

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: **CC 5/2013**

**THE STATE**

versus

**WILLEM VISAGIE BARNARD**

**Neutral citation:** *S v Barnard (CC 5/2013) [2018] NAHCMD 4 (23 January 2018)*

**Coram:** SHIVUTE J

**Heard:** 21-24 October 2014; 27-30 October 2014; 25 March 2015; 3-6 August 2015; 24 September 2015; 4 August 2016; 5-7 June 2017; 5-6 July 2017; 18 August 2017 and 21 August 2017

**Delivered:** 23 January 2018

**Flynote:** Criminal Procedure – Evidence – Admissions – Admissibility – Extra-judicial admission voluntarily made by accused against his own interest – Accused under the influence of intoxicating substance – Extra judicial admission admissible – Court to determine weight to be attached.

Evidence – Circumstantial evidence – Inferences to be drawn from circumstantial evidence – Court to engage in inferential reasoning – Court to consider evidence in its

totality. Two requirements to be met – Inference sought must be consistent with proved facts – Inference must exclude any other inferences.

Criminal Law – Defence of – Temporary Criminal incapacity – Onus of proof – Where such defence properly raised – State bears onus of proof to prove accused's criminal capacity and liability.

Criminal Procedure – Failure to challenge point in dispute under cross-examination – Party calling such witness entitled to assume unchallenged witness' testimony accepted as correct.

Evidence – Single witness evidence – Court may convict on evidence of single witness – Provided it is clear and satisfactory despite shortcomings – Court to be satisfied truth has been said.

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## **ORDER**

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The accused is found guilty of murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2004) with direct intent.

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## **JUDGMENT**

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SHIVUTE J

[1] The accused has been arraigned on an indictment containing one count of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The allegations are that upon or about 10 April 2010 and at or near Aranos in the district of Mariental, the accused unlawfully and intentionally killed Anette Barnard, an adult female person.

[2] At the time of the incident the accused was married to the deceased. It is alleged that the couple was alone at home. Whilst they were watching television an argument erupted between them over a South African political leader, the late Eugene Terblanche, and the accused shot the deceased in the head with a firearm.

[3] The accused pleaded not guilty to the charge. In his plea explanation he stated, amongst other things, that he and the deceased were at home. The deceased ordered two bottles of brandy and a carton of 2.5 litres of Johannesburger wine. They started drinking whilst they were watching the funeral of the AWB leader on television. After lunch they continued drinking and according to his recollection they drank about five glasses of brandy. At about 17h00, the accused left home to one of the posts on the farm to start a machine. He was experiencing a problem with the machine and as a result he only returned when it was almost dark. That day the accused took alcohol combined with prescribed drugs Alzam and other tablets. When the accused returned from the post, he and the deceased continued to drink and to watch television. Around 22h00, he went to bath after that he took his sleeping tablet his stomach pills and one Alzam tablet. He returned to the lounge where he found the deceased still sitting in front of the television. He sat on the couch on the left side of the deceased. He still wanted to smoke but he passed out. He left and when he woke up he saw the deceased lying with her head down on the coffee table and saw a mark on the table but then realized that it was a pool of blood although he originally thought it was alcohol spilled on the table. He was shocked. The accused then saw the phone next to him, took the phone, saw the number of his daughter on the phone and dialed the number but his son in-law answered instead.

[4] According to his recollection he informed him: 'Your mother was shot.' He also looked on the floor and saw the revolver lying on the ground between the two of them. He is of the opinion that when he spoke to his son-in-law the son-in-law said to him: 'Leave everything as it is, we are on our way.' As he could recall, he went out of the room and sat on a chair. He also smoked a cigarette. His son-in-law arrived. He could not recall who came first. He could not recall whether he drank alcohol further. He could not recall how many police officers were there and to which police officer he spoke. He could also not recall what happened as he was only informed afterwards that he drove with Commissioner Meyer to Aranos. He had no recollection how the revolver

ended up on the floor between them. When he returned from the post he did not see the revolver. According to his recollection, he did not remove it from the safe. He could not recall exactly what he said to his son-in-law. He also could not recall ever handling the revolver the night in question. He also could not recall hearing a shot fired. On the day in question he and his wife did not argue. With regard to drinking, they followed their routine of drinking. His wife had double shots whilst he had triple shots. He further denied that he shot his wife. Furthermore, because of the alcohol and drugs he consumed, at the time of the alleged incident, he was unable to appreciate the moral and legal wrongfulness of his actions as at the time he suffered from a temporary non-pathological disorder. In the event it is proved by the State beyond reasonable doubt that he had shot the deceased, his defence is that of non-pathological criminal incapacity.

[5] In order to prove its case, the State called several witnesses. The first one being Hermanus Leeb, the son-in-law of the accused. He testified that on the date in issue he received a telephone call from the accused. He informed him that 'I shot your mother I had enough of that.' Under cross-examination the witness testified that the accused also uttered the words: 'I lost control I snapped.' He asked the accused whether he was serious and he responded that he was serious. The accused asked the witness whether he should phone the police or the witness would phone them. The witness advised the accused not to do anything and leave everything as it was. The witness had the key to the gate of the accused's farm. The witness proceeded to the farm. The witness also told his brother to accompany him to the farm which he did. The witness arrived on Farm Kholes about an hour and half from the time he received a phone call from the accused. When the witness arrived on the farm house, the accused opened the door for him and his brother. According to the witness, the accused was unbelievably drunk. However, the witness asked the accused whether it was true what he told him on the phone and why it happened. The accused answered that it is true and that there was no reason why it happened. When the witness asked where the mother-in-law was, the accused said she was in the sitting room. When the witness entered the sitting room, he found the deceased on the right side of the lounge bank leaning forward with her face on a coffee table. There was a lot of blood on the table and on the floor. The deceased was already dead and there was a big shot mark on her head. She was lying on the left side of her face and on the right side there was a

big wound. The witness observed A38 revolver lying on the left side of the coffee table on the edge. It was also on the left side of the deceased. The witness took a pen that was lying on the table and picked the revolver up and hid it in the microwave. He also took a blanket and covered the deceased.

[6] From there he went to the kitchen and phoned Inspector Meyer of the Mariental Police. On the kitchen table he found a half bottle of brandy standing. It was a 750ml bottle. He hid it in the fridge because the accused wanted to pour alcohol from it and drink further. The witness went outside the house to his wife who was in the car. Two police officers arrived from Aranos before Inspector Meyer. When the police arrived they took the body and the accused was also taken to Aranos. According to the witness, although the accused was intoxicated he was able to communicate with him. They talked to each other but it was short sentences and short answers.

[7] Through cross-examination, it was put to the witness that having regard to his state of intoxication, the accused will lead evidence concerning what he instructed his counsel and what he testified in the bail application on what he believed he said to the witness, namely 'My wife was shot.' The witness was asked whether it was possible that in respect of the confusion that existed he could have been mistaken as to what he had replied? The witness replied as follows:

'To answer honestly everyone as of today in this Court if you are awoken at 00h10 with such news you have a fright, you are confused and what I have heard at that moment was 'I shot your mother' as I have also said the manner in which he talked to me it was difficult to understand so there exists a possibility that I could have misunderstood him that your mother was shot or I shot your mother (sic).'

However, through re-examination the witness re-affirmed that what he heard was that: 'I shot your mother.'

[8] The witness was further asked why he was saying the accused was 'unbelievably drunk' and he explained that the accused could not walk normally as he was touching on things such as the kitchen table and the fridge as he was walking . The witness was further asked whether he saw any other bottles of brandy maybe in

the bin or somewhere else or any *Johannesburger* wine? The witness responded that he did not see any. Concerning the question as to what type of a person the deceased was, the witness testified that the deceased was a very aggressive person especially when she had taken alcohol and the accused is a quiet person by nature. The witness also testified that he was aware that the accused was on medication.

[9] It was put to the witness that there were discrepancies in the two statements he gave to the police. In the statement dated 10 April 2010, the witness stated that when the accused called him he said: 'He has had enough and that he had finished his job.' His direct words in Afrikaans were: 'Ek het nou genoeg gehad en het nou klaar gemaak met jou ma.' In his statement dated 14 April 2010 it was written that the accused had said to him: 'Ek het nou genoeg gehad en het nou klaar gemaak met jou ma. Ek het haar geskiet.' I had enough of your mother and had finished with her. I shot her.' The witness confirmed that in the statement dated 10 April 2010, he did not mention that the accused said: 'I had shot your mother.' It was further put to the witness that there were discrepancies in his two statements because the sequence of words was not the same. The witness confirmed that the sequence of words was not the same. Furthermore, it was put to the witness that there were discrepancies in his two statements concerning the answer allegedly given by the accused when the witness asked the accused whether he was joking or serious because in his statement dated 10 April 2010 the witness stated that: 'I asked the accused whether he is making a joke and he told me that he is serious and that he shot his wife.' In the second statement, however, the witness said: 'I asked the accused whether he is making a joke or whether he is serious, and he told me that he is serious.' The witness responded that it is correct. It was again put to the witness that the version that when he asked the accused whether it was true that he had killed his wife and why did it happen the accused responded that it was true, did not appear in any of his police statements. The witness answered in the affirmative.

[10] However, through cross-examination when the witness was asked to clarify his telephonic conversation with the accused the witness testified that he heard the accused telling him that he had shot his wife and when he enquired whether he was joking or serious the accused replied that he was serious. The witness also said if his memory served him well, the accused told him that he had snapped.

[11] Inspector Max Kastoor Joodt testified that around 02h21 he received a report from Commissioner Meyer that the owner of Farm Khores had allegedly killed his wife on the farm and he should go there to attend to the scene. He drove to the scene with Constable Reed. The witness introduced himself to the accused and that he was investigating the case of murder and informed him of his rights to legal representation and the right to remain silent. The accused just said: 'Okay.' The accused appeared to be drunk and when he was asked what happened, he first did not answer but later spoke with a slurred voice saying that he had a quarrel with his wife whilst they were drinking. The witness could see that the accused was not normal. The accused was asked whether there were farm workers on the farm and he responded that he had no farm workers but he will get somebody to look after the farm while he is in custody. The accused had showed the witness a bottle of *Klipdrift* brandy that contained some liquor. He also showed him a cellar cask wine. The alcohol was in the fridge. The bottle of brandy was under half. However, he did not check how much was in the box of wine. When the accused was walking he was holding against the wall. However, the witness said he had a normal conversation with the accused.

[12] Whilst at the scene the witness had observed the deceased seated on the sofa. She was covered with a blanket. When he uncovered the blanket he saw that her head was lying on the coffee table and her hands were next to the table. She had an open wound on the right side of her head. When the witness drew the curtain he saw a hole in the window. The witness did not observe any empty bottles. He further said the accused left the scene with Commissioner Meyer. Through cross-examination, the witness was asked about the extent of the accused's drunkenness and he said that the accused was very drunk at the time the witness arrived on the farm.

[13] Willem Daddy Stoffel, a Detective Sergeant in the Namibian Police, testified that on 10 April 2010 around 04h00, he went to Farm Khores to take photographs for the scene of crime. He found the deceased covered with a blanket in the sitting room. He was shown the deceased by Commissioner Meyer. He took photographs of the deceased. He also observed bloodstains on the curtains, a piece of hair and a piece of bone. Commissioner Meyer also showed him a murder weapon that was in the microwave. The witness compiled a photo plan, he indicated that the accused was

positioned at point A at the time of the shooting. He assumed that the accused was so positioned based on his experience of murder crime scenes, because between point B where the deceased was found and point C the exit of the projectile that hit the deceased and went through the curtain and the window, the wound of the deceased and then it formed a line to point C based on that he found point A to be the most appropriate position. Nobody pointed to him where the accused was. Point B was how the deceased was found after the witness removed the blanket that was covering the deceased.

[14] The witness testified that some of the photos were taken at around 04h00 whilst others were taken after they had removed the deceased's body. The witness identified exhibit K as the photo plan he compiled. The witness further testified that Inspector Joodt assisted him whilst he was taking a prime residue. The witness collected samples from the scene and these were placed in containers 1 to 5. In container 1 there was a piece of hair, container 2 there was a piece of bone, container 3 to 4 there were pieces of curtains with bloodstains and in container 5 there was blood from the carpet. They waited for the post-mortem examination to be conducted and when they got the deceased's blood for grouping they sent the exhibits for forensic analysis at the National Forensic Laboratory. It was the witness' further testimony that he conducted a prime residue test at the scene. The prime residue test was conducted to detect any gun powder after a shooting incident. It was conducted on the deceased and the accused. The residue kits and the forms that accompanied the kits was also filled in. There were two prime residue kits for the deceased and for the accused. The residue kits were taken to the laboratory for forensic analysis.

[15] The witness testified that when he went to the farm, he found the accused very drunk as he was not stable on his feet. The witness's further testimony was that the firearm, A38 Special revolver, found in a microwave was taken by Inspector Joodt to be booked in the exhibit register. However, Sergeant Kolman gave it to him later to be taken to the laboratory for forensic examination. The firearm was together with 2 empty cartridges and 4 live ammunition that were in the revolver. The firearm's serial no was 55538. The .38 Special revolver with serial no. 55583 was admitted in evidence and marked as exhibit 1. The envelope with 2 empty cartridges were marked together as exhibit 2. The firearm with 2 empty cartridges and 4 rounds of live ammunition were

sent to the laboratory for forensic examination. However, when the firearm came back there were only 2 rounds of live ammunition. The envelope with 2 live ammunition was admitted in evidence and marked as exhibit 3. The witness also identified the sketch plan and it was produced in evidence as exhibit. Apart from the photo plan and sketch plan, photographs of the post-mortem examination were taken by Sergeant Mbula who is now deceased on the instructions of the witnesses. These photographs were handed over to the witness.

[16] The witness was asked whether he had received the results for the samples collected at the scene and the witness replied that he had received the prime residue and the ballistic results only. He also did not receive the list of the items he had sent to the laboratory. The witness was further asked why he did not take photographs of the exit wound that was on the right side. The witness replied that he did not take it because he knew it would be taken during the post-mortem examination. It was put to the witness that having regard to the entry wound and the exit wound; the manner how it seemed to have been inflicted, where it went through the window the picture can just as well fit in with a possible suicide. The witness said he would not dispute it. It was further put to the witness that the revolver was found on the left side of the table by Mr Leeb and that there is a possibility that it could be a suicide, to which the witness said he would not dispute it. It is worth mentioning here that although Mr Leeb said he found the firearm on the table on the left side that was not the original position the firearm was because the accused in his plea explanation said the firearm was lying on the floor.

[17] Dr Paul Stefan Ludik, the Director of the National Scientific Forensic Institute, analyzed the primer residue kits that were forwarded by the police for scientific examination. His findings were that both the accused and the deceased had primer residue on their hands. The deceased had it on both hands whilst the accused had it on his left hand. According to the expert witness, for the primer residue to be found on the accused and deceased's hands means that both the accused and the deceased were adjacent to the firearm at the time of the firing. Doctor Ludik could not identify the shooter. Doctor Ludik testified further that it is possible that the accused held the firearm with both hands and one hand for example the left hand shielded the right hand, one will not expect to find gun powder residue on the right hand. Doctor Ludik

testified that the deceased had more gun powder on both hands comparing to the gun powder found on the accused's one hand. Through cross-examination the defence sought to draw inferences that because the deceased had gun powder on both of her hands and that the accused had lesser primer residue, an inference could be drawn that it was more probable that the deceased shot herself. The doctor replied that other 'hypotheses' were also possible. It was further suggested that because there was more primer residue on the left hand of the deceased and the entry wound was on the left side of the deceased's hand an inference could also be drawn that the deceased shot herself. If I understand the doctor's answer correctly, he explained that if the primer residue was correctly collected it would mean that the hand with more residue was the one closest to the firearm at the time of firing and provided that the other hand was not shielded by an object. The doctor further explained that there are other hypotheses one would be if the glove was used it would obviously skew the quantitative impact of these results if there was obstacle in the way that could also skew the quantitative inference. Again if hands are being washed chances are being diminished. The plastic containing 2 primer residue bits was admitted in evidence and marked as exhibit 4.

[18] The finding of Mr William Nambahu, a Chief Forensic Scientist who examined the weapon that was recovered from the scene of crime and the two spent cartridges was that the spent cartridges were fired from A38 Special revolver found at the scene. Mr Nambahu testified further that he received from the police A38 Special revolver with serial no.55528, 2 spent cartridges and 4 live ammunition. He used two of the live ammunition he received from the police to test fire the firearm. Furthermore, Mr Nambahu was requested to determine the trigger force of the .38 Special revolver. His findings were as per his report admitted in evidence and marked as exhibit Y. Through cross-examination the witness confirmed that as a result of recoiling effect if a suicide is committed, and there is an entrance wound from the left side of the head, death is instantaneous and one would expect the weapon to end up on the left side of the shooter.

[19] Commissioner Jacobus Meyer testified that he was informed that there was a shooting incident on Farm Kholes on 10 April by Mr Leeb. He phoned Warrant Officer Joodt and instructed him to go to the farm and do the necessary investigations. He

also went to the farm and found the accused severely drunk. In the sitting room he found the body of the deceased with a bullet wound to the head. He also observed a hole in the curtain on the right side as well as a hole in the window. The witness asked the accused what happened. The accused said there was an argument or a discussion between him and his late wife about the death of former AWB leader then he became annoyed because they were just talking about the death of Eugene Terblanche. He was asked where he got the firearm from and he led him to the safe in the sleeping room. He took the keys from the top of the safe, opened it and showed him where he got the revolver from. Prior to explaining what happened and the pointing out the accused was not warned of his rights. The accused allegedly also told the witness that he did not know how the revolver came into his hands. Through cross-examination, the witness turned around and said he could not remember exactly what he asked the accused whether he said: 'Where do you normally keep your firearms?' Or whether he asked 'Where did you get the firearm from?' The witness observed a bottle of brandy on the table that was more than half or a quarter of a bottle and a box of wine in the fridge.

[20] On the other hand, the accused gave evidence under oath and called two witnesses. The accused Willem Visagie Barnard testified that he was happily married to the deceased until 1982 when both of them were on Alzam medication. The doctor prescribed the drug to him for purposes of calming him down as he was nervous and he used to stutter. Whilst his wife was given the same drug because she was suffering from depression. The accused was taking the drug three times a day. As a result of the depression his wife became more aggressive and would hit him occasionally. Apart from the medication the accused and his wife were also taking alcohol. Every two weeks they would buy three bottles of brandy and a 5 litre box of wine which they would consume and finish as soon as they could. They could finish the brandy in two days and the box of wine in a day. The accused never acted aggressively towards the deceased. However, his wife was aggressive towards him. She once stabbed him with a knife on the chest. His wife would assault him approximately once a month and he was not happy about it. She also shot at him.

[21] The accused further testified that there was a time his late wife put his life in danger when she and her sister allegedly drugged him by putting drugs in his food.

His wife had also pointed a firearm at him. It was again the accused's testimony that whenever he stored his firearm, he would put an empty cartridge in the chamber so that a shot would not go off immediately. Because the accused's wife was abusing him, he once mentioned to her the idea of divorcing her and she threatened to kill him. Apart from both taking Alzam the accused also took zopiclone tablets. On the date of the incident the accused had taken his Alzam tablet and his stomach tablet. In the evening he also took Alzam. From around 11h00 the accused and his wife had about 4 or 5 drinks of brandy. He was drinking triple whilst the deceased was drinking double tots. They continued to drink until they were totally drunk. Around 22h00 the accused went to take a shower, after he showered he took his Alzam, stomach pill and zopiclone. Before going to bed he wanted to smoke a cigarette but he had a black out next to her on the bench.

[22] The accused pointed to point B on the photo plan which is exhibit K as the point where he would normally sit. However, that evening he was confused and he could not tell as to where he sat. When he woke up he saw his wife sitting on the table and saw a spot on the table which he thought was alcohol. However, it turned out to be blood. He also observed a revolver lying on the floor between him and the deceased. He phoned his daughter and his son-in-law answered. However, he was not sure what he said to him but he thinks he said to him 'Your mother has been shot.' He had no recollection of speaking to anyone on that fateful night and only started to recall on Sunday at midday. He also had no recollection on how he went outside but he knew that he went outside. The accused could recall his son-in-law telling him that he should leave everything where it was. The accused further testified that he did not handle a firearm that night, however, he last handled it at least a week before the incident but could not recall when he last fired a firearm. The accused did not know where the primer residue found on his hand came from. The accused testified that on that day he never had an argument with his wife. He also could not recall whether Warrant Officer Stoffels conducted a primer test on his hands. It was again the accused's testimony that point B, being the couch where the deceased was found was said by Warrant Officer Stoffels to have been situated in the Northern direction, but it was on the Eastern side. Again the accused's testimony is that he is right handed and his wife was also right handed. However, at one stage she had an injury on the right hand. The

accused could not recall shooting the deceased. Therefore, the inference that should be drawn is that she had shot herself so, accused testified.

[23] Through cross-examination the accused testified that when he mentioned to his wife the idea of divorcing her, she told her that she would rather kill him as she had nowhere to go. The accused also said that he could not remember whether when he saw the revolver lying on the floor he had touched it. When it was put to the accused that he told his son-in-law that he had snapped he replied that he could not remember. Concerning the issue whether he could recall telling Inspector Joodt that he said there were no workers on the farm and that he replied that he would look for somebody to look after the farm whilst he was in custody, the accused said he could recall that but he said it at the police station when he had regained his consciousness or when he became sober. When he was questioned whether he expected to be in custody, he responded that he could not recall whether he said that. Concerning the issue why he allegedly put a spent cartridge on his revolver for the safety of the children and adults he was asked as to which children was he protecting since he was staying only with his wife on the farm. He replied that his grandchildren were visiting him and they got visitors who also come with children. When he was asked whether children and visitors had access to the safe, he testified that they had no access because the safe was locked.

[24] Maria Martin Leeb a daughter to the accused and the deceased testified that her mother was aggressive whilst the accused was very quiet and he had a soft heart for her mother. However, as far as outsiders were concerned her father had a strong personality he could not be intimidated. To amplify her mother's aggressiveness she referred to two instances when her mother almost stabbed her father in the stomach in her presence and she stopped her. She only stabbed him slightly as the stab wound was not deep. At one stage her mother also attacked her. She also confirmed that both her parents were on medication and that they used to drink alcohol and they abused it. During 2005 her mother showed her marks on the ceiling in the bathroom and she said she was trying to shoot her father. Concerning her father on the day of the incident she said he was very drunk and he was not stable.

[25] Doctor Gerhard Max a psychiatrist by profession compiled two psychological reports in respect of the accused. The first report was produced before court and it was marked as exhibit A. Its purpose was to provide an opinion on whether the amount and type of substance consumed by the accused on 9 April 2010 could result in memory loss for the event leading to and culminating in the death of his wife. According to the doctor's first report the accused took Alprazolam after breakfast. He drank brandy at about 12h00 while watching the funeral of Terblanche on television with his wife. He took a further 1mg of Alprazolam after lunch. By 17h00 the accused could remember he took about 5-6 drinks and he took off to start the engine way from the house. Regarding the strength of the drinks the accused said he over did it a bit or went a little bit overboard (in Afrikaans 'oordoen dit n' bietjie'). On closer questioning, it became apparent that accused took 'more than a double brandy.' This means that by implication the accused took between 12 and 15 standard drinks (300 – 375 ml brandy in this case).

[26] Shortly before sunset he continued drinking brandy until about 22h00 when he went to shower. He was unsure of the amount of alcohol he consumed between sunset and 22h00. The accused further told the doctor that after the shower he took Alprazolam and added a 7.5 mg of Zopiclone. The doctor also under the heading 'Alcohol and drug history' stated that: 'At that time it seems as if he and his wife tended to drink in a binge pattern, meaning they consumed up to two 750ml bottles of brandy over a 48 hour period when it was available.'

[27] The accused went back to the living room from there he could not remember anything until he woke up to find his wife lying in a pool of blood next to him. The doctor's finding was that the amount of alcohol, Alprazolam and Zopiclone consumed on that day would be highly likely to cause memory loss to appreciate the moral blame worthy and legal wrongfulness of his alleged actions due to the timing, amount and combination of psycho-active substances he and his wife consumed during the course of the day the alleged offence occurred. The Benzodiazepines, especially in combination with alcohol, can cause memory impairment, impulsivity, poor judgment and states of confusion. These side effects are usually limited to the period of intoxication of the substance. The accused could have possibly been incapable of

understanding the moral and legal wrongfulness of his alleged action, only for the short period while being intoxicated by the mentioned substances.

[28] According to Doctor Max, after he sat in court and listened to the accused testifying he made another calculation concerning the quantity of alcohol taken by accused. According to him if the accused and his wife had taken about 750ml of brandy and he took triple tots versus double tots taken by his wife, if it is assumed that he had consumed 60 percent of the bottle and his wife 40 percent of the bottle that means he had consumed around 450ml of brandy. If it is divided by 25 milliliters which is a standard tot it means he had drank 18 standard tots for the first bottle. Although there is uncertainty as to how much of the second bottle he had drank, if it is presumed that he drank standard drinks it means he had drank 27 tots from 12h00 to 22h00. The accused in 10 hours drank twice the amount the male person is allowed to drink per week because a male person's consumption of alcohol per week was supposed to be 14 standard drinks. After the shower he took 1mg of Alprozolam and added 7.5mg of Zopiclone. Thus, the amount and combination of alcohol, Alprozolam and Zopiclone consumed on that day would be highly probable or more probable than not to cause memory loss for several hours.

[29] According to the doctor some of the side effects of Alprozolam and Zopiclone are in line with what was said about the accused namely slurred speech, the behaviour of Mr Barnard and level of unconsciousness. The doctor continued to testify that to avoid memory loss Zopiclone should only be taken if planning to have a full night's sleep. Mr Barnard had two or three incidents of not being able to remember what happened the previous night during a 20 year period since he started to take both medication combined with alcohol.

[30] Most patients do not realise that they had memory loss because they are sleeping. The doctor continued to testify that one had to get up in the middle of the night for some reason then the person would realise that he or she had memory loss the previous night and this might explain the accused's position. It was further the doctor's testimony that if the drugs were taken over a long period of time it may have less effect on the person's memory level or consciousness. However, he again said that the liver can only metabolise alcohol and benzodiazepines at a fixed rate. The

higher the level of the substance in the blood the more likely one would have amnesia. Concerning the issue of the accused remembering certain things and forgets certain things, Dr Max said that both alcohol and benzodiazepines may give a picture of a patchy type of memory loss and it is completely random which bits one remembers and which bits one does not remember.

[31] According to the second report, the accused told the doctor that he had an epileptic seizure. However, this is contrary to what the accused said in court, namely that the doctors who examined him 'did not definitely say that it is epileptic fits but until today, I cannot, I do not know what it is.' The accused had also told the doctor that he had only been taking Zopiclone for 3 months before his wife's death. However, in court the accused testified that he took it for many years. Doctor Max in his report stated that the accused was on 1mg three times a day of Alprazolam and on the night of the alleged offence he also took 7.5 mg of Zopiclone, which is like Alprazolam, also a member of the Benzodiazepine family. The family of medication called Benzodiazepines is well known to cause memory impairment and states of confusion. These two drugs are placed in the same category and have the same effects. Therefore, in his opinion the amount of alcohol, Alprazolam consumed that day would be highly likely to cause memory loss for several hours.

[32] When the doctor was confronted with the fact that the accused had not been taking Zopiclone few months before the incident but for years and he was confronted with his version that the longer the drugs are taken the more a person develops tolerance towards that drug, he responded that this issue that he mentioned of tolerance is the one that might have an effect. He continued: 'The longer you take something the better your system gets at just metabolizing it... So if that was only Zopiclone then you would expect a slightly less of an effect after three months but we are not talking about only Zopiclone. Zopiclone, is one of the smaller ingredients in the soup clearly.' When an emphasis was placed again on Zopiclone being taken for years the doctor said Zopiclone was just a very small part of the cocktail that he was taking. So that small shift would not change the level of consciousness given the massive amounts of similar substances he consumed.

[33] Having summarized the evidence I will now turn to the summary of counsel's submissions. Counsel for the State argued that an inference cannot be drawn from the proven facts of gun powder residue on the deceased's hands and on the accused's hand as sought by the defence that there is a probability that the deceased had shot herself. The reason being that these proven facts are not the only reasonable inferences to be drawn from the proven facts as the doctor said there are many hypotheses. Counsel further argued that the accused was moving around after the deceased was killed touching objects. Accused had ample time to diminish the quantity of gun powder residue on his left hand. There is also a possibility that the deceased had tried to hold a firearm when she noticed a firearm pointed at her. It could also be possible that in an attempt for the deceased to prevent the accused from shooting her, she inadvertently covered the accused's hands. Counsel further argued that the fact that both the deceased and the accused had gun powder residue in their hands means that both accused and deceased's hands were adjacent to the firearm at the time of the firing and this creates a vital nexus between the accused, the murder weapon and the deceased at the time of the shooting. Counsel again argued that there is evidence that links the accused in the form of direct and indirect admissions the accused made to witnesses.

[34] With regard to direct evidence, counsel referred to the version of the accused that he allegedly told Mr Leeb when the accused phoned him and Leeb's query when he inquired from the accused whether he was joking or he was serious as well as when he inquired as to why he did it. Counsel argued further that although the accused disputed Mr Leeb's version that he said 'I shot your mother', he did not dispute the rest of the statement that 'I had enough of that'. Had the accused said 'your mother was shot' and that he 'had enough of that' this would not make sense. Why would the accused had enough of the deceased taking her own life? Counsel argued that the accused's version that he said 'your mother has been shot' is a fabrication conjured by the accused to escape liability and it does not tally with the probabilities. If the accused's version was true that he told Mr Leeb that 'your mother was shot or has been shot' then one would have expected Leeb to ask 'who shot her?'

[35] Counsel continued to argue that if the accused did not know what happened to the deceased and that she was fatally shot in the head, he was expected to ask for

the ambulance to assist his wife but he knew she could not be saved as he had killed her and he expected the police to come and arrest him that is why when he was asked by police officer Joodt whether he had farm workers on the farm, his reply was that 'I am not having farm workers on the farm but I will get somebody to look after the farm while I am in custody.' According to counsel, this is an indication that the accused expected to be arrested whereas at that stage he had not yet been placed under arrest. This version was not disputed under cross-examination that the accused had said it prior to being arrested. The accused only disputed it through cross-examination by the State when he claimed that he said it when he was sober and already in custody when the police were taking his fingerprints. The accused confirmed the content of the conversation concerning farm workers. However, he denied the time and place of the conversation. The accused could recall the conversation that took place between him and Joodt and by changing the time and place of the conversation he wanted to exonerate himself, hence he selectively chose to distance himself from incriminating evidence and to remember non-incriminating evidence. The accused told Commissioner Meyer that he could not remember what happened but there was a conversation about Eugene Terblanche. Counsel argued that the admissions made by the accused to Leeb, Commissioner Meyer and police officer Joodt are admissible and the only issue is what weight to attach to them.

[36] Concerning the witness statements, their contradictions and insufficiency or omissions counsel argued that despite minor inconsistencies in the evidence of State witnesses the witnesses testified to the best of their abilities what they recalled and had no reason to falsely implicate the accused.

[37] With regard to the accused's testimony, counsel argued that the accused's evidence was implausible and could not be reasonably possibly be true, because although the accused claimed to have a black out on the day in question he remembered what he did except at the crucial time when the deceased was killed. The accused claimed to have had a happy relationship with the deceased although the deceased would regularly assault him. Counsel asked rhetorically, how could the accused be happy in an abusive relationship? Concerning the evidence of Maria Leeb, her evidence seemed to be contradictory especially when she said her father has a strong character and could not be intimidated, at the same time she described him as

a soft hearted man. How could the accused be a soft hearted man if he had a previous conviction involving assault? Counsel asked.

[38] With regard to the evidence of Doctor Max, counsel argued that there were some discrepancies in what the accused told him he had only started to use Zopiclone drug a few months before the incident whilst the accused testified in Court that it had been years since he started taking the drug. Furthermore, the accused was alleged to have had 2 other incidents of black out, but those were not in the doctor's report. The doctor sought to amend the level of alcohol intake the accused had taken and the inflated amount of drugs that had been ingested was then also reduced from 15 mg to 7.5 mg. Counsel again argued that since the accused was the primary source of information and he had misled the doctor then the report becomes tainted. It was further counsel's argument that from the reading of the report according to the doctor, Zopiclone, Alprazolam and alcohol had played a significant role on his findings. However, the doctor down played the effect of Zopiclone when he talked about small ingredient in the soup. Bearing in mind that the accused consumed 7.5 mg of Zopiclone as opposed to 1mg three times a day which translates to 3mg of Alprazolam, when the doctor was confronted again that the accused took Zopiclone for years instead of months the doctor said what the accused was taking was a very small part of the cocktail and that the small shift would not change the level of consciousness given the massive amount of substances he consumed. From the doctor's answer he was abandoning reliance on Zopiclone and relies on massive amounts of similar substances consumed and this could only be Alprazolam and alcohol as the doctor testified the Nexium had no effect and was not included in his report. The doctor changed his attitude on the possible effects of Zopiclone on the accused when he learned that instead of three months, the accused had been taking it for years and hence he developed a tolerance towards it and it had a lesser effect.

[39] Counsel continued to argue that if on the doctor's own testimony 7.5 mg Zopiclone became insignificant due to the fact that it had been taken for years and the accused can develop a tolerance towards it, then the same applies to Alprazolam that was taken for over 30 years. Furthermore, the accused had been taking these drugs and alcohol for years and coincidentally he only suffered a black out on the eve of the killing as he himself testified that the other two black outs were as a result of allegedly

having been drugged by his wife. It was a point of criticism that the doctor's evidence was tailored to fit the accused's version since the doctor was sitting in court listening to what the accused had to say so he could amend his version in line with that of the accused. Counsel further argued that this Court is not bound by the doctor's opinion that there is a possibility that he, accused, had a black out and that he might have not been capable of appreciating the wrongfulness of his actions, as the doctor also conceded that there is a possibility that the accused might have been capable of appreciating the wrongfulness of his actions and act in accordance thereto and that the accused might not have had a black out as the doctor was not there. The accused's blood alcohol level was also not checked.

[40] Concerning the defence of non-pathological criminal incapacity, counsel for the State argued that the Court should be careful and scrutinize the accused's actions before the deceased was killed, the detailed account testified to by the accused for all his actions and movements before he allegedly passed out, the detailed accounts about the amount of alcohol consumed, the time periods given when he took the drugs and alcohol and what he did after taking a shower all the while under the influence of alcohol, Alprazolam and Zopiclone which he started taking that morning. Counsel argued that the accused's actions proved that he was in control as he had a detailed recollection of certain events. He knew the daughter's number and he knew that he had shot the deceased and this was confirmed by the gunshot wound to the head. In his drunken state, he also advised the witness to call the police as he knew that a crime had been committed. Counsel argued further that the accused was capable of forming coherent thoughts as he was even going to arrange for people to look after the farm as he knew there was no one else on the farm. With regard to Meyer's testimony, the accused was asked questions concerning the firearms, the accused took him to their room and walked to the safe, removed the key that was on top of the safe and opened the safe that contained firearms. He was not confused about where the safe or keys were and he would open the safe by himself and show the firearm. It is for these reasons that the accused was not shown to have suffered from any non-pathological criminal incapacity that would entitle him to be acquitted so, counsel argued.

[41] It is again counsel's argument that if the Court weighs the circumstantial evidence the cumulative impact of the admissions to several witnesses and accused's conduct on the day the deceased was killed. The evidence carries a high degree of probability that the accused had killed the deceased with direct intent when he shot her on the head. The cumulative impact of the evidence shows that the accused knew what he was doing and hence an inference of guilty is a reasonable inference to be drawn and the State's evidence by far outweighs the accused's averments of innocence. In support of his propositions for the conviction, counsel referred this Court to several authorities.

[42] On the other hand, counsel for the defence argued that the accused denied the actus reus and criminal responsibility based on the defence of non-pathological criminal incapacity. The defence of non-pathological criminal incapacity is relied upon if the Court finds that the State had proved beyond reasonable doubt that the accused had shot the deceased. Counsel argued that the accused maintained his defence from the outset and the State should prove that the accused shot the deceased excluding the possibility of suicide and in such event whether when he did so, he was criminally liable and did not suffer from non-pathological criminal incapacity. Counsel further argued that the accused's defence has been supported by the doctor's psychological reports which state that: 'The combination of alcohol, Alprazolam, Zopiclone consumed on that day would be highly likely or highly probable or more probable than not to cause memory loss for several hours'. Furthermore, it seems that the accused might not be able to appreciate the moral and legal wrongfulness of his alleged actions due to the timing, amount and combination of psychoactive substance he and his wife consumed during the course of the day the alleged offence occurred. It is a well-known fact that benzodiazepine especially in combination with alcohol can cause memory impairment, impulsivity, poor judgment and state of confusion. These side effects of benzodiazepine are usually limited to the period of intoxication on the substance. In other words Mr Barnard could possibly have been incapable of understanding the moral and legal wrongfulness of his alleged actions only for the short period while being intoxicated on the mentioned substance.

[43] Counsel further argued that there exists no corroboration for any of the State witnesses' version in so far as they attempted to implicate the accused in the alleged

shooting of the deceased. Apart from the alleged admissions made by the accused to Hermanus Leeb, there is no direct evidence which implicates the accused as the perpetrator of the actus reus. As such, only circumstantial evidence is available. Counsel criticized Hermanus Leeb's version as being contradictory and that there were discrepancies in his two statements he gave to the police, which discrepancies the witness confirmed. The discrepancies of Mr Leeb's version are as referred to by counsel for the defence when he was cross-examining the witness. It was further counsel's point of criticism that Mr Leeb was a single witness as far as the content of the alleged conversation with the accused over the telephone was concerned. Counsel argued that during cross-examination, the witness conceded that because the accused spoke in a slurred voice he could have made a mistake that the accused said 'your mother was shot' instead of 'I shot your mother'. It was again counsel's argument that with the discrepancies in the witness' version the witness could not be said to have been clear and satisfactory in every material respect in his evidence. Not only did he make previous inconsistent statements, but also made a concession that cannot be ignored.

[44] With regard to the evidence of police officer Joodt, counsel argued that the accused allegedly made admissions to him. One of them is that he told him that he had a quarrel with his wife. However, this was not contained in the witness statement. Again although the witness allegedly explained to the accused his rights, the accused could not give a proper explanation regarding the incident because of his state of intoxication. The accused did not provide any indication that he understood his rights so explained. The accused never responded to the alleged explanation of his rights. Counsel again argued that although witness Joodt said he was able to communicate with the accused, the accused was very drunk and the witness could not have communicated well with him. Such admissions made, if any, as well as the alleged pointing out made to the police are inadmissible in evidence. This include the evidence of Commissioner Meyer when he testified that he asked the accused where he got the revolver from and that the accused took him to the safe.

[45] In connection with police officer Stoffel's testimony, counsel argued that the witness on assumption of the direction the projectile took indicated on his photo plan that point A, as indicated was the most appropriate and suitable position from where

the shot could have been fired. This assumption was shown to be without any merit as the witness did not do a proper test including distance measurements of relevant heights and that he was not a ballistic expert. The witness had also conducted a primer residue on the hands of the accused but there was no evidence that blood spatters were noticed on the hands of the accused.

[46] With regard to witness Nambahu, counsel argued that although he indicated that he was a ballistic expert it only related to a small portion of the field and more specifically relating to tool marks and to investigate causes of fire. He also testified that when he received the firearm there were no spent cartridges or live bullets contained in the firearm itself. They were already removed when he received the firearm, spent cartridges and the live ammunition. The witness conceded during cross-examination that he did not investigate the recoil of this specific weapon.

[47] With regard to Commissioner Meyer's evidence, counsel argued that he testified that he never explained the accused's rights. This is in contrast to his statement in which he stated that he explained the accused's right. Again his allegation that the accused took him to the safe and the conversation in respect thereof did not find its way in the statement. It is counsel's further argument that the witness' contradictions and his disregard for the accused's rights cannot be said that his testimony was clear and satisfactory given the circumstance that he was a single witness in this respect.

[48] With regard to the accused's level of intoxication counsel argued that State witnesses testified that the accused was very drunk. Therefore, it follows that whatever he said in a state of intoxication is not reliable and that it will have very little value.

[49] In respect of the possibility of the deceased having had committed suicide, counsel argued that State witnesses testified that nothing was disturbed at the scene and no indication that there was any altercation between the accused and the deceased. Commissioner Meyer also conceded that the scene as found is not inconsistent with a suicide having been committed. Furthermore, counsel argued that according to Doctor Ludik's findings the deceased had primer residue on both her hands. Whilst the accused's dominant right hand had no primer residue. Counsel

further argued that the proposition that the deceased shot herself had been also supported by expert witness Doctor Ludik. Counsel argued that the presence of blood spatters on the hands of the deceased as exhibited in photographs 13 and 14 on exhibit L as well as photographs exhibit K logically means that due to proximity of the hands to the head of a person who committed suicide by shooting herself through the head some form of blood spatters will be present on such person's hands. Counsel again argued that being right handed, it is highly improbable that if the accused had to shoot the deceased he would have used anything else but his dominant hand. However, no primer residue was found on his right hand. Counsel argued that based on the available evidence, the reasonable possibility is that it was the deceased who committed suicide. For the above going reasons, counsel argued that the Court should give the accused the benefit of doubt. I was also referred to several authorities by counsel in respect of the defence submissions, to which I have had regard.

[50] Having summarized the evidence and counsel's submissions, I will now proceed to discuss the principles regarding non-pathological criminal incapacity and in determining whether the accused intentionally killed the deceased I will approach the present matter in the light of those principles. In *S v Eadie* (199/2001) [2002] ZASCA 24 (27 March 2002) NAVSA JA stated the following at para 2:

'It is well established that when an accused raises a defence of temporary non-pathological criminal incapacity, the State bears the onus to prove that he or she had criminal capacity at the relevant time. It has been repeatedly been stated by this court that:

- (i) in discharging the onus the State is assisted by 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 to create a reasonable doubt on the point;
- (iii) evidence in support of such a defence must be carefully scrutinized;
- (iv) it is for the Court to decide the question of the accused's criminal incapacity, 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.'

[51] It is in light of these legal principles that I will proceed to determine the crucial question of whether the deceased was killed or whether she took her own life. There is evidence that the deceased was found on a couch with her head lying on the coffee table with a gun wound to her head. According to the post-mortem findings, the deceased had a round wound 0.8 cm diameter on the left parietal skull and a round wound 3.5 cm diameter on the right parietal skull. Multiple fractures of the skull and intracranial bleeding were observed. The post-mortem report further reveals that the cause of death was head injury due to penetrating skull trauma.

[52] There was no eye witness to the events leading to the deceased's death and the Court has to rely on the version of the accused and on inferences drawn from events before and after the death of the deceased. The State rests its case on direct evidence, circumstantial evidence and on alleged admissions made by the accused. In dealing with circumstantial evidence all evidence requires the Court to engage in inferential reasoning. What is required is to consider the evidence in its totality from which the Court would then be able to draw certain inferences. However, before the inferences are drawn two requirements should be met namely.

- '(i) the inferences sought to be drawn are consistent with all the proven facts, and
- (ii) the proved facts are such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.' *R v Blom* 1939 AD 188 at 202.3 *S v Reddy* 1996 (2) SACR 1 (A).'

[53] It is common cause that both the deceased and the accused had gunpowder residue on their hands. The deceased had it on both hands whilst the accused had it on his left hand. This is a proved fact as testified to by Doctor Ludik. Doctor Ludik testified further that for the primer residue to be found on the hands of the accused and the deceased both of them were adjacent to the firearm at the time of the firing. The accused however, testified that he could not remember handling the firearm on the date of the incident. However, there is no explanation how primer residue found its way on his left hand.

[54] It has also been suggested by counsel for the defence that there is a possibility that the deceased committed suicide because she had primer residue on both hands and that State witnesses testified that nothing was disturbed at the scene. With regard to the suggestion that the deceased had committed suicide because of the gunpowder residue that was found on both hands, this is not the only reasonable inference to be drawn from the proven facts. Doctor Ludik, an expert witness, testified that there are other hypotheses possible. The doctor further testified that he could not identify the shooter.

[55] Concerning the issue that the scene was not disturbed, the accused in his plea explanation stated that the revolver was lying on the ground between him and the deceased whilst Mr Leeb testified that he found A38 revolver lying on the left side of the coffee table on the edge. He removed it and placed it in the microwave. Again, when he arrived, he also found a half bottle of brandy on the kitchen table. He removed it and hid it in the fridge as the accused wanted to pour from it in order to drink further. This is a clear indication that when the police arrived, the scene was already interfered with. Therefore, the submission by counsel for the defence that the scene was not disturbed is not supported.

[56] Counsel for the defence levelled criticism at the alleged admissions and pointing out made by the accused to Commissioner Meyer. Counsel argued in this regard that the accused never told the witness that he had a quarrel with his wife and that the witness did not ask the accused from where he got the firearm which question resulted in the accused allegedly leading the officer to the room and pointing at the safe as the place where the firearm was taken from. On the contrary, counsel put it to Commissioner Meyer that the Commissioner inquired from the accused where he normally kept his firearms and the accused took him to where these firearms were ordinarily kept. The witness conceded to counsel's proposition. If it is correct that the accused took Commissioner Meyer to the safe in order to show him where he normally kept his firearms, it cannot be said that the accused made an admission that he showed Commissioner Meyer the place from where he got the pistol that was used to shoot the deceased. This Court will not rely on the alleged admission made by the accused that he said he quarreled with his wife because at the time the accused

allegedly made those admissions he was not warned of his rights. The Court will also not rely on the alleged pointing out made to Commissioner Meyer as to where the accused got the firearm from. However, the Court accepts the defence's proposition that Commissioner Meyer asked the accused where he normally kept his firearms and the accused took him to the safe. Although he was drunk, by taking Commissioner Meyer to the safe, the accused was able to engage Commissioner Meyer into a coherent conversation. He could remember where he normally kept the firearms; he was able to lead the witness to the room; he knew where the keys were, and was in a position to open the safe.

[57] Counsel for the defence also criticized the testimony of Inspector Joodt that when he asked the accused whether he had farm workers on the farm and he responded that he had no farm workers but he would get somebody to look after the farm while he is in custody. It is not disputed that when the accused was asked whether he had farm workers he said he was going to get someone to look after the farm whilst he was in custody. The dispute revolves around the place and the time the conversation took place. According to Inspector Joodt the accused was asked whether he had farm workers whilst they were still on the farm and the accused testified that he made that statement at the time he was at the police station after he had gained his consciousness. When police officer Joodt testified that the accused told him that he will get someone to look after the farm whilst he is in custody the version was not disputed under cross-examination. It was only disputed when the accused was placed on his defence and testified that he told Inspector Joodt whilst he was at the police station when they were taking fingerprints.

[58] Where evidence is in dispute it should be challenged through cross-examination. In *President of the Republic of South Africa and Others vs South African Rugby Football Union and Others* 2000(1) SA 1 CC (SARFU case) at pages 36-38 it was stated as follows:

‘The institution of cross examination not only constitutes a right it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’ attention to that fact by questions put in cross-examination showing that the imputation is intended to be made and to

afford the witness an opportunity, while still in the witness – box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* (1893) 6 R67 (HL).'

I respectfully associate myself with the principles laid down above.

As counsel for the prosecution rightly pointed out, if there was a dispute concerning what the accused told Inspector Joodt the defence was supposed to put it to the witness through cross-examination. The approach that leaves a witness' version unchallenged in cross-examination only to urge the Court to disbelieve such version later is not in line with the principles set out in the SARFU case above and is to be rejected. This Court regards the accused's version that he told Inspector Joodt whilst he was in custody and whilst he was sober as an afterthought and it is therefore rejected as it cannot be reasonably possibly true. Again, by telling Inspector Joodt that he would get someone to look after the farm whilst in custody, is a clear indication that although he was intoxicated to a certain extent he was able to appreciate what was going on around him.

[59] The accused had allegedly made spontaneous admissions to Mr Leeb when he phoned him and when Mr Leeb arrived at the farm. The law regarding admissions is stated under section 219A (1) of the Criminal Procedure Act 51 of 1977 and it reads as follows:

'(i) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible against him at criminal proceedings relating to that offence...'

[60] It is also *trite* law that admissions made by an accused although under the influence of intoxicating liquor is admissible and the Court should determine what weight to be attached to it. *R v Molloa* 1956 (4) SA 824. Although the accused allegedly made the admissions to a single witness in the person of Mr Leeb it is *trite* law that the Court may rely and accept into evidence the version of a single witness. Diemont JA

in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180 E-G stated as follows in respect of the evidence of a single witness:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness '(see the remarks of Rumpff JA in *S v Weber* 1971(3) SA 754 A at 758). The trial judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony he is satisfied that the truth has been said.'

[61] Another issue raised by counsel for the defence is that Mr Leeb gave contradictory evidence between the statements he gave to the police and his *viva voce* evidence. Witness' self-contradiction must be approached with caution. I will approach the witness' version in line with the well-established principles laid down in *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) [2002] 4 ALL SA 74. It was stated in the headnote as follows:

'The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contraction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain

the contradiction – and the quality of the explanation – and the connection between the contradictions and the rest of the witness' evidence, amongst other factors. [are] to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth had been told, despite any shortcomings.'

[62] Furthermore, this Court had the privilege to have had two expert witnesses testifying. Moreover, in arriving at the conclusion one way or the other, this Court must have regard to all the facts and circumstances of the case as well as the actions of the accused before, during and after the incident. The Court should also consider the expert witnesses' testimonies together with the evidence as a whole. It is trite that an expert witness' opinion is admissible to assist the Court with scientific information which is unlikely to be within the knowledge and experience of the judge.

[63] I will now proceed to deal with the alleged admissions made by the accused to Mr Leeb. Mr Leeb testified that when the accused phoned, he told him that 'I shot your mother. I had enough of that.' The accused disputed that he told the witness that 'I shot your mother'. Instead, his instruction was that 'My wife was shot.' As counsel for the prosecution rightly put it, had the accused said 'My wife was shot. I had enough of that', this would not make sense. The accused and the deceased were the only two occupants of the house at the time the deceased was shot. No evidence adduced that the farm was invaded by an intruder. If the deceased had committed suicide by shooting herself, the accused was not going to inform Mr Leeb that 'my wife was shot' or 'your mother was shot'. Again, if the witness was informed that 'your mother was shot' or 'my wife was shot', it is natural that Mr Leeb would have inquired from the accused as to who had shot the deceased. The witness did not inquire as to who shot the deceased because he was aware of the identity of the person who killed the deceased. He had no doubt of what he was told by the accused and he conveyed the message to the police. When the accused asked the witness whether he or the accused would phone the police, the witness informed the accused to leave everything as it was. The accused had confirmed the latter portion of the witness version that he was indeed told to leave everything as it was.

[64] The accused had allegedly made other admissions to Mr Leeb, namely that he had lost control; he had snapped. There are further admissions that the accused made when asked whether he was serious by saying that he had shot the deceased. The accused informed the witness that he was serious. Again when the witness arrived at the farm he again inquired from the accused whether what he told him on the phone was true and why it had happened. The accused told him that it was true and did not give a reason why it had happened. When the witness asked where his mother-in-law was, the accused told him that she was in the sitting room. The witness went there and found her lifeless body.

[65] Counsel for the defence argued that there were discrepancies and inconsistencies with the regard to the witness statements Mr Leeb gave to the police. He based his argument on the fact that the first statement reads that 'He has had enough and that he had finished his job. His direct words in Afrikaans were 'Ek het nou genoeg gehad. Ek het nou klaar gemaak met jou ma'. Whilst in the second statement the accused allegedly said to the witness. 'Ek het nou genoeg gehad en het nou klaargemaak met jou ma'. ('I had enough of your mother and had finished with her). 'Ek het haar geskiet.' 'I shot her'. The contradiction lies in the fact that the first sentence omitted to mention that 'I shot your mother' and in the difference in the sequence of words used. Mr Leeb's testimony is that the police translated his statement from Afrikaans to English and the statements were not read back to him. The fact that Mr Leeb contradicted himself does not show that he is a liar and that the court should reject his evidence as a whole. The court should make an evaluation and consider the nature of contradictions, how many are they and their effects on the witness' testimony.

[66] If one has regard to the two statements, the one omitting the words 'I shot your mother' but stating He had had enough and finished his job or I had enough of your mother.' If one has to read the statement in light of the context of this case, when the witness went to the farm he found the mother referred to dead because she was shot. So the words 'finishing his job or having had enough of your mother' were indeed referring to the deceased's death. Although a single witness, the court may convict the accused on evidence of a single witness provided that his evidence is clear and satisfactory. Mr Leeb is an independent witness from the police. Although there have

been shortcomings in his testimony, the contradictions and discrepancies referred to were not material to warrant his evidence to be rejected in toto. I find Mr Leeb to be a credible witness and his evidence is clear and satisfactory in material respects. Concerning the sequence of words used, although in some cases the sequence of the words used by a witness may be vital, in the present case I do not find the sequence to be material. I am therefore satisfied that the truth has been said that the accused made the admission to the witness and he had no reason why he should implicate the accused in that respect. By insisting that he instead stated 'My wife was shot' is a conclusion by the accused to distance himself from the admissions in order to escape liability. Although the admissions were made whilst the accused was intoxicated such admissions are proved to be made voluntarily by the accused and they are admitted in evidence against him.

[67] I will now proceed to deal with the accused's defence of temporary non-pathological criminal incapacity. This court had the privilege of having highly qualified expert witnesses in the names of Doctors Ludik and Max testify before it. As observed above, an expert witness's opinion is admissible to assist the court with scientific evidence which is unlikely to be within the knowledge and experience of the judge. However, in the end it will be the judge to determine whether at the time of the commission of the offence the accused was or was not under the influence of intoxicating liquor or drugs or both and whether the substances had rendered him incapacitated to the extent that at the crucial time he was unable to appreciate the moral and legal wrongfulness of his actions due to him suffering from a temporary non-pathological criminal incapacity. In arriving at the conclusion that the accused had diminished criminal responsibility, the court must have regard to all the facts and circumstances of the case as well as the actions of the accused before and after the incident. The court should also have regard to the expert witnesses' testimonies and consider them together with the evidence as a whole. Although Doctor Ludik had conceded in evidence that there was a possibility that the deceased would have shot herself, this was not the only reasonable possible inference to be drawn in the circumstances as there were other hypotheses. On the other hand Dr Max's finding was that the combination of alcohol and drugs consumed by the accused would be highly probable or more probable than not to cause loss of memory, confusion, poor judgment and impulsivity and that the accused would have highly possibly or more

probable been incapable of understanding the moral and legal wrongfulness of his alleged actions for a short period while being intoxicated.

[68] If one has regard to the accused's testimony, he was able to remember the event of the fateful day from the morning up to about 22h00 when he had the alleged black out. After the black out, he regained consciousness and observed the deceased lying dead. He was able to make a call on his phone and realized that the phone was answered by his son-in-law. He alleged he could not recall everything he discussed with his son-in-law but remembered that he told his son-in-law that 'My wife was shot' and that the son-in-law told him to leave the scene as it is. The accused recalled having taken a shower; he recalled that after he took the shower he also took his medication. He recalled the amount of alcohol he took. The accused had a recollection that he went outside the house after he had passed out and that he smoked a cigarette. However, he had no recollection whether he handled a firearm. He also had no recollection whether Warrant Officer Stoffels conducted primer residue test on his hands and that he would not recall how the primer residue came to his hand. The accused remembered seeing the blood on the table and the firearm lying on the floor but he could not remember whether he touched it or not.

[69] Although the substances taken by the accused are capable of causing loss of memory which may result in temporary non-pathological criminal incapability as testified to by Dr Max, a holistic approach to all the evidence reveals that the accused was in control of his mental faculties although he was drunk to a certain extent. He was able to remember most of what happened but conveniently had a lapse of memory of the crucial event. The accused's specified actions before he allegedly had a black out and his actions after he regained consciousness and losing it again is not consistent with the behaviour expected from a person who had no recollection of the critical moment. I have therefore come to the inescapable conclusion that the accused is hiding behind the defence of non-pathological criminal incapacity in order to escape liability for his actions. The accused could not even tender an explanation how the primer residue came to his hand. As Doctor Ludik pointed out, for the evidence to be on the hands of both the accused and the deceased it means both hands were adjacent to the firearm at the time of firing. A link has been established between the firearm, the accused and the deceased. Taking the evidence as a whole, the only

reasonable inference that can be drawn is that the accused is the one who shot the deceased. I am satisfied that the State has proved beyond a reasonable doubt that the accused was at all material times conscious and he was able to direct his conduct and could distinguish between right and wrong. I therefore reject the expert's opinion that the accused was suffering from non-pathological criminal incapacity at the crucial time. Although at the time he was found by the witness he was drunk, he was still conscious and able to appreciate what was going around him. Again the fact that the accused was found very drunk does not necessarily mean that he was in the same state of drunkenness at the time the offence was committed, because there is a reasonable possibility that the accused drank further after he shot the deceased. This inference may be drawn because when Mr Leeb arrived at the farm, he found a bottle of brandy on the table and he had to hide it because the accused wanted to pour alcohol from it in order to drink further. This court is satisfied that the State has discharged its burden of proof beyond a reasonable doubt that it is the accused who shot the deceased. By shooting the deceased with a firearm on her vital part of the body, namely the head the accused intended to kill the deceased. He had direct intent to do so.

[70] In the result the following verdict is made:

The accused is found guilty of murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2004) with direct intent.

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N N SHIVUTE

Judge

**APPEARANCES:**

**THE STATE:** P KHUMALO (with him C LUTIBEZI)  
Of Office of the Prosecutor General, Windhoek

**ACCUSED:** L C BOTES  
Instructed by Garbers & Associates, Windhoek