IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS 40/2006

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES**

(Signed)

24 December 2020 .....

SIGNATURE

THE STATE

v

RAUTENBACH, JUSTIN PIERRE Appellant

JUDGMENT

SPILG, J:

INTRODUCTION

1. This is an appeal from the judgment of Vally J. The judgment is reported as *S v Rautenbach* 2014(1) SACR 1 (GSJ).

2. The appellant was charged with five offences. He had pleaded guilty only to the unlawful possession of cannabis and methaqualone (mandrax). He was subsequently convicted on all the other charges; namely, on count 1 to the murder of his father, on count 2 for theft[1] and on counts 3 and 4 for the unlawful possession of a firearm and of ammunition.

3. The trial judge imposed an effective sentence of 18 years' imprisonment, with a further 6 months' imprisonment suspended for five years on the usual conditions. The major portion of the sentence, that of 16 years' imprisonment, was imposed for the murder. The additional two years is made up of eight years for the theft, six of which was ordered to run concurrently with the main sentence. The four years' imprisonment in respect of both the possession of the firearm and ammunition were all ordered to run concurrently with the main sentence. An additional suspended sentence was imposed in respect of the illegal substances offence.

4. The case arises from the death of the appellant's father on the night of 18 December 2011. His body was found in the garage of their house. The deceased had been shot with his own .303 rifle. The bullet passed through the palette in an upward trajectory which meant that the barrel of the rifle was in the deceased's mouth when the shot was fired.

5. That same evening, and after the shooting, the appellant was found in possession of his father's car in which was strewn bed linen and clothing belonging to the deceased. Four rounds of shot gun ammunition were found in the cubbyhole of the car. 1.1 grams of cannabis and mandrax was also found at the house, being the illegal substances which he admitted to possessing.

6. The main issue in respect of the murder charge was whether the cause of death arose from the bullet wound and if so whether the deceased had placed the rifle there himself and taken his own life or whether the appellant had killed him.

[1] This was a competent verdict to the charge of robbery with aggravating circumstances; the court finding that the items had been taken after the murder.

LEAVE TO APPEAL

7. On 8 April 2014 the Registrar of the Supreme Court of Appeal forwarded an email to the parties attaching a copy of the order he signed and which had been granted by Theron JA (at the time) and Salduker JA in terms of which the appellant was granted leave to this court to appeal "*against convictions in count 1 and count 2".* The appellant therefore believed that leave had only be granted in respect of the convictions for murder and theft and on that assumption filed his heads of argument of 27 March 2019.

8. On receipt of the appellant's heads *Mr. Gcaba* for the State informed *Mr. Guarneri* who represents the appellant that he was in possession of another order also signed by the Registrar on same date; i.e., 8 April 2014 save that it differed from the first in two respects; it was granted by Theron JA and Swain AJA and it granted leave "*against count 1 and count 2"*.

9. Mr. Gcaba did not file heads in respect of sentence and attached to his heads of argument two communications both dated 8 April 2014 signed by the Registrar of the SCA. Both referred to the grant of the application "*as per attached order".* Attached to the first was the order granted by Theron JA sitting with Salduker JA Attached to the other identically worded letter was the other order also signed by the same registrar handed down by Theron JA and Swain AJA.

10. In his comprehensive set of heads on conviction Mr. Gcaba accepted that the orders "*were granted on 4 April 2014 albeit by different Judges"* but submitted that the latter order granting leave did not specify whether it was on conviction or on sentence and assumed that it was to be interpreted by reference to the other order and therefore meant that the application was successful in respect of conviction only.

11. After being apprised of the second order Mr. Guarneri on behalf of Legal Aid, and who has represented the appellant throughout the proceedings, sough clarity from the Registrar of the SCA as to which was the correct order. While it is evident that the appellant must be given the benefit of an order which grants leave in respect

of conviction (unless the error was one of transcription by the Registrar) the difference between the two affects whether the appellant is only entitled to argue the conviction or whether he can also argue sentence if he does not succeed on setting aside the conviction.

12. Initially the Registrar of the SCA replied "*The order is correct as it was made by the Judges. There was no error"*.

Unfortunately, the Registrar did not state whose order he was referring to. In order to obtain clarity Mr. Guarneri wrote back indicating that he was not asking for a variation, only to establish which of the two orders is the correct one. In an email of 29 April 2019, the Registrar advised that "*The Prayers as per notice of motion is what was asked for*". As is usually the case, unless new issues are raised, this court is not provided with the petition to the SCA- it will only have the application for leave to appeal brought before the trial judge. The application for leave to appeal had been made from the bar, the transcript of which, including Vally J's dismissal of the application, revealed that the application was in respect of both conviction and sentence[2].

In preparing for the appeal, we had assumed that the petition would have followed the same course and covered sentence as well. However, in a supplementary set of heads dated 20 May 2019 Mr. Guarneri informed the court that the notice of motion to which the Registrar of the SCA referred did not cover sentence[3] but that the body of the petition contained a distinct section of seven paragraphs, at pp15 to 16, headed "*Ad Sentence".*

13. The question of whether this court could entertain the appeal in respect of sentence therefore remained, as Mr. Guarneri impressed on us, that there had been no enquiry to resolve the ambiguity between the notice of motion and the contents of the affidavit, which *inter alia* referred to the length of time the appellant was in

[2] See judgment of 20 November 2013 record pp1173-1174 and record pp1172-23 to 1172-30 and 1172-33 to 1172-37

[3] Prayer 2 of the Notice of Motion read: "*That the Applicant be granted leave to appeal against the conviction …. by Mr Justice Vally on a count …"*

custody pre-conviction and the imposition of a sentence of 18 years' imprisonment for non-premediated murder. Although the notice of motion was cast in error when considered in light of the distinct submissions made under the "*Ad sentence*" heading, this court was concerned that the Registrar's last communication was unambiguous and that only the order sought in the notice of motion for leave to appeal - in respect of the count of murder and of theft- had been granted.

14. The Registrar's notifications however showed that the SCA did not consider that a petition on sentence had been brought before it. That being so, it could not be said that the SCA had refused leave on sentence as it had not been expressly asked to in the notice of motion.

15. Since the issue of whether this court sitting on appeal is empowered to consider the question of sentence pursuant to a petition to the SCA is determined within the four-corners of the Superior Courts Act no 10 of 2013 and not under any inherent power Mr. Guarneri considered it prudent to make further enquiries with the Registrar of the SCA and if need be to submit a fresh petition in respect of sentence.

16. Since the record is some 1500 pages long, we retained the matter. The Registrar of the SCA indicated that a dedicated application for leave to appeal sentence would have to be brought together with an application for condonation. Both condonation and leave to appeal sentence to the Full Court on all counts were granted by the SCA. The appeal was again set down for hearing before us and argument presented on both conviction and sentence.

GROUNDS OF APPEAL

17. The appeal on conviction in respect of the murder charge attacks the judgment on a number of grounds. They included that the trial court refused to allow the reception of vital evidence, that there was only circumstantial evidence linking the appellant to the death of the deceased and that this was insufficient to allow a finding that there was not another reasonable explanation accounting for the

deceased's death. The appellant also attacked the credibility findings in respect of two of the main witnesses and the finding that after the incident blood and whitish substances were visible on the appellant's chest, the substances being identified as fragments of bone or brain.

While it is correct that findings are to be made based on circumstantial evidence, they are also based on the appellant's own testimony which, I intend demonstrating, turns out to be most damning against him.

18. Although Adv. Guarneri offered no submissions either in his heads of argument or in court as to why the conviction for theft was wrongly decided he did not expressly abandon that leg of the appeal.

It is nonetheless incumbent on us to discern the grounds on which it was considered that there were prospects of success in respect of the theft conviction.

19. The grounds of appeal against the sentence imposed are based both on an alleged error in law, in that a court must give reasons if it is to exceed the minimum sentence for the specific offence, and that the one year and four months spent in custody pre-conviction should have been taken into account with all other factors as amounting to mitigating circumstances. Finally, it is argued that the cumulative effect of the sentences induces a sense of shock.

20. There is a fundamental consideration which must be taken into account when considering the grounds of appeal raised. It is the acceptance by the appellant's counsel of the trial court's findings that the appellant was not candid and that his evidence cannot be accepted. Vally J said the following;

> "*Most of his evidence was manufactured for the purpose of rebutting any evidence of the State that he believed was supportive of the State's case. He also did this on a piecemeal fashion and in so doing he was unable to avoid the pitfalls of self-created confusion"*

The judge then gave two clear illustrations. I have gone through the record twice and also found it necessary to repeatedly revisit certain aspects and in particular the evidence of the person who was with the appellant that evening, and who I will refer to as Freda. This is because the appellant's evidence in court did not make sense in relation to what had been put to Freda, what was not put to her and what parts of her evidence were never in issue or became distorted during the appellant's testimony.

In this regard it does not lie in the appellant's mouth to contend that he or his counsel had overlooked something material when Freda was cross-examined: At what may aptly be described as past the eleventh hour, since Mr Guarneri was already arguing for a discharge at the end of the State case, he successfully applied to re-open the cross-examination of Freda in order to deal with everything that had inadvertently been omitted and was required to be put to her. During argument for re-opening the cross-examination Mr Guarneri provided the court with a full list of questions that still needed to be dealt with in relation to Freda's cross-examination.

NON-RECEPTION OF HEARSAY AND OPINION EVIDENCE

21. Looming large in the submissions made by the appellant is how the trial court, in applying s 3(1)(c)(iv) of the Law of Evidence Amendment Act no 45 of 1988 (Evidence Amendment Act), dealt with the admission or rejection into evidence of the following hearsay evidence;

    a. Evidence of attending doctors, Drs. Diova and Modise, that the deceased was suffering from depression and that he had told Diova that he felt suicidal.

       The statement about feeling suicidal was made on 27 January 2010, which was almost two years before the incident. Moreover, Diova had found the deceased to be emotionally stable at the time and put him on a course of Brazipam tablets which she said was sufficient to help him overcome his condition.

The trial court had disallowed the admission of this testimony on the grounds that it would be of "*little probative value when considering the events two years later when the deceased was shot"* [4]

b. The further evidence of Mrs Newcombe who said that the deceased had told her that;

   i. He would never take the appellant's life but was able to take his own;

      The trial court considered that this evidence was of little or no value in determining what happened on the night in question. The statement would have been made at least 9 months before the incident. The court considered *inter alia* that much had occurred in the interim "*and neither she nor anyone else had heard him repeat the statement"*. The court *a quo* was also of the view that "*the statement was meant to indicate his affection for the accused*".

      The judge therefore held that the probative value was so low that it would not be in the interests of justice to admit it. [5]

   ii. He was depressed about the children from his late wife threatening to take the house

      This statement had been made in March 2011 whereas the appellant had testified that at the time of the incident, and for some time before then, the deceased had secured the contractual rights to remain in the house until he died.

The trial court therefore considered that this evidence was valueless.

[4] Judgment p1125 at para 114
[5] Judgment p1124 para 113

c. That part of Peggy's evidence in which she said that the deceased told her that;

   i. he refused to see a psychiatrist

   ii. if his car was damaged then "*I might as well blow my brains out".* This was allegedly said on the morning of 18 December 2011.

The court refused to admit the evidence on the grounds that it had minimal if any probative value.

This conclusion was based on all the other evidence of what occurred that day. The court found that there was no evidence demonstrating that on the deceased's return home on the fateful day that he had become so desperate that suicide was the only way out.[6]

22. The line drawn by the court, as the reception of hearsay evidence, was determined by reference to whether its probative value (being one of the considerations to be taken into account by reason of s 3(1) (c)(iv) of the Evidence Amendment Act) was such that the "*quality of the hearsay evidence and the extraneous reliability guarantors make it imperative that* (it) *be admitted".* This was an extract cited from *S v Ndhlovu and others* 2002 (6) SA 305 (SCA) at para 52

23. In my respectful view as much as there exists the danger of procedural prejudice to which Cameron JA (at the time) referred in *Ndhlovu*, so too, once our law recognises that an essential underpinning to accepting hearsay evidence is based on its reliability, there are dangers in isolating pieces of evidence to determine their probative value or relevance. The danger is that they may turn out to be rationally connected to a broader set of dynamics with which the case is concerned and against which a court is required to test the soundness of inferential reasoning during the fact-finding process.

[6] Judgment p1125 at para 115

24. As appears from cases such as *Ndhlovu* at para 45[7] and *S v Saat* 2004(1) SA 593(W) at 93E-F (para 4 of judgment), determining the probative value of evidence involves a consideration of its reliability and what it is intended to prove if admitted[8]. In application they appear to be inseparable.

25. However, admissibility of a hearsay statement based on reliability is distinct from determining the weight it will ultimately be given- or put another way, the relative value it is to be given. Weighing evidence does not determine admissibility whereas determining the reliability of a hearsay statement acts as one of the gatekeepers to its reception into the pool of evidence which a court is obliged to consider.

26. To conflate the two would result in the exclusion of hearsay statements which have probative value that may, for instance, explain conduct or put events that unfold[9] into perspective. Reliability and contextual relevance are not the same thing. At times it may be difficult to draw a clear distinction since relevance may creep into the issue of probative value because of the second element relating to what the hearsay statement is intended to prove.

27. In the present case there is a gunshot which must have been fired after the muzzle of the rifle had been placed in the deceased's mouth in an upward direction. That evidence is not inconsistent with suicide. All other things being equal it would support a suicide if only because of the resistance that the victim is likely to put up unless he or she was already immobilised, if not already dead.

28. Accordingly, evidence of the deceased suffering from severe depression in the past or had actually contemplated or expressed the possibility of taking his own life, whenever that might have been, is relevant since events at the time of the

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[7] *Ndhlovu* at para 45:

> *[45] 'Probative value' means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if I admitted?', but 'will it do so reliably?' In the present case, the guarantees of reliability are high. The most compelling justification for admitting the hearsay in the present case is the numerous pointers to its truthfulness*

[8] Compare *Principles of Evidence* (4th) by Prof Schwikkard and van der Merwe at 299 paras 13.7.4. They appear to be of the view that the test of what will it prove goes to relevance while the requirement of reliability is intended to negate the potential prejudice of receiving hearsay testimony.

[9] This would include the common law res *gestae* exception to the hearsay rule

deceased's death may be capable of triggering the same emotional response- and that cannot be excluded because it indicates a certain premorbid disposition.

29. Peggy's evidence regarding the deceased mentioning that he might as well blow his brains out because of the appellant having taken his car and having done something to it cannot be excluded on the basis that it does not fit the pattern of events on the day. In my respectful view that begs the very question the court was to answer- namely is there evidence to support suicide. The context in which the words were uttered, whether they were used figuratively or literally and whether it fits a pattern goes to the weight to be attached to it

30. The evidence tendered meets the requirements of reliability: Although hearsay, there are enough factors present, including the statements by treating doctors, that satisfy the test of reliability and therefore all evidence in that regard should be admissible. The question of relevance, which was the ground for its rejection as part of the pool of evidence which was to be considered, only rears its head at the weighing of evidence stage. At that stage one of the factors to be taken into account is the deceased's actual emotional disposition at the time of the event and how long it had been since he displayed such tendencies. In my view the evidence in this regard was admissible and ought to be weighed together with all the other admissible evidence placed before the court in order to make a factual finding as to whether the deceased had taken his own life or not.

31. In my respectful view a more holistic approach to the sum total of what the witness had to say should be assessed. In this regard it should be recalled that the trial court found all the witnesses barring the appellant to be reliable.

    The decision as to whether the evidence should have been admitted, in my respectful view, ought to have regard to the post mortem and the ballistic reports. Neither of them could discount suicide as a cause of death. This would satisfy the basic requirement of reliability allowing the testimony to be admitted into the pool of evidence which the court was required to consider in order to reach its factual finding.

Once received, the evidence can then be weighed together with all the other evidence to determine its ultimate relevance and the credibility of the witness in question. In application, there may well be two stages where reliability is taken into account. The first is *prima facie* reliability where the credibility of the witness cannot be taken into account because it would be premature to do so at that stage. The second is when all the witnesses have testified and the court can determine both the veracity of the witness' testimony and its overall reliability (such as the witness's faculty for recollection).

Since an accused ought to know the evidence against him by the time the State closes its case, a court may be obliged to determine admissibility by then or at least indicate to the accused that it is being admitted provisionally (the admissibility of certain documentary evidence comes to mind). That being so a final decision to exclude hearsay evidence at the end of the State case on grounds of relevance, even if notionally sound, may create its own practical difficulties of application as I believe this case demonstrates- particularly where a court may be obliged to determine the facts by reference to circumstantial evidence. See *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) at para 36 where the Constitutional Court said:

> *"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.*[10]

[10] See also Cachalia JA in *Director of Public Prosecutions, Western Cape v Schoeman and another* 2020 (1) SACR 449 (SCA) at para 63 *et sec*

CIRCUMSTANCES SURROUNDING THE DECEASED'S DEATH ACCORDING TO THE STATE'S WITNESSES

Freda and MacFarlane's evidence

32. The appellant was living with his father, the deceased, at the time of the latter's death. The appellant and a person who will be identified as Freda were in a relationship; but according to her, it had just about ended.

    There was a lodger, Mr Macfarlane, who stayed in the house. He was a security officer working at the same company as the appellant. The appellant was in charge of the engineering department.

    It appears that MacFarlane started living at the house a short while after he met the appellant at work in June 2011. The appellant had commenced his relationship with Freda approximately a month later. It is also evident that the appellant was able to confide in MacFarlane, at least in relation to Freda. According to MacFarlane, until the appellant formed a relationship with Freda his relationship with his father appeared to be good. However, after Freda entered his life, the appellant started drinking heavily and stole money from the deceased prior to the incident.

33. Freda claimed that she had met the appellant at a hotel bar late on the Friday night or early Saturday morning prior to the incident which occurred on Sunday evening. He was driving the deceased's car at the time. There were two other males in the car. One of the occupants alighted before they arrived at the deceased's house. Freda identified him as Deon Mandell. At that time the appellant was under the influence of both alcohol and drugs.

34. On the morning of 17 December the other person left and Freda spent that day and the next with the appellant. Both she and the appellant continued to consume tranquilizers (Brazipam) with whiskey.

35. According to Freda the deceased only arrived at the house at about 11h30 on the Sunday morning. Soon after his arrival a heated argument ensued between him and the appellant regarding the appellant having used the deceased's car. She

was later recalled after the appellant's application for a discharge was refused. She then accepted that the argument may have been about the pawning of the deceased's lawnmower which had occurred on the Saturday. She also accepted that the deceased had come to the appellant's room, where she was lying down, to find out whether the lawnmower had been pawned or sold and told him that she did not know.

The argument continued and she then fell asleep between 17h00 to 18h00.[11]

36. When she woke up to go to the bathroom she found that the deceased was outside in the garden holding a spade in his hand and trying to get in, as the appellant had somehow locked him out. She recalled that the deceased eventually managed to get in. She then passed out again in the appellant's bedroom.

37. Later that evening Freda was awakened by the appellant who said that the deceased had committed suicide. He took her to the garage where she saw the deceased's body. She said that the body was "*lying there on the gas cylinder"*. This was not challenged.

38. She then told the appellant to call the police. They went inside and he used the landline. He took the phone but after a short time put it down telling her that there was no airtime to make the call. She told him that they should go to the police station and report the incident. The appellant then went back to the garage.

39. Despite telling him to leave everything until the police arrived, he came out of the garage with four or five rounds of shotgun ammunition in his hand, gave them to her and said she must put them in the deceased's car. She went to place them in the cubbyhole. When she returned to the appellant, he was holding a rifle with the barrel pointing under his chin.

40. When Frida was recalled to testify, she said that she could not comment on where the appellant had retrieved the rifle from. She was adamant that he produced it when she had returned from putting the ammunition in the car. She also denied

[11] Record p221

seeing the rifle under the deceased's arm. She was adamant that she would have seen it if it had been there.

41. Returning to her chronology of events: Freda testified that the appellant said he was going to commit suicide because he had just lost the only person who cared for him. She shouted at him not to be stupid, grabbed the rifle out of his hands and threw it into the swimming pool.

42. According to Freda, the appellant then went back into the house and began ransacking the deceased's room. He took bedding and clothing which he put in the deceased's car. He told Freda to help him, saying that he needed petrol money to reach the police station but had to pawn the items he was taking to get the money. She could not recall if the appellant had a shirt on at that time.

43. MacFarlane claims that he left his girlfriend's place on his motorcycle at about 21h00 and returned to the house. He found the deceased's car parked outside the yard and at the side of the house. When he had left earlier it was inside the yard. As he passed through the yard he saw linen, what looked like curtains and other items strewn in the area. On entering the house he was confronted with a mess-things just strewn around. He found the appellant in the passage without a top on and wearing only one takkie. MacFarlane asked where the deceased was.

44. The appellant told Macfarlane that his father had committed suicide in a nearby park which was some 150 metres from the house, and that his body was still there. When MacFarlane asked what was going on the appellant started to cry and appeared to want to speak about it. Macfarlane asked him several times what had happened. According to MacFarlane, on each occasion Freda intervened and told the appellant to say nothing. MacFarlane estimated that he left the house sometime after 21h30 but before 22h00. He arrived back at his girlfriend's house just after 22h00 but this was because his motorcycle had broken down along the way.

    By contrast, Freda claimed initially that she could not remember if MacFarlane had come to the house that evening but denied that she would have prevented the

appellant from speaking to him. Freda however said that the appellant was wearing a top and only had one takkie on.

45. According to Freda, as they were reversing out of the driveway they were approached by the handyman who worked at the church around the block, known as Mr Aaron. Aaron said that he had heard a gunshot and came to ask what had happened. The appellant replied that the deceased had shot himself and drove off.

46. They drove straight to Solly Kramers tavern and bought a half jack of sherry. The appellant had R18 in cash with him at the time. After consuming the half jack, they went to Freddies tavern, the owner of whom is also a pawnbroker. Freda recalled that the appellant had previously pawned items belonging to the deceased there.

47. According to Freda, Freddie was not interested in taking clothes and bedding. The police arrived while they were still talking. Freda confirmed that she and the appellant were brought back to the house in separate police vans. They were at the house until about 05h00 and were then taken to the Booysens police station where they were charged. Later that day, at about 12h00, they were taken back to the house and asked about the location of the shotgun barrel. According to Freda the appellant did assist the police in the search, but he only looked inside the house. He did not take them to the yard.

48. It is necessary to again interpose MacFarlane's testimony. Shortly after 22h00 when he had returned to his girlfriend, the deceased's girlfriend, Peggy, called him. She was concerned that the deceased was not answering his phone. Macfarlane told her that he had not seen the deceased and that the house was a mess.

49. Macfarlane then went back to the house with his girlfriend to gather his uniform for work. On arriving he discovered that the padlock at the entrance had been changed which prevented entry. He then alighted, walked around into the yard through a side passage intending to enter the house via the garage. It was then that he saw the deceased in a kneeling position inside the garage. The deceased did not have a top on. Neither the appellant nor Freda were at the house

MacFarlane went to his room and picked up his garments. He however found linen and bedding lying in the yard. Macfarlane then contacted his own employer who told him to go straight to the police. He went to the Booysens police station where he related the events he claimed to have witnessed.

50. Once the police had attended at the scene, Macfarlane was informed that he was a suspect and was brought back to the house. When he arrived the appellant and Freda were already there locked in the police van. He was told to remain at the pool area while the police continued with their investigation of the scene. He also noticed that the deceased's car was now back at the house.

51. While there, he saw the appellant and Freda being taken to the deceased. They were brought from there to the pool area and MacFarlane heard the appellant crying and saying:" *Who would do this to my father?"*

52. Macfarlane was then taken to the kitchen. While there, a detective brought in a .303 rifle and a shotgun, the barrel of which was missing. These had been found on the premises. It is not in dispute that both firearms belonged to the deceased.

Police witnesses

53. Constable Chauke had attended the scene after receiving a report of an alleged suicide. On arrival a member of the public said that the appellant had told him that the father had committed suicide and that the appellant could be found at a local Solly Kramers Tavern. There was no objection to this evidence. The person was Aaron, who Freda had said approached them while they were driving out of the driveway of the house.

54. After finding the deceased's body the constable proceeded to Solly Kramers where he was told that the appellant had driven to another tavern a few hundred metres away. This is where he found the appellant and Freda. The appellant did not have a shirt on and according to the constable the appellant had blood and a white substance splattered on his chest. The constable claimed that the whitish substance looked like fragments of bone or brain tissue. Chauke informed both the appellant and Freda that they were suspected of murdering the deceased.

55. The constable also inspected the car which the appellant was driving. The car had not been started with a key but had been "hotwired"[12]. It had also been broken into since one of the windows was shattered and glass was still on the car seat and floor, Inside the car they found numerous items of clothing and bedding as well as some rounds of live shotgun ammunition. Much of this evidence was confirmed by warrant officer Yende who had brought Macfarlane back to the house. The warrant officer added that there was also clothing and bedlinen found in the boot.

56. The appellant and Freda were brought back to the house in separate police vans while another policeman drove the car that the appellant had been using back to the house. On arriving at the house, glass matching the car's broken window was found on the ground. Both MacFarlane and the warrant officer mentioned that the deceased's car was parked in the street when they came back to the scene. MacFarlane had said that the car was parked in the driveway before he had left the house prior to the appellant telling him that the deceased had committed suicide in the park.

57. Warrant officer Yende examined the garage. He described how he found the deceased's body, that blood was spattered on the walls and human tissue was still adhering to it. There was a small hole in the wall which appeared to have been caused by a bullet and the plaster had fallen onto the floor**.** He found the gunsafe and described that it had been forced open with a grinder.

58. From there the warrant officer proceeded into the house and described the mess that greeted him: Clothing and bedding were all over the floor.; In one of the rooms he found a takkie with blood on it. He found some green tablets on the floor of the appellant's bedroom. In the kitchen he found a broken bottle containing cannabis and mandrax.

59. The warrant officer then went outside. He retrieved two live rounds of ammunition for the rifle. One of the rounds was found near the pool while he found the rifle at the bottom of the pool. He noticed that the bolt had been engaged but had not

[12] i.e. The engine was started by cutting and joining the ignition wires in order to bypass the ignition system.

closed with the result that the round had not yet entered the chamber. This meant that the rifle was half-cocked**.**

60. The appellant and Freda were only brought to the house in the police vans after the warrant officer had gone back into the house after the rifle had been retrieved from the pool and was busy writing up his notes. Warrant officer Yende observed that the appellant appeared to be drunk and was agitated.

61. Freda's evidence that on the Monday the appellant only searched inside the house for the shotgun barrel was corroborated by the police witnesses.

The gunsafe and the shotgun barrel

62. A number of days after the incident Mr Newcombe was allowed to enter the house. He knew that the deceased had kept both the rifle and the shotgun locked in a gun safe. On inspecting the safe he found that the hinges had been cut with a grinder.

63. Later, Mr Ronaldson who is the husband of the deceased's stepdaughter came to the house. This was on 5 January 2011. He came to clean up the property as it had been put on the market. He described that blood was still spattered on the walls and floor while fragments of the deceased's skull were still on the floor. In addition, he noticed three holes in the roof, only one of which had rusted while the other two appeared to be more recent.

64. Perhaps the most significant discovery Ronaldson made was of the shotgun's missing barrel. While cleaning the yard he found it concealed in a hedge. The investigating officer was then called and took possession of the barrel.

Evidence as to whether the deceased was capable of taking his own life

65. The following witnesses dealt with the nature of the relationship between the appellant and the deceased, or confirmed that the deceased had at some stage or another suffered from depression, or from alcohol addiction or had made statements indicating suicidal tendencies. They are;

    a. MacFarlane who said that the deceased had been recovering from alcoholism but was unaware that he suffered from depression;

    b. Aside from being a close friend of the deceased, Mr Newcombe also knew the appellant well. He testified that:

        i. The deceased had experienced a number of problems with the appellant because of the latter's drug addiction. This had caused the deceased much pain. The appellant had also stolen from his father in order to support his drug habit.

        ii. When the police allowed him to enter the house Newcombe took a cabinet which was in the kitchen and in which the deceased had placed important documents. Newcombe explained that the deceased had requested him to do so if anything happened to him. Among the papers was a letter written on 8 December 2009 by the appellant to the deceased and which he had deposed to. The letter expressed remorse for his unacceptable behaviour and promised to change.

        iii. In the cabinet he found a number of anti- depressant tablets. There was also a letter the deceased had written to his daughter which revealed that he was in a depressed state. The letter had been given to the daughter.

    c. Mrs Newcombe's evidence, to which reference has already been made when dealing with her hearsay testimony, was to the effect that the deceased had suffered from depression some two and a half years prior to the incident. There was however a more recent note that the deceased's

girlfriend, Peggy, had received which indicated that he had started drinking again.

d. Peggy testified that the deceased had been depressed over a number of events. This has been mentioned earlier. She had spoken to him on the morning of 17 December 2011. She mentioned that the appellant had driven the deceased in his car. She said that the deceased was in a jovial mood for the rest of the day and that they had a good time together. On the following day he went back home and when she spoke to him later that day he appeared to have been drinking. She however denied sending a message to Mrs Newcombe on a previous occasion that the deceased had been consuming alcohol; she added that he had not done so previously during their three-year relationship.

e. Dr Diova had treated the deceased in January 2010 because he felt suicidal. At the time she considered that he was stable and recommend that he see a psychiatrist. The deceased was however given a sedative which would have made him drowsy if he consumed alcohol at the same time. She said that the deceased had been making a serious attempt to overcome his depression.

f. Dr Modise saw the deceased as recently as October 2011. The deceased had attended as an outpatient and was prescribed a sedative which would result in him being capable of sleeping for ten to twelve hours if he was also taking alcohol

66. The appellant testified that the deceased was a rehabilitated alcoholic, having last consumed alcohol some 16 years earlier. He however claimed that when the deceased came back on 18 December he was reeking of alcohol. The deceased denied to the appellant that he had been drinking but almost immediately gave him money to buy a bottle of whisky. On his return the deceased poured a drink for each of them.

67. From the outset the appellant contended that the deceased had committed suicide. Whether or not the deceased suffered from bouts of depression requiring treatment or medication and whether he fell within the category of persons who could conceivably take their own life was therefore relevant and do have probative value on the question of whether the deceased could have shot himself. So too, the intervals between the deceased experiencing severe depression and what might have triggered another bout. The fact that some of the episodes occurred a long time ago should also not be excluded from consideration particularly as episodes of depression continued to surface from time to time. They are relevant to the issue of whether the deceased had been able to manage his depression or whether it could resurface.

68. Unless all instances are taken into consideration of when the deceased displayed signs of severe depression which might take him over the edge and contemplate suicide it, would be well-nigh impossible to know where to draw the line on admissibility. In my view they are all relevant as it is important to be able to take a step back and see if there is a broader canvass which requires consideration.
Once the canvass of facts has been presented a court will also be in a better position to weigh up a particular piece of evidence if it is contradicted, determine its reliability or reject some of it because of subsequent events or because, overall, the witness is found to be untruthful.

69. In the result suicide cannot be excluded because, according to the ballistics' expert, despite the rifle's length it was physically possible for the deceased to have shot himself and because his psychological history cannot exclude him from the category of persons who might take their own life.

APPELLANT'S VERSION

70. The appellant challenged much of Freda's evidence concerning how they came to meet on 17 December, whether there were two others who were with them and whether one of them stayed over until the morning of 18 December[13]. While the

[13] The appellant claimed that Freda only came over to the house at about 11h30 on the Saturday morning.

appellant's denial that there was another person who came home with them raises eyebrows as to why Freda's mention of something as seemingly innocuous as that should have been so vigorously challenged, or whether anything ought to have turned on his denial of knowing the other person who Freda alleged was in the car with them and who was dropped off before arriving at the house (Deon Mandell), was never taken further. Neither party has suggested that it is necessary to take into account these events which may or may not have occurred. I agree that it is unnecessary to do so.

71. One aspect of the appellant's testimony regarding the events of the Saturday which needs to be mentioned is that on the Saturday morning Freda had suggested that they pawn the deceased's lawnmower which they then did. The appellant also confirmed that during the course of Saturday he and Freda consumed alcohol and took drugs.

72. According to the appellant when the deceased came home on the morning of Sunday 18 December and after he and the deceased had a drink together they started arguing about the lawnmower which he was accused of stealing. The appellant claimed that this was soon resolved when he promised to return it the following day.

73. The appellant initially said that after seeing the deceased go up to talk to Freda he then took more Brazipams with whiskey and then passed out on the couch in the lounge.

74. The appellant claimed that he awoke around 21h30 to 22h00. He only had boxer shorts on. He put on a pair of jeans and his takkies, but did not put on a shirt. He went to the garage and saw the deceased in a pool of blood. The deceased was on the far side of the garage. He then immediately ran back inside to wake Freda and brought her to the garage. In other words, on his version the appellant did not enter the garage or go close to the deceased before running to fetch Freda.[14]

[14] This was confirmed at p 477 of the record where he explained how the deceased's blood could have been on his takkies and jeans- "*Well when I found my father after I have called Freda I went back to the garage … I was*

75. On coming down to the garage Freda remained at the entrance of the garage while he went to the deceased and while trying to lift him saw the rifle under the deceased's right shoulder. He then took the rifle from underneath the deceased, *"I loaded it, I wanted to shoot myself … It did not go off for some reason, but Freda grabbed the gun and threw it into the pool".* [15]

76. Mr Guarneri put to the appellant when clarifying the appellant's evidence that Freda had taken the rifle and then threw it into the pool: "*So she went to the pool- ja she threw it into the pool". [16]*

77. The appellant claimed that once Freda had thrown the rifle into the pool , which was about 4 metres from the garage door[17], he ran into the house to call the police. He claimed that he dialled 10111 from the landline inside the house. That number is an emergency toll free number when dialled from a landline.

The first time the appellant revealed that he tried the toll free number was when he gave evidence. He claimed that he might have dialled an incorrect number since it rang and was told, presumably by the automated response , that there were insufficient funds available.

78. He then went to the deceased's bedroom after which he went all around the house to look for the R1500 he had given the deceased to keep for him during the previous week. He could not find the money. The appellant said that he needed the money to put petrol in the deceased's car so that he could drive to the police station and report his father's death. The appellant described his condition as "*completely freaked out".* It was at this time that he claims that the one takkie must have come off.

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on my knees like that and I lifted my old man's shoulder… And it looked like half his face is gone. I think that is maybe how the blood got onto my pants and my … "

[15] At p459

[16] Record p 461

[17] Initially the appellant said it was about 2-3 metres but when the estimated distance was measured in court it turned out to be some 4 metres (Record p 461)

79. Since he could not find the money, the appellant took a whole lot of stuff and threw it into the car. He confirms asking Freda to help him. He could not find his set of spare keys for the deceased's car so he hot-wired the ignition and expressly stated that prior to then he always used the spare set and had never hot-wired the car.

80. The appellant denied that he had handed four live rounds of shotgun ammunition to Freda to put in the deceased's car, denied any knowledge of how the shotgun's barrel came to be removed although he had originally thought that Freda might have thrown it there since she had thrown the rifle into the pool.

    Although the appellant had challenged the State's witnesses about breaking into the deceased's car, when giving evidence he claimed that he did so and hot-wired the ignition because he could not find the car keys. At this stage he said that the deceased's car was inside the driveway and that he drove it out while Freda closed the garage door, and then the gate before entering the car.

81. The reason given by the appellant for taking the items was in order to sell them to get petrol money in order to drive to the police. He claimed that he was already aware on the Saturday that the car did not have enough petrol. This was the explanation given for not fetching his father from Peggy. Peggy's testimony was that she had arranged for one of her friends to take the deceased back home and confirmed that the deceased had first arrived at her place being driven in his car by the appellant.

82. It should be added that the appellant repeated that MacFarlane did not come when he and Freda were still there.

    He also disputed that Aaron spoke to him as they exited the gate. He was adamant that he saw Aaron for the first time at the entrance to Solly Kramers tavern. Initially he claimed to have told Aaron that his father had committed suicide and asked Aaron to call the police but did not wait to find out if Aaron was doing so before entering Solly Kramers. However, he later explained that he saw Aaron had a cellphone and he told Aaron about the deceased shooting himself. He asked Aaron to phone the police and saw Aaron proceeding to make a call. He at one stage said

that Aaron had in fact phoned the police but then stated that he assumed that Aaron was phoning the police because on requesting Aaron to do so he saw Aaron making a call.

83. According to the appellant he tried to sell his own jacket at Solly Kramers and bought a half jack of Old Brown Sherry- this to calm him down. In fact, going to Solly Kramers was a spontaneous decision as they were passing by it since his intention was to pawn his jacket and the deceased's items at Freddies. The appellant did not inform the bartender of the suicide or ask the bartender to call the police. They then went to Freddies tavern which was a few hundred metres further on. He claimed that Aaron saw him leave Solly Kramers but did not ask Aaron if he had managed to contact the police.

84. When he arrived at Freddies he tried to pawn his own jacket. While there they were apprehended by the police.

85. The appellant denied being taken back to the house. He claimed that he and Freda were taken straight to the police cells. It was only the following day that they were taken to the house. He claimed that he searched both inside and outside the house for the shotgun barrel.

FORENSIC EVIDENCE

The Autopsy

86. The penetrating bullet wound through the palette in an upward direction, described as a "*burst head"* wound, was not the only injury noted in the autopsy report.. It was one of five wounds that were noted. The report was admitted into evidence by agreement thereby rendering it unnecessary for the pathologist to testify or explain his report

87. There was also an accumulation of blood captured between the scalp and the skull. It is identified in the autopsy report as sub-aponeurotic haemorrhages to the back

of the head which were purple in colour[19]. There was no indication as to whether these injuries preceded or were due to the gunshot. It is however listed as a separate "*right periorbital haematoma"* wound ("*wound 2"*) to the *"burst head*" one ("*wound 1*").

The autopsy finding was that the cause of death was consistent with a gunshot wound to the head.

DNA results and blood splatter

88. The deceased's blood had splattered onto the wall and ceiling of the garage

89. A forensic examination was conducted of the blood found on the jeans and on a takkie appellant had been wearing at the time. They matched the deceased's blood. The undisputed evidence was that the appellant did not have the other takkie on after the incident, nor did he have a shirt on.

Ballistics

90. Lt Col Pieterse who is a ballistics expert testified that the deceased was killed with the rifle. He was of the opinion that the position the deceased was found was inconclusive in deciding whether the deceased had committed suicide or had been murdered,

91. He also testified that although there would be primer residue on the hand of the person firing the rifle, it could have been wiped off in many different ways. He confirmed that the rifle was in a half-cocked position when it was recovered.

92. Despite searching through the evidence, I could not find any examination of the exterior of the rifle or shot gun or of any examination of the spade which was found

[19] Autopsy report vol 16, p 1180

at the pool or an axe found inside the house. All I could find were photographs of these items.

93. I accept that the evidence of constable Chauke and warrant officer Yende had to be reconstructed but one would have expected to find some examination undertaken or at least some reference to the visible appearance of the rifle for any blood or fragments. The photographs of the rifle once it had been retrieved from the pool are of no assistance, nor is the description on the photographs in question.

94. This is particularly disconcerting because if the rifle had been wiped clean before being thrown in the pool then surely *caedit questio* in the absence of an explanation by the appellant.

95. Unfortunately, the investigation appears to have been sloppy and Mr Guarneri's challenge to the police that the crime scene had not been properly cordoned off was well taken.

WEIGHING THE EVIDENCE

96. At the outset I accept that Freda and MacFarlane's evidence must be treated with circumspection. Freda had been warned at some stage that she was a s 204 witness liable to prosecution herself. The trial court expressly recognised that her evidence had to be treated with caution.

97. The difficulty I have with MacFarlane's evidence is the contents of his alleged conversation with Peggy when she contacted him expressing concern that the deceased was not picking up her calls. Of significance is that during the conversation with her he did not mention that the deceased had died despite, on his version, having returned from the house after being told by the appellant that the deceased had shot himself. Peggy denied that she had called MacFarlane at all and of course both the appellant and Freda denied that he was there sometime before 22h00.

Only two conclusions can be drawn; either MacFarlane was not there when he claimed or else he happened to come upon the scene and became part of the

cover-up by revealing nothing to Peggy. I say this because, as Vally J pointed out in accepting MacFarlane's narration and rejecting Freda's version, his version was too detailed of what he saw and the discussion that ensued. It is also relevant that the appellant and MacFarlane were work colleagues and friends living under the same roof (no doubt at appellant's recommendation to the deceased) and that the appellant had confided in him previously.

98. The fact that the state witnesses may be or are untruthful does not on its own result in an acquittal. It sometimes occurs that the state can rely on no evidence other than that of an admitted perjurer; for instance, where he or she has been separately convicted of the same offence. It is the totality of the evidence and the explanation of the accused, if called, which will ultimately determine guilt or innocence even if it is based on circumstantial evidence provided it satisfies the requirements of *R v Blom*. [20]

99. In my view there are three critical features of the appellant's version which conclusively establish his guilt. In two instances they may even stand on their own. They are the number of times the appellant and Freda went to the garage and what transpired there, the attempted cocking of the rifle and its dumping in the pool, and lastly the reason for leaving the house when compared to what the appellant claims he actually did, including when he came upon Aaron.

100. Before dealing with each, it is necessary to mention that the only explanation offered for the appellant's clearly contradictory evidence and inexplicable conduct is that he was not thinking rationally because his faculties were impaired by the consumption of alcohol and, certainly suggested during the State's evidence, the taking of drugs or at least Brazipam tranquilizers that were taken together with alcohol.

101. However by the time he testified the appellant's version was that during the entire day of the incident, i.e. the Sunday, he had only one tot of whisky, which itself had been diluted with soda water, and that only sometime later after he had

[20] *R v Blom* 1939 AD 188 at 202 – 203. See also *S v Basson* 2004 (1) SACR 285 (CC)

argued with the deceased he had taken some tranquilizers, but did not disclose whether it was only two or more than that. He expressly stated during his evidence that he had not taken any drugs on the Sunday.[21]

102. That leaves the appellant's explanation of irrational conduct floundering on the possibility that he could not think properly after he saw his father's face blown away which "*freaked me out"*. The immediate difficulty this presents for the appellant is that instead of being consistent, either that he could not recall the events or that his conduct displayed irrationality, he was adamant that certain events did not take place as described by the witnesses. Moreover the appellant's conduct is rationally explicable if he had killed the deceased

103. The first aspect can be readily dealt with. The appellant was adamant about the sequence of events immediately after he discovered the deceased's body and that he had not handed the rounds of shotgun ammunition to Freda. The other aspect related to where he and Freda first came upon Aaron and what transpired between them. The appellant was not even prepared to concede that he might have been in error due to the state he was in.[22]

It is more than incongruous for the appellant to have been so adamant about these events when he claims that his irrational behaviour rendered him incapable of knowing what he was doing. The two cannot sit together. As *Mr Mpekana*, who appeared for the State at the hearing, put it; the appellant cannot approbate and reprobate.

Of particular concern when analysing the evidence as a whole is that the entire edifice of the appellant's explanations which would enable a court to find that the state has not proven its case beyond a reasonable doubt ultimately hinges on the circumstances surrounding the only events on which the appellant is adamant about. This is not coincidental and explains why initially the appellant blew hot and cold about what he had consumed. Freda's recollection, how she fared under cross examination both initially and when re-examined together with the other evidence

[21] At p501
[22] Record pp 577-578

which supported it required the appellant to shift tack and make the issue one of competing versions rather than his faculties being too numbed to recollect.

The sequence relating to appellant's movements and producing the rifle

104. The sequence of events according to Freda's testimony was quite straight forward: The appellant woke her up saying that the deceased had *"just shot himself"*.[23]

The appellant never challenged that he had told her that the shooting had occurred just before he woke her up.

He took her to the garage where she saw the deceased lying on the gas cylinder with his face shot away. This too was not challenged.

Freda then told him that they must call the police and the appellant went into the house to do that.

105. When he was unable to contact the police Freda said that they should go to the police station. Instead of going there straight away the appellant then went back to the garage despite Freda saying that he should not. Her testimony was;

> *"I still said to him do not, what are you doing, do not go back there, leave everything as it is, wait for the police"*.[24]

The import of this evidence could not have escaped the appellant. It conveyed that until he had attempted to make the call to the police he had not tampered with the scene and therefore had not picked up the rifle from under the deceased before the call was made. Yet Freda's evidence on this score was not challenged, not even when she was re-called.

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[23] Record p 221 line 22-24
[24] Record p 222

106. Her testimony about what occurred next is equally clear. While the appellant had then entered the garage, she did not. She said that she did not see the appellant go inside the garage again and under cross-examination said that she never went back into the garage after the appellant had allegedly attempted to contact the police from inside the house[25]. It was only when he came out of the garage that he then gave her the four rounds which she took to the deceased's car and put them in the cubbyhole.

The objective facts as demonstrated by the photographs admitted into evidence by consent as well the police testimony which was not disputed on this score corroborated her version. The appellant has no explanation as to how the rounds came to be there other than that Freda had misguidedly thought she was assisting him- which makes no sense but rather begs the question to which I will return.

107. It was only when she returned from the car that she saw the appellant with the rifle pointing under his chin.

108. The appellant's version was far more complex. Firstly, when he awoke between 21h30 and 22h00 he was only wearing boxer shorts. No explanation was offered as to why he undressed himself since he claimed to have simply passed out on the couch. Be that as it may he claimed to have first put on his jeans and then his takkies and after looking around for his father went to the garage.

Since the uncontradicted evidence was that he told Freda that the deceased had "*just shot"* himself the question must be asked why he did not hear the gunshot. Aaron who lived a block away clearly did and part of that evidence was allowed as part of the *res gestae* without demur. Moreover, unlike Freda who had passed out after taking whiskey with tranquilizers the appellant claimed to only have had the one tot of whiskey and soda with the deceased already during the morning.

Although he claimed to be a bit "*deurmekaar"* from the Brazipam he had taken in the afternoon he was neither drunk nor high from drugs.[26]

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[25] Record p 239
[26] Record pp 620 – 621

109. More pertinently he stated that when he went to the garage for the first time, he touched nothing but just ran inside to call Freda.

The appellant and Freda went together to the garage. Freda stood at the door. It was then that he tried to lift the deceased by his shoulder. It was then that he saw his father's face blown away which freaked him out. He however took the rifle from under the deceased, loaded it and after he had loaded it then tried to shoot himself at the garage door by pulling the trigger but the rifle did not go off. It was only then that Freda grabbed the rifle, and went to the pool to throw it in the water.[27]

110. The appellant claimed that it was only after that when he went into the house to call the police from the landline. He denied returning to the garage or giving Freda the rounds of shotgun ammunition.

111. The way in which the appellant's evidence unravelled between the time the first version was put to Freda and his eventual testimony in the witness box is also revealing.

The following was initially put to Freda regarding the sequence of events:

> " *.. he agrees with you that he had pointed the gun at himself, but his version is that he first tried to do that and only then afterwards tried to phone."*

Instead of persisting with that sequence Freda was asked, in relation to the sequence she had given, whether she could comment on whether the appellant could have cocked the rifle between the time he gave her the rounds to take to the car and her returning from the car to find him with the rifle. The appellant would have been expected to put to Freda whether it was possible for the rifle to have been cocked while she was there with him in the garage *before* she was handed the ammunition. This was not done, nor was there any mention of the rifle being retrieved from under the deceased when the appellant tried to lift him.

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[27] Record pp 458-461

At no stage during Freda's cross-examination nor at any stage prior to applying for the appellant's discharge did the appellant change his version about the sequence regarding when he took the rifle to shoot himself; it was always as he came down to the garage with Freda and tried to move the deceased. It meant that Freda would have been observing him.

I am satisfied that this was not an oversight since the appellant had at that stage a clear version which would require Freda to have seen him take the rifle, then try and use it on himself.

If that is what happened, then it would have been put. However Freda could not be shaken on a number of events which did occur when she had been woken and the appellant's version started falling apart.
To re-call Freda after applying for a discharge and then putting a version that he had taken the rifle from the deceased before she was given the ammunition flies in the face of his allegation that she would have had to be there when the rifle was produced; not after she was sent to put the rounds in the car which gave him the opportunity to retrieve the rifle.

More importantly, on his version he would have had to cock the rifle in front of her in order to explain how it eventually came to be found half-cocked despite the deceased being ostensibly the last person to have engaged its mechanism.

112. The sequence of events as related by the appellant cannot be believed. Why would Freda have the conversation with the appellant not to tamper with the scene if he had already picked up the rifle in Freda's presence and had his father's blood on at least the one takkie which he happened to have taken off once they returned inside?

113. More than that, there is one thing which stands out: It was never put to Freda that the appellant had cocked the rifle and pulled the trigger in her presence. The reason for the appellant not doing so is obvious and is dealt with in the next section.

Cocking of the rifle and dumping it in the pool

114. The previous topic covered events up to Freda seeing the appellant with the firearm pointed under his chin.

115. Irrespective of the different versions as to the sequence of events which led up to that moment; according to Freda, when the appellant had the rifle pointed under his chin and while he was giving her an explanation as to why he intended to shoot himself, she grabbed the rifle from him, told him not to be stupid and threw it into the pool. On her version this would have taken place outside the garage and near enough to the pool to simply throw it in the water without having to take it there. It will be recalled that the appellant initially claimed that the distance could have been as little as two metres.

116. On the appellant's version he picked up the rifle where the deceased was either kneeling or lying down[28]. This was on the other side of the garage door. He therefore had to proceeded to the garage door where Freda was standing. While approaching her he had to have attempted to cock the rifle and believing that he had done so by the time he was within her reach he pulled the trigger. She had to have been within his reach for her to have grabbed the rifle.

117. The insuperable difficulty facing the appellant is that on this version of events, which now included cocking the firearm and pulling the trigger;

a. Freda could not have avoided seeing him at some stage with the rifle in his hand and by the time he had reached the door where Freda was standing he would already have managed to cock it or at least believe that he had.

   But nothing of the sort was mentioned until the appellant testified once the court had ruled against a discharge;

[28] In putting a version to Freda regarding where the deceased's blood found on the appellant's garments could have come from it was put that this may have occurred when the appellant was trying to lift the deceased when he was lying down. Although this was said to have been her testimony it is nowhere to be found on the record up to that point: It however suited the appellant to explain how the blood came to be on what he was wearing.

b. In order to believe that he had placed a cartridge in the chamber it would have been necessary for him to have physically rotated the bolt upwards so that he could slide it back to behind the cartridge feed and then would have had to push the bolt forward to guide the next round into the chamber and then rotate the bolt down to complete the cycle before pulling the trigger.

All this would have to occur as he approached Freda because on his version only the deceased could have pulled the trigger last therefore requiring someone else to have proceeded to rotate the bolt up again and slide it back so that the next cartridge could enter the chamber. Obviously that could only have been done by the appellant.

Yet Freda neither heard nor saw the bolt being engaged. Nor was it put to her that this occurred in her presence as it must have done if the appellant's version was true. Moreover, she was close enough to him to grab the rifle which any one in her position would realise could have fatal consequences for either of them once the bolt had been engaged.

c. Of course appellant's version is incompatible with the explanation he gave to Freda about wanting to end his life and which was never challenged. Her version is only consistent with him intending to end his life; not already having pulled the trigger and failed. Appellant, when giving his version, did not claim that he had attempted to give a whole explanation as to why he could not live anymore, let alone any explanation whatsoever.

d. Whereas Freda described a straight forward motion of grabbing the rifle and tossing it in the pool- all of which was not described with any reference to the location of garage door (nor did the cross-examination seek to elicit that, leaving the distinct impression that it all occurred away from the garage door and close to the pool)- the appellant's version would require Freda to be facing inside the garage when she grabbed the rifle, turning around and physically taking the rifle to the pool before throwing it into the water.

118. Finally, on this aspect, aside from failing to put to Freda that he had cocked the firearm in her presence let alone had attempted to pull the trigger the appellant did not suggest to the ballistic expert called, Lt Colonel Pieterse, that it would be possible to cock the firearm and pull the trigger while holding the rifle under one's own chin without the butt having to be on a firm surface or that it is possible for the bolt action to be inaudible. The testimony that was given on whether it was possible for the deceased to have committed suicide with his own rifle suggests otherwise.

The point I wish to make is not that it is impossible to kill oneself by holding the rifle in the manner described by the appellant, but rather why the full version of what the appellant claimed to have occurred when he allegedly found the rifle under his father's armpit was not put to Freda; bearing in mind that Lt Colonel Pieterse had yet to testify at that stage. The appellant's decision not to put a proper version until the state had closed its case and until after Freda had been re-called appears deliberate. Moreover, the appellant was familiar with both the deceased's rifle and the shotgun because on his own testimony he used to clean and oil them together with his father. [29]

Reason for leaving the house compared with subsequent events, including speaking to Aaron.

Reason for leaving

119. The appellant said that he and Freda left the house to report the incident because he could not contact the police from the house phone.

He also said that in order to drive to the police station he needed money as there was not enough petrol to get there and, because he only had R18 on him and could not find any money in the house he took the deceased's bedding, curtains and clothing to pawn at Freddies tavern. He would then buy petrol with the money and drive to the police station.

[29] Record at p 508

This is a very elaborate series of consecutive actions to achieve a simple objective; namely, to inform the police that his father had killed himself and that they should come over.

It is necessary to split up the sequence of events in order to test whether the seemingly complex series of actions that the appellant considered taking was irrational behaviour which the appellant ascribes to being *"a bit deurmekaar"* and then "*freaked out"* when he lifted his father and claimed to have seen for the first time the gruesome site of his father's face being shot away.

Inability to contact the police from home

120. It will be recalled that after seeing the deceased's body (and irrespective of whose version is accepted as to what occurred when Freda was awakened and went to the garage) the appellant went inside to call the police. Only when he testified was it revealed that he had dialled 10111 which is a toll-free landline number. He claimed that he must have inadvertently dialled the incorrect number because an operator's voice (presumably automated) indicated that there was insufficient "*airtime"*.

121. The difficulty in accepting this version is that he could simply have re-dialled. The argument advanced by Mr Guarneri that this is indicative of the appellant's irrational behaviour at the time is met by the appellant's own evidence that the moment he claims to have come upon Aaron, he asked Aaron to call the police and inform them of the incident.

122. Moreover, it is difficult to accept that instead of simply re-dialling the appellant goes through a whole series of actions while still in the house to look for money, then when finding none ripping linen off the bed, and curtains from their railing and then taking the deceased's clothing as well as removing an old fax machine-cum-telephone from the kitchen in order to pawn them some distance away and purchase petrol at some other locality before reaching the police station.

123. During the appellant's cross-examination it also transpired that the deceased had a cell phone. The appellant did not claim that he was unable to access it, only that he assumed that the deceased had hidden it and therefore the appellant did not look for it. He however claimed to have searched high and low for the money that the deceased was supposed to have had.[30]

Destination when leaving the house

124. The appellant explained that the purpose of taking the deceased's items was to pawn them at Freddies. However, he did not proceed to Freddies. He claims to have impulsively stopped at Solly Kramers because he needed to calm his nerves. There he buys a half jack of Old Brown Sherry.

125. The difficulty with this is that he forgot that the photographs admitted into evidence revealed an unfinished bottle of whiskey in the house. His only explanation was that he did not see it. This is a person who has effectively ransacked the house looking for money and had gone into the deceased's room stripping it of linen and his father's clothing yet right in front of his eyes was the whiskey.

126. Upon arriving at Solly Kramers and fully alive to needing money to contact the police by driving there, he does not simply ask the bartender to help by making a call to the police. After all he could even have paid for it out of the R18 he had. Instead, he buys a half jack.

127. Once again it is no answer to say that the appellant was acting irrationally because of the tranquilizers or emotional trauma since on his version he had just asked Aaron to do precisely that for him before entering Solly Kramers.

128. Moreover, he claims to have asked the bartender if he could pawn his biker jacket. Why do that if he was thinking rationally enough to ask Aaron to phone the police and believe that Aaron had in fact done so? All he had to do was ask Aaron if he had managed to contact the police and then he could simply have turned

[30] Record at p 677

around and gone back home to await the police. After all he claims that Aaron saw them leave Solly Kramers for Freddies. He therefore cannot claim that Aaron had left by the time they proceeded from Solly Kramers.

129. Finally, when he does reach Freddies, he does not claim to have tried to pawn any of the deceased's items, only his own biker jacket. When pressed under cross-examination the furthest he went was to say that he "*could*" have tried to pawn or sell the deceased's items, not that he had actually discussed doing so with the person at Freddies.

Encounter with Aaron

130. It is readily apparent that every avenue appellant has sought to adopt to explain what happened after he left the house with the objective of reporting his father's death to the police hinges on the encounter with Aaron. Aaron can cover the need to try and call the police when he failed to do so at either tavern. It also provides a version that is close to the truth in respect of meeting Aaron at all that night, since the appellant would already have known that Aaron was the person who claimed to have spoken to him and the issue of identity could not be overcome. Accordingly, Aaron had to be placed on the scene at some stage.

131. Aaron also posed a danger because he was the only one the appellant was aware of who could put a time to when the appellant was actually seen to be leaving the house. The relevance of this will become apparent later.

132. Being unaware of what may transpire during the trial the appellant therefore had little choice but to remove Aaron from the immediate vicinity of the house but still have some encounter with him that evening. The only place could be Solly Kramers because that would also enable him to say that he had in fact asked someone he knew to call the police. In this regard one is reminded of the trial court's observation that the appellant made up his version by reference to the evidence as it unfolded.

133. But of course one of the immutable facts of the case is that Aaron was not at Solly Kramers but exactly where Freda said he was- at the house as they were exiting. Accordingly, the entire edifice of evidence presented around the encounter with Aaron and asking him to call the police yet not waiting to find out if he did is not just implausible but untrue. As such the excuse of acting irrationally does not feature, more so bearing in mind that one of the facts the appellant was adamant about was that Aaron was not at the house but outside Solly Kramers.

Insufficient petrol

134. Just as the reason for leaving the house is dependent on an inability to contact the police from there , the reason for taking linen and clothing items and stopping en route is dependent on there not being sufficient petrol in the car to reach the police station.

135. The appellant claimed that he had known since Sunday morning that there was insufficient petrol in the car. This was when he claimed that he was asked to fetch the deceased from Peggy but could not. This was never put to Peggy.

136. However, the incontrovertible evidence is that there was sufficient petrol for the car to not only get to Solly Kramers and then Freddies (albeit neither far but still requiring stop start driving), but the car was taken by the police to the police station and then back to the house without requiring any additional petrol. At the trial, Mr Gcaba also put to the appellant that the R18 which he had on him would have purchased close to 2 litres of petrol which was more than adequate to reach the police station. The appellant was unable to respond.

ASSESSMENT OF APPELLANT'S CONDUCT

137. Although the appellant bears no onus, on the facts his behaviour calls for an explanation considering that he was first on the scene after his father had "*just*" died and where, on the version he ultimately gave when Freda had to be re-called, he was holding a half-cocked rifle.

This was the firearm responsible for his father's death, which had taken place in the garage. However no spent cartridge was found inside the garage, whereas two live rounds for the .303 rifle were found in the vicinity of the pool.

138. On the appellant's version he continually failed to do the obvious: He did not immediately re-dial the toll-free emergency number for the police after his first attempt or look for his father's cell phone despite searching high and low for money: He also did not look out for either his or the deceased's set of car keys while looking for money: He did not think of again trying to call the police from home before engaging in the rather convoluted exercise of collecting relatively worthless soiled bedlinen, clothing and possibly curtains, some of which he left strewn in the yard, with the alleged intention of pawning or selling them at Freddies. Despite this being his purpose, when he gets to Solly Kramers and then to Freddies he only tries to pawn or sell his own biker jacket, never offering the items he had ransacked from the house.

Even assuming that he was unable to make a call to the police from the house, once the appellant drove away, he had numerous opportunities to quickly contact them, some of which did not require him to try and pawn his biker jacket: The moment he started the car the fuel gauge would have indicated that he had enough petrol to drive to the police station without having to pawn or sell anything:
As soon as he exited the drive way (or even if he was to be believed- once he had stopped at Solly Kramers) Aaron could have phoned the police making it unnecessary for him to sell or pawn anything- he could simply have returned home to await the arrival of the police: Similarly, once he arrived at Solly Kramers he could have asked the bartender to phone the police.

139. The appellant's recourse was to explain his irrational actions as just that. Initially it was left as a suggestion that his behaviour was attributed to a combined alcohol *cum* drug or tranquiliser induced stupor.

As the trial progressed it was apparent that State witnesses were not budging on key testimony which in turn was being corroborated by other evidence. This eliminated the possibility of submitting at the end of the trial that suicide remained a reasonable alternative basis which would account for the deceased's death. Since the appellant could no longer rely on suggested possibilities, he became obliged to directly challenge evidence that was being presented. This is reflected in his re-opening of the cross examination of Freda when it became apparent that there would not be a discharge.

140. In order to directly challenge the State's testimony his faculties would have to be somewhat more acute than initially suggested. By the time the appellant had completed his evidence he claimed to have taken no more than one or two sedatives (at between 17h00 to 18h00) which was well after the single tot of whisky mixed with soda water which he had by about noon. It will also be recalled that he claimed to have woken up between 21h30 to 22h00- a minimum of two and a half hours later.

141. While conceding that he was actually sober the appellant contended that he was traumatised by the sight of his father's face that had been blown away.

However, his behaviour cannot be explained on the basis of the trauma the appellant claimed to have suffered and the one or two tranquilisers he claimed to have taken.

Assuming that tranquilizers did not assuage the trauma then it is not possible to see how that could have contributed to him placing two cartridges for the rifle in the vicinity of the pool despite the deceased being shot in the garage, why he removed four live rounds of shotgun ammunition from their box which was in the garage or why the barrel of the shotgun was removed from its stock and concealed- none of which could be attributable to something the deceased did before he died.

Only the appellant could have moved or removed them since he was admittedly the first person at the scene, irrespective of whether it was "*just"* after, as he had said to Freda, or not.

142. Far from the appellant's behaviour being irrational, it was quite deliberate and focused when it mattered: From removing the barrel of the shotgun and concealing it to directing the police search away from where he had put it. Even his version of the encounter with Aaron, if believed, would be consistent with rational conduct- the moment he sees someone with a phone he asks for assistance to call the police.

143. There is however a consistent and logical thread to the appellant's narrative.

It is;

a. The need to delay the police from attending the scene.

This was achieved by claiming that he could not get through to the police on the house phone and then could not drive directly to the police station since there was insufficient petrol in the car. In turn this required an elaborate explanation of not finding any money at the house to buy petrol.

b. The need to remove Aaron from the vicinity of the house.

By placing Aaron elsewhere, it would be difficult for others to establish when he and Freda left the house. Since the State had not called Aaron the appellant believed it would be a simple matter of creating doubt regarding Freda's version of events. The record reveals that he failed to take into account the police's evidence from which, by straight forward deductive reasoning, Aaron could not have been at Solly Kramers as claimed by the appellant because the police had first gone there to make enquiries as to his whereabouts (which evidence was not challenged).

c. The creation of a crime scene.

Not only did the appellant remove the barrel from the shotgun and conceal it, but he placed evidence around the house: Two cartridges for the rifle were placed near the pool, while a half-cocked rifle was left in the pool and four shotgun rounds were removed from their box in the garage.

Furthermore linen, clothing and a fax machine were taken from the home with some items left strewn in the yard. The shotgun rounds were taken to the car as were the linen and clothing, none of which were actually offered when he went to the tavern- only his own biker jacket. In other words, the very items he took from the house were not going to be pawned. They were removed from the house together with the four shotgun rounds for another purpose.

d. The need to establish an alibi.

I say this because the appellant did not need phone money or petrol money, nor did he need to have a drink at Solly Kramers since there was still whiskey at home which would have been readily visible when, on his version, he would have needed it most- straight after seeing his father's face and coming back inside the house.

However, he went to buy a half jack and tried to pawn his own biker jacket. All he really did was to engage people at two different locations who knew him and who were likely to recall a conversation about trying to pawn a biker jacket at that time of night. He never mentioned the linen or clothing to them and perhaps most significantly never asked them to call the police. Not doing so demonstrates that he did not want to disclose that he knew that his father was already dead when he arrived there.

TOTALITY OF EVIDENCE

144. As is regularly said, it is the totality of the evidence that ultimately matters. In this case one has the forensic evidence, the evidence of state witnesses on essential facts which are independently corroborated (and the reliability of which cannot be gainsaid) and the untruthful version given by the appellant on the most critical elements of the case.

These have been dealt with earlier and include how the appellant came to be holding a half-cocked bolt action rifle despite it having recently been fired, the slew of nonsensical actions and decisions had his father taken his own life, the failure to do the obvious if it was a suicide as well as the fact that only the appellant could have altered the scene of the crime to the extent and in in the manner already discussed.

145. I am satisfied that it is the appellant's version which ultimately exposes the truth of what occurred. The appellant's hand is all over the death of his father when regard is had to how the firearms came to be where they were, the conditions in which they were and the dispersal and removal of rounds of ammunition for both. None of this can be attributable to the deceased or anyone other than the appellant by his own actions or with assistance, whether due to unwittingly misguided loyalty or otherwise.

146. In this case the circumstantial evidence satisfies the requirements of *Blom.* as endorsed by the Constitutional Court in *S v Basson* 2004 (1) SACR 285 (CC)

147. The only other explanation offered was that the deceased committed suicide.

There are a number of reasons why this can be rejected out of hand much of which has already been covered and more especially, that for obvious reasons, the deceased could not have tried to cock the rifle after the fatal shot or place the cartridges at another locality let alone strip the shotgun and conceal its barrel.

On the evidence of the appellant, their argument was short lived. It only concerned the lawnmower and he had promised the deceased that it would be returned from the pawnbroker on the following day. This is not unreasonable since according to the appellant the deceased held some R1500 of his money and the lawnmower had been pawned for only R200.

148. The deceased stood his ground in what Freda said was a protracted argument over either the appellant damaging the car or pawning the lawnmower. The deceased had been taken off medication and the outburst that he could kill himself in respect of what his son had done to the car was a figure of speech. He had left Peggy in the morning in a jovial mood after spending a good time together.

149. The claim that the deceased was concerned about the appellant's alcohol consumption was of no concern to the deceased that day because, according to his version, the deceased had actually asked him to go out and get a bottle of whiskey so that they could share a drink together which they did.

150. Furthermore, suicide cannot account for the deceased deliberately taking out another firearm and despite being in the state he allegedly was, to have dismantled the barrel of the shotgun and deliberately hide it in the yard. And if by any stretch of the imagination he had done so then one would have expected him to have written a suicide note.

151. All that might be left is whether the appellant had the means and opportunity to take the rifle from the gun safe and immobilise the deceased before putting the rifle in his mouth if only one bullet was fired.

ACCESSING THE FIREARMS AND HOW IT WAS POSSIBLE FOR THE BARREL TO BE PLACED IN THE DECEASED'S MOUTH

152. In my view it is unnecessary to determine how the deceased could have been killed in the fashion he was. The only thing which needs to be considered is whether the facts of the case preclude a finding that the appellant had the means and the opportunity to commit the murder.

153. In the first instance the separate gun compartment of the second safe which was in the garage was broken into with a grinder. The appellant attempted to sow confusion regarding the number of safes. The evidence of Mr Newcombe put that to bed. He expressly identified the gun safe in the garage, the hinges of which he confirmed had been broken by a grinder. One of the police officer's testified to the same effect although he did not identify its location.

154. During his testimony the appellant confirmed that ordinarily he did not have access to the gun compartment of the safe and at one stage he also tried to sow confusion as to which safe or part of which safe had previously been forced open when the deceased could not find his keys.

However, that is irrelevant because on the appellant's own version the gun safe was already broken and therefore could be easily accessed by him. That being so there was no reason for the deceased to force it open.

155. Since the safe which housed the two firearms were broken into, even if on an earlier occasion, the appellant had the opportunity to take the firearms. The fact that he attempted to suggest that only the deceased could have removed the rifle points to the appellant holding out that the gun compartment of the safe was secure prior to the deceased being shot with his own firearm

156. Earlier I indicated that the autopsy report does not rule out a blunt force injury to the back of the neck. At the scene there were three items which might have caused such an injury. The two which were visible are the spade and an axe. Freda sought to account for the spade by saying that she saw the deceased holding it when he attempted to enter the house- a rather curious way of trying to do so.

The third is the barrel which had been deliberately concealed

157. Accordingly, the means and opportunity presented themselves to enable the rifle to be placed in the deceased's mouth if he was immobile, a situation that cannot be ruled out if a blunt force instrument was used first to hit the deceased on the back of the head.

There are other possibilities if regard is had to the scenario just mentioned or even that two bullets were fired at different times, only the last one inside the mouth, bearing in mind that there was another bullet hole in the wall of the garage while Mr Newcombe saw two similar, and not rusted holes in the garage roof, and of course the appellant deliberately placing two rifle cartridges at the pool area. None however can support a suicide on any basis.

WHAT WENT WRONG

158. Once again it is unnecessary to consider what objective the appellant sought to achieve aside from delaying the arrival of the police by not reporting the incident sooner.

159. The appellant had created the appearance of a robbery gone wrong at the house[31] and set up an alibi by being seen at the two taverns without once revealing that he either had items from the house that he wished to pawn or that he wished to contact the police.

160. The first thing that went wrong was the arrival of Aaron at the house and the knowledge that he had heard a gunshot. However, that might have been irrelevant had it not been for Aaron again coming to the house after the police had arrived and telling them that he had seen the appellant leaving and possibly mentioning that this was after hearing the gunshot.

161. The appellant could no longer claim that there must have been a robbery while he was out. He was now compelled to take the version he had given Aaron when explaining the gunshot (i.e., that his father had committed suicide) and create a narrative that might account for the scene that he had already staged at the house and for his presence at both taverns. That is the version the trial court rejected and which I am satisfied was correctly rejected, albeit on a somewhat different analysis.

[31] It is unnecessary to decide whether the appellant had completed the task by the time he was reversing the car when Aaron came. It is also unnecessary to make any finding as to whether MacFarlane had arrived at the scene after 21h30 but before the appellant and Freda had left the house

THEFT

162. After careful consideration it is not possible to find a basis upon which the theft conviction can be challenged and the implicit concession by Mr. Guarneri appears to be correctly made

SENTENCE

163. The period for which the appellant has been sentenced raises three concerns.

The first is that the SCA has since indicated that if more than the minimum prescribed sentence is to be imposed then reasons are to be provided for doing so.

The second is that the appellant was in custody for possibly up to two years before being sentenced. This period could have been taken into account in ameliorating any sentence in excess of the minimum. It is however insufficient, when considering all the other aggravating factors with no mitigating ones being raised (on the facts which the appellant was prepared to disclose), to constitute substantial and compelling circumstances allowing for a reduction from the minimum sentence in respect of a murder conviction.

Finally, the sentence for theft appears high. It should be no more than five years. On the analysis of the facts, it also appears that the theft was part of the cover-up for the murder.

164. In all the circumstances the sentence in respect of murder should be reduced to fifteen years' imprisonment and the theft reduced to five years' imprisonment, all sentences to run concurrently with that imposed for the murder. The effective sentence is therefore 15 years' direct imprisonment.

ORDER

165. In the result:

1. The appeal against the convictions is dismissed

2. The appeal in respect of sentence succeeds in part and the order of the trial court is amended in respect of the sentences for murder and theft to read;

    a. Imprisonment of 15 years in respect of murder

    b. Imprisonment of 5 years in respect of theft

    c. The sentences in respect of theft to run concurrently with the sentence imposed for murder

    d. The effective sentence inclusive of that in respect of all the other counts, which are all to run concurrently with that for murder, is therefore 15 years' imprisonment.

(Signed)

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SPILG, J

We agree:

(Signed)

_____

MOKGOATLHENG, J

(Signed)

_____

DJF. DU PLESSIS, AJ

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date of hand-down is deemed to be 24 December 2020

DATE OF JUDGMENT:	24 December 2020.
REVISED	7 January 2021
FOR APPELLANT:	Adv. Guarneri
	Legal Aid
FOR RESPONDENT:	Adv. Mpekana
	(Heads of argument drawn by Adv. Gcaba)
	National Director of Public Prosecutions