THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 96/2015

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG **APPELLANT**

and

OSCAR LEONARD CARL PISTORIUS **RESPONDENT**

Neutral citation: *Director of Public Prosecutions, Gauteng v Pistorius* (96/2015) [2015] ZASCA 204 (3 December 2015)

Coram: Mpati P, Mhlantla, Leach and Majiedt JJA and Baartman AJA

Heard: 03 November 2015

Delivered: 03 December 2015

Summary: Criminal Law and Procedure ─ appeal under s 319 of Criminal Procedure Act 51 of 1977 ─ conviction on a competent verdict to be regarded as an acquittal on the main count and does not debar an appeal on a question of law reserved.

Legal intention in the form of *dolus eventualis* ─ trial court incorrectly applying the principles thereof ─ constitutes an error of law.

Inference of fact to be drawn from the totality of the evidence ─ trial court not taking all the relevant evidence into account in determining the presence or otherwise of *dolus eventualis* ─ this also constitutes an error of law.

On a proper conspectus of all the evidence, the trial court ought to have found that the accused had been guilty of murder and not culpable homicide, and that his defence of putative private defence could not be sustained. Conviction of culpable homicide and the sentence imposed for that offence set aside under s 322 of CPA and the matter remitted to the trial court to impose sentence afresh.

ORDER

On appeal from: Gauteng Division, Pretoria (Masipa J with two assessors sitting as court of first instance):

1 The first two questions of law reserved are answered in favour of the Director of Public Prosecutions.

2 The accused's conviction and sentence on count 1 are set aside and replaced with the following:

'Guilty of murder with the accused having had criminal intent in the form of *dolus eventualis*.'

3 The matter is referred back to the trial court to consider an appropriate sentence afresh in the light of the comments in this judgment.

JUDGMENT

Leach JA (Mpati P, Mhlantla and Majiedt JJA and Baartman AJA concurring)

[1] This case involves a human tragedy of Shakespearean proportions: a young man overcomes huge physical disabilities to reach Olympian heights as an athlete; in doing so he becomes an international celebrity; he meets a young woman of great natural beauty and a successful model; romance blossoms; and then, ironically on Valentine's Day, all is destroyed when he takes her life. The issue before this court is whether in doing so he committed the crime of murder, the intentional killing of a human being, or the lesser offence of culpable homicide, the negligent killing of another.

[2] It is common cause that in the early hours of 14 February 2013 the respondent, Mr Oscar Pistorius, shot and killed the 29 year old Miss Reeva Steenkamp at his home in a secured complex known as Silver Woods Country Estate in the district of Pretoria. Pursuant to this, he was tried in the Gauteng Division of the High Court, Pretoria on several charges, including one of the murder of Miss Steenkamp. Throughout the proceedings in the trial court, the respondent was referred to as 'the accused' and, for convenience, I intend to do so as well. I trust that those near and dear to her will forgive me if I refer to Miss Steenkamp at times by her given name of Reeva, although I shall endeavour to do so only where it is necessary to emphasize her identity. I shall otherwise refer to her simply as 'the deceased'.

[3] The proceedings in the trial court were attended by unprecedented publicity. As far as I am aware, for the first time in the history of this country the trial was covered on live television (as was the appeal in this court). Although I did not follow the proceedings closely, it was impossible not to learn that although it was common cause that the accused had shot and killed the deceased, the trial court had found him not guilty of her murder but guilty of culpable homicide. Contending that the trial court erred on certain legal issues, the Director of Public Prosecutions, with leave of the trial court, now appeals to this court on questions of law reserved, arguing that the appropriate conviction would be one of murder.

[4] It is necessary at the outset to clear a technical issue out of the way. The appeal to this court relates solely to count 1 of the indictment, namely, the alleged murder of the deceased. The accused was not charged in the alternative with the lesser offence of culpable homicide. It was unnecessary for the State to do so as s 258 of the Criminal Procedure Act 51 of 1977 (the CPA) provides that if the evidence led on a charge of murder does not prove that offence but the offence of culpable homicide (or numerous other offences unnecessary to mention for present purposes) 'the accused may be found guilty of the offences so proved'. That is what happened in the present case. The trial court held that the State had not proved that the accused was guilty of the murder but had shown that he was guilty of culpable homicide. Relying on s 258 it accordingly found him guilty of the latter offence.

[5] The appeal to this court relating to this conviction is brought in respect of questions of law reserved under s 319 of the CPA. That section provides:

'(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-

mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.
(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law.'[1]

[6] Section 322 of the CPA prescribes the powers that may be exercised by a court of appeal hearing an appeal relating to any question of law reserved under s 319. I shall deal with these provisions in more detail in due course, but it suffices to mention at this stage that s 322(4) provides that in an appeal by the prosecutor where a question of law has been reserved in the case of an acquittal, 'and the court of appeal has given a decision in favour of the prosecutor, the court of appeal may order that such of the steps referred to in s 324 be taken as the court may direct'. This corresponds with the provisions of s 369 of the CPA's predecessor, Act 56 of 1955, which in turn reflected the wording of its predecessor s 374 of Act 31 of 1917. In *Solomons*,[2] following the decision in *Gani*,[3] this court held that the effect of s 369 of the 1955 Act was that the State can only have a question of law reserved should there be an acquittal of the accused.

[7] After *Solomons* and *Gani*, this court held that an acquittal envisaged by s 322(4) had to be a total acquittal, and that did not include a case in which a competent verdict had been entered in place of the charge upon which the accused had been arraigned in the charge sheet. Thus in *Seekoei*,[4] where an accused had been charged with housebreaking with intent to rob and robbery with aggravating circumstances, but convicted on the competent verdict of the lesser offence of housebreaking with intent to steal and theft with aggravating

[1] The reference to the Appellate Division in the section must for present purposes be taken as an appeal to this court.
[2] *R v Solomons* 1959 (2) SA 352 (A).
[3] *R v Gani & others* 1957 (2) SA 212 (A).
[4] *S v Seekoei* 1982 (3) SA 97 (A).

circumstances, it was held there had not been an 'acquittal' as intended by s 322(4). The court went on to hold that in consequence of there having been no acquittal, the trial court had impermissibly reserved a question of law for determination under s 319.

[8] At first blush this decision seems to provide an obstacle to the State's appeal on points of law in the present matter as, although the accused was not convicted of the murder with which he had been charged, he was convicted on the competent verdict of culpable homicide – and thus there was not a 'total acquittal' on the murder charge making it permissible for the trial court to reserve points of law as it did. However, the matter does not end there. As was argued by the State, the accused could quite easily have been charged with culpable homicide as an alternative charge to that of murder. If that had been done, and the accused found guilty of culpable homicide, the court would have been obliged to acquit him on the murder charge, and in that event the ratio of the decision in *Seekoei* would not operate to bar an appeal on a point of law in respect of that charge.

[9] The decision in *Seekoei* has been a matter of controversy, and doubt has been expressed in this court on the correctness of the reasoning.[5] It is after all somewhat artificial to regard an accused found guilty of the lesser offence of culpable homicide not to have been acquitted of the more serious charge of murder. But any dispute on this has been resolved by the decision of the Constitutional Court in *Basson*.[6] In that matter, after considering the legislative history of s 319(2) of the CPA, the court held that there is 'nothing in this language to suggest that the State may only request the reservation of questions

[5] See *S v Mene* 1978 (1) SA 832 (A) at 838A-C.
[6] *S v Basson* 2007 (1) SACR 566 (CC.

directed at the conviction or acquittal of the accused'.[7] In the light of this, counsel for the accused accepted that the limitation upon the State's right to appeal on a point of law as prescribed in *Seekoei* could no longer be regarded as good law and that there could be no objection to the appeal proceeding in respect of the points of law reserved in the trial court, notwithstanding the conviction of the accused on the competent verdict of culpable homicide. This concession was correctly made.

[10] In the light of this, I turn to the issues raised in the appeal. In order to do so it is necessary to paint the factual backdrop to the points of law debated before us.

[11] The accused was born with deformed legs, the fibula on each side having been missing. Consequently, before his first birthday, both of his legs were surgically amputated below the knee and, since then, he has had to rely on prosthetics. Despite such a severe physical handicap, he made his way bravely into the world and, at school, although he described himself in evidence as having been 'never really much of an academic', he participated in various sports. It was during the course of rehabilitation from a knee injury sustained playing rugby that, in early 2004, he started training with a biokineticist at the University of Pretoria who encouraged him to participate in a disabled athletics meeting. He did and the rest, as they say, is history. It is unnecessary to detail the accused's spectacular athletic career which followed. Suffice it to say that he was awarded a sports bursary by the University of Pretoria and competed at an international level in both disabled and able-bodied athletic events. He won numerous international medals, including gold medals at the Paralympics. Having persuaded the International Athletic Federation that he enjoyed no advantage by using prosthetic legs, the accused represented South Africa in both

[7] Para 148.

the Olympic and the Paralympic Games of 2012. His athletic achievements not only brought him international fame but also into contact with charities, and for his humanitarian work in the world of prosthetic and prosthetic developments he was awarded an honorary doctorate from the University of Strathclyde in Glasgow.

[12] The accused met the deceased on 4 November 2012 when they were separately invited by a mutual friend to lunch at a motorcar track-day event. She agreed to accompany him to the South African Sports Awards function that evening. Romance quickly blossomed and they became intimate. As so often happens with romantic relationships, especially in their youthful stages, theirs was attended by petty conflict and tensions as evidenced by a transcript of text messages that had passed between them that was handed in as an exhibit at the trial. But despite these hiccups, the deceased at times slept over at the accused's home.

[13] She did so on the night of 13 February 2013. In the early hours of the following morning, screams, gunshots, loud noises and cries for help were heard, emanating from the accused's house. Within minutes, a Mr Stander and a Dr Stipp, the latter a medical practitioner, arrived at the accused's home. There they found the accused in a highly emotional state, kneeling alongside the deceased who was lying on the floor at the foot of the stairs leading to the sleeping quarters of the house. She had been carried there by the accused from an upstairs bathroom where the shooting had taken place. She had been shot several times and was mortally wounded. The severity of her injuries was such that she was not breathing and Dr Stipp was unable to find a pulse. If she was still alive at that time, she died soon after. In due course the accused was charged with her murder in the Pretoria High Court.

[14] It was common cause at his trial that the accused was responsible for the death of the deceased in that he had fatally injured her when he fired four shots with a 9mm pistol through the door of a toilet cubicle in the bathroom adjacent to his bedroom. Relying upon a web of circumstantial evidence, including the screams that had been heard before the sound of the shots that the accused had fired, the State attempted to persuade the trial court that the accused had threatened the deceased during the course of an argument, that she had locked herself into the toilet cubicle in the bathroom to escape from him, and that he had thereupon fired the fatal shots through the door and killed her.

[15] The accused, on the other hand, alleged that he had awoken from his sleep in the early hours of the morning. It was very warm and, when he sat up, he noticed that two fans he had earlier positioned near the sliding door in the room leading onto a balcony were still running and the door was still open. Although it was dark in the room, he was aware that the deceased was awake in the bed next to him as she rolled over and spoke to him. He got out of bed, brought the two fans into the room, closed and locked the sliding doors, and drew the curtains. It was very dark in the room, the only light being from a small LED on an amplifier at the TV cabinet. He noticed a pair of jeans lying on the floor, and had just picked them up in order to place them over the amplifier to cover the light when he heard the sound of a window opening in the bathroom. The bathroom is situated not directly adjacent to the bedroom but down a short passage lined with cupboards. He immediately thought that there was an intruder who had entered the house through the bathroom window, possibly by climbing up a ladder. He quickly moved back to his bed and grabbed his 9mm pistol from where he kept it under the bed. As he did so, he whispered to Reeva to ‘get down and phone the police’ before proceeding to the passage leading to the bathroom. He was not wearing his prosthetic legs at that stage and, overcome with fear, he started screaming and shouting both for the intruder to

get out of his house and for Reeva to get down on the floor and to phone the police. When he reached the entrance to the bathroom, he stopped shouting as he was worried that the intruder would know exactly where he was. As he neared the bathroom he heard the toilet door slam. Photographs of the bathroom showed that facing the passageway entrance there is a shower cubicle immediately adjacent to a toilet cubicle, the latter having an external window. The toilet cubicle is fitted with a door, and is very small. Also in the bathroom is a triangular built-in corner bath, immediately to the left as one enters.

[16] According to the accused, he had his pistol raised in a firing position with his arm extended ahead of him. Peering around the wall at the end of the passage, he saw that there was no one in the bathroom itself but that the toilet door was closed. He alleged that at that point he started screaming again, telling Reeva, who he presumed was in the bedroom, to phone the police. He then heard a noise coming from inside the toilet and promptly fired four shots at the door. After that he retreated to the bedroom where he found that Reeva was no longer there. It then dawned on him that it could be her in the toilet. In panic he went back to the bathroom and tried to open the door, but found it to be locked. He then started screaming for help, put on his prosthetic legs, and unsuccessfully tried to kick open the door. He then grabbed a cricket bat which he used to bash out a piece from the door, and seeing the key lying on the toilet floor, he unlocked the door and found Reeva slumped with her weight on the toilet bowl. She was not breathing. He held her, and at some point thought he heard her breathing. And so he pulled her into the bathroom before telephoning another resident of the estate, Mr Stander, (the phone call was made at 3:19) followed by the emergency number of Netcare 911, a paramedic organisation (at 3:20), and then the estate's security (some 90 seconds later). He thereafter carried Reeva down the stairs where he was found, first by Mr Stander and shortly thereafter by Dr Stipp, when they arrived at the house.

[17] With ample justification, the court found the accused to have been 'a very poor witness'. His version varied substantially. At the outset he stated that he had fired the four shots 'before I knew it' and at a time when he was not sure if there was somebody in the toilet. This soon changed to a version that he had fired as he believed that whoever was in the toilet was going to come out to attack him. He later changed this to say that he had never intended to shoot at all; that he had not fired at the door on purpose and that he had not wanted to shoot at any intruder coming out of the toilet. In the light of these contradictions, one really does not know what his explanation is for having fired the fatal shots, an issue to which I shall revert in due course. There were other inherent improbabilities in his version, some of which were mentioned by the trial court in its judgment.

[18] It is not necessary to examine the accused's credibility in any greater detail for purposes of this judgment as, despite these deficiencies, the trial court concluded that it had not been shown that the State's version ─ that there had been an argument between the accused and the deceased which had led to her fleeing to lock herself into the toilet and him then shooting her through the door ─ was true beyond a reasonable doubt; and that the State had not shown that the accused had fired at the toilet door for any reason other he had thought there was an intruder behind it. It therefore concluded that it could not be said that the accused did not entertain a genuine belief that there was an intruder in the toilet who posed a threat to him, and therefore 'he cannot be found guilty of murder *dolus directus*'. Although it is not clear from the judgment, this finding appears to have been based on the reasoning that the accused could not be found guilty of murder with direct intent as he had not known Reeva was in the toilet (the correctness of this latter conclusion was not an issue raised in this appeal).

[19] Importantly, the trial court went on to find that the accused, in shooting as he did, had not done so with so-called legal intent or *dolus eventualis* (an issue that lies at the heart of this appeal). However, it found that the shooting had been unlawful and that, although the accused had not had the necessary intention to kill the deceased, he had done so negligently and was therefore guilty of culpable homicide. The accused was thereupon sentenced to five years' imprisonment capable of being converted to correctional supervision under s 276(1)(*i*) of the CPA.

[20] It was pursuant to this finding that the State sought, and obtained, the trial court's leave to appeal to this court in respect of questions of law reserved under s 319 of the CPA. The questions, so reserved, were the following:

'1.Whether the principles of *dolus eventualis* were correctly applied to the accepted facts and the conduct of the accused, including error *in objecto.*

2. Whether the court correctly conceived and applied the legal principles pertaining to circumstantial evidence and/or pertaining to multiple defences by an accused.

3. Whether the court was correct in its construction and reliance on an alternative version of the accused and that this alternative version was reasonably possibly true.'

[21] It is probably wise at this stage to briefly explain the ambit of this appeal and what this court may consider. As a general rule, an appeal is a complete rehearing, without the leading of evidence, in which a trial court's conclusions of both fact and law may be challenged by having regard to the evidence on record. As a general rule, then, a person convicted of a crime may, on appeal, challenge the credibility of the witnesses who testified at the trial as well as the factual findings made by the trial court upon which the conviction was based. The trial court's conclusions on matters of law relevant to the conviction may also be disputed.

[22] However, in a case such as this, where effectively the State seeks to appeal against the acquittal of the accused (in this instance on the charge of murder) and the appeal is brought under the provisions of s 319 of the CPA, different considerations apply. Of course the State may well feel justifiably aggrieved by a trial court acquitting an accused person when, on the facts of the case, a conviction should have followed, but in such a case, as was observed by Corbett CJ in *Magmoed*[8] 'the traditional policy and practice of our law' is that an acquittal by a competent court in a criminal case is final and conclusive and may not be questioned in any subsequent proceeding.

[23] Consequently, as opposed to an accused who has the benefit of appealing against a conviction based on alleged incorrect factual findings, the State may not appeal against an acquittal based solely on findings of fact. And as Chaskalson CJ pointed out in *Basson*:[9]

'Prior to 1948 [the State] could also not appeal against a finding of law made in a trial before a Judge which resulted in the acquittal of an accused person. In 1948 the Criminal Procedure Act then in force was amended to make provision for the reservation of questions of law at the instance of the State in terms substantially similar to s 319 of the present Act.'

[24] In the light of these decisions, the State has no right to appeal save where there is a statutory right bestowed on it to do so. In this instance its right is limited to the three questions of law reserved, quoted above. This court cannot interfere, for example, with the factual decision made by the trial court rejecting the State's version that there had been a disagreement between the appellant and the deceased that led the deceased to hide herself in the toilet to escape from him, before being shot. The matter must therefore proceed, as was accepted by the State, on the basis both that its rejected version cannot be reconsidered and that it has not been shown that the

[8] *Magmoed v Janse van Rensburg & others* 1993 (1) SACR 67 (A) at 101g-i.
[9] *S v Basson* 2004 (1) SACR 285 (CC) para 108.

accused had acted with the direct intention to kill the deceased. The State's case before this court therefore revolved primarily on whether the trial court had erred in regard to the issue of *dolus eventualis*.

[25] It is necessary to explain certain of the issues that arise for consideration in a murder case. Over the years jurists have developed what has been referred to as the 'grammar of criminal liability'.[10] As already mentioned, murder is the unlawful and intentional killing of another person. In order to prove the guilt of an accused on a charge of murder, the State must therefore establish that the perpetrator committed the act that led to the death of the deceased with the necessary intention to kill, known as *dolus*. Negligence, or *culpa*, on the part of the perpetrator is insufficient.

[26] In cases of murder, there are principally two forms of *dolus* which arise: *dolus directus* and *dolus eventualis*. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with *dolus directus* if he or she committed the offence with the object and purpose of killing the deceased. *Dolus eventualis*, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to *dolus directus*, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of *dolus eventualis* arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must

[10] See CR Snyman *Criminal Law* 5th ed (2008) at 29.

act 'reckless as to the consequences' (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been 'reconciled' with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.

[27] These are the basic principles to be borne in mind in considering the first of the three legal questions reserved for decision in this appeal. The first relates specifically to whether the trial court properly applied these principles to the facts that it had found had been proved. In considering whether it did, it is necessary to quote fairly fully the trial court's reasoning relevant to whether the accused had acted with *dolus eventualis* when he fired the fatal shots through the door of the toilet cubicle. In this regard it said the following:

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

1. Did the accused subjectively foresee that *it could be the deceased behind the toilet door* and

2. Notwithstanding the foresight did he then fire the shots, thereby reconciling himself to the possibility that *it could be the deceased in the toilet*?

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

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

After recording that the accused had told the persons who first arrived on the scene, including Dr Stipp and the police, that he had shot the deceased believing that she was an intruder, the court continued:

'Counsel for the defence correctly argued that it was highly improbable that the accused would have made this up so quickly and be consistent in his version, even at the bail

application before he had access to the police docket and before he was privy to the evidence on behalf of the State at the bail application.

The question is: Did the accused foresee the possibility of the resultant death, yet persisted in his deed reckless whether death ensued or not? In the circumstances of this case the answer has to be no. Although during argument counsel for the state referred to "a good grouping" of bullets fired at the door as proof that there was intention to kill the person behind the door there was nothing in the evidence to support this.

How could the accused reasonably have foreseen that the shots he fired would kill the deceased or whoever was behind the door? Clearly he did not subjectively foresee this as a possibility that he would kill the person behind the door, let alone the deceased, as he thought she was in the bedroom at the time. The version of the accused was that had he intended to kill the person behind the door he would have aimed higher at chest level. This was not contradicted.

To find an intention to kill the deceased, in particular, would be tantamount to saying, inter alia, that the accused's reaction after he realised that he had shot the deceased was faked; that he was play acting merely to delude the onlookers at the time.

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

There was nothing to gainsay that observation and this court has not been given any reason to reject it and we accept it as true and reliable. This court also accepts that there was no intention to kill the person behind the door. It follows that the accused's erroneous belief that his life was in danger excludes *dolus*. The accused, therefore cannot be found guilty of murder *dolus eventualis*.' (The italicised emphasis is mine.)

[28] I find the reasoning in this passage to be confusing in various respects. The rhetorical question 'How could the accused reasonably have foreseen that the shots he fired would kill the deceased or whoever was behind the door?' wrongly applies an objective rather than a subjective approach to the question of *dolus*. The issue was not what was reasonably foreseeable when the accused

fired at the toilet door but whether he actually foresaw that death might occur when he did so. As Holmes JA emphasised in *Sigwahla*:[11]

'The distinction must be observed between what actually went on in the mind of the accused and what would have gone on in the mind of a [reasonable person] in the position of the accused. In other words, the distinction between subjective foresight and objective foreseeability must not become blurred.'

Moreover, the question indicates that the court found the presence of a person behind the door not to have been reasonably foreseeable; but this is at odds with its subsequent conclusion that the accused was guilty of culpable homicide on the basis that a reasonable person in the same circumstances would have foreseen the reasonable possibility that the shots fired at the door of the toilet might kill whoever was in the toilet.

[29] Furthermore, the finding that the accused had not subjectively foreseen that he *would kill* whoever was behind the door and that if he had he intended to do so he would have aimed higher than he did, conflates the test of what is required to establish *dolus directus* with the assessment of *dolus eventualis*. The issue was not whether the accused had as his direct objective the death of the person behind the door. What was required in considering the presence or otherwise of *dolus eventualis* was whether he had foreseen the possible death of the person behind the door and reconciled himself with that event. The conclusion of the trial court that the accused had not foreseen the possibility of death occurring as he had not had the direct intent to kill, shows that an incorrect test was applied.

[30] There was a further fundamental error. It is apparent from the extract of the judgment quoted above, in particular the two questions posed at the outset and the passages that I have emphasized, that the trial court's consideration of

[11] *S v Sigwahla* 1967 (4) SA 566 (A) at 570C-E.

dolus eventualis centred upon whether the accused knew that the person in the toilet cubicle was Reeva, and its conclusion that *dolus eventualis* had not been proved was premised upon an acceptance that, as he had thought Reeva was in the bedroom, he did not foresee that she was the person in the toilet. Simply put, the finding was that as the accused did not realise that it was Reeva in the toilet, he did not foresee that his action in shooting could cause her death and he could not be held guilty of her murder.

[31] This finding goes to the heart of the first question of law reserved ie whether the principles of *dolus eventualis*, including so-called '*error in objec*to', were properly applied. In this regard, it is necessary to stress that although a perpetrator's intention to kill must relate to the person killed, this does not mean that a perpetrator must know or appreciate the identity of the victim. A person who causes a bomb to explode in a crowded place will probably be ignorant of the identity of his or her victims, but will nevertheless have the intention to kill those who might die in the resultant explosion. Reverting to the lexicon of a lawyer, this is known as intent in the form of so-called '*dolus indeterminatus*' ie the killing of an indeterminate person.[12] It is not a form of intention apart from *dolus directus* or *dolus eventualis*; it is merely a label meaning that the perpetrator's intention is directed at a person or persons of unknown identity. A perpetrator can therefore act with *dolus indeterminatus* simultaneously with *dolus eventualis*. For example, as Snyman points out,[13] and as this court has recently observed,[14] our courts have consistently held persons engaged in a wild shootout in the course of an armed robbery to be liable for murder on the basis of their having acted with both *dolus eventualis* and *dolus indeterminatus* where persons were killed as a result.[15]

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[12] Compare eg *S v Mavhungu* 1981 (1) SA 56 (A) at 66H.
[13] CR Snyman, *Criminal Law* 5ed (2008) at 200 - 201.
[14] *Nkosi v The State* (20727/14) [2015] ZASCA 125 (22 September 2015) para 5.
[15] See eg *S v Nhlapo & another* 1981 (2) SA 744 (A).

[32] What was in issue, therefore, was not whether the accused had foreseen that Reeva might be in the cubicle when he fired the fatal shots at the toilet door but whether there was a person behind the door who might possibly be killed by his actions. The accused's incorrect appreciation as to who was in the cubicle is not determinative of whether he had the requisite criminal intent. Consequently, by confining its assessment of *dolus eventualis* to whether the accused had foreseen that it was Reeva behind the door, the trial court misdirected itself as to the appropriate legal issue.

[33] This conclusion shows the fallacy in the submission of counsel for the accused that the first question of law raised solely a question of fact. Since the question as to the form of the intention of an accused in a case of murder invokes a factual enquiry, at best for the accused the first question reserved invokes an issue of mixed fact and law. As there was an incorrect application of the legal issue, the first point of law reserved must be determined in favour of the State.

[34] A further issue which arises in respect of *dolus eventualis* overlaps with the second point of law reserved for decision, namely whether the legal principles relating to circumstantial evidence were correctly applied. As this court has pointed out,[16] while the subjective state of mind of an accused person in a case such as this is an issue of fact that can often only be inferred from the circumstances surrounding the infliction of the fatal injury, the inference to be properly drawn must be consistent with all the proved fact. It is thus trite that a trial court must consider the totality of the evidence led to determine whether

[16] Inter alia, in *S v Dlodlo* 1966 (2) SA 401 (A) at 405G-H.

the essential elements of a crime have been proved.[17] As Nugent J stated in *Van der Meyden*,[18] a passage oft cited with approval in this court:[19]

'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[35] In *Magmoed* one of the parties had been an accused in previous criminal proceedings during which he had made certain vital admissions relevant to the issues in the subsequent proceedings. An application to use the evidence in the previous proceedings was ruled inadmissible, and the issue arose whether this ruling was an issue of fact or of law. Corbett CJ held that the trial court, which had ruled the evidence to be inadmissible, had erred as a matter of law, and that 'it would have served the due administration of justice' for the evidence to have been admitted.[20]

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

[17] *S v Libazi & another* 2010 (2) SACR 233 (SCA) para 17.
[18] *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449j-450c.
[19] Eg *S v Mdlongwa* 2010 (2) SACR 419 (SCA) para 11.
[20] At 827G.

account not be taken of any evidence placed before court which ought to be weighed in the scales.

[37] Illustrative of this, is the decision of the Canadian Supreme Court in *R v B,*[21] to which counsel for both sides referred us. The accused in that case had been charged with assault, an allegation they denied. The trial judge acquitted them but the Court of Appeal allowed the Crown's appeal and ordered a new trial. In doing so, it acknowledged that under the Canadian Criminal Code, similar to the position in this country, it was not open to an appellate court to consider the reasonableness of a trial judge's findings of fact, but stated it could determine whether the trial court had properly directed itself to all the relevant evidence bearing on the relevant issues. It held that the trial judge had ignored certain evidence, or failed to mention it and, in doing so, displayed a lack of appreciation of the relevant evidence which could have had a bearing on the result. This justified an appeal court interfering with the decision. In a further appeal, this time by the accused, the Supreme Court of Canada confirmed the order of the Court of Appeal. In doing so, Wilson J stated that although it had not been open for the Court of Appeal to overturn the acquittal if it found it to be unreasonable or unsupported by the evidence, it could do so on questions of law and that an appeal would lie where the question of law originates from the trial judge's conclusion that he or she is not convinced of the guilt of the accused because of an erroneous approach to, or treatment of, the evidence adduced at trial.[22] After referring to the judgment of the majority of the Canadian Supreme Court in *Harper*[23] in which the court had held that where the record, including the reasons for judgment, discloses 'a lack of appreciation of relevant evidence and more particularly the complete disregard of such

[21] *R v B* (G) (1990) 56 CCC (3d) 181 (SCC); (1990) 2 SCR 57.
[22] Para 28.
[23] *Harper v R* [1982] 1 SCR 2, 65 CCC (2d) 193, 133 DLR (3d) 546 40 NR 255.

evidence' a court of appeal could intervene, Wilson J cited with approval[24] the following comment of Marshall JA in a judgment of the Newfoundland Court of Appeal in *R v Roman*,[25] a case also involving an acquittal (a passage which counsel for the accused conceded in this court would also amount to an accurate reflection of our law):

'There is a distinction between reassessment by an appeal court of evidence for the purpose of weighing its credibility to determine culpability on the one hand and, on the other, reviewing the record to ascertain if there has been an absence of appreciation of relevant evidence. The former requires addressing questions of fact and is placed outside the purview of an appellate tribunal . . . the latter enquiry is one of law because if the proceedings indicate a lack of appreciation of relevant evidence, it becomes a reviewable question of law as to whether this lack precluded the trial judge from effectively interpreting and applying the law.'

[38] In the present instance, although the question of the accused's intention at the relevant time is one of fact to be determined by inference, there regrettably does appear to have been such 'an absence of appreciation of material evidence' relevant to that issue. In this regard, the failure of the court to take into account the evidence of Capt Mangena , a police forensic expert, whose evidence as to the reconstruction of the crime scene was found by the court to have been 'particularly useful', is of particular importance. Having regard to the position of the bullet holes in the door, the marks the bullets left in the toilet cubicle and the position of the injuries on the deceased's body, and after making use, inter alia, of laser technology, he determined that the deceased must have been standing behind the door when she was first shot and then collapsed down towards the toilet bowl. Although the precise dimensions of the toilet cubicle do not appear from the record, it is clear from the photographs that it is extremely small. And it is also apparent from the reconstruction and the photographs, demonstrating with laser beams and steel rods the path each bullet had travelled,

[24] Para 34.
[25] *R v Roman* (1987), 38 CCC (3d) 385, 66 Nfld. & PEIR 319, 204 APR 319.

that all the shots fired through the door would almost inevitably have struck a person behind it. There had effectively been nowhere for the deceased to hide.

[39] In addition, Capt Mangena testified that the Black Talon ammunition the accused had used was specifically designed for the purpose of self-defence. It would penetrate a wooden door without disintegrating but would mushroom on striking a soft, moist target such as human flesh, causing devastating wounds to any person who might be hit. The veracity of this is borne out by the photographs depicting the injuries the deceased sustained, correctly described by the trial court as being 'horrendous'.

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

[41] Consequently, the first two questions reserved for decision must be answered in favour of the prosecution to the extent that I have indicated. I thus turn to the third question, namely, whether the trial court was correct 'in its construction and reliance of an alternative version of the accused and that this alternative version was reasonably possibly true'. The question as posed is vague. Questions reserved for decision under s 319 of the CPA should be clearly formulated so that this court can identify with precision the legal issue it is called upon to decide. At best for the State, the question asks no more than whether the accused's version accepted by the trial court was reasonably

possibly true. This is a factual decision. As already set out, and on the strength of the authorities to which I have referred, a finding of fact falls beyond the scope of what this court may decide under s 319. In any event, in the light of my findings in regard to the first two questions, the third question, even if it can be construed as being a point of law, seems superfluous.

[42] To summarise, in regard to the questions of law reserved for decision of this court:

(1) The principles of *dolus eventualis*, including *error in objecto*, were incorrectly applied to the facts found to be proved relevant to the conduct of the accused; and

(2) The trial court did not correctly conceive and apply the legal principles pertaining to circumstantial evidence.

[43] The question then becomes, what should this court do in the light of these findings? The powers of a court in the case of an appeal on a question of law reserved are set out in s 322 of the CPA as follows:

'(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may-

(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or

(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

(c) make such other order as justice may require:

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.

. . . .

(4) Where a question of law has been reserved on the application of a prosecutor in the case of an acquittal, and the court of appeal has given a decision in favour of the prosecutor, the court of appeal may order that such of the steps referred to in section 324 be taken as the court may direct.'

[44] Under s 324 of the CPA, referred to in s 322(4), where there has been a misdirection of law, as has occurred in this case, proceedings in respect to the same offence may again be instituted before another judge and assessors. Accordingly, it is a permissible option for this court to set aside the conviction of culpable homicide on count one of the indictment and order that the accused be tried *de novo* on that count. However, given the protracted nature of the trial that has already taken place, the issues that were involved, the time that has already elapsed and the unfairness that may result if witnesses have once again to testify,[26] it would seem to me to be wholly impracticable and not in the public interest to follow that course. Indeed neither side pressed for such an order.

[45] Counsel for the accused drew our attention to the fact that the accused has already served the period of direct imprisonment envisaged by the period of correctional supervision imposed upon him by the trial court, and argued that apart from answering the questions of law, this court should exercise its discretion under s 322 to make no further order. However, in my view, that too is undesirable. The interests of justice require that persons should be convicted of the actual crimes they have committed, and not of lesser offences. That is particularly so in crimes of violence. It would be wrong to effectively think away the fact that an accused person is guilty of murder if he ought to have been convicted of that offence.

[26] Compare *Magmoed* at 827I-J.

[46] In my view, the option which most readily presents itself as being in the interests of justice is to consider whether on the facts found proved, the trial court erred in drawing the inference it did as to *dolus eventualis.* This is so as in an appeal of this nature this court is in as good a position as the trial court in drawing inferences of fact from proven facts.[27] In my view, then, the interests of justice require this court on an acceptance of the facts found proved, if of the view that the incorrect conclusion was reached in respect of *dolus*, to set aside the conviction of culpable homicide on count 1.

[47] The pertinent issue then becomes whether, on the primary facts found proved, considering all of the evidence relevant to the issue, and applying the correct legal test, the inference has to be drawn that the accused acted with *dolus eventualis* when he fired the fatal shots. In this regard the following observation of Brand JA in *Humphreys* is to the point:[28]

'[L]ike any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.'

[48] In arguing that the State had failed to show that the accused lacked the necessary subjective intention in respect of both elements of *dolus eventualis*, counsel for the accused emphasised the accused's physical disabilities, the fact that he had not been wearing his prostheses at the time and that he had thus been

[27] *R v Dhlumayo* 1948 (2) SA 677 (A) at 705-6, *S v Crossberg* 2008 (2) SACR 317 (SCA) para 149 and *Minister of Safety and Security & others v Craig & others NNO* 2011 (1) SACR 469 (SCA) para 58.
[28] *S v Humphreys* 2015 (1) SA 491 (SCA) para 13.

particularly vulnerable to any aggression directed at him by an intruder. He also placed considerable emphasis on the psychiatric evidence that the accused suffers from a general anxiety disorder, and would become anxious very easily in a situation of danger, although he also has a 'fight rather than flight' reaction. The argument appears to have been that in the circumstances that prevailed, the accused may well have fired without thinking of the consequences of his actions.

[49] In my view this cannot be accepted. On his own version, when he thought there was an intruder in the toilet, the accused armed himself with a heavy calibre firearm loaded with ammunition specifically designed for self-defence, screamed at the intruder to get out of his house, and proceeded forward to the bathroom in order to confront whoever might be there. He is a person well-trained in the use of firearms and was holding his weapon at the ready in order to shoot. He paused at the entrance to the bathroom and when he became aware that there was a person in the toilet cubicle, he fired four shots through the door. And he never offered an acceptable explanation for having done so.

[50] As a matter of common sense, at the time the fatal shots were fired, the possibility of the death of the person behind the door was clearly an obvious result. And in firing not one, but four shots, such a result became even more likely. But that is exactly what the accused did. A court, blessed with the wisdom of hindsight, should always be cautious of determining that because an accused ought to have foreseen a consequence, he or she must have done so. But in the present case that inference is irresistible. A person is far more likely to foresee the possibility of death occurring where the weapon used is a lethal firearm (as in the present case) than, say, a pellet gun unlikely to do serious harm. Indeed, in this court, counsel for the accused, while not conceding that the trial court had erred when it concluded that the accused had not subjectively

foreseen the possibility of the death of the person in the toilet, was unable to actively support that finding. In the light of the nature of the firearm and the ammunition used and the extremely limited space into which the shots were fired, his diffidence is understandable.

[51] In these circumstances I have no doubt that in firing the fatal shots the accused must have foreseen, and therefore did foresee, that whoever was behind the toilet door might die, but reconciled himself to that event occurring and gambled with that person's life. This constituted *dolus eventualis* on his part, and the identity of his victim is irrelevant to his guilt.

[52] As a final counter to the State's case, it was argued that although the accused had not acted in private or so called 'self-defence' ─ there had in fact been no attack upon him that he had acted to ward off ─ he had genuinely but erroneously believed that his life was in danger when he fired the fatal shots. As opposed to what is commonly known as self-defence, this is so-called 'putative' private or self-defence. The principles relevant to these two defences were authoritatively dealt with by this court in *De Oliveira*,[29] and were explained by Smalberger JA as follows:

'The test for private defence is objective ─ would a reasonable man in the position of the accused have acted in the same way (*S v Ntuli* 1975 (1) SA 429 (A) at 436E). In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus* in which case liability for the person's death based on intention will also be excluded; at worst for him he can then be convicted of culpable homicide.

[29] *S v De Oliveira* 1993 (2) SACR 59 (A) 63i-64b.

On appeal the unlawfulness of the appellant's conduct was not in issue. Accordingly the only issue was whether the State had proved beyond all reasonable doubt that the appellant subjectively had the necessary intent to commit the crimes of which he was convicted, in other words, that he did not entertain an honest belief that he was entitled to act in private defence . . .'

[53] The immediate difficulty that I have with the accused's reliance upon putative private defence is that when he testified, he stated that he had not intended to shoot the person whom he felt was an intruder. This immediately placed himself beyond the ambit of the defence, although as I have said, his evidence is so contradictory that one does just not know his true explanation for firing the weapon. His counsel argued that it had to be inferred that he must have viewed whoever was in the toilet as a danger. But as was pointed out in *De Oliviera*,[30] the defence of putative private defence implies rational but mistaken thought. Even if the accused believed that there was someone else in the toilet, his expressed fear that such a person was a danger to his life was not the product of any rational thought. The person concerned was behind a door and although the accused stated that he had heard a noise which he thought might be caused by the door being opened, it did not open. Thus not only did he not know who was behind the door, he did not know whether that person in fact constituted any threat to him. In these circumstances, although he may have been anxious, it is inconceivable that a rational person could have believed he was entitled to fire at this person with a heavy calibre firearm, without taking even that most elementary precaution of firing a warning shot (which the accused said he elected not to fire as he thought the ricochet might harm him). This constituted prima facie proof that the accused did not entertain an honest and genuine belief that he was acting lawfully, which was in no way disturbed by his vacillating

[30] *S v De Oliveira* 1993 (2) SACR 59 (A).

and untruthful evidence in regard to his state of mind when he fired his weapon.[31]

[54] In order to disturb the natural inference that a person intends the probable consequences of his actions, the accused was required to establish at least a factual foundation for his alleged genuine belief of an imminent attack upon him. This the accused did not do. Consequently, although frightened, the accused armed himself to shoot if there was someone in the bathroom and when there was, he did. In doing so he must have foreseen, and therefore did foresee that the person he was firing at behind the door might be fatally injured, yet he fired without having a rational or genuine fear that his life was in danger. The defence of putative private or self-defence cannot be sustained and is no bar to a finding that he acted with *dolus eventualis* in causing the death of the deceased.

[55] In the result, on count 1 in the indictment the accused ought to have been found guilty of murder on the basis that he had fired the fatal shots with criminal intent in the form of *dolus eventualis*. As a result of the errors of law referred to, and on a proper appraisal of the facts, he ought to have been convicted not of culpable homicide on that count but of murder. In the interests of justice the conviction and the sentence imposed in respect thereof must be set aside and the conviction substituted with a conviction of the correct offence.

[56] Of course the accused has now served a portion of the sentence imposed upon him in respect of the lesser offence of culpable homicide. But the issue of what would be an appropriate sentence was not debated before this court, quite properly, particularly in the light of the Constitutional Court's judgments in *Nabolisa*[32] and *Bogaards*[33] as the matter must be sent back to the trial court for

[31] Compare *De Oliveira* at 64H-65C.
[32] *S v Nabolisa* 2013 (2) SACR 221 (CC) para 82.

sentence to be imposed afresh. In doing so, obviously whatever punishment has already been served by the accused in respect of the incorrect conviction of culpable homicide will be taken into account.

[57] Before closing, it is necessary to make a final comment. The trial was conducted in the glare of international attention and the focus of television cameras which must have added to the inherently heavy rigors that are brought to bear upon trial courts in conducting lengthy and complicated trials. The trial judge conducted the hearing with a degree of dignity and patience that is a credit to the judiciary. The fact that this court has determined that certain mistakes were made should not be seen as an adverse comment upon her competence and ability. The fact is that different judges reach different conclusions and, in the light of an appeal structure, those of the appellate court prevail. But the fact that the appeal has succeeded is not to be regarded as a slight upon the trial judge who is to be congratulated for the manner in which she conducted the proceedings.

[58] The following order is made:

1 The first two questions of law reserved are answered in favour of the Director of Public Prosecutions.

2 The accused's conviction and sentence on count 1 are set aside and replaced with the following:

'Guilty of murder with the accused having had criminal intent in the form of *dolus eventualis*.'

3 The matter is referred back to the trial court to consider an appropriate sentence afresh in the light of the comments in this judgment.

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[33] *S v Bogaards* 2013 (1) SACR 1 (CC) paras 74 and 75.

L E Leach
Judge of Appeal

Appearances:

For the Appellant:	G C Nel (with him A Johnson, DWM Broughton and JS Grant)
Instructed by:	Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein
For the Respondent:	B Roux SC (with him S Jackson and R Adams)
Instructed by:	Ramsey Webber, Johannesburg Lovius Block, Bloemfontein