THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 904/2017

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERN CAPE **APPELLANT**

and

MARC SCHOEMAN **FIRST RESPONDENT**

GERHARD BOTHA **SECOND RESPONDENT**

Neutral citation: *DPP, Western Cape v Schoeman & another* (904/2017) [2019] ZASCA 158 (28 November 2019)

Coram: Cachalia, Plasket, Nicholls, Dlodlo JJA & Tsoka AJA

Heard: 26 September 2019

Delivered: 28 November 2019

Summary: Application for leave to appeal against refusal by trial court to reserve questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977 – factual bases for the reservations not set out, did not appear fully from the judgment and no request was made to trial court for special finding on the facts upon which points of law hinged – questions of fact and not law sought to be reserved – application for leave to appeal dismissed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Veldhuizen J and assessors sitting as court of first instance).

The application for leave to appeal is dismissed with costs.

JUDGMENT

Cachalia and Plasket JJA (Nichols and Dlodlo JJA and Tsoka AJA concurring)

[1] The distinction between questions of law and questions of fact is often notoriously difficult to draw. This matter raises this difficulty in relation to an application brought by the State in terms of s 319 of the Criminal Procedure Act 51 of 1977 (the CPA) to reserve what it claimed were questions of law.

[2] Six men, including the respondents, Mr Marc Schoeman and Mr Gerhard Botha, stood trial before Veldhuizen J and assessors in the Western Cape High Court, Cape Town on a large number of charges of contravening the Prevention of Organised Crime Act 121 of 1998 (POCA), fraud, contravening the Value Added Tax Act 89 of 1991, contravening the Income Tax Act 58 of 1962 and contravening the Companies Act 61 of 1973.

[3] Two of the accused were discharged at the end of the State's case. At the conclusion of a lengthy trial, accused 1, Mr Johan Van Staden, was convicted of a large number of the charges against him, and was sentenced to an effective term of 20 years' imprisonment. He emerged, during the trial, as the mastermind in a massive

scheme in terms of which the South African Revenue Service (SARS) was defrauded of approximately R 250 million. The remaining accused, Schoeman, Botha and Mr Mark Newmark, were acquitted.

[4] In response to the acquittal of Schoeman and Botha, the State applied, in terms of s 319 of the CPA to reserve questions of law for the consideration of this court. Veldhuizen J dismissed that application. On petition, however, this court ordered that the 'application for leave to appeal and condonation [for the late filing of the record] is referred for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013' and that the parties 'must be prepared, if called upon to do so, to address the court on the merits'.

Background

[5] The Indo-Atlantic group of companies, founded and controlled by Van Staden, comprised of four companies, Indo-Atlantic Seafoods (Pty) Ltd (Seafoods), Indo-Atlantic Shipping (Pty) Ltd (Shipping), Indo-Atlantic Group Holdings (Pty) Ltd (Group Holdings) and Southern Ocean Marine Corporation (Pty) Ltd (SOMC). It would appear that the most active of these companies was Seafoods and, for that reason, it was central to the fraudulent scheme that Van Staden designed and implemented.

[6] The scheme took advantage of the zero-rating, for VAT purposes, of the start-up costs and capital expenditure associated with the establishment of Seafoods, and the zero-rating of the cost of fish and seafood products that were exported.

[7] This took at least three forms. First, Van Staden engaged in what was described as 'invoice harvesting'. For instance, he sought quotations for the design and installation of a fish processing line, a refrigeration system and for a number of vehicles. He asked for each quotation to take the form of an invoice, stating that he would be obtaining finance from abroad to fund the acquisitions. After he was presented with an invoice he would 'claim back' the amount of VAT specified on the invoice, even though he had never paid the invoice. In a variation on this method, he claimed to have purchased vessels, and 'claimed back' the VAT portion of the

purchase price, but the purchases were fictitious as the vessels were either under arrest or unseaworthy and could not have been sold.

[8] Secondly, VAT refunds were claimed for fish and seafood purchases that were exported, as well as other input costs such as rental. Sometimes these transactions were genuine, it would appear, but in other cases the prices in genuine transactions were inflated.

[9] Thirdly, records of non-existent transactions were fraudulently manufactured and input VAT claimed on them. For instance, a number of invoices ostensibly from an entity called Isotherm were forgeries. (It was when SARS looked into these invoices that Van Staden's scheme began to be unravelled, with his eventual conviction and imprisonment being the end result.)

[10] Schoeman had met Van Staden before the the Indo-Atlantic group of companies was established. In May 2005, Van Staden requested Schoeman, through his firm, S & D Consulting, to provide bookkeeping services for the group. Schoeman agreed to do so.

[11] Van Staden had indicated that Indo-Atlantic was losing money as a result of not being able to process its paperwork. He particularly wanted S & D Consulting's help in this regard. Schoeman testified that, at that stage, there was about a year's worth of arrear invoices. It was agreed that S & D Consulting would take on the job of 'capturing' the paperwork, getting it into a format and submitting VAT returns to SARS.

[12] Botha and Schoeman had known each other since the early 1990s when both had worked at SARS. When Botha wished to move from Johannesburg to Cape Town, Schoeman gave him a job at S & D Consulting. Botha, as the newest employee at S & D Consulting, was given the Indo-Atlantic work. In October 2006, Van Staden asked if Botha could work at Indo-Atlantic's offices. It was agreed that he would be seconded for a four month period. He then left the employ of S & D Consulting and became an employee of the Indo-Atlantic group. He resigned from that employment in October 2008.

[13] In August 2005 when the first VAT returns had been submitted and repayments were due, it transpired that there was a problem with Indo-Atlantic's bank account. Schoeman said that it was acceptable to SARS to pay into a third party's account as long as the appropriate form was filled in. It was decided between him and Van Staden that S & D Consulting's account would be used. For Schoeman there was a good business reason for this arrangement: it enabled S & D Consulting to control the funds that came in and to ensure that it was paid what it was owed before the rest of the funds were paid to Indo-Atlantic or, on its instructions, to its creditors.

[14] Van Staden made an offer to S & D Consulting: in return for it managing the VAT returns, it would be entitled to ten percent of the amounts it recovered from SARS. Schoeman agreed to this offer and an agreement to this effect, drafted by Schoeman, was reduced to writing.

[15] In 2008, SARS acted on information it had received that the VAT returns of the Indo-Atlantic group were fraudulent. Its investigations found this to be so and that, for all practical purposes, the group had no viable business whatsoever. A trial lasting over a year and a half ensued, with the result that we have detailed above. The record, bound in 54 volumes, ran to 10 127 pages.

The judgment

[16] The charges to which the respondents were required to answer were contraventions of the Prevention of Organised Crime Act 121 of 1998 (POCA), a number of counts of fraud, a number of counts of forgery and three counts of reckless conduct of business in contravention of s 424(3) of the Companies Act 61 of 1973. In addition, Van Staden was charged with further counts of fraud and he and accused 5, Mr Gary Newmark, were charged with contraventions of the Value Added Tax Act 89 of 1991 and the Income Tax Act 58 of 1962.

[17] Veldhuizen J noted early in his judgment that a great deal was common cause. He stated:

'It is common cause that during the period 2005 to 2008, in all 35 claims for the repayment of input VAT were presented to SARS by Indo-Atlantic Seafoods (Pty) Ltd. It is also common

cause that these claims were largely false and accused 1 conceded that all the claims in respect of Isotherm were false. Of these claims only the last three were not paid.'
He found that the total amount that SARS paid as a result of the fraudulent scheme was R250 362 792.03.

[18] The court found Van Staden to have been a 'very bad witness' who had been evasive, who claimed not to be able to remember when it suited him and who lied at times. The court accepted that he was the person who was legally responsible for the VAT returns of the Indo-Atlantic Group. During the course of his evidence he admitted that he had signed most of the VAT returns.

[19] After considering the evidence of a considerable number of State witnesses concerning individual instances of fraudulent conduct on the part of Van Staden, Veldhuizen J held that while Van Staden claimed to know little of the financial aspects of the Indo-Atlantic Group, this was simply not true: in fact, he was aware of every payment received from SARS. He stated:
'In all these transactions the hand of accused 1 is evident. The part he plays runs like a golden thread through all of them. This finding is also supported by the evidence of accused 3 that once he had received the spreadsheet from Ms Claudia Manele, accused 1 supplied the false information which appeared at the end of the VAT control account.'

[20] When money was paid by SARS to the Indo-Atlantic Group, a significant amount of it appears to have found its way to Van Staden personally. He bought a game farm, an aircraft and motor vehicles, as well as a flat for his daughter. He took his family on a holiday to Mauritius in a chartered jet. Veldhuizen J found that Van Staden had been unable to explain how the Indo-Atlantic companies to which VAT had been paid had transferred the funds to him, and that it was clear that he 'lived in luxury on the money that the SARS claims provided'. He concluded that '[a]ll the facts and circumstances lead us inexorably to the conclusion that accused 1 had put in place and implemented the scheme whereby SARS was defrauded'.

[21] Van Staden was convicted of racketeering and money laundering in terms of ss 2 and 4 of POCA, 38 counts of fraud and three counts of reckless trading in terms of the 1973 Companies Act.

[22] The court then dealt with Schoeman. It noted that early in 2005, Van Staden approached Schoeman to render bookkeeping and accounting services, through his firm S & D Consulting, to the Indo-Atlantic Group. This included the submission of VAT returns to SARS. Fairly early in the relationship between S & D Consulting and the Indo-Atlantic Group, the latter had failed to pay the former's fees. Van Staden then suggested that S & D Consulting be paid ten percent of all VAT refunds plus its fees. Schoeman agreed to this proposal (and reduced the agreement to writing). Later it was agreed that it would be arranged that SARS would pay refunds into S & D Consulting's account, that S & D Consulting would deduct the fees due to it and then pay the rest to the appropriate Indo-Atlantic company.

[23] Initially, the returns in terms of this arrangement were not particularly big but they grew with time. By the time the bubble burst, S & D Consulting had received R37 million. This arrangement, Veldhuizen J pointed out, was not unlawful although it may have been opportunistic. The court was also satisfied that the agreement was not entered into 'with the purpose of concealing or disguising the nature or source of the money that was paid by SARS'. The evidence of Schoeman concerning the genesis and purpose of the arrangement could not, the court held, be said to be false beyond reasonable doubt.

[24] Veldhuizen J found Schoeman to have been a very good witness who 'answered all questions to the best of his ability', and who, contrary to the argument of the State, was not an evasive witness. The court found that Schoeman had no reason to believe that SARS was being defrauded. He also found that, generally speaking, 'accused 2 had no part in the management or the day to day business or the operations of the Indo-Atlantic Group'; and that, in performing his functions, he 'relied solely on the information and documentation supplied to him by the company's employees'.

[25] Furthermore, Veldhuizen J found that nothing made Schoeman suspect that all was not above board. For instance, he found that Schoeman 'seldom visited the offices of his client but on occasions that he did he saw what was by all appearances a healthy and wealthy company'. He concluded that 'there were no facts or circumstances on

which he should have concluded that the refunds were tainted or out of the ordinary', and that he was accordingly entitled to an acquittal.

[26] The court then turned to Botha. It commenced its consideration of the case against him by stating that it had to answer the question whether he was 'a party to the presentation of the false claims or did he have knowledge of their falsity and despite his knowledge nonetheless went ahead and presented the VAT returns to SARS'.

[27] Botha was employed by Schoeman but later began to work for the Indo-Atlantic Group. He appears to have been involved in the running of the VAT account but, as the court pointed out, he 'stood under the instructions of accused 1'.

[28] Botha's task in relation to VAT claims was that he was presented with a 'spreadsheet of all invoices that qualified for claiming input VAT', he was then given figures by accused 1 that constituted further claims – and which were false input VAT claims. He denied that he was aware of the falsity of the claims. He 'simply accepted accused 1's figures'.

[29] The court stated:

'We have to keep in mind that the completion of the VAT returns was only a small part of the tasks that accused 3 was required to perform. There can be little doubt that his attention was for the most part occupied with the other daily financial matters of the group and towards the end dealing with the complaints of unpaid creditors. Eventually he, like the erstwhile accused 6, became uncomfortable with the large refunds that were received from SARS.'

[30] The court found that no false invoices were stored on his computer and that save for bonuses paid to him, he received 'very little benefit from the refunds paid by SARS'. It was clear, the court held, that accused 3 became increasingly uncomfortable concerning the VAT refunds and it found that he 'sought to distance himself from these claims by firstly threatening to resign and eventually resigning from the Indo-Atlantic Group of companies on 30 October 2009'.

[31] Botha was found to have been a good witness overall. (The court found there had been some blemishes in his evidence.) Tellingly, it found that he had been a much better witness in cross-examination than he had been in chief. It found that '[w]ith the exception of a few matters we are satisfied that his evidence can be accepted'. He was then acquitted.

The reserved questions

[32] Section 319 of the CPA provides:

'(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.
(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law.
(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.'

[33] Du Toit, De Jager, Paizes, Skeen and Van der Merwe in *Commentary on the Criminal Procedure Act*[1] state that s 319 'makes provision for an appeal on the basis of a reserved question of law and thus creates a third way in which a person who has been found guilty – and in certain circumstances even not guilty – in a superior court as court of first instance . . . may submit his case to the Supreme Court of Appeal'.

[34] In its application in terms of s 319 of the CPA, the State applied for four questions to be reserved. The first question was formulated as follows:

'1 Did the court correctly conceive and apply the legal principles pertaining to circumstantial evidence. In particular:

1.1 Did the court fail to correctly formulate and apply the general principles regarding circumstantial evidence, including that all such evidence must be properly considered and evaluated without improperly omitting to consider some of the evidence?

[1] E Du Toit, F De Jager, A Paizes, A Skeen and S E Van der Merwe *Commentary on the Criminal Procedure Act* (Supplementary Volume) at 31-34A.

1.2 Did the court, in contravention of the legal principles regarding circumstantial evidence, fail at all to evaluate and give any weight to probative evidence that, had it been considered, would inevitably have led a reasonable court to convict the Respondents?

1.3 Did the court, by omitting to evaluate probative evidence in contravention of the legal principles regarding circumstantial evidence:

1.3.1 Give undue weight to the evidence that the court did evaluate in favour of an acquittal?

1.3.2 Fail to give sufficient weight to the evidence that the court did evaluate in favour of conviction?'

[35] The second question was formulated as follows:

'Did the court fail to consider and apply *dolus eventualis* as a form of *mens rea* sufficient to sustain convictions on the charges requiring intention, in circumstances, where, had it been considered and applied to all the circumstantial evidence, had it been properly considered, a reasonable court would inevitably have convicted the Respondents?'

[36] The third question was formulated as follows:

'Did the court fail at all to mention, consider and apply the provisions of section 1(2) and 2(1)(e) of POCA in respect of Count 2, when the circumstantial evidence, had it been properly considered, indicated that the Respondents had knowingly, as defined in section 1(2) of POCA, whilst employed by or in association with the enterprise, participated in the unlawful business?'

[37] The fourth question was formulated as follows:

'Did the court fail at all to mention, consider and apply the provisions of section 4 of POCA in respect of Count 3 and its alternatives, namely money-laundering or receipt of the proceeds of crime in contravention of section 4 of POCA, when the circumstantial evidence, had it been properly considered, indicated that the Respondents at least ought reasonably to have known that the VAT repayments they assisted to generate and receive from SARS were the proceeds of fraud?'

[38] It is evident that the first question is the key to the State's entire case. If it does not succeed on this question, the remaining questions do not arise, because the factual basis for them to succeed will be lacking. In other words, it is only in the event of the court below's factual findings being altered as a result of more weight being

given to circumstantial evidence that, according to the State, was not properly evaluated, that inferences may be drawn as to the intention of the respondents and their knowledge of Van Staden's criminal enterprise.

The factual basis upon which the reservation of the points of law is said to hinge

[39] The State has a right of appeal only against a trial court's mistakes of law, not its mistakes of fact. Indeed, Du Toit, De Jager, Paizes, Skeen and Van der Merwe stress that this 'restriction will not be relaxed by the fact that the trial judge considered the facts incorrectly'.[2] Before a question of law may be reserved under s 319 three requisites must be met. First, it is essential that the question is framed accurately leaving no doubt what the legal point is. Secondly, the facts upon which the point hinges must be clear. Thirdly, they should be set out fully in the record together with the question of law.[3]

[40] Unless the State does this, it may not be possible for a court of appeal to establish with certainty what the conclusions on the legal point, which the trial court arrived at, are. Where it is unclear from the judgment of the trial court what its findings of fact are, it is therefore necessary to request the trial judge to clarify its factual findings.[4] Where this is not done, the point of law is not properly reserved.[5]

[41] In this case, in its application for leave to appeal against the judgment of the high court the State sought to reserve the four questions of law that we have quoted above. The grounds for their reservation were set out in the application but the factual basis upon which they supposedly pivot were not.

[42] In their response opposing the application, the respondents complained that the application was fatally defective because it was vague. In particular, they protested that the questions of law were not clear and that the facts disclosing the circumstantial evidence, which the trial court had supposedly ignored, were absent.

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[2] At 31-38A.
[3] *Director of Public Prosecutions, Natal v Magidela & another* 2000 (1) SACR 458 (SCA) para 9; *S v Basson* 2003 (2) SACR 373 paras 6-8.
[4] *R v Tshabala* 1921 AD 13 at 15-16.
[5] *S v Nkwenja & 'n ander* 1985 (2) SA 560 (A) at 568E-F.

[43] The trial court dismissed the application because the State was unhappy with the inferences it had drawn from the evidence and the result reached. This, it said, was a factual question and not one that could be reserved as a legal question. We shall return to this issue. It is however apparent that the respondents' complaint that the State had not complied with the requirements for reserving questions of law under s 319 was justified, as we shall demonstrate.

[44] First, as mentioned, the factual bases for the reservation of the questions of law are not set out in the record. Secondly, they do not appear fully from the judgment of the high court. Finally, the State did not request the trial court to return a special finding on the facts upon which the points of law hinge.

[45] If we were to entertain the appeal on the merits, we would face the task of having to ascertain the relevant facts. To this end, we would have to read the entire record and re-evaluate all of the evidence, thereby second-guessing the trial judge who was best placed to do this. We would thus have to approach the matter as if this were a full appeal on the merits. The problem does not end there. Having embarked on this task, we would have to decide whether the facts established by us accord with those found by the trial court. It is only if we find that the factual findings of the trial court were wrong and the result of a legal error would we be obliged to interfere with the decision of the trial court.

[46] This is why courts of appeal require strict adherence to the requirement for the State to set out the factual basis for the reservation of any point of law before it will entertain it. Here the State has not even attempted to comply with this requirement. We thus hold that the State has not properly reserved its four points of law. That ought to be the end of the matter. We consider it necessary, however, to deal further with the issue.

Has the State reserved questions of law or of fact?

[47] It is evident that the first question that the State sought to reserve – the alleged failure of the trial court to evaluate the circumstantial evidence in accordance with legal

principle – lies at the heart of its case. It is only if we alter the factual findings of the trial court, that we may draw inferences as to the intention of the respondents and their knowledge of Van Staden's criminal enterprise, which are raised in the remaining questions.

[48] The State relied on *Director of Public Prosecutions, Gauteng v Pistorius*[6] where this court held that a failure by a trial court to appreciate relevant evidence – circumstantial evidence in this case – constituted an error of law. We shall return to *Pistorius.* It is necessary first to examine how our courts have approached attempts by the State to reserve questions of law under s 319. Central to this examination is the distinction between mistakes of fact, which cannot form the basis of a reservation in terms of s 319, and mistakes of law, which do.

[49] The leading case is *Magmoed v Janse van Rensburg & others*.[7] It involved a private prosecution arising from an incident where law enforcement officers, who were passengers on a truck despatched to quell unrest in a Cape Town suburb, fired on a gathering. This resulted in the death and injury of several people. One of those killed was the appellant's son. The Attorney-General declined to prosecute the policemen who were involved in the incident. Magmoed then instituted a private prosecution and indicted the policemen for murder, alternatively culpable homicide, on the ground that they had acted with common purpose to bring about the death of his son. The trial judge acquitted all the policemen. He subsequently refused the application by the aggrieved parent to reserve certain questions of law. The appellant then petitioned this court.

[50] For present purposes, two questions formulated in the petition are relevant. The first was aimed at the finding of the trial court that the evidence had not proved a common purpose. It asked whether, as a matter of law, on the facts found and the uncontroverted evidence, the trial court correctly found that no such common purpose was established beyond a reasonable doubt. The trial court had refused the

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[6] *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; 2016 (2) SA 317 (SCA) paras 37-38.
[7] *Magmoed v Janse van Rensburg & others* 1993 (1) SA 777 (A).

reservation of this question because, in its view, this was framing, as a point of law, something that was a matter of fact.[8]

[51] Corbett CJ agreed with the trial court. He said that where the question reserved requires an enquiry into the 'essence and scope of the crime', it is a question of law whether the facts proved brought the conduct of the accused within the ambit of the crime charged. However, he continued to say that 'a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, where there is no doubt or dispute as to what those ingredients are'.[9]

[52] He demonstrated the distinction by referring to the judgment of Botha J, (van Dyk AJ concurring) in *S v Petro Louise Enterprises (Pty) Ltd & others*.[10] There, a magistrate had found that the State had failed to prove a contravention of s 2(*b*) of the Prevention of Corruption Act 6 of 1958. The allegation was that A had paid certain sums of money to B as an inducement or reward for having done something to further his principal's business. The question was whether, on the undisputed facts, the only reasonable inference to be drawn was that the accused were guilty of the charge.[11] The State contended, as it does in the instant case, that the rules relating to the drawing of inferences in criminal cases, as laid down in *R v Blom,*[12] were rules of law, and that the manner of their application to a set of facts was a matter of law. Similarly, it was contended, it was a question of law whether a possible inference drawn in favour of an accused from a given set of facts was so speculative, having regard to the evidence, that it did not qualify as a reasonable possibility justifying the acquittal of the accused.[13]

[53] Botha J said the following regarding the prosecution's contention that it had raised a legitimate point of law:[14]

'Here there is no doubt, nor was there any doubt in the court *a quo* regarding the elements of the offence with which accused Nos. 1, 2 and 3 had been charged, nor is or was there any

[8] At 806F-I.
[9] At 808A-B.
[10] *S v Petro Louise Enterprises (Pty) Ltd & others* 1978 (1) SA 271 (T).
[11] At 278E-F.
[12] *R v Blom* 1939 AD 188 at 202-203.
[13] At 279E-H.
[14] At 279B-C.

doubt as to the precise scope, nature or interpretation of the elements of the offence. The magistrate found that one of the elements of the offence had not been proved, viz. that the accused had made the payments to Bosch as an inducement or reward for causing or having caused the payment of his principal's investment funds to accused No. 1. In the circumstances of this case, this was a finding of fact, pure and simple.'

[54] He also rejected the 'widely-based and generalised proposition that in all cases the question whether a particular inference is the only reasonable inference to be drawn from a given set of facts is a question of law'.[15] On the proved facts of the case in question, he continued, the magistrate's conclusion that the guilt of the accused was not the only reasonable inference to be drawn was a finding of fact, not law.[16]

[55] Corbett CJ, in *Magmoed*, endorsed the reasoning in *Petro Louise*.[17] In so doing, he explained that direct evidence is not always required to prove certain crimes. In those instances, the prosecution usually relies upon inferences to prove the commission of the crime. This does not make the question as to whether any inferences drawn to establish the guilt of an accused is one of law. Facts, he continued, may be classified as primary, i.e. those established by evidence, and secondary, i.e. those established by way of inference from primary facts. Consequently, the inference that is drawn as to an accused's state of mind, whether in the form of *dolus, dolus eventualis or culpa*, is one usually drawn from the primary facts and is a question of fact, not law.[18] It is true, he continued: 'that the legal consequences of a common purpose may be said to fall within the sphere of a rule of law, but in a case such as this the rule itself and its scope is not in issue': what was in issue was 'the factual foundation for the application of the rule' and that is a question of fact.[19] He thus concluded that the trial court had correctly dismissed the application to reserve this question as one of law.[20]

[56] The next point of law sought to be reserved in *Magmoed* was as an alternative to the previous one. It was 'whether any reasonable court could have found on the

[15] At 280B-C.
[16] At 280G-H.
[17] Note 7 at 808C-809C.
[18] At 810G-811C.
[19] At 811C-D.
[20] At 811G.

basis of the factual findings… and the uncontroverted evidence that none of the accused were guilty of the offence of culpable homicide or murder'.[21] The trial court had refused the reservation because, in its view, the question related to a 'value judgment on the facts'.[22] The premise of this point was that it accepted the finding of the trial court regarding common purpose on the facts. Corbett CJ said that the question in effect was 'whether any reasonable court would have acquitted the respondents'.[23] After considering the history of provisions allowing for the reservation of questions of law, he concluded that what had been reserved as a 'question of law (so-called)'[24] was in truth a question of fact. It is noteworthy that Corbett CJ indicated that, in his view, another court could well have concluded that the policemen were guilty of murder, but he made it clear that that factual determination did not fall within the ambit of s 319. He stated:[25]

'Before proceeding to the next aspect of the case there is, however, one general observation that I wish to make. Having read the evidence in this case, and particularly having several times viewed the video film, I am left with feelings of shock and dismay at the conduct of the policemen concerned with the execution of this operation. Even on the respondents' own version their reaction to the situation in which they found themselves was, in my view, grossly excessive. Moreover, as the trial Court found, there were "strong indications" of the common purpose to act illegally alleged by the prosecution. And another Court seized of the case on the merits may well have concluded that these strong indications, taken in conjunction with the failure by the accused to enter the witness box, were cogent enough to secure the conviction of the respondents, or some of them. These considerations must not, however, be allowed to obscure one's perception of the legal and policy issues involved in permitting s 319 to be utilised in the manner the prosecution in this case wishes to use it; or to weaken one's resolve to maintain what appears to be sound legal practice.'

[57] In this case, it is apparent from the analysis of the two questions in *Magmoed* that we have discussed that the State's attempt to reserve its first point of law on the basis of the alleged failure of the trial court to evaluate the circumstantial evidence in accordance with legal principle must founder. First, it is evident from the reasons dismissing the application for the reservation of the point of law that the trial judge was

[21] At 811H-I.
[22] At 811I.
[23] At 812A-B.
[24] At 812A.
[25] At 818G-I.

aware – as one would expect – of the rules regarding the drawing of inferences from circumstantial evidence as set out in *R v Blom*,[26] and applied them in this case. Secondly, if the trial judge drew incorrect inferences from this evidence, he committed factual, not legal, errors. Thirdly, there is no suggestion that the trial court made any errors relating to the elements or scope of the offences with which the respondents were charged. Finally, it is also apparent that the State's real complaint is that having regard to all the evidence, including the circumstantial evidence, no reasonable court would have acquitted the respondents. That is quintessentially an attempt to reserve a question of law from what was a value judgment of the trial court regarding the facts.

[58] It bears mentioning that in *S v Basson*[27] the Constitutional Court endorsed both *Magmoed* and *Petro Louise*.

The *Pistorius* case

[59] This brings us to the judgment of this court in *Pistorius*,[28] which appears to depart, in one respect, from the approach in these cases, and upon which the State placed great reliance. A careful examination of the judgment is therefore, warranted. In *Pistorius*, the State sought to reserve three points of law for consideration by the court. For present purposes, only two are relevant. These were: (a) whether the principles of *dolus eventualis* were correctly applied to the accepted facts and the conduct of the accused, including error *in objecto*; and (b) whether the court correctly conceived and applied the legal principles pertaining to circumstantial evidence and/or pertaining to multiple defences by an accused. Counsel for Mr Pistorius contended that both points raised factual, not legal, questions.

[60] The accepted facts were briefly these. Pistorius had fired a several shots into a cubicle behind a closed bathroom door. His girlfriend, Ms Reeva Steenkamp, was inside the bathroom behind the door at the time. She died after sustaining multiple gunshot wounds. The evidence of the police forensic expert confirmed this. The trial court found this evidence to be particularly useful. It convicted Pistorius of culpable

[26] Note 12.
[27] *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) paras 45-49.
[28] Note 6.

homicide rather than murder, which the State contended was wrong on the proven facts; hence its reservation of the two points of law.

[61] The trial court had found that the State had failed to prove that Pistorius, who knew, on his own version, that someone was behind the door, had realised that the deceased was inside the cubicle when he fired the shots. It followed, the trial court reasoned, that Pistorius was not guilty of murder on the basis of *dolus eventualis*, but guilty of culpable homicide instead.

[62] This court upheld the application for the reservation of the first point of law. It reasoned thus:[29]

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

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

[63] Having so found, the court proceeded to the second point, which is immediately relevant to this appeal. It is necessary to quote the relevant passages in full:[30]

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

[29] Paras 32-33.
[30] Paras 34-37.

must consider the totality of the evidence led to determine whether the essential elements of a crime have been proved…

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

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

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

Roman a case also involving an acquittal (a passage which counsel for the accused conceded in this court would also amount to an accurate reflection of our law):
"There is a distinction between reassessment by an appeal court of evidence for the purpose of weighing its credibility to determine culpability on the one hand and, on the other, reviewing the record to ascertain if there has been an absence of appreciation of relevant evidence. The former requires addressing questions of fact and is placed outside the purview of an appellate tribunal . . . the latter enquiry is one of law because if the proceedings indicate a lack of appreciation of relevant evidence, it becomes a reviewable question of law as to whether this lack precluded the trial judge from effectively interpreting and applying the law." (Footnotes omitted.)

[64] The court then referred to the circumstantial evidence of a police forensic expert and concluded that even though the trial court had referred to it as 'particularly useful' it had failed to appreciate its import.[31]

[65] It is beyond dispute that the trial court had erred by assuming that because Pistorius was unaware, on his version, that it was Ms Steenkamp in the bathroom at the time he fired the fatal shots, he could not be found guilty of murder because the requisite intention in the form of *dolus eventualis* had not been proved. This court's reasoning in support of its finding that this was a legal error is, with respect, therefore correct.

[66] Having found in favour of the prosecution regarding the reserved question of law, it was also correct in substituting Pistorius's conviction of culpable homicide, with a conviction of murder. The forensic evidence – being the circumstantial evidence – relevant to the reservation of the second point of law (so-called) – was uncontroversial and found by the trial court, as we have mentioned, to have been 'particularly useful'. It was, therefore, among the proved facts before the court, which buttressed the State's case against Pistorius.

[67] That being so, it was not necessary for this court to have gone further to answer the question whether the trial court had 'correctly conceived and applied the legal principles pertaining to circumstantial evidence . . '. The question was academic.

[31] Para 38.

However, it did so and found, following a concession from counsel, that the passages quoted above from the Canadian cases of *Roman* and *Harper* correctly reflected the position in our law. It cited no authority in our law to support this assertion.

[68] The foundation for this conclusion is the statement of the court that there is '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'. Both types of error, it said, adversely affect the judicial process and its outcome and are therefore legal errors as envisaged by s 319.[32]

[69] It is not, in our view, correct to say that all issues concerning the admissibility of evidence are questions of law. Corbett CJ, in *Magmoed*, made it clear that such issues may not necessarily be questions of law. He stated:[33]

'The admissibility of evidence may well turn solely on an issue of fact. An obvious example of this is the case where the admissibility of an extra-curial statement by the accused is in issue and this depends on whether it was made freely and voluntarily and without undue influence or whether it was induced by some form of physical coercion. This is a question of fact; and the only way in which it could be raised by an accused person as a point of law reserved would be to pose the question as to whether there was any legal evidence upon which the Judge could properly have found that the prosecution had discharged the onus on this issue. Admissibility may, on the other hand, turn purely on a question of law, for example whether a certain statement constitutes a confession. Furthermore, in a particular case admissibility may depend upon both law and fact.' (Footnotes omitted)

[70] In *S v Basson*[34] the Constitutional Court specifically endorsed this dictum.

[71] Our courts distinguish carefully between errors of law, which fall within the ambit of s 319, and errors of fact, which do not. A good example is *S v Coetzee*,[35] also a judgment of this court, written by Rumph CJ, which Corbett CJ cited with approval in *Magmoed*.[36] There, the question posed was whether on the facts found the court had correctly applied the law. There had been two separate incidents resulting in the death

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[32] Para 36.
[33] Note 7 at 823B-E.
[34] Note 24 para 57.
[35] *S v Coetzee* 1977 (4) SA 539 (A).
[36] Note 7 at 809G.

of a person. On a charge of murder, the accused's version was that he had acted in self-defence. The trial court acquitted him. The State appealed, contending that he was at least guilty of culpable homicide. It appeared from the record that the trial judge had treated the two incidents in isolation, as if the first incident had no bearing on the second. It was also apparent that he had not analysed the evidence properly by asking himself whether the accused had acted in self-defence or whether the facts showed that there had been a 'free-for-all' between him and the deceased. This court concluded that it may well have been that the trial judge had misdirected himself with regard to his treatment of the facts, but there was no indication of any misdirection regarding the law.[37]

[72] It bears mention that part of the State's complaint against the manner in which trial court dealt with the circumstantial evidence in the instant case is that it did so in a piecemeal fashion. As I have indicated earlier, the trial court said that it was aware of the rule pertaining to the treatment of circumstantial evidence. But even if it did err by dealing with the evidence piecemeal, this would amount to a misdirection of fact, not law, and could not avail the State.

[73] It seems, therefore, that this court in *Pistorius* erred, with respect, in finding, albeit obiter in our view, that where a trial court ignores evidence or displayed a lack of appreciation of its relevance, that this amounted to an error of law. As we have demonstrated, this conclusion is at odds with a long line of authority in this court, endorsed by the Constitutional Court. We do not agree that the test for the applicability of s 319 is whether the judicial process is adversely affected by the error made by the trial court. That test would have the effect of making almost every material error of fact an error of law. That is not what is envisaged by s 319. As Corbett CJ pointed out in *Magmoed*, even where there are 'strong indications' from the evidence that there were cogent reasons to convict an accused '[t]hese considerations must not. . . be allowed to obscure one's perception of the legal and policy issues involved in permitting s 319 to be utilized in the manner the prosecution in this case wishes to use it; or to weaken one's resolve to maintain what appears to be sound legal practice.[38]

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[37] Note 35 at 544E-545A.
[38] Note 7 at 818H-I.

[74] Put simply, the mere fact the judicial process has become flawed by the way a trial court goes about assessing the evidence before it, does not justify permitting s 319 to be used by the prosecution to reserve a point of law for what is in truth misdirection of fact. That impermissibly undermines the clear language of the section and the deliberate choice of the legislature to restrict appeals in terms of the section to questions of law. The law as reflected in Canadian cases cited in *Pistorius* does not reflect the position in our law.

[75] This case is not the first time that the State has attempted to reserve a question of law on the basis of what appears to have been the treatment of circumstantial evidence in *Pistorius.* In *The Director of Public Prosecutions, KwaZulu-Natal v Ramdass*,[39] the accused was acquitted on a charge of murder after he had successfully raised a defence that he had lacked criminal capacity because he had been intoxicated and under the influence of drugs at the time he had caused the death of the victim. One of the questions of law sought to be reserved on the authority of *Pistorius* was whether the trial court had erred in applying the test regarding inferences drawn from circumstantial evidence in concluding that the accused lacked criminal capacity in circumstances indicative of goal-directed conduct, patchy recollection and the absence of a 'trigger' for his actions. The trial court had concluded in refusing to reserve the question that the State was unable to point out any material misdirection and the question seemed to involve a finding of fact and not law.

[76] In this court, the State contended that question sought to be reserved related primarily to the trial court incorrectly evaluating the proved facts. There was no challenge to the inferences drawn by the trial court, but to the conclusion reached by it based on the inferences that were drawn. The State contended that the trial court failed to exercise its discretion judicially by failing to consider all of the facts and circumstances. It emphasised that the trial court 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.[40]

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[39] *Director of Public Prosecutions, KwaZulu-Natal v Ramdass* [2019] ZASCA 23; 2019 (2) SACR 1 (SCA).
[40] Para 44.

[77] This court distinguished *Pistorius* and said the following:[41]

'[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…

[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.'

[78] As in *Ramdass*, the State in this case seeks to require this court to reassess the circumstantial evidence for the purpose of affording it different weight in the overall assessment of the respondents' culpability. This is not a legitimate basis for the reservation of a point of law for the reasons we have given.

Conclusion

[79] As the questions of law (if such they were) were not properly reserved for want of a proper factual foundation, and the first question of law that was reserved, and which was the key to the other three being considered, was a question of fact and not of law, there are no reasonable prospects of the appeal succeeding.

[79] The application for leave to appeal is dismissed with costs.

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[41] Para 46-48.

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A Cachalia

Judge of Appeal

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C Plasket

Judge of Appeal

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