THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1236/2017

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL **APPELLANT**

and

DONOVAN MARK RAMDASS **RESPONDENT**

Neutral citation: *The Director of Public Prosecutions, KwaZulu-Natal v Ramdass* (1236/2017) [2019] ZASCA 23 (28 March 2019)

Coram: Wallis and Swain JJA and Mokgohloa AJA

Heard: 14 March 2019

Delivered: 28 March 2019

Summary: Criminal Procedure Act 51 of 1977 – s 319(1) – refusal by trial court to reserve questions of law – petition in terms of s 317(5) and s 316(13)*(c)* for special leave to appeal refused – Superior Courts Act 10 of 2013 – s 17(2)*(f)* – reconsideration and variation of order – refusal of reservation of questions of law confirmed – erroneous order refusing special leave varied – ordinary leave to appeal refused.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Ploos van Amstel J sitting as court of first instance):

1 The order granted by this court on 16 August 2017 is varied in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013, by the deletion of paragraph 2, reading as follows:

'The application for special leave to appeal is dismissed on the grounds that there are no special circumstances meriting a further appeal to this court.'

and its replacement with the following paragraph:

'The application for leave to appeal is dismissed on the grounds that there are no reasonable prospects of success and there is no other compelling reason why an appeal should be heard.'

JUDGMENT

Swain JA (Wallis JA and Mokgohloa AJA concurring):

[1] The respondent, Mr Donovan Ramdass, was acquitted of the murder of the late Ms Ashika Singh (the deceased), by the KwaZulu-Natal Local Division, Durban (Ploos van Amstel J), on the grounds that there was reasonable doubt whether he possessed the requisite criminal capacity, to appreciate that what he was doing was wrongful and to act in accordance with such appreciation, when he strangled the deceased. The respondent was also acquitted of an additional charge of robbery with aggravating circumstances, for the same reason.

[2] The respondent maintained that he had no recollection of what had happened to the deceased on the evening when he killed her, as he had been drinking and smoking crack cocaine. He stated that if he had caused the death of the

deceased, he did so without realising what he was doing and without the intention to kill her. He claimed to have no recollection of events on the evening in question. His evidence to this effect was accepted by the trial judge. It had not been substantially challenged by the State, which called no expert evidence to refute the claim of amnesia, or to show that his claim not to know what happened or what he was doing that evening, was false.

[3] Dissatisfied with the outcome of the trial, the State then requested the court a quo to reserve a number of questions of law in terms of s 319(1) of the Criminal Procedure Act 51 of 1977 (the CPA), for consideration by this court. The application having been refused by the court a quo, the State then embarked upon an incorrect jurisdictional path in order to challenge in this court, the decision of the high court. Whether this incorrect procedure results in this court lacking jurisdiction to hear the appeal, must be determined at the outset.

[4] The starting point in determining the correct jurisdictional path that should have been followed by the State, is s 319 of the CPA. The relevant provisions of the section are ss 319(1) and 319(3) which provide as follows:

'(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.

(2) . . .

(3) The provisions of sections 317(2), (4) and (5) and 318(2) shall apply *mutatis mutandis* with reference to all proceedings under this section.'

[5] If the trial judge refuses the application to reserve questions of law, the provisions of s 317(5) of the CPA (as referred to in s 319(3)), dealing with appeals against such a refusal, are the next step in the process and provide that:

'If an application for condonation or for a special entry is refused, the accused may, within a period of 21 days of such refusal or within such extended period as may on good cause shown, be allowed, by petition addressed to the President of the Supreme Court of Appeal,

apply to the Supreme Court of Appeal for condonation or for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular and not according to law, as the case may be, and thereupon the provisions of subsections (11), (12), (13), (14) and (15) of section 316 shall *mutatis mutandis* apply.'

[6] The manner in which the petition then had to be dealt with by this court, requires a consideration of ss (11), (12) and (13) of s 316 of the CPA, (as referred to in s 317(5)), which provide as follows:

'(11)*(a)* A petition referred to in subsection (8), including an application referred to in subsection (8)*(b)*(ii), must be considered in chambers by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal.

(b) If the judges differ in opinion, the petition shall also be considered in chambers by the President of the Supreme Court of Appeal or by any other judge of the Supreme Court of Appeal to whom it has been referred by the President.

(c) For the purposes of paragraph *(b)* any decision of the majority of the judges considering the petition, shall be deemed to be the decision of all three judges.

(12) The judges considering a petition may –

(a) call for any further information from the judge who refused the application in question, or from the judge who presided at the trial to which the application relates, as the case may be;

(b) in exceptional circumstances, order that the application or applications in question or any of them be argued before them at a time and place determined by them; or

(c) call for a copy of the record or portion of the record of the proceedings if it was not submitted in terms of subsection (10)*(c).*

(13) The judges considering a petition may, whether they have acted under subsection (12)*(a)* or *(b)* or not –

(a) . . .

(b) . . .

(c) in the case of an application for leave to appeal, subject to paragraph *(d)*, grant or refuse the application; and

(d) . . .

(e) in exceptional circumstances refer the petition to the Supreme Court of Appeal for consideration, whether upon argument or otherwise, and the Supreme Court of Appeal may thereupon deal with the petition in any manner referred to in this subsection.

(14) . . . .'

[7] Under those provisions of s 316 of the CPA the application had to be lodged with this court and placed before two Judges in accordance with the directions issued by the President of the court. If the two disagreed, either the President or a third Judge nominated by her would consider the petition and the view of the majority would prevail. The Judges considering the petition could grant it, dismiss it or refer it to argument before the court. In all cases where direct imprisonment had been imposed, they were required to deal with the petition as a matter of urgency. Their decision would be final. The only appeal that would lie against their decision would be one to the Constitutional Court with its leave.

[8] However, the State did not apply to this court in terms of s 317(5) of the CPA, but in terms of s 319(1) of the CPA, read with s 16(1)*(b)* of the Superior Courts Act 10 of 2013 (the SC Act), asking for special leave to appeal against the refusal. Section 16(1)*(b)* of the SC Act provides as follows:

'(1) Subject to section 15(1), the Constitution and any other law –

(a) . . .

(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal . . .

(c) . . . .'

[9] The application followed the incorrect procedure and was defective in two respects:

(a) First, special leave was not required. The State only required the ordinary leave of this court and the provisions of s 16(1)*(b)* of the SC Act were not applicable. That section deals with appeals against any decision of a division of the high court taken on appeal to it, where the special leave of this court is required.

(b) Second, the definition of 'appeal' contained in the SC Act provides that 'appeal' in Chapter 5, which includes ss 16 and 17, does not include an appeal in a matter regulated in terms of the CPA. As the appeal in the present matter is regulated in terms of the CPA, it should follow that these sections of the SC Act do not apply.

[10] The application for special leave to appeal was then considered by two Judges designated by the President of this court. However no doubt misled by the fact that it was couched as an application for special leave to appeal, it was

dismissed on the erroneous ground that there were no special circumstances meriting a further appeal to this court. That was an incorrect test. As the proposed appeal was against the high court's refusal to reserve the suggested questions of law, the proper question in considering the application was whether the proposed questions of law should have been reserved for decision by this court.

[11] Dissatisfied with this outcome, the State then applied in terms of s 16(1)*(b)* and s 17(2)*(f)* of the SC Act, read with s 319(1) of the CPA, for a reconsideration and variation of the refusal of special leave by this court. On its face this further compounded the procedural irregularity.

[12] The reference in the application to the provisions of s 17(2)*(f)* must be examined in the context of ss 17(2)*(a)* and 17(2)*(b)* of the SC Act. These sections provide that:

'(2)*(a)* Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, but any other judge or judges of the same court or Division.

(b) If leave to appeal in terms of paragraph *(a)* is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.'

Section 17(2)*(f)* provides that:

'The decision of the majority of the judges considering an application referred to in paragraph *(b)*, or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

[13] As pointed out above, the definition of 'appeal' contained in the SC Act provides that 'appeal' in Chapter 5, which includes s 17, does not include an appeal in a matter regulated in terms of the CPA. As the appeal in the present matter is regulated in terms of the CPA, it should follow that s 17 of the SC Act does not apply.

[14] Furthermore, it is a basic rule of interpretation of statutes that a proviso must be read and considered in relation to the principal matter to which it is a proviso. It is not a separate and independent enactment and the words of the proviso are dependent on the principal enacting words, to which they are attached as a proviso. The words of the proviso cannot be read as divorced from their context. In *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 633 (A) at 645B-F, the following was stated:

'This argument altogether overlooks the true function and effect of a proviso. According to Craies, *Statute Law*, 7th ed., at p. 218 –

"the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect".

In *R*. v *Dibdin*, 1910 P. 57, Lord FLETCHER MOULTON at p. 125, in the Court of Appeal, said -

"The fallacy of the proposed method of interpretation (i.e. to treat a proviso as an independent enacting clause) is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as for instance in such cases as *Ex parte Partington*, 6 Q.B. 649; *In re Brockelbank*, 23 Q.B. 461, and *Hill v East and West India Dock Co.*, 9 App. Cas. 448, have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso."'

This passage was quoted with approval by Mahomed J in the majority judgment in *S v Mhlungu & others* 1995 (3) SA 867 (CC) para 32.

[15] The proviso to s 17(2)*(f)* qualifies the finality of a decision by two Judges in dealing with an application for leave to appeal under s 16, whether it is an application for leave or special leave. It does so by providing for the President of this court to review the decision and, in exceptional circumstances, refer it for reconsideration by the court. There is no equivalent provision in the provisions of s 316 cited earlier and there is no principle of statutory interpretation permitting a proviso to a section in the

SC Act, qualifying appeals in civil cases and appeals from courts composed of more than a single Judge in the high court, to be transplanted to the provisions of the CPA governing appeals in criminal cases originating in the high court. On the terms of the SC Act therefore it would seem that the order by the President, referring the decision by two Judges to refuse the petition for special leave to this court for reconsideration, would not involve a reconsideration of the merits of the application to reserve questions of law for determination by this court. Precisely what it would involve beyond upholding the dismissal of that petition, but possibly on the different ground that it was an irregular proceeding, need not be decided for the reasons that follow.

[16] Despite these difficulties, the Constitutional Court in *S v Liesching & others* [2016] ZACC 41; 2017 (2) SACR 193 (CC) held that s 17(2)*(f)* applied in the following circumstances. Leave to appeal against conviction by the high court had been refused by two Judges under s 316(13)*(c)* of the CPA. The President of this court was approached some two years later under s 17(2)*(f)* to reconsider the refusal on the grounds that the principal witness at the trial had, at a subsequent trial of another accused, recanted his evidence. The application for reconsideration was accompanied by an application to lead further evidence on appeal. The President held that he had no jurisdiction to reconsider the previous order under s 17(2)*(f)*. On further appeal to the Constitutional Court it held that he had such jurisdiction and referred the matter back for reconsideration.[1]

[17] The reasoning of the Constitutional Court requires careful scrutiny. It held that where the CPA regulates a matter, chapter 5 of the SC Act has no application (para 37). Having considered s 316(5) of the CPA, which dealt with the ordinary circumstance, where an application to lead further evidence on appeal accompanies the application for leave to appeal, it held that there was no provision of the CPA

[1] The President refused the application under s 17(2)*(f)* and the Constitutional Court subsequently held that there were no exceptional circumstances justifying the exercise of the President's discretion. *S v Liesching & others* [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC).

dealing with applications to lead further evidence on appeal after a petition had been refused (para 44). Accordingly, it held chapter 5 of the SC Act applied in that situation. It then concluded that, because s 17(2)*(f)* does not distinguish between civil and criminal cases and the proviso is couched in extremely broad terms aimed at preventing injustice, the President could refer any refused petition to the court for reconsideration under the section (para 57). It pointed out that the President had previously done so in several criminal cases.[2]

[18] The effect of this was to divorce the proviso to s 17(2)*(f)* from its context, referring back to an application for leave to appeal under s 16 of the SC Act, and to treat it as a general enacting provision. In reaching that conclusion the court did not refer to the rules governing the interpretation of provisos referred to above.

[19] In my view, it must necessarily follow from this line of reasoning that the proviso to s 17(2)*(f)* is now to be understood as conferring on the President of this court a power, to be used in exceptional circumstances, for reconsideration of any application for leave to appeal or petition, whether brought in terms of s 16 of the SC Act or s 316 of the CPA, that has been refused. That leaves only the question whether this court can condone the irregularities on the part of the appellant in pursuing the application for leave to appeal under s 16 of the SC Act instead of under the applicable provisions of the CPA. The procedure in dealing with a petition under s 316 essentially mirrors that to be followed in dealing with an application for leave to appeal under s 17 of the SC Act. In my view, the fact that the incorrect section was cited as the source of this court's authority to grant leave to appeal can therefore be condoned, and the dismissal of the application be treated as a dismissal of a petition under s 316(13)*(c)* of the CPA. That is what the President referred for reconsideration. In dealing with it, however, the test to be applied is that applicable in

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[2] *Notshokovu v S* [2016] ZASCA 112; *S v Ntlanyeni* [2016] ZASCA 3; 2016 (1) SACR 581 (SCA).

any case of an appeal against the refusal of a trial court to reserve a question of law for this court's consideration, not the test for the grant of special leave to appeal.

[20] I turn to the merits of the appeal. The questions of law that the State requested the court a quo to reserve in terms of s 319(1) of the CPA were based on the following proven facts relating to the conduct of the accused before, during and after the death of the deceased:

'3.1 The accused had been drinking prior to the offence.

3.2 The accused was taken to a place allegedly where he had purchased drugs in the past.

3.3 The deceased was killed between the hours of 20h30 and 21h12.

3.4 The deceased's semi-naked body had her head wrapped in plastic and a ligature (extension cord) tied around her neck.

3.5 The accused left the residence within 40 minutes of having been left alone with the deceased.

3.6 The residence was locked and the drive-way gate was jammed with a stone. The accused drove the deceased's motor vehicle to the Point Area, CBD from Merebank.

3.7 The accused subsequently travelled from the Durban CBD to the Umhlanga area during the early hours of the morning following the murder.

3.8 The accused was found by relatives in the Umhlanga area.

3.9 The accused had been using his cellular phone throughout the night until 11h00 the next morning'.

[21] It was also recorded that the court a quo had found as a proven fact that the respondent had caused the death of the deceased. However, as correctly pointed out by the court a quo, the evidence did not prove that the deceased had been found with an extension cord tied around her neck.

[22] The questions of law that the State sought to have reserved were the following:

'1. Did the court err when applying the principle relating to criminal capacity as set out in *S v Chretien* 1981 (1) SA 1097 (A)?

2. Did the court err in not applying the binding authority as set out in *S v Eadie* 2002 (3) SA 719 (SCA)?

3. In view of its acceptance of previous physical altercations between the deceased and the accused during arguments, did the court err in over-emphasising alternatively, incorrectly

evaluating the absence of a motive and/or conduct out of character, given the accused's drinking/consumption of alcohol?

4. Did the court err in applying the test regarding inferences to be drawn from circumstantial evidence, in reaching a conclusion that the accused lacked criminal capacity in circumstances indicative of goal-directed conduct, patchy recollection and the absence of a "trigger"?

5. Did the court err when:

(a) interpreting s 1(1) of the Criminal Law Amendment Act (CLAA) 1 of 1988, and/or

(b) applying the proven facts of this matter to this section?

6. Did the court err in denying the State the opportunity to re-open its case, when it is accepted practice (the only way) in dealing with defences of this nature where the accused has to lay a basis, the full extent of which is only known following his evidence'?

[23] Before dealing with the merits of whether the court a quo should have reserved these issues as questions of law for consideration by this court, it is necessary to examine what the court a quo considered when deciding this issue. In respect of each of the questions sought to be reserved, in addition to determining whether they were questions of law, the court a quo decided that none of them had 'reasonable prospects of success'.

[24] However, all that the court a quo had to decide was whether the issues sought to be reserved by the State were questions of law. Whether any of the questions sought to be reserved possessed reasonable prospects of success in this court, did not constitute part of the enquiry before the court a quo. As decided by this court in *S v Basson* 2003 (2) SACR 373 (SCA) paras 10 and 11, when a question of law arises, the trial court, or, where it refuses to do so, this court, has to decide on application by the State, whether to reserve a question of law for consideration by this court. When this court considers an application by the State for leave to appeal against a refusal to reserve a question of law by the trial court, as with any other application for leave to appeal, it will only exercise its discretion in favour of the State, where there is a reasonable prospect that a mistake of law was made. In addition, there must at least be a reasonable prospect that if the mistake of law had not been made, the accused would have been convicted.

[25] Because the questions sought to be reserved by the State require a consideration of what constitutes a question of law, as well as the requirements necessary to establish the defence of criminal incapacity caused by intoxication and the consumption of drugs, these issues must be briefly examined. In *Magmoed v Janse van Rensburg & others* 1993 (1) SACR 67 (A) at 94, this court stated that it is a question of law whether the proven facts bring the conduct of the accused within the ambit of the crime charged. This involves an enquiry as to the essence and scope of the crime charged, by asking whether the proven facts in the particular case constitute the commission of the crime. Where there is doubt regarding the elements of the offence with which the accused has been charged, or doubt as to the precise scope, nature or interpretation of the elements of the offence, the enquiry as to whether the accused is guilty of the crime charged is a question of law. However, where there is no such doubt, it is a question of fact whether the evidence establishes one or more of the factual elements of a particular crime.

[26] In *S v Laubscher* 1988 (1) SA 163 (A) at 166H-I, the test for criminal capacity was formulated as follows:

(a) The accused must have been able to distinguish between right and wrong, that is to realise he or she was acting unlawfully, and

(b) To act in accordance with that realisation by resisting the temptation to act unlawfully.

[27] In *S v Eadie* 2002 (3) SA 719 (SCA) para 2, this court held that when an accused person raised a defence of temporary non-pathological criminal incapacity, that is, criminal incapacity due to factors such as intoxication, provocation, drug use and severe emotional stress, the State bore the onus of proving that he or she had criminal capacity at the relevant time. This court emphasised that it had repeatedly been stated that:

‘(i) In discharging the onus the State is assisted by the natural inference that, in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;

(ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;

(iii) evidence in support of such a defence must be carefully scrutinised;

(iv) it is for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period.'

[28] Before the court a quo dealt with the questions of law that the State sought to have reserved, it stated the following:

'There was no dispute at the trial that criminal capacity was a factual ingredient of the crimes charged. I found that the evidence did not establish this particular ingredient beyond a reasonable doubt. That, in my view, was a finding of fact . . . My view is that my finding that the State failed to prove criminal capacity on the part of the accused was a factual finding and that the State is not entitled to appeal against the acquittal on the basis that my factual finding was wrong.'

Counsel for the appellant, although conceding that criminal capacity was a factual ingredient of the crimes charged and that the finding by the court a quo that the evidence did not prove this issue beyond a reasonable doubt, was a question of fact, nevertheless argued that the questions sought to be reserved were questions of law.

[29] It is against this background that I turn to consider the issues that the State sought to have reserved as questions of law. The first issue is; whether the court erred when applying the principle relating to criminal capacity, as set out in *Chretien*? The court a quo stated that counsel for the State did not develop this point and made no submissions as to how the court a quo had erred. It held that 'although on the face of it' the question posed was one of law, it had no reasonable prospects of success.

[30] The State submitted that the relevance of the decision in *Chretien* to a determination of whether the issue sought to be reserved was a question of law, lay in the first leg of the test for criminal capacity, namely the ability of the respondent to distinguish between right and wrong. It was submitted that the decision exonerated an accused person from criminal liability in circumstances where the accused as a result of intoxication, was not aware of what he or she was doing. It presupposed an involuntary action on the part of the accused.

[31] In support of this submission, the State referred to a number of aspects in the evidence, maintaining that this evidence showed that the respondent was able to distinguish between right and wrong, at the relevant time. Accordingly, the criticism of the State lay not in the fact that the court a quo had wrongly applied the legal principles in *Chretien*, but rather that it should have reached a different factual conclusion in the light of those principles.

[32] The ability of the respondent to distinguish between right and wrong was an issue of fact, to be considered in deciding whether the State discharged the onus of proving beyond reasonable doubt that the respondent possessed the requisite criminal capacity, at the relevant time. The conclusion by the court a quo that the State had failed to discharge this onus was based upon a finding that the respondent had established a sufficient foundation in fact for this defence. It concluded that on the totality of the evidence there was a reasonable doubt whether the respondent had the requisite criminal capacity, when he strangled the deceased. This was not a conclusion of law, because whether the evidence established one or more of the factual elements of the particular crime, namely criminal capacity, was a question of fact. Consequently, although framed as a question of law, the issues sought to be raised were purely factual in nature and cannot be reserved as a question of law.

[33] The second issue that the State sought to have reserved as a question of law was; whether the court a quo erred in not applying the binding authority as set out in *Eadie*? The court a quo stated that what it had said in regard to the first question sought to be reserved, applied equally to this question. In other words, ‘although on the face of it a question of law’ the point had no reasonable prospects of success.

[34] The State submitted that the relevance of the decision in *Eadie* to a determination of whether the issue sought to be reserved was a question of law, lay in the second leg of the test for criminal capacity, namely that of self-control. It was submitted that the important aspect of the applicable test was that the respondent had to prove that he was unable to exercise self-control in order for his defence to succeed. In support of this submission, the State referred to a number of aspects in the evidence and again maintained that this evidence showed, that the respondent

was able at the relevant time to exercise self-control. As in the case of the first question of law sought to be reserved, the criticism of the State accordingly lay not in the fact that the court a quo had wrongly applied the legal principles in *Chretien,* but rather in the manner in which the court a quo did so having regard to the factual findings.

[35] In *Eadie* para 42, it was stated that:

'. . . it is clear that in order for an accused to escape liability on the basis of non-pathological criminal incapacity he has to adduce evidence, in relation to the second leg of the test . . . from which an inference can be drawn that the act in question was not consciously directed, or put differently, that it was an involuntary act.'

And at para 53, the second leg of the test was described in the following terms:

'The second leg of the test . . . is read to mean that one looks to see whether in all the circumstances of the case the accused could not resist or refrain from this act or was unable to control himself to the extent of refraining from committing the act.'

[36] The State bore the onus of proving that the respondent possessed the requisite criminal capacity at the relevant time. The respondent bore no onus of proving that he was unable to exercise self-control in order for the defence to succeed. All that the respondent had to do was adduce evidence from which an inference could be drawn that the strangulation of the deceased was involuntary, in the sense that the respondent was unable to prevent himself from committing this act.

[37] The ability of the respondent to control his conduct is again an issue of fact to be considered when deciding as a matter of fact, whether the State discharged the onus of proving beyond reasonable doubt that the respondent possessed the requisite criminal capacity, at the relevant time. As in the case of the first question sought to be reserved, the conclusion by the court a quo that the State had failed to discharge this onus was based upon a finding that the respondent had established a sufficient foundation in fact, from which an inference could be drawn that the act in question was involuntary. This was not a conclusion of law but one of fact, based upon the evidence. Consequently, although framed as a question of law, the issues sought to be raised were purely factual in nature and cannot be reserved as a question of law.

[38] The third issue that the State sought to have reserved as a question of law was; whether in view of the court a quo's acceptance of previous physical altercations between the deceased and the accused during arguments, the court erred in over-emphasising alternatively, incorrectly evaluating the absence of a motive and/or conduct out of character, given the accused's drinking/consumption of alcohol? The court a quo stated that counsel for the State did not point to any material misdirection in the judgment and that the question seemed to be one of fact and not law. If it could be said to involve a question of law, the court a quo held that it had no reasonable prospect of success on appeal.

[39] The State submitted that the court a quo in accepting the respondent's defence of criminal incapacity as reasonably possibly true, placed weight on his character and the absence of a motive. In doing so, the court a quo failed to evaluate material evidence which the State maintained would have affected the conclusion reached.

[40] As regards the weight placed by the court a quo on the apparent absence of a motive on the part of the respondent to kill the deceased, the court a quo dealt with the submissions of the State, in the following terms:

'The motive suggested by counsel for the State was that the accused resented the deceased because of her controlling and abusive behaviour, or that they may have argued because he wanted more money to buy drugs. I see no merit in these contentions. The accused agreed that there were problems in their relationship, but was adamant that they were working on them and were planning to get married. This was consistent with Mrs Singh's evidence. The possibility of an argument over money is mere speculation and there is no evidence to support it. It does not seem likely that if the accused was in control of his senses he would have killed the deceased for one of the reasons suggested by counsel, especially not in the manner in which he did. In my view no motive to kill the deceased was established even as a reasonable possibility.'

[41] Whether the respondent possessed a motive to murder the deceased, was therefore considered by the court a quo in the context of determining whether the respondent 'was in control of his senses', at the time. As pointed out by Professor J Burchell *Principles of Criminal Law* 5 ed at 353:

‘The general rule is that a person’s motives, whether good or bad, are irrelevant to criminal intent. However, evidence of the accused’s motive in committing a crime is admissible and may prove important especially in implicating the accused in the commission of the crime and even in helping to establish intention.’

In other words, the absence of a motive is a factor to be considered in determining whether the respondent possessed criminal capacity to form the intent to murder the deceased. The conclusion reached by the court a quo on the evidence that the respondent did not possess a motive to murder the deceased, is clearly a question of fact and not one of law.

[42] As regards the character of the respondent, the court a quo concluded on the evidence that the respondent ‘was regarded by those who knew him as a gentle and humble person’ and ‘what he did was completely out of character’. Again, this conclusion is clearly a question of fact and not one of law. Consequently, the issue cannot be reserved as a question of law.

[43] The fourth issue that the State sought to have reserved as a question of law was; did the court err in applying the test regarding inferences to be drawn from circumstantial evidence, in reaching a conclusion that the accused lacked criminal capacity in circumstances indicative of goal-directed conduct, patchy recollection and the absence of a ‘trigger’? The court a quo stated that no material misdirection was demonstrated in argument and the question seemed to involve a finding of fact and not law.

[44] The State submitted that the question sought to be reserved related primarily to the court a quo, incorrectly evaluating the proven facts. The inferences drawn by the court a quo were not challenged, but the conclusion reached by the court a quo based upon the inferences that were drawn, was challenged. It was submitted that this entailed an evaluation of the discretion exercised by the court a quo when analysing the proven facts in relation to each of the charges. It was submitted that the court a quo failed to exercise its discretion judicially, by failing to consider all of the facts and circumstances. The State emphasised that the court a quo had failed to consider and evaluate the goal-directed behaviour of the respondent and more

specifically ignored the principle that a 'trigger', was necessary for the respondent's defence to succeed.

[45] In *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; [2016] 1 All SA 346 (SCA); 2016 (1) SACR 431 (SCA) para 36, this court stated the following:

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

Having reached this conclusion, the court at para 37 referred with approval to the Canadian Supreme Court case of *R v B* (G) (1990) 56 CCC (3d) 181 (SCC); (1990) 2 SCR 57, in which it was held that where the record including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, a court of appeal could intervene. In addition, the following passage in *R v Roman* (1987) 38 CCC (3d) 385; 66 Nfld & PEIR 319; 204 APR 319, was approved:

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

This court in *Pistorius* then concluded at para 38 that:

'In the present instance, although the question of the accused's intention at the relevant time is one of fact to be determined by inference, there regrettably does appear to have been such "an absence of appreciation of material evidence" relevant to that issue.'

[46] In the present case there was, however, no failure on the part of the court a quo to appreciate material evidence in relation to the goal-directed behaviour of the respondent. It did so in the following terms:

'Counsel for the State submitted that the accused could not have been so intoxicated that he lacked criminal capacity having regard to his actions when he left the house. He had to unlock and open the front door and security gate, open the driveway gate, drive the car out, close the gate and then drive to the city centre. He also drew attention to the cupboards that the accused opened in the house, the items he threw on the floor, and the fact that he took the deceased's phone, camera charger and Garmin device. There is no expert evidence to the effect that these apparent goal-directed actions are inconsistent with the state of intoxication in which he says he must have been.

On the contrary, Professor Mkhize expressed the view, on the assumption that his amnesia is genuine, and with knowledge of his subsequent behaviour, that he may have lacked the capacity to realise that what he was doing was wrong, or to act in accordance with such appreciation, or to form the intention to kill.'

[47] The submissions of the State in this regard simply amount to an invitation to this court, to reassess the evidence of the goal-directed behaviour of the respondent for the purpose of affording it different weight in the overall assessment of the respondent's criminal capacity.

[48] I turn to the submission by the State that the court a quo ignored the principle that a 'trigger', was necessary for the respondent's defence to succeed. In support of this submission, the State referred to certain dicta in *Eadie* in which this court, in dealing with the evidence of two psychiatrists who testified in that case, referred to what was described by these witnesses as an event that 'triggered' a 'period of automatism' or which resulted in the appellant being deprived 'of the power to make decisions'. The court also referred to certain other decisions dealing with criminal incapacity, in which there was evidence of a 'trigger' event that caused the accused's conduct. However, the case is no authority for the proposition that a defence of criminal incapacity cannot succeed, unless there is evidence of a 'trigger event' that resulted in the accused lacking criminal capacity. Consequently, the issue cannot be reserved as a question of law.

[49] The fifth issue that the State sought to have reserved as a question of law was; did the court err when:
(i) interpreting s 1(1) of the CLAA, and/or
(ii) applying the proven facts of this matter to this section?
The court a quo stated that a contravention of the section was never part of the State's case. It was not referred to in the charge sheet, nor was it relied on by the State in argument and the only reason why it was referred to in the judgment, was to try and explain to the family of the deceased, why the accused could not be convicted of the statutory offence. The court a quo then held that the point did not have reasonable prospects of success.

[50] The State submitted that the court a quo failed to apply the provisions of this statute, when in circumstances it was bound to do so. The essence of the submission appears in the following passage from the State's heads of argument:
'The trial court found that the applicant failed to discharge its onus beyond reasonable doubt that the applicant had the criminal capacity. In doing so, the trial court accepted the respondent's defence as being reasonably possibly true. It found that he had laid the factual foundation for the defence. Thus, on its own reasoning, its logical conclusion is that the applicant has proven beyond reasonable doubt that the respondent lacked criminal capacity due to the consumption of intoxicating substances.'
It was submitted that this argument raised a substantial point of law.

[51] What the argument illustrates, however, is a lack of understanding on the part of the State, of the effect of s 1(1) of the CLAA. A finding that the State failed to prove beyond reasonable doubt that the respondent possessed criminal capacity at the time, does not automatically result in a finding that the State proved beyond reasonable doubt, that the respondent lacked criminal capacity at the time. In terms of the common law, the accused may be acquitted of murder if there is a reasonable possibility that the accused lacked criminal capacity, as a result of intoxication. In terms of s 1(1) of the CLAA the accused will also escape liability in terms of the statute, unless the State proves beyond reasonable doubt that the accused was so intoxicated, that he could not be criminally liable at common law. Consequently, as pointed out by this court in *S v September* 1996 (1) SACR 325 (A) at 328, for a conviction in terms of the CLAA, it must be positively proved beyond reasonable

doubt that the accused lacked criminal capacity. If there is doubt concerning the criminal capacity of the accused, he or she cannot be found guilty either in terms of the common law or the CLAA.

[52] The court a quo in dealing with this issue stated the following:

'The difficulty with a statutory offence is the requirement that the accused must have been so drunk that he lacked criminal capacity. In a case where the accused is acquitted on a charge of murder on the basis that there is a reasonable possibility that he was so drunk that he lacked the required capacity he cannot be convicted of the statutory offence unless the Court can find beyond a reasonable doubt that he did not have such capacity.'

The court a quo accordingly correctly interpreted and applied s 1(1) of the CLAA to the facts of the case and there is no basis for the issue to be reserved as a question of law. We were not invited to reconsider the decision in *S v September*.

[53] The final issue that the State sought to have reserved as a question of law was; did the court err in denying the State the opportunity to re-open its case, when it is accepted practice (the only way) in dealing with defences of this nature where the accused has to lay a basis, the full extent of which is only known following his evidence? The court a quo stated this issue was fully dealt with in the judgment and there was nothing further to say about it. In addition, it did not consider the point had reasonable prospects of success on appeal.

[54] The State submitted by reference to various aspects of the evidence that the court a quo had misdirected itself by refusing the application by the State to re-open its case, when it was fair and practical to do so. It was submitted that the court a quo did not exercise its discretion judicially, as it reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.

[55] It is, however, clear from the judgment of the court a quo that it exercised its discretion in this regard judicially and not capriciously, or upon any wrong principle, but for substantial reasons. (*Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-399.) There is accordingly no basis for the issue to be reserved as a question of law.

[56] Consequently, a reconsideration of the order granted by this court on 16 August 2017, requires variation by the substitution of the order refusing special leave to appeal to this court, with an order refusing ordinary leave to appeal to this court.

[57] The following order is granted:

The order granted by this court on 16 August 2017 is varied in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013, by the deletion of paragraph 2 reading as follows:

'The application for special leave to appeal is dismissed on the grounds that there are no special circumstances meriting a further appeal to this court.'

and its replacement with the following paragraph:

'The application for leave to appeal is dismissed on the grounds that there are no reasonable prospects of success and there is no other compelling reason why an appeal should be heard.'

K G B Swain
Judge of Appeal

Appearances:

For Appellant:	Mr K L Singh (with Mr K M Shah) Instructed by: The Director of Public Prosecutions, Durban The Director of Public Prosecutions, Bloemfontein
For Respondent:	Mr P Marimuthu Instructed by: Legal Aid Board, Durban Legal Aid Board, Bloemfontein