by the intoxicated state he was in, as was consistently testified by all witnesses who encountered him that night. The main judgment surmises that at the time of the incident the appellant and deceased had only consumed half or a quarter of a bottle and concludes that the appellant's intoxication is exaggerated.

[103] The main judgment reaches this conclusion on the basis of the amount of brandy in the bottle observed at the scene. This despite the appellant's evidence that a bottle of brandy had been consumed and that he was unaware as to how much was left in the second bottle.

[104] During cross-examination, it was put to the appellant:

'Now still on the same day of the incident you have demonstrated the amount of alcohol that you took, you say approximately a bottle and a half, is that what you said? That is together with your wife? -- That is correct. I do not know how much was in the second bottle.

Besides the brandy, did you take any other liquor? -- From the 2.5 wine (box), I took a full glass.

So you also had drank wine, a full glass of wine? (*sic*) -- Yes.'

[105] This aspect was not challenged in cross-examination.

[106] The witnesses all observed a single bottle roughly half empty. But there was no evidence of any search for another bottle. If it were still full, it would presumably have been seen. But it was not. And if empty, it would presumably have been disposed of and not standing and visible on a counter or the like. None of the witnesses testified that there had been a search for any sign of more liquor – only that they had seen a single half full bottle. There is thus no basis in the evidence to reach a conclusion that only half a bottle of brandy was consumed between the appellant and the deceased, both seasoned drinkers. All the evidence on this aspect, properly approached, gainsays this conjecture (and the conclusion which is then based upon it).

[107] The main judgment makes much of Commissioner Meyer's evidence of the appellant stating that there had been an argument between himself and the deceased that afternoon arising from viewing the televised funeral of the extremist AWB leader Terre'Blanche and the Commissioner's evidence that, upon asking the appellant where he obtained the firearm, the appellant accompanied him to the bedroom and pointed out a safe and opened it with keys which were placed on top of it. The High Court rightly disregarded this evidence, given the Commissioner's failure to provide the necessary warning to appellant. I agree with the High Court ruling in this respect. It is entirely correct. The ensuing pointing out and admission

are inadmissible in the absence of a warning as is well established. This evidence is to be disregarded, as was done in the High Court, and the reliance upon it in the main judgment is impermissible and misplaced.

[108] The finding reached in the main judgment that ‘an argument ensued about Terre’Blanche that resulted in the tragedy of that day’ is accordingly unsupportable. There was also no evidence of any struggle at the scene. Indeed the observations were to the contrary – that it was consistent with a suicide.

[109] The only direct evidence of the appellant having committed the *actus reus* - the act of shooting the deceased – is the purported admission made to his son-in-law, Mr Leeb in his phone call to him. The main judgment and that of the court below would appear to consider the sole issue to be one of credibility of Mr Leeb as the pertinent question, even though both refer to the fact that he was a single witness on the admission. I have no reason to question the trial judge’s assessment of this witness’s honesty and accept her finding that he was credible.

[110] That is merely one aspect in an assessment of his evidence. But accepting his credibility is not a licence to overlook other shortcomings in his evidence, especially as a single witness to the only direct evidence of the *actus reus* in the form of an alleged admission. His evidence would also need to be clear and satisfactory on the terms of the admission itself. That it was not.

[111] Mr Leeb conceded that the appellant could have said that the deceased had been shot instead of saying that he had shot her. In weighing his evidence,

both the High Court and the main judgment essentially only refer to discrepancies (between his prior statements) but do not address this concession which unquestionably renders his evidence of the admission as unsatisfactory and his recollection as not sufficiently reliable.

[112] Furthermore, he acknowledged that he was woken with this news and was in a state of shock. In addition, he testified that the appellant was incoherent and spoke confusingly and it was difficult to make out what he was saying. And that the appellant was intoxicated, as was confirmed by all other witnesses who saw him that night. The High Court correctly pointed out with reference to apposite authority⁸ that admissions made by an accused under the influence of alcohol would not be inadmissible for that reason but that the state of intoxication may determine the weight to be attached to it.

[113] In this instance, there can be no question of the voluntary nature of the statement to Mr Leeb but it is not clear that there was no misunderstanding as to what was said. On the contrary, the concession made by Mr Leeb in the context of struggling to make out what the appellant was saying gives rise to doubt as to its precise terms.

[114] The lack of clarity concerning the terms of the alleged admission, and the doubt which this gives rise to, are to be considered together with the appellant's explanation of denying the shooting and postulating suicide. The State's forensic expert considered that the deceased firing the shot is more probable than the

⁸ *R v Moiloa* 1956 (4) SA 824 (A).

appellant having done so. Two senior investigating officers considered that the scene was consistent with a suicide. The evidence of the deceased's depression and the call to her daughter-in-law would also support suicide as a reasonable possibility.

[115] As was said by Liebenberg J in *S v BM*⁹:

'The accused's evidence forms part of the body of evidence to be evaluated and the test is whether in the light of all the evidence, it is reasonably possibly true. Obviously, the weaker the state case the stronger the possibility of the accused's version being reasonably true.'

[116] The established test, as neatly summarised by Liebenberg J in *S v HN*¹⁰:

'The question that must be answered is whether the State's case has been proved beyond reasonable doubt when measured against the accused's conflicting version or - putting it differently - is the accused's version reasonably possibly true even if the court does not believe him? Is there a reasonable possibility that it may be substantially true? (*S v Jaffer* 1988 (2) SA 84 (C); *S v Kubeka* 1982 (1) SA 534 (W).)

Whilst guarding against 'compartmentalisation' of evidentiary considerations the court must - as stated above - measure the totality of the evidence, not in isolation, but by assessing properly whether in the light of the inherent strengths, weaknesses, probabilities and improbabilities on both sides, the balance weighs so heavily in favour of the State, that it excludes any reasonable doubt about the accused's guilt in one's mind.'

[117] Applying this test to the facts of this matter, the weakness in the State's case resting upon an admission lacking in clarity where it is conceded that the

⁹ 2013 (4) NR 967 (HC) para 117.

¹⁰ 2010 (2) NR 429 (HC) para 113 - 114.

hearer could have been materially mistaken and there being a reasonable possibility that the appellant's version may be true, it follows that the State has not proven the appellant's guilt beyond reasonable doubt and that he was entitled to an acquittal.

[118] It further follows that the appeal should in my view succeed and the appellant's conviction and sentence be set aside.

SMUTS JA

HOFF JA

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