THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 901/2016

In the matter between

GLOUDINA JOHANNA BOTHA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Botha v S* (901/2016) [2017] ZASCA 148 (8 November 2017)

Coram: Cachalia JA and Mokgohloa, Gorven, Mbatha and Rogers AJJA

Heard: **15 August 2017**

Delivered: **8 November 2017**

Summary: Criminal procedure – refusal of discharge in terms of s 174 – court a quo did not act irregularly by refusing discharge – there was evidence on which a reasonable court might convict.

Criminal procedure – reopening of the State's case – State failed to establish grounds for reopening – court a quo's decision to allow reopening irregular (Mokgohloa AJA and Mbatha AJA dissenting).

Criminal procedure – whether State proved beyond reasonable doubt that appellant shot deceased and that deceased did not commit suicide – excluding evidence adduced pursuant to irregular reopening, such guilt established (Gorven AJA, Cachalia JA concurring, Rogers AJA dissenting)

On all the evidence, including evidence adduced pursuant to reopening, such guilt established (Mbatha AJA, Mokgohloa concurring).

Sentence – 12 years' imprisonment strikingly inappropriate – mitigating circumstances, including prolonged abuse – appellant not a danger to society – matter remitted to trial court for reconsideration of sentence in terms of s 276(1)(h).

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Phatshoane J, sitting as court of first instance):

1 The appeal against conviction is dismissed.
2 The appeal against the sentence is upheld.
3 The sentence imposed by the court a quo is set aside.
4 The matter is remitted to the court a quo for it to take the steps set out in s 276A(1) (*a*) of the Criminal Procedure Act 51 of 1977 and to thereafter impose sentence afresh.

JUDGMENT

Mbatha AJA (Mokgohloa AJA concurring)

[1] The appellant, Mrs Gloudina Botha, was charged and convicted by the Northern Cape Division, Kimberley on 10 December 2015 on one count of murder read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLA). The court a quo found in terms of s 51(3) of the CLA that there were substantial and compelling circumstances and imposed a sentence of 12 years' imprisonment. With leave of the court a quo, the appellant appeals to this Court against both conviction and sentence.

[2] On Saturday the evening of 10 July 2010 at about 19h00 the deceased retired early to bed. The appellant joined the deceased in bed shortly thereafter.

The following morning only the appellant emerged alive. The deceased had died as a result of two gunshot wounds to the head.

[3] The deceased and the appellant lived on a farm in Kareehoek, Britstown in the Karoo. The deceased was a prominent and successful farmer in the area. It emerged from the evidence that the deceased treated his family with cruelty, in particular his stepsons, biological son and the appellant. The appellant was always at the receiving end of his brutality. The deceased was known for his aggression and cruelty not only to his immediate family but also within the extended family and in the community of Britstown.

[4] It is common cause that on a Friday, 9 July 2010, at lunchtime, the deceased was in a terrible aggressive mood after learning of the loss of sheep, which had died after eating a poisonous plant in one of the camps under the control of his stepson, Pieter. The appellant and the deceased left together after lunchtime to go to the camp where the carcasses were. In his enraged state, the deceased almost ran Pieter down with the bakkie, as Pieter had refused to proceed with him to the camp. It was also during this trip that he assaulted the appellant in the presence of Pieter. The appellant was also traumatised by the reckless way that the deceased drove that afternoon as the deceased just drove through the closed gates. Upon their return at about 18h00 when the appellant complained to him that she would never drive with him again, the deceased went berserk, hit her with a fist on her chest, slapped her on her face and when she fell down he kicked her to a point that she wet herself. In his fuming state that afternoon, the deceased had driven up to Casper Byleveldt, his daughter's fiancée, forcing him against the wall with his bakkie to a point that he could not move forward or backwards. This incident had unsettled Casper to a point that he had considered leaving the farm with Loudine. He had no idea what caused the deceased to act so irrationally.

[5] The deceased retired very early for bed at about 19h00 after watching a rugby match. He had been very quiet and morbid the whole afternoon. That was the last time that Loudine and Casper saw the deceased alive. On the morning of 11 July 2010, Loudine and Casper had left for Vioolkop farm at about 08h15. Shortly thereafter they received a call from the appellant informing them that the deceased had shot himself. This led to the arrival of Leon van Heerden, who went inside the farmhouse with Casper and confirmed that the deceased was dead. The police arrived and processed the crime scene. Riaan and Nelia Botha, cousins to the deceased and other members of the family also congregated at the deceased's home.

[6] As a result of the fatal shooting of the deceased, the appellant was charged with murder. The State had called a number of witnesses. It is unnecessary to delve into their evidence fully.

[7] The State's case is based on circumstantial evidence. Therefore the all enduring of logic as stated in *R v Blom*[1] should be applied.[2] The appellant went to bed with the deceased and the following morning he was dead. The appellant tested positive for the primer residue and the deceased did not, even though he had allegedly fired two shots to his head, in the process killing himself. In the light thereof, the court a quo concluded that she had a case to answer.

[8] The appellant related as to what happened when she joined the deceased in bed. Although they were exhausted, they could not fall asleep and the deceased conversed the whole night about various issues. He relived his early

[1] *R v Blom* 1939 AD 188 at 202.

[2] '(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

childhood life without maternal love, expressed his pain about his sons, Nannie and Phillip who had left the farm. He expressed his hope that one day when he is ‘gone’, Phillip would return to the farm. The deceased also appeared to have come to terms with the fact that Loudine was to marry Casper, the farm manager, despite their disapproval of the marriage. They discussed a number of issues including where she would live after his death and the deceased informed her about the letter of wishes left for her and Riaan Botha, which was attached to his last Will in the safe. The deceased had expressed his fear of dying from brain cancer like his mother, as he frequently suffered from severe headaches.

[9] The appellant contended that the conversation continued into the early hours of the morning when the deceased suddenly complained of a severe headache and requested the appellant to get him a disprin from the kitchen. As it was a bitter cold night, before going downstairs she remarked to the deceased that his hands were very cold and the deceased responded that his hands were also prickly as if they had needles in them. The appellant suggested that he wear the gloves that he received as a gift from a friend, which she assisted him to put on.

[10] The appellant then proceeded downstairs to the kitchen and on her way back to the bedroom, carrying a tumbler containing the dissolved disprin, she heard a gunshot whilst at the top of the staircase. She entered the bedroom and went to sit next to the deceased on his side of the bed. She noticed a trickle of blood behind the deceased right ear. The appellant enquired as to what happened and the deceased responded by saying that he suffered a stroke. The deceased then lifted his head and drank the dissolved disprin, whilst he held the firearm in his right hand.

[11] The appellant tried to remove the firearm from the deceased hand, but failed due to her arthritis. She testified further that the deceased told her to let go of the firearm, lest she causes danger to herself.

[12] The appellant could not recall for how long she sat next to the deceased, but she testified that the deceased enquired about the whereabouts of their children and that the deceased was completely incoherent at that stage. The deceased then pointed the firearm at the appellant, told her to run and call their children. The appellant changed out of her night clothes, dressed herself in civilian clothing and went out of the bedroom to call Loudine.

[13] As she was descending the steps, but before reaching the front door, she heard the gunshot go off for the second time. She immediately returned to their bedroom and on the bed she noticed a lot of blood and the deceased had sustained a head wound. The appellant sat down next to the deceased, took the firearm from his hand, opened it to see if all the cartridges had been fired and checked how many rounds of ammunition were left in the firearm.

[14] The appellant then removed the gloves from the deceased hands in order to check for a pulse, but soon realised that the deceased was dead. The appellant touched the deceased's face, put the firearm down and walked out of the bedroom to call Loudine.

[15] On Loudine and Casper's return, they waited in Casper's house, until the arrival of Leon and the Police. It was the appellant's evidence that before they entered Casper's house, she requested Casper to go to their bedroom in the farmhouse to fetch a bundle of her night clothes, which were lying on the floor at the foot of the bed. These night clothes were placed in the washing machine by the appellant. The appellant confirmed relating to Nelia Botha a few days

later, that she had found the pair of gloves that the deceased wore the night of his death, from the washed laundry, amongst her night clothes.

[16] At the plea stage the appellant offered no explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977 (the CPA), preferring to exercise her right to remain silent. However, it became apparent early during the cross-examination of the state witnesses, that the appellant's defence was that the deceased committed suicide.

[17] In criminal proceedings the State bears the onus to prove the accused's guilt beyond a reasonable doubt. The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found on credible evidence, that the explanation is false.[3] The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. The appellant's conviction can only be sustained after consideration of all the evidence, and her version of the events is found to be false.

[18] The exact time of the shooting was never canvassed during trial. However, it can be accepted that the shooting of the deceased could not have been during the early hours of the morning when it was still dark, due to the fact that it was not disputed that the appellant's phone call to Loudine was after 08h15 in the morning on 11 July 2010. Had the shot been fired in the early hours of the morning, Loudine would have heard it.

[19] The appellant could not explain how the gloves that she had removed from the deceased's hands, after he allegedly shot himself ended up in the pockets of her night gown. There was no explanation as to why she had to remove both the gloves to check for a pulse. If she had removed the gloves, one

[3] *S v V* 2000 (1) SACR 453 (SCA) at 455B.

would have expected them to have been placed on the bed or on the floor, or on the side of the bed which is the side where the deceased was lying. No gloves were found on the crime scene. Her version is that the gloves must have found their way onto the pile of discarded nightwear. For this to be true she must coincidentally have thrown the gloves towards the end of the bed on the deceased side, so that they landed on the night clothes. At no stage did she testify that she threw the gloves away from the bed but her evidence was that she removed the gloves only. More confusing was how the gloves found their way into the pockets of her nightgown, as she had changed into civilian clothes before she went downstairs and before the deceased shot himself for the second time. The version of the appellant is improbable if not false.

[20] More improbable was her evidence in that she suggested that the deceased put on gloves in bed, instead of telling him to put his hands under the blanket. The appellant's version is improbable as Loudine and Leon had testified that the deceased never wore gloves even at day time.

[21] The appellant failed to explain why she did not seek help or assistance from her daughter, who was supposedly in the house, if indeed the shooting occurred in the early hours of the morning. Her conduct after the firing of the first and second shots is inconsistent with the conduct of a reasonable person placed in the same situation.

[22] There is also a question as to where the firearm came from. The appellant claimed not to have seen it anywhere in the room before coming back after the first shot, yet she heard the sound of a gunshot. It may have been in the deceased's bedside cabinet, but the deceased was found lying on her side of the bed where there is no drawer or cupboard. Therefore the deceased could not

have hidden the revolver inside the bedside table, which had no drawer. The irresistible inference to be drawn is that she was in possession of the firearm.

[23] Notwithstanding that the deceased shot himself for the second time, she carefully removed the duvet cover and placed it on a chair, just to sit next to the deceased instead of assisting her husband . She sat on the bed and counted the cartridges left in the firearm, instead of trying to get medical assistance for the deceased. More improbable, however, is her conduct after the shooting in that she took only the night clothes that she wore on the night in question and placed them in the washing machine, whereas the clothes that she wore the previous night lay in an untidy heap in the same room. If she was sensitive about the untidiness of the clothing and underwear being seen by police officers, it is surprising that she asked her daughter's fiancée to fetch her underwear and night clothes only and not the clothes of the previous day, which lay on the floor. Casper had denied that he had removed her night clothes from the bedroom at all. This is contrary to the evidence of Casper. According to Casper he never removed her night clothes from the bedroom at all.

[24] The version given by the appellant that she saw a trickle of blood behind the deceased's ear without mentioning the presence of the wound is improbable. The appellant testified that she sat next to him on the bed and tried to take the firearm from his hand. This would have given her an opportunity to observe the wound on the side of his head, particularly since she heard a gunshot.

[25] It is also common cause that though the key of the safe was kept in various places in the house, the deceased returned the keys to the appellant on the Saturday. There is no evidence that indicates that at any stage prior to the deceased retiring to bed, he had asked her for the key.

[26] The appellant went to great lengths to cover her actions by inventing the gloves story. The fetching and washing of her night clothes which coincidentally included the gloves in the pockets of her nightgown and also making sure that she relates this to Cornelia Botha, being her version as to what occurred on that fateful night. The conclusion that one comes to is that the appellant's version was false and in those circumstances it cannot reasonably be the truth. There are many improbabilities in her account coupled with the contradictory evidence from Casper and Cornelia regarding the gloves issue.

[27] Having considered the totality of the evidence, the probabilities and improbabilities, it is my view, that her version is false. The trial court cannot be faulted for rejecting her version as well.

[28] The letter of wishes dated 20 June 2010, with a heading 'Brief van wense aan trustees' and addressed to 'Koekie en Riaan' was read by Riaan and the appellant the day following the death of the deceased: It records as follows:

'Brief van Wense aan Trustees

Koekie en Riaan

1. Begrawe my in rante sonder enige seremonie so gou as moontlik.
2. Kinders Verdeling Inkomste:

Lo-Ami – Kareehoek. Estorte en Botterkraal

Loudine – Plotpan

Pieter – Good Hope en Wit Baku

Flip – Wildebeeskuil Brakendam

Koekie – Lang Memieskloof

Kareehoek almal wat hulle deel bydra tot die in standhouding van die plaas en dit moet instand gehou word soos ek dit gelaat het. Koekie kan in die hoof huis bly so lank as wat sy wil en daarna sal dit instand gehou word vir die hele familie.

Elke een sal moet of sy stuk voltyds boer anders sal dit deel van die Kareehoek opset word en die een sal sy inkomste verbeur indien een op Kareehoek bly sal hy sy deel van sy

inkomste op sy stuk kan kry as hy dit goed bestuur. Jo-Ami kan deeltyds op Kareehoek Estorte woon en sy hoef nie op haar stuk in SA woon nie. Geen een sal sy of haar huis aan iemand kan verhuur nie, maar indien een van sy of afstammelinge daarop voltyds boer sal hy geregtig wees op sy inkomste. Koekie ken haar deel en Kareehoek verhuur as sy wil of een van die kinders kan dit vir haar boer.
Die een wat op Kareehoek bly + een van die ander wat 'n deel van die bokke dan kan ook daar in deel. Ek sal dit graag wel laat behou vir die nageslag.
Flip sal moet sy voornneme bewys om deel van die besigheid te wil word anders sal ek wil hê hy moet uit gesluit bly ek voel hy was onder vreemde druk wat hy aan my gedoen het, maar as hy dit wil volhard vir sy vrou vrou en kind respekteer ek dit en sal nooit die seer kan vergeet wan hy aan my gedoen het nie, al het ek hom so bederf tot nadeel van die ander kinders nie.
Nannie ek voel vir jou jammer dat jy my heeltemal as stief Pa verwerp het en het gehoop jy sou my vergewe het vir wat ek aan jou gedoen het, maar jy het self jou ma wat soveel vir jou en Pieter opgeoffer het verwerp ek hoop jy maak met haar vrede sonder om eers terug te verwag en net vir haar te gee wat jy oor jare nie gedoen het nie.
Ek hoop een of almal sal die ideale wat ek vir die familie gehad voor te sit en gelyk maar ook hierdie pragtige besigheid vorentoe te vat.
God het my vergewe ek hoop almal van julle sal die ook kan doen.
Liefde Nico'

[29] The letter of wishes spoke directly to its recipients, 'Koekie' and Riaan. The letter stated where the deceased wished to be buried without ceremony, dealt with the estate and distribution thereof and ended with a note that God forgave him and that he hoped that they will be able to forgive him too.

[30] It was argued on the appellant's behalf that the letter of wishes supported the suicide scenario as against a homicide. The letter of wishes was only written on the advice of the deceased's accountant Mr Swiegers, otherwise it would have been non-existent. The contents of the letter were in line with the wishes of the deceased. It does not in any way suggest that the deceased wished to commit suicide.

[31] The trial court made credibility findings in respect of the state witnesses. In *S v Pistorius*[4] this Court expressed itself as follows:

'It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12.'The trial court has the enviable benefit of being steeped in the trial.'[5]

[32] Accordingly, I am satisfied that the court a quo's approach to the credibility finding of the State witnesses' evidence was correct. In the absence of any suggestion that the trial court in assessing the credibility of the State witnesses was wrong, this court is unable to interfere with the court a quo's finding.

[33] I now turn to the questions of law raised in the appeal. First, whether the appellant was entitled to be discharged at the close of the State's case in terms of s 174[6] of the CPA and second, whether the court a quo committed an irregularity when it permitted the State to reopen its case and lead further evidence. If the answer is in the positive, (in both scenarios), what the effect of such irregularity should be.

[34] The question whether the court a quo should have granted a discharge, entails an exercise of a discretion by the court a quo, which discretion must be exercised judicially.[7] It is my view that the court a quo correctly exercised its

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[4] *S v Pistorius* [2014] ZASCA 47; 2014 (2) SACR 314 (SCA).
[5] Para 30.
[6] 'If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty'
[7] In *S v Lubaxa* 2001 (2) SACR 703 (SCA) para 18, this Court held that where '. . . accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero*

discretion as the credibility of the witnesses play a very limited role in the s 174 application.

[35] As to the second question of law, this Court in dealing with a similar situation in *S v Ndweni & others*[8] said the following:

'An applicant seeking to re-open a case and lead further evidence will generally be required to satisfy the following requirements:

(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.'

[36] The court a quo may in the exercise of its discretion and at any stage of the proceedings, grant leave to a party to the proceedings to re-open its case. The State provided sufficient reasons for the application, such as the inexperience of the State advocate, which led to the failure to call certain material witnesses. The State indicated that it had started with the re-examination process of the exhumation of the deceased's body as the doctor who conducted the first autopsy was not a pathologist. The State also intended to recall certain state witnesses. This application, which was brought after the refusal of an application to discharge the appellant, cannot be said to be supplementing the State's case. It was in the interest of justice that the truth be told. The court a quo had already ruled that the appellant had a case to answer. In these circumstances there was no prejudice to the appellant in the re-opening of the State's case.

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motu, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.'

[8] *S v Ndweni & others* 1999 (2) SACR 225 (SCA) at 227E; S v De Jager 1965 (2) SA 612 (A) at 613A-B.

[37] With regard to sentence, an appeal court will interfere with sentence only on named grounds. One of these is where the trial court materially misdirected itself.[9]

[38] The appellant was sentenced on the basis that the murder was premeditated in terms of the provisions of s 51(1) of the CLA, which prescribes a minimum sentence of life imprisonment. The court a quo stated that this emanated from 'inferential reasoning, supported by objective facts' which, it was said, established that: the deceased was asleep when he was killed; that the appellant must have read the letter of wishes (as she had access to the keys of the safe); and that the killing of the deceased was motivated by greed as she wished to have control over the family finances.

[39] I do not agree with such a conclusion as there is no evidence to support that she armed herself with a firearm, planned to kill the deceased and that she had prior access to the letter of wishes. It is therefore clear that premeditation was not established and that the court a quo committed a material misdirection in this regard. The appellant should therefore have been sentenced in terms of s 51(2) of the CLA. This requires a minimum sentence of 15 years' imprisonment absent substantial and compelling circumstances warranting a reduction. In fact no one knows how the events of the night unfolded except the appellant. The killing of the deceased could have been premeditated or not premeditated. That leaves this court at large to consider the sentence afresh and giving the benefit of the doubt to the appellant.

[40] The court a quo found the following substantial and compelling circumstances to exist. It highlighted the advanced age of the appellant (67 years old at the time of the offence), that she had no previous brushes with the

[9] S v Malgas 2001 (1) SACR 469 (SCA) at 478.

law, was residing in a retirement village in Kimberley, that there were far reaching effects of the death of the deceased on the appellant's relationship with her family and that it was very unlikely that she would commit a crime of this nature in the future.

[41] A synopsis of the appellant's emotional and physical state was completely disregarded by the court a quo. The court a quo over emphasised the seriousness of the offence by stating that 'the sentence to be imposed should send out a clear message that the crime of murder would not be countenanced, particularly if it involves premeditation'. The court a quo ignored the evidence of the appellant, Pieter, Phillip, and Dr Panieri-Peter, a specialist forensic psychiatrist, with regard to the abusive behaviour of the deceased towards her and other family members. Both the appellant's sons testified of the prolonged abuse meted on the appellant by the deceased and related their own personal experiences of abuse at the deceased's hands. It is significant to note that the intensity of the abuse was of such a nature, that it resulted in Nannie and Phillip leaving the farm for good.

[42] The appellant is now 70 years old and alienated from most of her family. She ultimately had to leave the farm in January 2012, and, in February 2012, was admitted to a psychiatric ward in Kimberley and still remains under the care of a psychologist and a psychiatrist. Dr Panieri-Peter stated that she suffers from severe post- traumatic stress disorder, generalised anxiety and depression. Since she left the farm, Loudine has never visited her. She has virtually no assets. The death of the deceased led to the breakdown of the relationships between her and her daughters. As the conviction has been confirmed by this Court she will be destitute as she may not be entitled to any inheritance under the deceased's will and will have no source of income and she has virtually no assets.

[43] This Court was referred to *S v Ferreira*[10], where the court imposed a wholly suspended sentence. The approach to take where a women offender had been abused was there stated to be:

'It is something which has to be judicially evaluated not from a male perspective or an objective perspective but by the Court's placing itself as far as it can in the position of the woman concerned, with a fully detailed account of the abusive relationship and the assistance of expert evidence such as that given here. Only by judging the case on that basis can the offender's equality right under s 9(1) of the Constitution of the Republic of South Africa Act 108 of 1996 be given proper effect. It means treating an abused woman accused with due regard for gender difference in order to achieve equality of judicial treatment. "Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women." It also, therefore, means having regard to an abused woman accused's constitutional rights to dignity, freedom from violence and bodily integrity that the abuser has infringed.'[11]

[44] In *S v Potgieter*,[12] this court imposed a non-custodial sentence after the trial court convicted the accused for murder and sentenced her to seven years' imprisonment. It was assumed in favour of the accused that over a period of six years she was subjected to assaults, humiliation and psychological abuse by the deceased. She was a first offender and had four children. The Court set aside the trial court's sentence and remitted the case to the trial court to consider a fresh sentence after complying with the provisions of s 276A1(a) of the CPA.

[45] In *S v Larsen*,[13] the appellant had been sentenced to five years' imprisonment, half of which had been conditionally suspended, for murdering her husband. This court set aside the sentence and remitted the case to the court a quo for the reconsideration of the imposition of sentence after complying with s 276A 1(a) of the CPA.

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[10] *S v Ferreira & others* 2004 (2) SACR 454 (SCA); [2004] 4 All SA 373 (SCA).
[11] Para 40, references omitted.
[12] *S v Potgieter* 1994 (1) SACR 61 (A).
[13] *S v Larsen* 1994 (2) SACR 149 (A).

[46] In *S v Samuels*[14] the following was stated*:* 'Sentencing courts must differentiate between those offenders who ought to be removed from society and those who, although deserving of punishment, should not be removed. With appropriate conditions, correctional supervision can be made a suitably severe punishment, even for persons convicted of serious offences'.[15] The appellant certainly does not fall within the category of persons who need to be removed from society. Imprisonment could, and probably would, have a devastating effect on her, particularly taking into consideration that over a period of 30 years she was subjected to assaults and abuse by the deceased. I am of the view, in all the circumstances, that consideration should be given to the imposition of a sentence under s 276(1)*(h)*. Since the provisions of s 276A(1)*(a)* of the CPA must be complied with before consideration of such a sentence can take place, it is necessary to remit the matter to the court a quo to comply with these provisions and to consider the sentence afresh.

[47] In the result the following order is made:

1 The appeal against conviction is dismissed.

2 The appeal against the sentence is upheld.

3 The sentence imposed by the court a quo is set aside.

4 The matter is remitted to the court a quo for it to take the steps set out in s 276A(1) (*a*) of the Criminal Procedure Act 51 of 1977 and to thereafter impose sentence afresh.

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YT Mbatha

Acting Judge of Appeal

[14] *S v Samuels* 2011 (1) SACR 9 (SCA).
[15] Para 10.

Rogers AJA (dissenting)

Introduction

[48] In my view the appellant's appeal against her conviction should succeed. As I shall presently explain, I consider that the court a quo acted irregularly in allowing the State to reopen its case. I shall deal with the implications of that decision at the end of my judgment. First, I shall address the question whether on the remaining evidence the State proved the appellant's guilt beyond reasonable doubt, a question which I answer in the negative. In discussing the remaining evidence I disregard the trial court's assessment of the witnesses' credibility for two reasons: (i) Firstly, the court a quo made some unfair criticisms of the evidence adduced by the defence witnesses while not subjecting the evidence of the prosecution witnesses to the same critical scrutiny. The court's assessment was not balanced. (ii) Second, the court a quo's credibility assessment may have been affected by the additional evidence adduced by the State pursuant to the reopening.

[49] As appears from my colleague's judgment, there are only two possibilities as to how the deceased died: either he committed suicide or the appellant shot him. If it was the latter, intention to kill must inevitably be inferred, given that two shots were fired to the head from close range. The question is whether the State proved beyond reasonable doubt that the deceased did not commit suicide.

Background

[50] The case – both in regard to conviction and sentence (though in the event I do not reach the question of sentence) – cannot be understood without some appreciation of the family history. Since the members of the extended family

share the surnames Botha or Van Zyl, I shall after their first mention refer to them by their first names, meaning no disrespect.

[51] The deceased and the appellant were both 61 at the time of the former's death. They got married in January 1976. This was the deceased's first marriage and the appellant's second. She had two sons from her previous marriage, Pieter and Nannie van Zyl. From the marriage between the appellant and the deceased three children were born: LoAmi, Loudine and Phillip. LoAmi relocated permanently to the United States in 1999.

[52] The evidence revealed that Nico was a domineering and manipulative man who was cruel, emotionally and physically, to his family and workers. While he could be charming to outsiders, he was prone to fly into terrible rages. He had to have his own way and would never admit to being in the wrong. He was an unrelentingly hard worker and expected his wife, stepsons and sons to follow his lead for meagre remuneration and little appreciation. He fell out with his brother Arno and his stepbrothers Charl and Johan. The latter, who was one of the defence witnesses and who for a while had a farming partnership with the deceased, described how the deceased sought to control those around him, including Johan and Johan's wife. Johan still had nightmares about the deceased's abusive behaviour.

[53] The deceased wanted his sons and stepsons to be involved in his farming empire but strictly on his own terms. As boys Nannie and Pieter suffered considerable cruelty at his hands. As young men they both started employment with Nico in the mid-1990s. He was often abusive to them. After one such incident in 2003, when Nico told Nannie that he was useless and should get off the farm, the latter packed his things that very night, left Kareehoek and never had anything more to do with his stepfather. Pieter was subjected to similar

invective. He testified that he and his wife Alanda stayed on the farm because he had young children.

[54] Nico's son, Phillip, very much the apple of his eye, took up residence at Kareehoek in 2004. He married his wife, Zane, that year. Following the birth of their first child in April 2008, Zane developed severe postnatal depression and required hospitalisation in Bloemfontein. Nico's attitude was that it was all in her head and she should get over it. He resented any time Phillip took off to be with his wife. Matters came to a head later that month after Phillip returned to the farm from Bloemfontein. Nico verbally abused Phillip, assaulted him and threw rocks at his car when he tried to drive away. Phillip put his packed bag back into the car, drove off and never spoke with his father again. His father's attempts to hound him led to Phillip launching high court proceedings for an interdict against any communication from his parents. This interdict was granted despite opposition. The interdict was against the deceased and the appellant – Phillip, who was called for the defence, testified that if he had not included his mother as a respondent, the deceased would have made her life a misery in his endeavours to get at him.

[55] Although the deceased was the cause of it, Phillip's departure was a huge emotional shock to him. He was often tearful and spoke of killing himself. Pieter and Alanda testified that about a month after Phillip's departure they were visiting the deceased with their grandson. Alanda found the deceased sitting in his study, the gun safe open and a rifle on his lap, weeping inconsolably.

[56] At around this time Loudine moved back to Kareehoek to assist her parents. In the latter part of 2009 Casper Byleveldt commenced employment for the deceased as farm manager. Not long afterwards Loudine and Casper began

a romantic relationship and became engaged in February 2010. Pieter and Alanda were living on another farm forming part of the deceased's empire.

[57] The letter of wishes which the deceased wrote on 20 June 2010 is quoted in full in my colleague's judgment. This day, a Sunday, was Father's Day. Phillip testified that he sent his father an SMS, saying that he had forgiven him for all the hurt he had caused. This was the only contact he had with his father after leaving Kareehoek in April 2008. On the same day Zane sent the deceased and the appellant a photograph of their granddaughter. This contact with Phillip may well have reopened the deceased's emotional wound and account for the writing of the letter of wishes and its maudlin tone.

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[58] This provides the background, of necessity cursory, to the more important events of the days immediately preceding the deceased's death. Pieter's youngsters spent about ten days with the deceased and appellant in late June/early July 2010. The deceased enjoyed this period with his grandsons but became tearful when the time came to return them to Pieter. According to the appellant, on the evening of Thursday, 8 July 2010, the deceased was very depressed after having returned the children to Pieter. He told her that he sensed he would never see the grandchildren again. He expressed his fear of being diagnosed with brain cancer, brought on by a growing bone deformity he had noticed on the right side of his head.

[59] Before this, on Wednesday 7 July 2010, the deceased had spent some time in conversation with his cousin and very close friend, Riaan Botha, on the latter's farm in the same district. Riaan and his wife Cornelia were among the witnesses for the State. The deceased was visibly upset when Riaan asked whether there had been any contact from Phillip. The deceased said that he had

made a mistake in bringing his sons back to Kareehoek – he should have left them to drive trucks. He told Riaan that Pieter would not be getting a salary increase for the next two years. He discussed various plans he had: arranging Loudine's wedding, a livestock auction and trips to Botswana and the United States. There was also some reference to his will though Riaan could not remember the details.

[60] Riaan and the deceased were accustomed to speak on the phone virtually every day. Riaan, who had returned to Gordon's Bay with his wife, testified that over the period Thursday to Saturday he tried on several occasions to phone the deceased but received no response. Because this was unlike the deceased and because the deceased seemed to have been downcast on the Wednesday, Riaan told Cornelia on the Saturday evening that if he did not hear from him on the Sunday he intended to drive back to Kareehoek.

[61] On Friday 9 July 2010 the deceased started out in a depressed mood. This switched to a frightening rage after the deceased learnt that about 50 sheep had died from eating a poisonous plant. The deceased told the appellant that this was Pieter's fault. After lunch he forced her to drive with him to where Pieter was busy with some workers. He drove like a man possessed. He instructed Pieter to get into the bakkie and show him the sheep's carcasses. A worker climbed onto the back. The deceased swerved recklessly from side to side, saying he did not mind if they crashed. He stopped at one gate for the worker to open it, and drove off, leaving the worker stranded. He slapped the appellant and asked why she stayed silent. The appellant was shaking from anxiety. At the next gate Pieter got out and refused to get back in. The deceased tried to run him over, driving over a fence when Pieter jumped over it. Eventually he stopped the bakkie, got out and struck Pieter. The latter told the

deceased that he was bitterly disappointed by his behaviour. They spoke for a few minutes after which the deceased calmed down.

[62] They then drove together to view the carcasses. After a long discussion about the future of the farming operations, the deceased said to Pieter (in Afrikaans), 'This time I can't go on, take your people, go home'. According to the appellant, the deceased told Pieter that he did not want to carry on, he was tired, he and the appellant just wanted to rest.

[63] The deceased and the appellant drove back to the house. The appellant said she was traumatised by the events and told the deceased that she would never drive with him again. He went berserk, punching her in the chest and slapping her in the face. When she fell, he kicked her on her back. She was so frightened she wet herself. (When she gave this evidence she became overwrought.)

[64] On the Friday evening Pieter phoned Mr Harry Rich, the family lawyer, to tell him of the day's events and to ask whether Rich would be able to assist him if anything similar were to happen again.

[65] On the same day the deceased also took out his anger on Casper. The latter testified that in the late afternoon the deceased drove into the shed where he was working. The deceased pinned Casper to the wall with his bakkie so that Casper could not move one way or the other. Casper described the deceased as being very unsettled and cross – he did not know why. Pieter testified that on the Friday evening Loudine phoned to tell him of this incident.

[66] The deceased remained in a bad mood on the Saturday. He spent most of the morning in his study. At one stage he came out while the appellant was feeding the lambs. He asked her for the key to the safe because he wanted to

check his financial statements. He kicked one of the lambs and instructed the workers to take the lambs to the ewes' pen, telling the appellant she would never again rear a lamb.

[67] The appellant testified that during the course of the Saturday morning Loudine told her that she and Casper would be leaving the farm because they were scared of the deceased. Loudine put her hands on her mother's shoulders and said that she should understand that the deceased was a very sick man. The appellant told Loudine that she should relax, that her father would calm down over the weekend and that they should not make an overhasty decision. The appellant's evidence in this regard is consistent with Pieter's. He testified that at around 07h30 on the Sunday morning (ie before any report that the deceased had shot himself) he phoned Loudine to talk about recent events. She asked Pieter what he was going to do. She said that she and Casper had already packed their things and were going to leave Kareehoek later in the day. He told her to think carefully about her decision.

[68] During the Saturday afternoon Loudine and Casper came over to the main house to watch rugby with the deceased and the appellant. According to the appellant, Loudine said to her mother that she did not understand why the deceased had invited them over when he had insulted them earlier in the day. The deceased was withdrawn and muttered to himself, as he usually did when he was in a bad mood. The appellant felt that he was on the verge of an outburst. The appellant did not help with the braai. After the rugby finished, at about 19h00, he went up to his room without eating. This was the last time that Loudine and Casper saw him alive. They left the house at around 20h30 to see to some goats that were giving birth. Loudine returned to the main house at around 22h00 and slept in her room next door to her parents' room.

Dr Panieri-Peter's assessment

[69] It is clear that the deceased was a troubled and troubling personality and that he was in a state of heightened agitation in the days immediately preceding his death. The defence called, as an expert witness, Dr Panieri-Peter, an experienced psychiatrist. She compiled a psychological and psychiatric profile of the deceased and the appellant, based on evidence before the court (she was the last to testify) and on extensive additional collateral information. The trial court said that her expert opinion could not carry weight because it was premised on factual evidence of poor quality from family members 'who had an axe to grind with the deceased'.

[70] I disagree. The evidence of Johan, Pieter, Alanda and Phillip reads well and was largely unchallenged. In regard to his treatment of the appellant, her evidence is likewise not open to serious criticism. It is clear from the transcript that Loudine and Casper, who testified for the State, sought to downplay the deceased's unpleasant personality. For example, Casper in chief did not mention the incident in the shed and described his working and social relationship with the deceased as very good. When he was cross-examined with reference to one of his docket statements, he initially gave a watered down version of the incident before conceding that his written statement was correct. During cross-examination he continually claimed not to be able to remember things. He confirmed, though, that he and Loudine had discussed leaving Kareehoek on the Friday evening because of the deceased's conduct. He said they decided not to leave because on the Saturday the deceased had apologised. Loudine, who testified before Casper, denied having been told about the incident in the shed and denied that she and he had ever discussed leaving the farm. Apart from being very unlikely, her evidence is not only at odds with Casper's but with Pieter's, who testified that on the Friday evening Loudine

phoned him to tell him of the shed incident. In this respect I am satisfied that her evidence was not truthful.

[71] Riaan described the deceased as rigid and inflexible. He conceded that when the deceased was younger he used to assault his workers. When it was put to him that the deceased also did not hesitate to assault his own children, Riaan replied that he never saw this and would not be part of a smear campaign against the deceased. Riaan was very close and self-evidently loyal to the deceased. It is quite conceivable that he did not suffer or witness the worst of the deceased's behaviour yet he nevertheless discerned certain important characteristics identified by Dr Panieri-Peter.

[72] It would not have been feasible for all the collateral information contained in Dr Panieri-Peter's report to have been the subject of direct oral evidence at the trial. That information was, however, consistent with direct testimony of similar behaviour. To some extent, the matter speaks for itself. There must have been something very wrong for Nannie and Phillip to abandon Kareehoek and cut themselves off completely from the deceased and for Phillip to institute high court proceedings against his parents.

[73] Dr Panieri-Peter testified that her method for building up her profiles by way of collateral information accorded with accepted psychiatric practice. The State had its own psychiatrist, Prof Labuschagne, present during her testimony. Neither her method nor her diagnoses were attacked in cross-examination. The prosecution merely sniped at the underlying factual material. However, there would have had to be a conspiracy on a grand scale to create the overall picture drawn by Dr Panieri-Peter. She explained that none of the collateral sources was psychiatrically knowledgeable yet the information they provided was

'incredibly consistent' and fitted a known psychiatric pattern, something which in her view added enormous weight to the information.

[74] When it was put to Pieter in cross-examination that he was exaggerating, he retorted that he doubted whether he had been able to convey even ten percent of the misery which the deceased had heaped on the family. This is borne out by the collateral information contained in Dr Panieri-Peter's report. It is truly an appalling indictment. Dr Panieri-Peter's conclusions did not rest on the accuracy of each minute detail but on the general picture. The court a quo did not have adequate grounds for rejecting it.

[75] According to Dr Panieri-Peter, the deceased met the psychiatric criteria for narcissistic personality disorder with features of dependent personality disorder. He also met the criteria for psychopathy and antisocial personality disorder. Furthermore there was substantial evidence to indicate that he was mentally ill – it is likely that he suffered a mood disorder throughout his life, with overwhelming evidence that he was profoundly depressed in the last two years of his life, something which may have been exacerbated by a physical ailment he suffered in April/May 2010. Many of the risk factors for suicide were present. According to Dr Panieri-Peter, an even greater risk was a femicide-suicide combination.

[76] As to the appellant, her life had quickly changed after marrying the deceased. He was jealous and did not wish her to have an outside life. He thwarted early attempts on her part to leave the farm with her children. Her life became a routine of extraordinarily hard work with minimal external social interaction. She displayed the characteristics typical of an abusive marriage – powerlessness, inaction and silent assent. She simply survived from day-to-day. At no stage was her behaviour suggestive of reaching a 'boiling point': she had

no emotional outbursts or rages and expressed no intention of changing her life. She displayed no signs of being savvy, manipulative or strategic. In short, Dr Panieri-Peter did not regard her as a likely candidate for killing her husband.

[77] With reference to the letter of wishes, which the defence sought to portray as a 'suicide note', Dr Panieri-Peter said that it accorded with her view of the deceased's personality and depressed state, though she explained that in psychiatry there was no such concept as a 'suicide note'. My colleague refers to the evidence of Mr Swiegers, the deceased's accountant. Because this evidence was adduced after the State reopened its case, I disregard it. One may take judicial notice, however, of the fact that where a testator has created a testamentary trust in his will, it is not unusual for him to express non-binding wishes in a letter to the trustees. All the same, this particular document was an unusual one. Quite clearly it was not drafted with professional assistance. It travelled beyond mere wishes for the administration of his testamentary trust. I accept that when it was written the deceased may have contemplated the possibility of taking his own life.

[78] In the circumstances, it would not have been a matter for surprise, as at 10/11 July 2010, if the deceased were to have committed suicide. On the other hand, his appalling behaviour provided motive for the appellant to want to kill him. I accept Dr Panieri-Peter's assessment that murder would not have been in keeping with the appellant's character and behaviour over many years but she acknowledged that it was possible that the appellant might have been pushed over the edge. The two days immediately before the deceased's death were particularly awful. She had been physically assaulted and degraded on the Friday. The appellant may have feared that the deceased's treatment of Pieter would cause him and his family to abandon the farming enterprise and have nothing more to do with the deceased. She may also have been worried that

Loudine would decamp with Casper, leaving her completely isolated from all her children. The prospect of a life lived solely with the deceased may have pressed down on her more heavily on her than his cruel treatment of her.

[79] Accordingly, and while Dr Panieri-Peter's evidence must be given due weight, the case cannot be adjudicated solely on the respective psychological and psychiatric profiles of the deceased and the appellant.

Forensic pathology

[80] Insofar as forensic pathology is concerned, it is common cause that there was a single entry wound for the two shots in the right temporal region; that one shot lodged in the thickened bone of the skull on the right side and did not penetrate the brain; that this shot would have left the deceased neurologically intact so that he could have spoken and moved his hands after this shot was fired; that the other shot penetrated the brain and exited the skull on the left side; and that this penetrating shot was instantly fatal though he may still have made involuntary convulsive movements.

[81] Both doctors (Dr del Ray for the State, Prof Loftus for the defence) accepted that the findings were compatible with suicide. Prof Loftus went further, saying that the findings were 'highly compatible' with suicide, that there was 'no scientific reason' to think that the wounds were inflicted by someone else but that he could not exclude the possibility of murder because 'there are perfect crimes'. Prof Loftus did not prepare a written report. From his oral testimony I cannot discern a scientific basis for a conclusion that the shots were more probably self-inflicted than not. The medical evidence is compatible with suicide and murder. However, if one assumes for the moment that the first shot was the one which did not penetrate the brain, the agreed conclusion by the

two experts that the deceased would have been able to talk, move and fire a further shot is important.

The appellant's version of the night of 10/11 July 2010

[82] The appellant testified that the deceased could not sleep and kept her awake all night with his ramblings. He said that although he was against Loudine's marriage to Casper, Loudine should be given a beautiful wedding because he would not be there. He asked what the appellant would do when he was no longer around and she told him, as she had in the past, that she would want to stay at Kareehoek. He spoke of his unhappy childhood. He expressed the belief that if he was no longer around Phillip would return to the farm and that the appellant would be able to unite the children if he was out of the way. He said that nobody loved him. He blamed the appellant for failing to persuade Phillip to come back to the farm. He was depressed about LoAmi's permanent absence. He asked the appellant to forgive him and to ask the children to forgive him. He said he was tired and did not want to live anymore. He repeated his anxiety about brain cancer. He told her that if anything were to happen to him there was a letter of wishes in the safe which was an addendum to his will.

[83] At some stage he complained that his hands were very cold and felt like pins and needles. The appellant suggested that he put on the woollen gloves he had got from a friend. She fetched them and helped him put them on. At a later stage he complained of a terrible headache and asked for disprin. She went downstairs to the kitchen and dissolved a disprin in a plastic cup. On her return, and at the foot of the stairs, she heard the first shot. She went to the bedroom and saw the deceased propped against the pillow and holding the revolver in his right hand. There was a small trickle of blood behind his right ear. She believed he had shot himself but did not know how seriously he was hurt. She sat down

on her side of the bed (the right side, nearest the wall) and asked him what he had done. He said he thought he must have suffered a stroke because of the terrible headache. He lifted his head and drank the dissolved disprin. She tried to take the revolver from him but did not have the power because of her severe arthritis. At this stage he had his right hand on the handgrip and his left hand on the muzzle. He told her to forget about the revolver because she might hurt herself. He asked her where the children were. He told her to take the quad bike to get them. He aimed the revolver at her and said she should hurry, that he had enough ammunition to kill both of them. He was utterly incoherent. She was wearing only her nightclothes and gown. It was a bitterly cold night. She went around the bed to his side because that is where her wardrobe was. She took off her gown and nightclothes at the foot of the bed, put on jeans and a top and ran out to call Loudine.

[84] She went down stairs. As she reached the front door she heard a second shot. She went back to the bedroom and stood at the door. When she heard that everything was still, she went inside. She saw a large amount of blood. As the photographs indicate, the deceased by this stage was lying on her side of the bed, closest to the wall, half turned to his right side. This time she sat on his side of the bed, closest to the door. Since what she did next is of some importance, I provide the following translation of her evidence in chief when she first dealt with this part of her account:

> 'I went and sat next to him on the bed, I pulled off the gloves, put down the revolver, I opened the revolver to see whether he would really have shot everyone, how many rounds were in the revolver, sat with his hands in mine, I realised he was no longer alive and I touched his face and I put the revolver down there and went outside to phone the children.'

She was evidently overcome with emotion at this point because the judge asked whether she wanted to break for a short while. She chose to carry on. Her

counsel asked her to explain again, more slowly, what she had done upon entering the room:

'I took the revolver out of his hand and put it down there. I went to sit with him and removed the gloves to feel whether his pulse was still beating. I touched his face, I just sat with him because I just knew this is the end, I couldn't help him any more, and I went outside to call the children.'

And in cross-examination, when she was asked why she removed the gloves, she said:

'I took off the gloves and held both his hands in mine. I sat there for a few moments and then went out to phone Loudine.'

[85] She phoned Loudine at around 08h30. On her version, the shots must have been fired relatively shortly before this though she testified that she lost track of time over the course of the night and early morning. The court a quo said that the appellant claimed that it was still dark when the deceased shot himself. I have not been able to find this statement in the evidence. It was, of course, mid-winter and it would certainly not have been fully light as at 08h15.

Gun shot residue

[86] At around 11h00 on the Sunday morning a W/O Odendaal took samples from the hands of the deceased and the appellant in order to test for gunshot primer residue (GSR). This was almost certainly a routine procedure. There is no indication that anyone suspected murder at this stage. W/O Odendaal was not called as a witness and the appellant was not cross-examined about the taking of the GSR samples. There is thus no evidence that she knew that the police were taking samples from the deceased's hands or that she was aware of the purpose of testing her hands. There was evidence, independently of her own (including that of the investigating officer, W/O Davids), that she was in shock, which on her version would not be surprising. There was no justification

whatsoever for the court a quo's finding that the appellant was 'putting up a facade for the police to give the appearance of being shocked'.

[87] W/O Lesabe testified regarding the results of the GSR analysis. No GSR was found on the deceased hands. GSR was found on the appellant's right hand (she is right-handed) but not her left hand. There was no evidence as to how much GSR was found on her right hand or as to where on her hand it was found (fingers, thumb, palm, back). W/O Lesabe and the defence ballistic expert, Mr Steyl, both testified that GSR could come onto a person's hands innocently. When a shot is fired, a GSR plume is created with a radius of about two meters which sifts down over five to seven minutes. Anybody who is within the plume's circumference during that period may get GSR on an exposed part of the body. GSR can also be transferred by handling an object containing GSR – in the present case, for example, the appellant's hand may have been contaminated by touching the revolver, the gloves (if the deceased was wearing them) or the deceased's hands and face.

Discussion of appellant's version

[88] There are three main features of the appellant's account which need to be considered: the disprin, the gloves and the revolver. In regard to the disprin, the prosecutor cross-examined the appellant about the absence of any sign, in the police photographs of the bedroom, of the cup containing the disprin. She said it was a small plastic cup. She could not recall where she put it down. The court a quo attached some significance to this in its judgment. In my view this was not warranted.

[89] The investigating officer, W/O Davids, was one of the first police responders. By the time he gave evidence the State knew the appellant's version in detail because she had, through her attorney, provided a full

exculpatory statement to the police in September 2010. Davids was not asked whether he had seen a plastic cup while inspecting the bedroom. The State did not call any other police witnesses who photographed or searched the bedroom. The photographs are not sufficiently clear or complete to safely draw the conclusion that the plastic cup was not in fact somewhere in the bedroom.

[90] The court a quo said that it was 'inconceivable that the deceased would ask for disprin and then went about shooting himself in the head he tried to cure'. I think this is a misdirection. The court a quo's reasoning was that the appellant made up the story about the disprin as part of an exculpatory fabrication. But how did this part of her account assist her suicide version? If the deceased intended to shoot himself, it would have been irrational for him to want to drink disprin. If the appellant wished to contrive a story, this irrationality would have been obvious to her. She could have made up a far more plausible reason for leaving the room, for example to go downstairs to make herself coffee. The very oddness of the request, in the context of a suicidal person, tends to indicate its truth rather than its falsity. As to why the deceased made the request, it is possible that he wanted her out of the room so that he could shoot himself. If she was in the room, she might be able to prevent him from doing so. He might even have wanted to spare her feelings, though such consideration had not been a feature of his behaviour

[91] It is true that when she came back with the disprin, he went ahead and drank it. On her version, the first shot must have been the one which lodged in his skull. The medical experts were agreed that the deceased would have remained conscious and capable of talking and of voluntary action. He had not succeeded in killing himself. He must have been in a state of great turmoil to take the step of firing the first shot. The blow to his head could have caused further confusion. According to the appellant, he was utterly incoherent by this

stage. One should not judge an extremely stressful and unusual situation by ordinary standards of rationality. I thus do not think that the appellant's evidence regarding the disprin can be rejected as false beyond reasonable doubt.

[92] What of the gloves? Unlike the disprin, there might have been a plausible reason for the appellant to fabricate the story of the gloves. The State's thesis is that it was concocted after she became aware that the police would be testing her hands and those of the deceased for GSR. If she had shot the deceased, she might have thought she would need to be able to explain why the police would not find GSR on the deceased's hands. The appellant explained the circumstances in which the deceased came to put them on. It may be thought to be peculiar. Again, though, one must bear in mind that on the appellant's version it was a very troubled night. She would have become increasingly tired. She explained that she just wanted to do anything that might make the deceased more restful. My colleague says that if the deceased's hands were cold the appellant would just have told him to keep them under the blankets. However, and apart from the danger of applying cool logic to a stressful and unusual night, not everyone likes to sleep with their hands tucked under the blankets.

[93] Dr Panieri-Peter testified that a classic symptom of panic and anxiety is pins and needles in the hands and feet. This is caused by mild hyperventilation. The appellant spoke of the deceased having complained of pins and needles shortly after his death and long before Dr Panieri-Peter was engaged. The appellant would not have known that pins and needles were a symptom of heightened anxiety. This lends some credence to her version.

[94] I should add that it was not in dispute that the deceased had received a pair of woollen gloves from a friend as a gift. It was not suggested that the

deceased would have been unable to fire the revolver with a gloved hand. (Both the revolver and the gloves were handed in as real exhibits.)

[95] The most problematic feature of the appellant's version on the gloves is her removal of them from the deceased's hands shortly after his death and her explanation for how they landed up in the washing machine. One might think that, after she encountered the bloodied scene following the second shot, she would immediately have left the room to phone her daughter and summon medical assistance. On the other hand, it is difficult to place oneself in her position. She had, on her version, been through an exhausting and stressful night, following two appalling days. Although she had every reason to detest her husband, her evidence was that she continued to love him and to feel sorry for him in view of his difficult childhood. She would have experienced strong and perhaps conflicting emotions when she came across his lifeless body. Although she spoke of feeling his pulse (something which may not have required the removal of the gloves, certainly not both of them), I also gain the impression, from the parts of her evidence which I quoted above, that she simply wanted to hold his hands and touch his face, almost as a farewell. Who is to say that a woman in her position would not have done so?

[96] The gloves were not found in the bedroom. On the following Wednesday the appellant came across them when she removed the clean washing from the machine. As to how the gloves came to be there, she surmised that they must have been part of the bundle of nightclothes which, on her version, she asked Casper to fetch from the bedroom before anyone else arrived and which she bundled into the washing machine. She did not claim to remember what exactly she did with the gloves. If events really happened as she testified, I would not hold it against her that she could not remember this detail.

[97] My colleague considers that it is more likely that she would have put the gloves down on the bed and that it is a considerable coincidence for them instead to have found their way to the nightclothes at the foot of the left-hand side of the bed. I agree that this is something of a coincidence but it is going quite far to say that it is not a reasonable possibility. She might have tossed them off the bed when she removed them from his hands. Or she may have picked them up when she stood up to leave the room and have dropped them on the pyjama pile as she went out. In her state of turmoil, this might have been a reflex action which she did not afterwards remember. If she were a dishonest witness, she could easily have said that she remembered dropping them on the pile of nightclothes.

[98] The next stage of her explanation for the temporary disappearance of the gloves is that she asked Casper to go and fetch her nightclothes so that the police would not find them on the floor. It is not unknown for women to be sensitive about matters of this kind. The court a quo found it 'boggling' that the appellant would have sent her future son-in-law to collect her 'intimate garments'. I personally do not find it particularly odd that she would have preferred Casper, rather than complete strangers, to deal with the nightclothes.

[99] The court a quo remarked that the appellant was unable to explain why the nightclothes were removed while her clothes and underwear that she had been wearing the previous day were still on the floor, as can be seen from the police photographs. My colleague mentions this latter aspect in her judgment. What this criticism leaves out of account is that, on the appellant's version, her nightclothes were lying at the foot of the bed on the near side as one enters the bedroom whereas her clothes and underwear from the previous day were lying against the far wall, concealed by the bed. If Casper went into the room, he would not have seen them without walking around to the other side of the bed.

The appellant herself, in a state of shock, may not have thought of those clothes and underwear.

[100] Casper denied having gone to the bedroom on his own. He testified that he only went into the bedroom after a family friend, Leon van Heerden, arrived. He denied having removed anything from the room. Casper's evidence of not going into the room on his own is at odds with his first docket statement, made at about noon on the Sunday. In that statement he said the following about the events after Loudine received the appellant's telephone call (my translation):

'When we arrived at the farm, [the appellant] was waiting in the road. She told me that he [the deceased] had shot himself in the bedroom. I went and looked and could see that he was lying on the bed and that the revolver was lying on the bed and that there was a lot of blood. I went back outside and Loudine then telephoned Leon van Heerden to tell him what had happened.'

[101] This statement was made less than four hours after the events he was describing. While he may have been shocked, it is a puzzling mistake for him to have made. A reading of the transcript shows that he was a poor witness. I have already mentioned his initial evasiveness regarding the incident in the shed. The court a quo said that Casper was cross-examined with reference to his five docket statements and that 'as the cross-examination reached its apex and towards its denouement, his responses degenerated to "I don't know" and "I cannot remember"'. The trial judge said that it did not follow that his evidence should be rejected in its entirety, 'particularly insofar as it is corroborated by other state witnesses or same is consistent with the probabilities'. It seems that she was not particularly impressed by his evidence, for good reason. I would add this. It is not correct that his answers only degenerated as the cross-examination reached its 'denouement'. On the contrary, and whereas his evidence in chief (a brief six pages) was helpfulness personified, his resort to evasive answers began three pages into a 54-page cross-examination.

[102] The family dynamics following the deceased's death must be borne in mind. This was a family divided. Pieter and Phillip supported the appellant and ultimately testified for her. According to Dr Panieri-Peter, the appellant was able to reconnect to some extent with Nannie following the deceased's death but he divorced himself entirely from family affairs and wanted nothing to do with the criminal trial. LoAmi was in America and uninvolved. Loudine and Casper, who got married in October 2010, assumed active control of the farming enterprise. Both of them testified for the State.

[103] By not later than the beginning of 2011, Loudine and Casper were adopting the position that the deceased had not committed suicide but been murdered by the appellant. It was in March 2011, and by way of his third docket statement, that Casper for the first time claimed that he had not entered the bedroom until Leon van Heerden arrived. Unsurprisingly the appellant's residence at Kareehoek became intolerable and she moved to a retirement village in Kimberley in January 2012, suffering a nervous breakdown shortly afterwards. She is completely estranged from Loudine and the latter's children. If the appellant were convicted, she would presumably lose any benefit from the deceased's estate in accordance with the principle that the bloody hand may not inherit. Loudine and Casper stood to gain financially from her conviction. Loudine at some stage laid a charge of murder and theft against Pieter (unrelated to the deceased's death).

[104] Loudine did not directly corroborate Casper's evidence on the question whether he went into the room before anyone else arrived. To the extent that her evidence tends to support his, I have already explained why I think she was untruthful about their intentions to leave the farm because of the deceased's behaviour. In general, her testimony is characterised by evasiveness. Her

docket statements and evidence in chief were designed to maximise suspicion against her mother with some grudging dilution in cross-examination.

[105] I have considered whether the appellant's version about the removal of the nightclothes is undermined by Cornelia's. When the police arrived on the Sunday morning, they took charge of the bedroom. They locked it when they left because the second bullet had not yet been found. It was located the next day during the post-mortem examination, and the key was returned to the family on the Monday afternoon. Cornelia testified that she was the first person to enter the bedroom. She claimed to have seen the appellant's maroon flannel pyjama pants and her pyjama top with a paisley pattern.

[106] In cross-examination, however, it was put to Cornelia that the pyjamas she was describing were those the deceased had worn on the Friday night. Although she did not think that the pyjamas she saw were men's pyjamas, her response to this proposition was that if the appellant said that the pyjamas were his, she could not contest it. In other words, it does not appear that she had actual knowledge as to whose pyjamas they were, even though in chief she had described them as the appellant's.

[107] Perhaps due to an oversight on counsel's part, the appellant was not led on this aspect of Cornelia's evidence. The matter was not taken up with the appellant in cross-examination and the court a quo did not mention this aspect in its judgment. It was not suggested that the appellant's nightclothes were anywhere to be seen in the undisturbed scene as photographed by the police. The appellant's clothes from the previous day can be seen in one of the photographs against the wall on her side of the bed while the deceased's clothes from the previous day can be seen just to the right of the door as one enters the bedroom. By the time Cornelia entered the room on the Monday, the police had

moved everything. If the appellant knew that her nightclothes were still lying on the bedroom floor, she would hardly have made up a version that Casper had removed them before the police arrived. Since the matter was not properly explored, I do not think it would be right to allow Cornelia's inconclusive evidence to tilt the balance.

[108] On the State's theory of the case, the deceased was not wearing gloves at the time he was shot. If this were true, one might have expected to find GSR on his hands unless they were tucked under the bed clothes throughout the time that the GSR plume was settling. That is possible though it was not the way the deceased was found by the police.

[109] In all the circumstances, and while the appellant's version about the gloves may be regarded as improbable and as resting on some coincidences, I do not think it can be rejected as false beyond all reasonable doubt.

[110] There are some other aspects of the appellant's version that need to be mentioned. If the appellant had murdered her husband but wanted to create a scene consistent with suicide, one would have expected the revolver to have been positioned in the deceased's right hand or in a position where it might have fallen after the deceased fired the fatal shot. In fact, the revolver was found underneath the deceased's left hand. Apart from the fact that the deceased was right-handed, the position was not even consistent with a left-handed grip – the revolver was lying in a reversed position. On the appellant's version, she removed the revolver from the appellant's right hand and examined it before putting it down on the bed. This could well account for the way in which it was found. Her conduct in examining the revolver may seem surprising but this too she would have realised if she were trying to concoct a plausible version. As with the disprin, the strangeness of her behaviour in

connection with the revolver may indicate that she was relating what actually happened rather than trying to fabricate a plausible story.

[111] A similar observation may be made about the position of the deceased's arms and hands. They were both stretched out rather unnaturally towards the left side of the bed, being the side where the appellant says she sat when she removed the gloves and held his hands. There does not seem to have been any arranging of the body to make things look like suicide. The arms and hands are, though, in the position they might have been if the appellant had moved them slightly to remove the gloves and then hold his hands.

[112] Then there is the fact that, according to the medical evidence, the bullet that lodged in the deceased's skull would not have rendered him unconscious and would have left him able to talk and move. If the appellant shot him and wanted to make it look like suicide, she would not have shot him twice unless this were necessary, since laypeople, if not forensic experts, would regard a suicide with two shots to the head as rather unusual. It would have been foolish to fire a second shot if the first one was fatal since this might eliminate suicide as a possibility. If her first shot was the non-fatal one, it would have taken a few moments for her to realise that she had not killed him. And if he was not rendered unconscious, he would not have remained in a position which allowed her to place a second shot precisely through the same entry wound as the first. He would have resisted. And if her first shot was the fatal one, she would have had no need to fire a second shot at all.

[113] On the other hand, if the deceased was intent on suicide but found that his first shot had not had the desired effect, he might well have chased the appellant out of the room and then placed the revolver in the same position and

fired a second shot. In this respect, therefore, the medical evidence lends some support to the appellant's version.

[114] Then there is the fact that the deceased was found lying on the appellant's side of the bed. It was not suggested that she could have dragged him there after he died or that she would have had any reason to do so. Furthermore the position of the bloodstains and the track of the bullet which exited the deceased's skull on the left side were consistent with his having been there when the fatal shot was fired. The deceased must thus have voluntarily moved to that side of the bed at some stage in the night. The appellant could not recall how he came to be there. She did not say, and it was not suggested to her, that she did not got into bed that night on her usual side. They had lived in this house for many years and I think we may take judicial notice of the fact that married couples generally have fixed sides on which they sleep.

[115] This suggests that the deceased could only have moved to the appellant's side of the bed after she got up, which on her version would either have been when she fetched the gloves or the disprin. The appellant recalled that when she returned to the room with the disprin, she sat on her side of the bed and held the cup for him as he drank. It is thus distinctly possible that by then he had already fired the first shot, that he shifted to her side of the bed to receive the disprin and that after chasing her out of the room he fired the second shot, thus completing his suicide.

[116] If this is what happened, it might also explain where the revolver came from. On the deceased's side of the bed was a bedside cabinet in which the deceased might have concealed the revolver. (On the appellant's side of the bed, by contrast, there was just a bedside table. No revolver could have been concealed there.) The deceased had asked the appellant for the gun safe key

earlier in the day, purportedly to examine financial papers. He may well have removed the revolver at that time and put it in his bedside cabinet. He might have been on his side of the bed when he fired the first shot but on her side by the time he fired the second. While this involves a measure of conjecture, the appellant on her version was out of the room when the two shots were fired and could not be expected to provide direct evidence of all the events. The State did not provide a more plausible explanation for how the deceased's body landed up where it did.

[117] The appellant's evidence that she did not have the strength to remove the revolver from the deceased's hands after the first shot due to arthritis finds support in Dr Panieri-Peter's testimony. Dr Panieri-Peter said that she could observe the bony deformities caused by the appellant's osteoarthritis and that the appellant's general practitioner confirmed that she had suffered from this condition for some years. Dr Panieri-Peter testified that the appellant had been unable to open a bottle of drinking water in her office. According to Dr Panieri-Peter, the appellant told her that when the deceased acquired the revolver about 15 years previously he had tried to teach her how to shoot it but she struggled with it as it was heavy and she was not interested in shooting.

[118] Finally, there is the fact that the appellant described two shots separated in point of time. She could not accurately recall how long she remained in the bedroom after returning there with the disprin. One would think, though, that at least five minutes or so must have separated the two shots. Again, this is somewhat unusual but why make it up if it were not true? If she wanted to fabricate a plausible tale, she could have said that two shots were fired in short succession while she was out of the room on the first occasion.

[119] The trial court said that the 'reasonable inference' could be drawn that the appellant gave the deceased sleeping tablets and that he was probably asleep when he was shot. Apart from the fact that these formulations fundamentally misapprehend the nature of the criminal onus, the judge's propositions are not consistent with all the proved facts, in particular the evidence that there were two shots and that one of them, which was almost certainly the first shot, would have not incapacitated the deceased.

[120] The State was required to prove the appellant's guilt beyond reasonable doubt. The only part of her testimony where improbability or coincidence really looms is her version about the removal of the nightclothes and her surmise as to how the gloves must have found their way onto the discarded nightclothes. Particularly in the face of other evidence suggestive of suicide, including Dr Panieri-Peter's testimony, the improbability of her version about the removal of the gloves is not so great as to justify a conclusion that it was false beyond reasonable doubt. I thus think the court a quo erred in convicting her.

Discharge at end of State's case

[121] In view of this conclusion, it does not really matter whether the court a quo should have discharged her at the end of the State's case. The two State advocates who initially prosecuted the case conceded that there was not a prima facie case. The court a quo was not bound by this concession. Unlike my colleague, however, I prefer not to justify the court a quo's refusal of discharge with reference to the court's discretion. Where there is a single accused facing a single charge, I doubt if a trial court can really be said to have a discretion whether to grant or refuse discharge. If there is no evidence on which a reasonable person might convict, the accused should be discharged. In the present case, there probably was evidence on which a reasonable person might have convicted. The appellant's counsel had put a detailed version to the State

witnesses which, if it was false insofar as the gloves are concerned, was strongly suggestive of a guilty mind. Casper had denied fetching the appellant's nightclothes. Credibility does not normally feature at the stage of discharge. In the absence of testimony from the appellant, a reasonable person might have accepted Casper's evidence.

Reopening of State's case

[122] In regard to the reopening of the State's case, the position is as follows. The prosecution was initially handled by Mr Makaga leading Mr Rosenberg. The witnesses for the State were (in order) Loudine, Riaan, Dr del Ray, Cornelia, Casper and W/O Davids. The defence witness, Prof Loftus, was interposed after Dr del Ray. This covered the period 12 to 20 November 2012. The defence applied for discharge which was argued on 21 November 2012. On 29 November 2012 the court a quo refused discharge. Although the defence was ready to proceed, Mr Makaga was unavailable, as a result of which the case was postponed to 4 March 2013.

[123] By 4 March 2013 Messrs Makaga and Rosenberg had been replaced by Ms A van Heerden and Mr Q Hollander, seemingly because their seniors thought that the case had not been prosecuted with sufficient vigour. On 4 March 2013 the State indicated that it wished to apply to reopen its case. The court a quo postponed the matter to 29 April 2013 with directions for the State to serve its application by 2 April 2013. The State failed to deliver a written application. At the appearance on 29 April 2013 Ms van Heerden was permitted to move her application orally despite this non-compliance and despite opposition from the defence.

[124] The transcript of the submissions made on 4 March and 29 April 2013 do not form part of the appeal record but it appears from the court a quo's ruling

that Ms van Heerden sought permission to call (i) fresh expert medical evidence pursuant to an exhumation of the body which had not yet occurred; (ii) expert ballistic evidence from W/O Dicks, which would require the court to release to him the revolver which was by then a real exhibit; (iii) evidence from W/O Ntloko, a handwriting expert; (iv) evidence from two new lay witnesses, Leon van Heerden and Johan Swiegers; (v) additional evidence by recalling Loudine and W/O Davids.

[125] The court a quo reserved its decision and granted the application to reopen on 18 June 2013. The trial resumed on 5 August 2013. At the commencement the defence applied for a special entry to be noted in terms of s 317 of the Criminal Procedure Act for an alleged irregularity in the form of the court's decision to allow the State to reopen its case. On the following day the court a quo delivered its ruling, refusing to make the special entry. The evidence of Leon van Heerden and Loudine was led on 6 and 7 August 2013. Ms van Heerden then applied for a postponement because the handwriting expert was sick and opposed motion proceedings relating to the exhumation of the body had not been finalised (Phillip, not the appellant, was the person who opposed the exhumation). Despite opposition from the defence, the court a quo allowed the postponement.

[126] The trial only started again on 11 August 2014 when the evidence of W/O Dicks, Dr Denise Louwrens and Swiegers was led and the State closed its case for a second time.

[127] The reopening of the case had the result that the State's case was only finally closed 21 months after the court a quo refused to discharge the appellant. Including the time taken up by the application to reopen and the

application for a special entry, the duration of the trial was extended by six court days at additional cost to the appellant.

[128] My colleague has, with reference to this court's decision in *S v Ndweni*, set out the matters which a court must consider in deciding whether to permit a reopening. These matters are not cast in stone (*S v Felthun*[16]) but a court must nevertheless consider them in the judicial exercise of its discretion.

[129] In the case of the new expert medical evidence and the new ballistic evidence, the application to reopen the case did not meet any of the requirements mentioned in *Ndweni*. Indeed, the State's application in these respects was not so much an application to reopen the case as an application for a postponement to allow further forensic investigations to be undertaken which might or might not lead to new relevant evidence. In the nature of things, the State did not know whether anything useful would be ascertained. In my view this was utterly irregular. The trial began about two and a half years after the alleged murder. The State should not have prosecuted the case if by then it did not have sufficient evidence.

[130] According to the court a quo's ruling, Ms van Heerden submitted that the medical evidence presented thus far did not 'ventilate pertinent aspects of the case', that Prof Loftus had not been thoroughly cross-examined, that the new evidence would 'demonstrate certain flaws in the post-mortem report already filed' and that reliance on that report 'would result in conjecture'. The fact that the new prosecutors thought that their predecessors had not cross-examined Prof Loftus adequately (something which is not self-evident from the record) was no justification for reopening the case. The original prosecutors could only

[16] *S v Felthun* [1999] ZASCA 4; [1999] 2 All SA 182 (A).

cross-examine Prof Loftus in accordance with the evidence of the State's own medical expert, Dr del Ray, which is what they did.

[131] In regard to the new ballistic evidence, the judge's ruling contains nothing to suggest that she was given information showing how such evidence might advance the case. Ms van Heerden herself did not know since the tests had not yet been done. The court a quo's ruling says nothing about the evidence which was to be given by the handwriting expert.

[132] In regard to the lay witnesses, Ms van Heerden apparently said no more that she wished to call Swiegers to testify regarding the letter of wishes. The existence of the letter of wishes, and what it potentially reflected about the deceased's state of mind, were well known to the State before the trial began. Mr van Niekerk for the defence submitted to the court a quo that the State had not disclosed what Swiegers would say. There was no evidence as to why what he might have to say was relevant or why it was not adduced at the proper time. The court a quo's ruling records nothing as to what Leon van Heerden would supposedly say or why he had not been called at the proper time.

[133] In regard to the recalling of Loudine and W/O Davids, Mr van Heerden submitted that certain important aspects had been left out of their evidence when it was led. Mr van Niekerk for the defence pointed out to the court a quo that Mr van Heerden had failed to identify what these important aspects were or why they were omitted at the relevant time.

[134] All of the defence's objections were brushed aside. Despite citing the relevant authorities, including *Ndweni*, the trial court concluded, without any reasoning, that 'the information placed before me is sufficient to determine that the evidence which the State seeks to adduce would be relevant to the outcome of the case and may assist the court in coming to a just decision'. There was no

such ‘information’. The relevant facts should have been placed before the court under oath in accordance with the court a quo’s directions and should have covered the standard requirements set out in *Ndweni*. The application to reopen was in my view an abuse which delayed the appellant’s trial by 21 months at considerable additional cost to her.

[135] In the event, the evidence given by Dr Louwrens and W/O Dicks was inconclusive and added little, if anything, to the evidence already before the court. W/O Davids was not recalled and W/O Ntloko did not testify, so presumably the State concluded that there was in fact nothing material they could add. In the case of Swiegers, Van Heerden and Loudine, their evidence (or further evidence), apart from falling well short of the test of being ‘materially relevant to the outcome of the trial’, was permitted without any explanation as to why it was not adduced at the proper time.

[136] The reopening application should have been refused. Apart from the fact that the normal requirements for reopening were not satisfied, the stage at which it was allowed – after the defence had pointed out weaknesses in the State’s case in the argument on discharge – created the distinct impression that the court was allowing the State to plug gaps in a weak case, not merely by adducing additional evidence, but by conducting further forensic investigations with a view to generating additional evidence against the appellant. This was unfair and would have been so perceived by the appellant.

[137] In terms of s 322(1)(a) of the Criminal Procedure Act, an appeal court may allow an appeal if the court thinks that on any ground there was a failure of justice, subject to the proviso that no conviction may be set aside or altered by reason of an irregularity in the proceedings ‘unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity . . .’. In

S v Moodie[17] Holmes JA said that the following rules could be stated regarding the identical provision contained in Act 56 of 1955:

'(1) The general rule in regard to irregularities is that the Court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial Court would inevitably have convicted if there had been no irregularity.

(2) In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been properly tried, this is per se a failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial Court would inevitably have convicted if there had been no irregularity.

(3) Whether the case falls within (1) or (2) depends upon the nature and degree of the irregularity.'

The test mentioned in (1) above has now been simplified – the test is no longer that of the reasonable trial court but whether the appeal court, on the evidence and on the credibility findings (if any), unaffected by the irregularity, considers that there is proof of guilt beyond reasonable doubt (*S v Yusuf*).[18]

[138] Generally speaking, an irregularity at a criminal trial occurs whenever there is a departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated and conducted. The basic concept is that an accused must be fairly tried.[19]

[139] The above requirements must now be applied with due appreciation for an accused person's rights in terms of s 35 of the Constitution, in particular the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay.

[140] I have no doubt that the court a quo's decision to allow the State to reopen its case was irregular. In view of my conclusion that, on the remaining

[17] *S v Moodie* 1961 (4) SA 752 (A) at 758E-H.
[18] *S v Yusuf* 1968 (2) SA 52 (A) at 57C-F.
[19] *S v Xaba* 1983 (3) SA 717 (A) at 728D-E.

evidence, the appellant was entitled to the benefit of the doubt, this is not a case in which it can be said that the on the remaining evidence the appellant's guilt was established beyond reasonable doubt.

[141] However, and because other members of the court may consider that the appellant's guilt was established beyond reasonable doubt by the remaining evidence, I should add that in my opinion the irregularity was so gross that the appellant's conviction should be quashed without reference to whether the remaining evidence suffices to sustain the conviction. This was not a case of calling one additional witness, as in *S v Felthun*,[20] (where there was in the event no finding that the trial court had acted irregularly by allowing the State to call the witness in question on a fairly narrow issue). The irregularity in the present case resulted in the calling of four new witnesses and the recalling of a fifth. About one-third of the evidence adduced by the prosecution was evidence led after the reopening. Moreover the State was given time, during the pendency of the trial, to investigate its case further in order to generate new evidence. This caused a lengthy delay in the completion of the trial and the incurring of substantial additional cost by the appellant.

[142] One does not know to what extent the additional evidence adduced by the State affected the defence team's decision to call the appellant. It is also difficult to know to what extent the additional evidence coloured the court a quo's assessment of the witnesses. It might be said that this prejudice can be avoided by disregarding the court a quo's credibility findings but on the other hand the appellant was entitled, as part of her right to a fair trial, to the benefit of proper credibility findings made by a trial judge who actually saw the witnesses.

[20] Fn 16 above.

[143] All in all, the way in which the trial court permitted the State to undertake further investigations and embark upon a wholescale adducing of additional evidence would in my opinion strike a reasonable person as a gross affront to basic fairness. Justice must not only be done but be seen to be done. This is a self-standing basis on which the appellant in my view is entitled to an acquittal.

Conclusion

[144] For all these reasons I would uphold set aside the whole of the court a quo's order and replace it with an order acquitting the appellant.

OL Rogers
Acting Judge of Appeal

Gorven AJA (Cachalia JA concurring)

[145] I have read the judgments of Mbatha AJA and Rogers AJA. I agree with Mbatha AJA that the appeal against conviction should be dismissed. I agree with her judgment on sentence and the order proposed. I disagree with her that the re-opening of the state case was not irregular. I agree with Rogers AJA that it was irregular but I disagree that the irregularity was of such a nature that the proceedings were thereby vitiated. The effect should be to disregard the evidence led after the reopening. If this is done, no failure of justice takes place. I disagree with Rogers AJA that the version of the appellant was reasonably

possibly true. I write to give additional reasons to those of Mbatha AJA why it is my view that the appellant's version was false beyond reasonable doubt and was correctly rejected by the trial court.

[146] Rogers AJA has sketched the factual background clearly. There is only one version of the events after the deceased and the appellant retired for the night on Saturday, that of the appellant. According to her, they did not sleep at all that night. The deceased was overwrought and the appellant was attempting to soothe him. The question is whether her version of what took place is reasonably possibly true. Neither Dr Panieri-Peter nor the forensic experts are able to determine whether the death of the deceased was as a result of homicide or suicide. There are factors which support both conclusions. The answer must be sought in the probabilities.

[147] Rogers AJA narrows the enquiry down to three factors; the cup with dissolved disprin, the gloves and the revolver. In my view there are additional factors to consider. I deal with these below.

[148] Loudine was in the house until about 05h00 when she left to assist Casper with feeding. The appellant was aware that they had left the farm at around 08h00. Loudine and Casper would have heard the shots if they had been on the farm at the time. On the appellant's version, therefore, the shots took place between 08h00 and 08h15 when she phoned Loudine. This means that everything that happened: her departure from the bedroom to fetch disprin for the deceased, her return and discovery that the deceased had shot himself, her leaving of the bedroom room again after changing her clothing at gunpoint, the discharge of the second shot, her return again, the removal of both gloves, the determination of how many rounds of ammunition remained in the firearm, her

holding the hands and face of the deceased and her phone call to Loudine took place in this fifteen minute period. Shortly after that, Casper and Loudine returned. The version of the appellant was developed in this time. Much of what Rogers AJA finds plausible in the appellant's story, which her counsel found difficult to defend, is because it is so unlikely that the appellant would not have dreamed it up but there was not time to carefully develop a version. It either happened as she says or it did not. The unlikelihood of her developing an improbable version cannot therefore be a justification for accepting her version. This is circular argument.

[149] It is highly improbable that the deceased donned gloves voluntarily. This version was met with utter disbelief by Riaan who had known the deceased for 35 years and farmed together with him for a period. In cross-examination, Riaan's evidence that it was laughable that the deceased acceded to wearing gloves and that he had never seen the deceased wear gloves, was challenged on the basis that the appellant would say that the deceased had worn them during hunting trips and when it was very cold. She did not in fact testify to this effect. Her version as to whether the deceased donned them after she gave them to him or whether she assisted him to put them on changed under cross-examination. This further differed from what was put to Riaan on her behalf that she put them on for him.

[150] It is also highly improbable that, if he was wearing gloves, the appellant would have removed them after he had shot himself. The reason given by her for removing them was in order to feel for a pulse. For a start, it is not necessary to remove one glove, let alone both, to feel a pulse. Secondly, the evidence of the appellant was that, as she entered the room after the second shot and saw so much blood, she immediately realised that the deceased was dead. In those circumstances, it beggars belief that she would remove the gloves. In

my view there is no warrant for the speculation by Rogers AJA that she did so because she wanted to hold his hands. She certainly did not give that as a reason for removing the gloves even though she said that she did hold both of his hands in hers after removing the gloves and feeling for a pulse. Thirdly, there is absolutely no explanation that accounts for how the gloves came to be with the pile of nightclothes, which she says she changed out of before leaving the room prior to the second shot being fired. Unless she deliberately placed the gloves on that pile of clothes or gathered them up with the clothes, there is no probable way that they could have been washed with the nightclothes.

[151] The deceased and the appellant had been tested for gunshot residue and none had been found on the deceased. This was irreconcilable with the deceased having shot himself, unless of course, he had his gloves on at the time. No mention was made of gloves by the appellant until after this test had been done and she explained her version to Riaan and Nelia shortly after their arrival at about 17h00 on the Sunday. On the following Tuesday or Wednesday, she said that she made a special call to her friend Nelia, apparently to tell her that she had discovered that the gloves had been washed along with her nightclothes from that night. She still did not tell the police about the gloves for a matter of months. Her version of how the deceased came to be wearing them, why she had removed them from the deceased's hands after the shooting, how they came to be placed with the nightclothes she had changed out of and how no-one saw them until they emerged from the wash is quite simply unbelievable. This is all the more so if, as she testified, she asked Casper to fetch the pile of clothes because the gloves would perforce have been on top of that pile or at least highly visible next to it.

[152] As regards the nightclothes, the appellant claims that Casper removed them at her instance. It is improbable that she would have limited her request to

these as her underwear from the previous day was lying elsewhere on the floor of the room, which she did not ask him to remove. She was aware that the police, and others, were going to enter the room and search it. An unnatural death had occurred and she must have known that investigations would be done or, at the very least, that the body would be removed and people would enter in order to say their last farewells. Her selective treatment of the nightclothes can only be so as to justify her having removed them from the scene and then washed them. If, as is likely, she shot the deceased while wearing the nightclothes, she would have to have washed them to remove evidence to that effect, whether GSR or blood.

[153] The appellant could give no cogent reason for why the cup in which the disprin was supposedly dissolved does not appear in the photographs. On her version, she arrived in the room, sat on her side of the bed and the deceased, lying on his back with the firearm resting on his chest, had clearly shot himself. Despite this, she recounted that he said that he had suffered a stroke and did not confront him with his actions, let alone immediately leave to obtain assistance. She simply gave him the disprin. The deceased, still gripping the firearm, lifted his head from the pillow and took the cup. The cup then disappeared without trace. Apart from the ludicrous picture of a person having shot himself in the head drinking disprin for a headache, the entire version is utterly improbable.

[154] Not only that, but the appellant would have had the court believe that the deceased threatened to shoot both of them, on one of her versions, and the whole family on another. He chased her away to call the children. If she could calm him, she would surely have attempted to persuade him to relinquish the firearm. If, as she says, he was so irrational, she would immediately have fled to seek help without changing. She was aware that the children were not on the farm and could only be called telephonically. She did not tell him this. Instead,

she decided to change out of her nightclothes at gunpoint with a threatening husband who she said she believed was about to shoot her to the extent that she could not reason with him. This, too, beggars belief. All she would be able to do was make a phone call and this did not require her to leave the house. In addition, she claimed to have done so because it was very cold. What she exchanged was nightclothes and a dressing gown for jeans and a top. She could not explain why this outfit would make her warmer. The version is simply an attempt to explain why she changed out of her nightclothes and washed them.

[155] Once she heard the second shot, she has no coherent version. She was scared to re-enter the room because the deceased had threatened to shoot her and she had still not done his bidding. She could not have known that the shot she heard had killed him. She could not explain why she entered the room despite this risk after she had been chased from the room at gunpoint in the belief that he would carry out his threat. In addition, it is clear that Loudine impressed on her not to go into the room again until they returned out of fear for the consequence. Such fear could only arise if the appellant was not sure that the deceased was dead. But her version is that she had entered the room and, either at the door realised that he was dead, or established this clearly by removing the gloves and feeling his pulse. By the time she phoned Loudine, there was no risk that the deceased was alive, much less in a position to harm anyone. There is no conceivable reason for why everyone stayed out of the room until Leon arrived and that Leon and Casper went to establish whether or not the deceased was in fact dead.

[156] The explanation of the appellant for why she took the firearm from the hands of the deceased and checked the number of rounds is bizarre in the extreme. By this stage, the appellant knew that the deceased was dead. I can conceive of no probable reason for a person whose husband has shot and killed

himself for counting rounds of ammunition to establish whether the deceased had been capable of carrying out his threat. It is an obvious attempt to explain away the GSR on her hand. Her story of the gloves is likewise her attempt to explain why none was found on the hands of the deceased despite his having allegedly shot himself twice. It is also noteworthy that she changed her version of whether she first checked the firearm or first removed the gloves. Initially, she was clear that she checked the firearm first. Under cross-examination, she was asked why she checked the firearm before feeling for the pulse of the deceased and establishing that he was dead. She then for the first time said that she could see from the amount of blood that the deceased was dead, but also then claimed that she did not remember in which order she had carried out these two actions.

[157] She had administered sedatives to the deceased on occasions before that night without his knowing it. Her testimony was that she did so when there was likely to be an eruption of emotion of the part of the deceased. Her testimony is that, from the Saturday afternoon, she could see such a build-up. And yet, during the night in question, with their not having slept a wink and with the deceased having been so agitated and irrational, she did not do so. Far more probable is that she in fact did so and shot him after these took effect. The evidence of both Riaan and Nelia that she told them that during the night she had twice given the deceased sleeping tablets was also never challenged.

[158] The key for the safe is another improbable factor. The evidence of her friend and confidant, Nelia, is that the appellant had it in her jeans pocket. This she denied but there is nothing to impugn Nelia's version on this aspect. In fact, the appellant's evidence was that it was her invariable practice to keep the key on her person. There is also no reason to reject Nelia's version that the appellant told her on the telephone on Tuesday or Wednesday that she had

found gloves in the pockets of her dressing gown. The latter aspect was denied by the appellant but Nelia would not have simply manufactured this. The appellant had to deny it because, on her version, she removed the gloves from the deceased at a time that she had already changed out of her nightclothes. The appellant took Nelia into her confidence and there is no indication that Nelia set out to falsely implicate the appellant. It is highly unlikely that the deceased had taken the firearm from the safe that afternoon and stored it in the bedroom and there is no way he could have fetched it while the appellant fetched disprin.

[159] It is also far more likely that the appellant would have been able to shoot the second shot into the precise entry point in the head of the deceased as the first shot than would the deceased.

[160] All in all, there are far too many gross improbabilities for it to be held that the version of the appellant is reasonably possibly true. It was properly rejected as false.

[161] I have said that the application to reopen the state case should not have been allowed. None of the factors previously recognised as founding such an application were present. No others were proffered by the state in support of the application. The grant of this application thus amounted to an irregularity. The effect of such an irregularity has been dealt with clearly over the years. In *S v Naidoo*,[21] the approach was explained in the following terms:

'There are irregularities (fortunately rare) which are of so gross a nature as *per se* to vitiate the trial. In such a case the Court of Appeal sets aside the conviction without reference to the merits. . .

[21] *S v Naidoo* 1962 (4) SA 348 (A) at 354D-H.

On the other hand there are irregularities of a lesser nature (and happily even these are not frequent) in which the Court of Appeal is able to separate the bad from the good, and to consider the merits of the case, including any findings as to the credibility of witnesses. If in the result it comes to the conclusion that a reasonable trial Court, properly directing itself, would inevitably have convicted, it dismisses the appeal, and the conviction stands as one on the merits.'

The approach does not differ materially from that of s 35(5) of the Constitution,[22] dealing with improperly obtained evidence, which provides:

'Evidence obtained in a manner that violates any rights in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

The basic question has been correctly distilled by Rogers AJA in citing *S v Yusuf*,[23] 'on the evidence and on the credibility findings (if any), unaffected by the irregularity, is [there] proof of guilt beyond reasonable doubt'?

[162] I respectfully differ from Rogers AJA on this point. It is clear that the evidence led as a result of the irregularity must be excluded. The question is whether, once this is done, the guilt of the appellant is established without reasonable doubt. The analysis undertaken above does not rely on any evidence led after the state reopened its case. In my view, excluding such evidence, the guilt of the appellant was established beyond a reasonable doubt. The reopening of the case therefore does not lead to a vitiating irregularity such that the appeal should succeed. The appellant was correctly convicted of murder and the appeal against conviction must be dismissed.

[22] Constitution of the Republic of South Africa, 1996.
[23] *S v Yusuf* 1968 (2) SA 52 (A) at 57C-F.

T Gorven

Acting Judge of Appeal

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