IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 483/2019

In the matter between:

JASON THOMAS ROHDE Appellant

and

THE STATE Respondent

APPELLANT'S HEADS OF ARGUMENT

INTRODUCTION:

1. Jason Rohde ("appellant") comes before this honourable Court ("this court") on appeal with the leave of this court against his convictions of murder and defeating the ends of justice and the resulting sentences handed down by the honourable Justice Salie-Hlophe in the Western Cape Division of the High Court, Cape Town ("the trial court").

2. He was sentenced to an effective 20 years imprisonment, 18 years on the murder conviction and 5 years on the conviction of defeating the ends of justice, of which 3 were ordered to run concurrently with the first sentence.

3. Appellant is currently on bail.[1]

BACKGROUND:

4. Appellant and his wife, the deceased, were engaged in a dispute as appellant was involved in an affair with another woman. The dispute and the relationship reached breaking point during the night of 23/24 July 2016 and the early morning of 24 July 2016 in room 221 at the Spier Hotel, Stellenbosch ("Spier") with appellant telling the deceased that the marriage was over.

5. That morning around 08h25 the deceased was found in the bathroom with the door locked from the inside and a cord of a hair curling tool around her neck attached to the towel hook on the bathroom door. All efforts to revive her failed.

6. The State alleged that appellant murdered the deceased and staged the scene to make it look as if the deceased hanged herself. Appellant pleaded not guilty to both charges and testified that the deceased took her own life.

7. The trial record runs to nearly seven thousand pages. An application on behalf of the appellant to be allowed to file heads of argument longer than the 40 pages prescribed by the Rules of

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[1] Rohde v S (1007/2019) [2019] ZASCA 193 (18 December 2019)

this Court, was refused. As a result, appellant's heads of argument are not as comprehensive as it would otherwise have been.

<u>APPELLANTS' SUBMISSIONS</u>:

8. It is respectfully submitted that the trial court erred in:

   8.1 accepting the evidence of Mr Desmond Daniels ("Daniels");

   8.2 accepting the evidence of the pathologists called by the State, Dr Akmal Kahn ("Kahn") and Dr Deidre Abrahams ("Abrahams") and rejecting the evidence of the pathologists called by the defence, Dr Geanas Perumal ("Perumal") and Professor Isak Loftus ("Loftus");

   8.3 not allowing the psychiatrist, Dr Larissa Panieri-Peter ("Panieri-Peter"), to complete her evidence and to accept the evidence of Jane Newcombe ("Newcombe") that the deceased was not a suicide risk;

   8.4 rejecting the evidence of the appellant as not reasonably possibly true;

8.5 basing its factual findings as to the events on the fateful morning mainly on speculation and in so doing ignoring certain important facts; and

8.6 finding that the State had proved its case against the appellant beyond a reasonable doubt.

THE EVIDENCE OF DANIELS:[2]

9. The trial court referred to Daniel's evidence as *"--- crucial [...] on a number of aspects"*[3] and the acceptance of his evidence regarding those 'aspects' formed an integral part of the building blocks on which the trial court built its reasons for its finding of guilt.

10. It is respectfully submitted that the trial court erred in accepting and relying on Daniels' evidence and failed to properly apply the cautionary rules applicable to the evidence of a single witness.[4]

11. It is submitted that the trial court erred in relying on its perceived demeanour of Daniels as a witness in circumstances where the 'written word' of the record did not justify or in any way support such reliance. As Cloete JA said in **S v Heslop** *"laudatory*

[2] Daniels' evidence is to be found in Volume 14, page 2789 to Volume 16, page 3124. The trial court's summary of his evidence is at Volume 33, pages 6539 to 6544 and evaluation at Volume 33, pages 6634 to 6642

[3] Volume 33, page 6635, lines 5-15

[4] **S v Mokoena** 1932 OPD 79

epithets (were) *applied by* (the) *trial court to witnesses when the record shows that their performance, judged by the written word, was obviously far from satisfactory"*[5]. It is submitted that the record shows that Daniels was a *"far from satisfactory witness*".

12. Daniels' evidence that he received a call to open the bathroom door at 08h15 and that he noted this time in his notebook[6] and that he was not told that the door was locked from the inside[7] was contradicted by the hotel's telephone records which showed that appellant only made the call for assistance at 08h22[8] and by the switchboard operator, Mavis Dilangibali, who stated that she told Daniels that the door was locked from the inside.[9] He was also wrong by claiming no one else arrived for over thirty minutes.[10]

13. Daniels' evidence as to what he observed once the door was opened, was totally unreliable (although understandable in the circumstances). This was clear when he gave three markedly different demonstrations as to how the cord was positioned on

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[5] **S v Heslop** 2007 (1) SACR 461 (SCA) at 470 e–f. See also **S v Texeira** 1980 (3) SA 755

[6] Volume 14, p 2794, lines 1-13 and Volume 15, p 2836, line 19 to p 2837, line 3

[7] Volume 14, p 2794, lines 15-16 and Volume 15, p 2904, line 9 to p 2905, line 5 and Volume 15, p 2991, lines 15-20

[8] Volume 15, p 2992, lines 5-27

[9] Exhibit "QQ", Volume 5, p 1009 to p 1011 and Volume 15, p 2996, line 11 to p 2997, line 21

[10] Compare: Daniels – He claims to have got there before 08h22 and the first person to arrive was at 08h55 Volume 16 p2916 Line 10-13 to Thompson who was there at 08h32 Volume 7 p1213 line 7 to Lee who was there when Daniels exited Volume 16 p3007 line 9 to p3008 line 12

the door hook and around the neck of the deceased.[11] His evidence in this regard was also directly and materially contradicted by his previous statements.[12]

14. He refused to answer and evaded answering relevant questions in cross-examination by saying "no comment" and "no explanation" numerous times.

15. He was blatantly dishonest when he claimed that he had lunch on his own on 15 March 2018 when he was under cross-examination, whilst CCTV footage showed that he had lunch with Spier's general manager and Spier's attorney.[13] Similarly, he lied that he was brought to court by Spier's driver.[14] He was brought to court by Spier's lawyer in an Uber.[15]

THE EVIDENCE OF THE EXPERT PATHOLOGISTS:

16. Where a court is confronted with experts with conflicting views, it is required of the court to determine to what extent the opinions advanced are founded on logical reasoning and how the

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[11] Volume 15, p 2831, line 14 to p 2835, line 10; Exhibit "B", photo 31; Volume 3, p 590; Volume 15, p 2959, line 9 to p 2961, line 23; Volume 15, p 2964, line 19 to p 2965, line 8; Volume 16, p 3015, line 6 to p 3019, line 20; Volume 16, p 3036, line 25 to p 3043, line 7

[12] Exhibit "LL3", Volume 5, p 961, para 5 and Volume 16, p 3107, line 23 to p 3108, line 10

[13] Volume 15, p 2963, lines 9-14

[14] Volume 15, p 2890, line 6 to p 2892, line 14

[15] Volume 16, p 3032, line 4 to line 26

competing sets of evidence stood in relation to one another, viewed in the light of the probabilities.[16]

17. In assessing an expert's opinions, an appellate court can test the expert's underlying reasoning and is in no worse a position than a trial court in that respect.[17]

KAHN:

18. Kahn conducted a post-mortem on the body of the deceased. The trial court found Kahn to be an expert whose evidence was trustworthy and reliable[18] and his evidence forms the mainstay on which the trial court based its judgement of guilt. It is submitted that the trial court erred in accepting his evidence insofar as it was disputed by Perumal and Loftus and the record confirms that error.

19. The underlying reasoning of Kahn was seriously flawed in several respects.

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[16] **Louwrens v Oldwage** 2006(2) SA 161 (SCA) at p 175, para [27]

[17] **Jacobs and Another v Transnet Ltd t/a Metrorail and Another** 2015(1) SA 139 SCA at p 148, para [15]

[18] Volume 33, page 6628, lines 8-14

20. **Time of death**:

20.1 Kahn testified that the deceased had died at 05h40 the morning of 24 July 2016[19]. That fact proved that appellant's version of events could never be true, that they continued arguing and that she went to the bathroom after 07h00 that morning.

20.2 During cross-examination, Kahn had to concede that his methodology to determine a time of death was seriously flawed and accordingly the time of 05h40 that he calculated could not be relied on as the time of death.

21. **Reliance on lividity:**

21.1 The lividity found by Kahn on the deceased's back was one of the factors utilised by him to determine the time of death as being 05h40.[20] This usage of lividity flies in the face of the accepted medical forensic literature and practise as lividity's "--- *variability is such that it is useless for any estimation of the time since death"*[21].

21.2 Kahn furthermore stated as a fact that because lividity was present on the deceased's back*: "That person died in a*

[19] Volume 7, page 1291, line 7 to page 1292, line 16. Initially he calculated the time of death to have been 04h40

[20] Volume 7, page 1290, line 24 to page 1292, line 14; Page 1538, lines 8-14 and page 1539, line 21 to page 1541, line 8

[21] Volume 8, pages 1540, lines 13-25

lying position, lying on her back" and not suspended as in a suicide by hanging[22]. This was an important observation in Kahn's conclusion that the ligature mark was applied after death and that the hanging was a staged event. Perumal gave sound reasons why lividity on the back does not prove that there was no hanging and Abrahams agreed with his view.[23]

21.3 The error is a basic one and Kahn's failure to recognise or acknowledge it should have raised serious questions on the reliability of his evidence. The trial court however brushed aside the issue and found that Kahn had said that the lividity was not a main factor in excluding a hanging but something he took into account.[24] That is not what Kahn had testified.[25]

22. **Prejudged:**

22.1 Kahn came to the conclusion that the deceased had not taken her own life but had been murdered, probably by appellant, when he attended the scene at Spier at 12h45 on the day the deceased died. Kahn directed the police to seize appellant's passport as he believed the appellant

[22] Volume 7, page 1290, lines 11-23
[23] Abrahams : Volume 13, page 2470, line 3 to page 2471, line 19; Perumal : Volume 20, page 3894, line 11 to page 3895, line 17
[24] See Volume 33, page 6489, line 18 to page 6490, line 2
[25] Volume 11, page 2121, line 9 to page 2133, line 28

was guilty and would probably flee to escape justice.[26] The main conclusions reached that day by Kahn were:

22.1.1 The deceased died at 04h40 that morning.[27] This was later amended to 05h40.[28] Anything therefore that appellant claimed to have happened between him and the deceased between 07h00 and 08h30 was a lie;[29]

22.1.2 The deceased was a battered woman, consequently appellant was a violent man.[30] Given the background of the emotional marriage break up and the acrimonious fight that night and morning, which Kahn was given knowledge of[31], this had to have confirmed his conclusion that appellant was responsible for the deceased's death.

22.1.3 Bloodstains in the bedroom and especially on the bed, indicated an assault or fight in the bedroom and indications such as a smear which he identified as a

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[26] Exhibit "D" : Bundle 1 (report), Volume 1, page 53 to 55, para 13

[27] Exhibit "D" : Volume 1, page 54, para 6 : Volume 7, page 1291, line 7 to page 1292, line 16

[28] Abrahams : Volume 13, page 2456, lines 12-22

[29] Kahn had to conclude under cross-examination that he was wrong. Not only was he wrong, that error was at the centre of his conclusions and had to have negatively affected his expertise, credibility and reliability.

[30] Volume 7, page 1319, line 20 to page 1320, line 7 and Exhibit "D", Volume 1, page 54 per 5.g

[31] Volume 7, page 1298, lines1-5.

faecal smear on the floor in front of the bathroom[32], small abrasions that in his opinion could have been consistent with her being dragged, confirmed in his view that the deceased had been murdered in the bedroom and had been dragged to the bathroom.[33]

22.2 The lividity found on the deceased's back proved that no hanging had occurred.[34]

23. Khan's conclusion that the appellant had killed his wife compromised his approach to the post-mortem examination of the deceased's body.

24. His mind was made up and he looked for that which confirmed his conclusions and ignored other possibilities. Kahn for example did not carry out procedures or investigations that would have been employed by a pathologist who was objectively predisposed:

24.1 He did not conduct a skin flap of the face that was apparently not injured, apart from an injury above the left eye, to determine whether or not underlying injuries were

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[32] Joubert (the blood spatter expert) identified this mark as a blood stain. Exhibit "GGI1", Vol 4, page 724 to 747 at paragraph 11.3, p 731 and photos 3, 9, 10 and 11 of Annexure "A" to Exhibit "GG1", Vol 4, pp 751, 757, 758 and 759
[33] Exhibit "D" : Volume 1, page 55, paragraphs 7-9
[34] Exhibit "D" : Volume 1, page 54, paragraph 5.m

present to prove or disprove his suspicion of the deceased having been smothered to death;[35]

24.2 He did not take photographs of the back of the deceased's neck to show, as he claims, that there was no ligature mark on the back of the neck.[36] In the light of all the photos he took, it is highly improbable if he had noticed that there was no ligature mark on the back of the deceased's neck, that he would not have taken a photo of the back of her neck.

24.3 He did not microscopically examine the tissues under the ligature mark to exclude an ante-mortem application of the ligature. He conceded that if histology tests were done it might have shown a vital reaction that would have exonerated the appellant.[37]

24.4 When questioned about a vital reaction related to the ligature mark, he concede that his experience in this regard is "limited".[38]

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[35] Volume 11, p 2136, lines 3-18
[36] Volume 12, p 2233, line 1 to p 2234, line 6
[37] Volume 11, p 2140, line 7 to p 2142, line 3 and p 2148, line 4 to p 2149, line 6 (especially at p 2149, lines 3-6)
[38] Volume 12, p 2233, line 1 to p 2234, line 6

25. His (and Abrahams') view that the injuries on the deceased's neck not directly underlying the ligature mark was not caused by the ligature, was not correct.

25.1 He misinterpreted a post-mortem artefact being an incised wound in the thyroid cartilage as a fracture of the thyroid cartilage, unrelated to the ligature.[39] This was a major consideration in his finding that the deceased was manually strangled.[40]

25.2 Perumal and Loftus showed, convincingly, that the wound to the thyroid cartilage was a post-mortem artefact.[41] In any event, even if it was not, it is typically the type of injury one would expect in a hanging[42] albeit not directly under the ligature mark, due to the stretching of the neck in hanging and the convulsions the deceased would have had.[43]

25.3 Kahn's technique in dissecting the thyroid cartilage and hyoid bone was also incorrect.[44]

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[39] Exhibit "D", Volume 1, p 61, para 9.2; Kahn : Volume 7, p 1308, line 20 to p 1309, line 3
[40] Kahn : Volume 11, p 2075, line 2 to p 2076, line 5
[41] Perumal : Volume 20, p 3836, line 10 to p 3837, line 12; Loftus : Volume 22, p 4333, line 14 to p 4334, line 25
[42] Perumal : Volume 20, p 3878, line 3877, line 11 to p 3878, line 26 and p 3949, line 20 to p 3952, line 3
[43] Perumal : Volume 22, p 4251, line 17 to p 4252, line 4
[44] Loftus : Volume 22, p 4333, lines 14-21

25.4 Kahn missed the fractures to the left ribs as he did not use the correct procedure to examine the ribs for fractures.[45]

25.5 He also missed the fractures to the sixth rib on the right.[46]

25.6 In his notes Kahn indicated a fracture to the hyoid bone.[47] Perumal testified that Kahn had told him that he found such a fracture. As a result he had the hyoid bone scanned.[48] Kahn denied that he had told Perumal about it.[49] The probabilities are, however, overwhelming that he did so.

26. Because of Kahn’s shortcomings in the methodology and investigation of the material facts he presented set out above and his admitted limited experience in this type of post-mortem, a court would never know what other skill or knowledge on which he based his opinions was also flawed[50]. The trial court should have approached his evidence with great caution, especially where his findings and conclusions differed from the well reasoned testimony of the experienced Perumal and Loftus.

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45 Perumal : Vol 20, p 3848, line 6 to p 3849, line 25

46 Exhibit "D", Volume 1, p 62, para 10 and Exhibit "E", Volume 24, p 4781, para 10; Perumal : Volume 20, p 3848, lines 14-17 and p 3049, lines 2-3

47 Exhibit "F", Volume 24, p 4812 ("#2 post hyoid"); Perumal : Volume 20, p 3839, line 22 to p 3840, line 8

48 Perumal : Volume 19, p 3798, line 2 to Volume 20, p 3801, line 12 and p 3838, line 5 to p 3839, line 2

49 Kahn : Volume 11, p 2081, lines 14-24 and p 2113, line 10 to p 2117, line 18

50 In **Daniels v Minister of Defence** (unreported, WCC case no 8462/2012, 21 June 2016) at [150] et seq. it was found (at [157]) that the decisions taken by the doctors in question were 'not supported with reference to sound medical procedure and protocol’ and were not in 'accord with the common sense and logic required’.

ABRAHAMS:

27. Abrahams was not listed as a witness for the State. The trial started on 9 October 2017[51] and Abrahams' report which she compiled after examining Kahn's reports and Perumal's initial report, was written and signed on 6 October 2017, more than a year after the post-mortem conducted by Kahn.

28. She made no notes of her own on the autopsy performed by Kahn on the body of the deceased. It is clear that she relied on Kahn's reports and her memory when she drafted her report and gave her evidence. She merely repeated Kahn's findings and supported them in her evidence.[52]

29. With regard to what she could remember of the events of 24 July 2016, she initially testified that she had started earlier that day with an autopsy, specifically with the external and partial examination of a body, after which she attended and observed the autopsy done by Kahn on the body of the deceased in the same dissection area.[53] She later testified that after she had checked her records, she must correct her evidence, her autopsy started after Kahn's autopsy of the deceased's body was completed.[54] Yet she gave detailed evidence on what Kahn found

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[51] Volume 6, p 1160, line 9
[52] Volume 12, p 2349, line 22 to p 2350, line 2 and Volume 13, p 2429, lines 16-19
[53] Volume 12, p 2344, line 8 top 2347, line 9
[54] Volume 12, p 2393, lines 9-23

during the autopsy. It is submitted that she was repeating what was contained in Kahn's reports and not what she actually recalled of the findings.

30. Abrahams was clearly out to support Kahn's findings at all costs, to criticise the initial report by Perumal and in so doing to attack Perumal personally.

30.1 She was not even prepared to concede that she and Kahn incorrectly calculated the time of death, when confronted with extracts from a text book by the scientist who developed the test wherein it is made clear that one can not use a mean time as the time of death.[55]

30.2 She testified that the mark on the back of the deceased's neck photographed by Perumal was not there when the autopsy was done by Kahn and ventured the opinion that it is a post-mortem artefact. She stated that it might be the result of the deceased lying on a block such as Exhibit 1 or being transported on a grooved object that would push into the neck tissue.[56] She was even prepared to speculate that a ligature was put on the deceased's neck after the release of the body.[57]

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[55] Volume 13, p 2464, line 22 to page 2466, line 7

[56] Volume 12, P 2360, line 19 to p 2361, line 8; Loftus explained, convincingly it is submitted, why this was not possible - Volume 22, p 4341, line 1 to p 4343, line 9

[57] Volume 14, p 2603, lines 10-15

30.3 Despite Kahn's concession that if histology tests were done of the tissue under the ligature mark, it might have shown a vital reaction that would have exonerated the appellant, she maintained that histology was not necessary. Even when confronted with publications on forensic medicine that states that a portion of the skin and deeper tissue in relation to a ligature mark should be examined histologically for evidence of tissue reaction, she refused to concede that that should have been done by Kahn.[58]

30.4 She agreed that where a person is strangled and strains against the strangling object, the face of the person would be more congested than were found in this case. Consequently she speculated that the deceased was manually strangled and smothered at the same time ("simultaneously").[59]

30.5 She was even prepared to speculate that Kahn noted that there was a pillow in the bedroom with marks appearing like eye make-up on it, together with blood "*possibly fitting*

[58] Volume 13, p 2487, line 5 to p 2494, line 21
[59] Volume 13, p 2566, line 13 to p 2567, line 1 and p 2572, lines 5-12

in with the face of the deceased", to imply that this was the pillow used to smother the deceased.[60]

30.6 She defended Kahn's view that pallor on the nose and around the lips of the deceased together with certain other observations, is proof that the deceased had been smothered. When confronted with Kahn's failure to do a full facial flap dissection as Perumal did, she stated that Perumal did not find any other underlying injuries in the facial flap "*as we have not suspected there to be any other injuries. And according to me a full facial flap was not, therefore, indicated*" completely missing the point that no proof of a forceful smothering was found during the autopsies by Kahn or Perumal.[61]

30.7 Confronted with Kahn's failure to detect the rib fractures on the left, she immediately sprang to his defence, stating that the ribs were fractured after Kahn had completed his post-mortem.

31. Her evidence, insofar as it differed from the conclusions reached by Perumal and Loftus, should not have been accepted.

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[60] Volume 13, p 2571, lines 1-8
[61] Volume 13, p1560, line 19 to p 2563, line 19 ("from p 2563 lines 16-19")

PERUMAL:[62]

32. It is respectfully submitted that the trial court erred in rejecting the evidence of Perumal. Its criticism of Perumal's evidence was primarily aimed at his initial report (Exhibit "E")[63] which was made available to the State during the appellant's bail application. The trial court completely ignored his second report, which he drafted after he had access to more information, including photographs taken by Kahn at his post-mortem (Exhibit "JJJ"), as well as his evidence in court, in which he explained what he had found, what his opinions were and what the scientific basis for these opinions were.

33. The trial court further erred in rejecting his evidence on the basis that he was hired by the appellant to do the second post-mortem and that he was thus a "hired gun" who misrepresented the deceased's injuries. It is respectfully submitted that the record of his evidence reveals exactly the opposite.[64] His opinions were founded on logical reason, are supported by the probabilities and he was prepared to make concessions.

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[62] His evidence appear in Volume 19, p 3795 to Volume 20, p 3959 and Volume 21, p 4065, to Volume 22, p 4258

[63] Volume 24, pp 4775-4785

[64] Judgment, Volume 34, lines 2 to p 227, line 12

LOFTUS:[65]

34. It is respectfully submitted that the trial court further erred in also rejecting Loftus' evidence. The trial court criticised Loftus that he had misrepresented to the trial court that he had done a digital or virtual autopsy and that he gave his comments and conclusions accordingly. With the assistance of Wikipedia, the trial court defined a digital autopsy and stated that she confronted Loftus that the notion of him having performed a digital autopsy was misleading, but that he refused to concede this.[66] Loftus explained, on questions of the trial court, what he did with the assistance of photographs. It is submitted that there was no attempt to mislead the trial court.[67] He made it clear that the photographs were all taken from different angles and also different distances from the body, consequently there is no fixed point which he could use as a reference mark. In an ideal situation, the camera should have been on a tripod next to the body and all the photographs taken from exactly the same angle and plane "... *because then one will be able to layer these and almost perform a digital dissection of the neck*".[68]

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[65] His evidence appear in Volume 22, p 4260 to Vol 23, p 4450
[66] Volume 34, p 6679, line 13 to p 6680, line 6
[67] Volume 22, p 4395, line 12 to p 4397, line 12
[68] Volume 22, p 4319, line 10 to p 4321 to p 4321, line 26 and Volume 22, p 4398, lines 15-26

35. The trail court, with respect, made no attempt to consider the evidence given by Loftus as to various injuries and his reasoning for his opinions

THE EVIDENCE OF THE APPELLANT:

36. It is submitted that the trial court erred in finding that appellant's evidence could not reasonably possibly be true and to reject it as false.

    36.1 It is submitted that the trial court's finding that appellant's evidence was evasive and specious[69] and interspersed with inherent improbabilities, is not supported by the record of his evidence.

    36.2 The trial court found that the appellant could not answer questions crucial to the events of that morning and contradicted himself in a number of ways.[70] Apart from the fact that the appellant could not say how the cord was around the neck of the deceased, whether it was a single strand or a double strand, and his explanation that he was shocked at the time and his only thought was to have the cord removed from his wife's neck, he answered the questions put to him as best he could, bearing in mind the

[69] Judgement, Volume 33, p 6644, lines 9-12
[70] Judgment, Volume 33, p 6646

circumstances under which he was acting. It is also respectfully denied that he contradicted himself in a number of ways.

36.3 The trial court's reasoning that the appellant explained his inability to remember details, such as the cord around the deceased's neck as a result of shock and trauma and to compare that with his evidence surrounding his arrest of which he could remember detail, is with respect, to compare apples with pears.[71]

36.4 The trial court's reasoning with regard to the blood of the appellant that was found on the duvet cover, one of the pillows and on the bathroom floor and that the blood on the bathroom floor was indicative of the fact that he must have received the injury from which he was bleeding not more than 30 minutes earlier is, with respect, not in line with the evidence of the blood spatter expert, Joubert. Joubert testified that the blood stains that he observed were minor, slight and it was very little blood stains that were transferred. It could have been from a very insignificant small cut.[72] It could have come from a nick whilst shaving or from a cut on one's finger that one would

[71] Judgment, Volume 33, p 6647, line 17 to p 6648, line 11
[72] Volume 14, p 2763, lines 14 to 22

not even have noticed.[73] He explained the blood in the bathroom could even have come from a towel that was handled by the appellant.[74] The blood could also have been deposited at any time during their stay at the hotel from Friday afternoon to Sunday morning[75] in keeping with normal day to day living.[76] The trial court's finding that the appellant in all probability had sustained the injury which deposited the blood after he got out of bed that Sunday morning, is not borne out by the evidence.[77]

36.5 The finding by the trial court that the pillow on which the deceased's blood and mascara were seen, was not on the side of the bed where the deceased had been sleeping but on the appellant's side of the bed, is not correct.[78] The appellant stated that he had slept on the left side of the bed as one looks at the bed. This was not disputed by the State.[79] This is corroborated by the sketch that Joubert made of the scene in which he indicated the blood stains on the bed sheet caused by the deceased's bleeding toes on the right hand side of the bed as one looks at the bed.[80]

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73 Volume 14, p 2766, lines 17-20
74 Volume 14, p 2767, line 20 to p 2768, line 4
75 Volume 14, p 2766, line 23 to p 2767, line 2
76 Volume 14, p 2768, lines 16-18
77 Volume 33, p 6649, lines 15-19
78 Volume 34, p 6687, line 3 to p 6688, line 10
79 Volume 18, p 3498, lines 19-26
80 Volume 27, p 5427 (the spots marked B12) and Volume 27, p 5409 - the DNA results of Otto

36.6 The brother-in-law of the deceased, Peter Robert Norton, testified that he and the appellant's father-in-law, Neville Holmes, inspected the appellant's hands that morning and that there were no marks on his hands.[81]

36.7 The trial court drew and adverse inference against the appellant that he did not call Mrs Diane Holmes to corroborate his testimony that the cut on his finger which Dr Tiemensma found, was caused by a vase that he had dropped in the days after the deceased's death.[82] This evidence by the appellant was, however, never disputed by the State in cross-examination.

36.8 The trial court's reasoning that it is inconceivable that the appellant would not notice his blood on the areas found by Joubert during the time that he had occupied the room and that he would not have felt the pain from the infliction of the wound, completely disregards the evidence of Joubert that the bloodstains were so minute that it could have come from a nick whilst shaving or from a small mark that the appellant would not even have noticed. Despite this evidence, the trial court held it against the appellant that he could not account for his bloodstains found at the

[81] Volume 9, p 1621, line 3 to p 1622, line 14
[82] Volume 33, p 6650, line 6 to p 6651, line 12

scene.[83] The further remark by the trial court that the appellant's blood was conspicuously noticeable on the duvet, the pillow and the bathroom floor, is not supported by the evidence or the photographs.[84]

36.9 The trial court found that appellant phoned his wife's phone at 08h02 and that his concerns "*at this point had grown to a 'gut feeling' that something was wrong".* He then waited in the room for 20 minutes before placing a call to the hotel reception.[85] This was, with respect, not the appellant's evidence. He testified that after he had phoned and she did not answer, he started packing his bags and shouting at the deceased to please open the door as he had to get going. He thought that she was teaching him a lesson by not opening the door, knowing that he had to go without brushing his teeth, etc. He also looked at his e-mails on his phone after he had packed his bags and then he went to listen at the door whether he could hear the water splashing. When he heard nothing, that was when he got an uneasy feeling in his gut and that was when he phoned the reception. After he had phoned the reception, he tried to force the door open with his shoulder

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[83] Volume 34, p 6653, lines 7-11
[84] Some of the photographs were magnified considerably
[85] Volume 34, p 6655, lines 1-7

and by kicking it, hence the crack in the door that was visible on the door in court.[86]

36.10 The trial court's finding that it is preposterous in the circumstances that the appellant asked that a "*maintenance worker*" should be sent to open the door[87], does not accord with what Dingalibale stated in her affidavit admitted as Exhibit "QQ".[88] She stated that she was asked "*to call somebody in maintenance or anyone who will assist to open the bathroom door in room 221, because it is locked from the inside*".[89]

37. In considering the appellant's evidence, the trial court also failed to take into consideration the probabilities that supported appellant's evidence.

37.1 If the ligature mark was made after the deceased had been killed as the State alleges, it is highly improbable that the appellant would have known to cause the deepest ligature on the left side of the neck to mimic a suspension point on the right side of the neck. Perumal testified that the greatest force will be exercised by the ligature at the point

[86] Volume 18, p 3503, line 14 to p 3504, line 23
[87] Volume 34, p 6655, lines 7-11
[88] Volume 5, p 1009 to p 1010
[89] Paragraph 5

opposite to the point of suspension[90] as was the case with the ligature mark.

37.2 If appellant had staged the suicide, it is highly improbable that he would have placed the deceased on her back with the noose loosely tied around her neck. He could not have known who the hotel would send to open the door of the bathroom, it could even have been one of the managers.

37.3 It is also improbable that the appellant would have attempted to put the robe on the body of the deceased, as the trial court found he did[91] and then only put her arms through the sleeves. There is simply no reason why the appellant would have tried to put a robe on the body of the deceased and even more improbable that he would have done so after Daniels had seen the deceased completely naked as Daniels testified.

37.4 According to the trial court's findings, the appellant would have had to handle the hair tool to stage the suicide and according to Daniels' evidence, to retie it to the towel hook on the bathroom door. Yet, the only DNA found on the hair tool was that of the deceased.[92]

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[90] Volume 20, p 3823, line 19 to p 3824, line 2
[91] Volume 34, p 6692, lines 1-8
[92] Otto, Exhibit "HH1", Volume 2, p 287 to 289 - paragraph 4.1 on p 289

38. It is accordingly submitted that the trial court erred in rejecting the evidence of the appellant as not reasonably possibly true.

THE OTHER FINDINGS BY THE TRIAL COURT:

A. THE LIGATURE MARK - ANTE OR POST-MORTEM?

39. The trial court decided that it is not necessary to determine "*at which point during the staging process the accused affected the ligature imprint on the deceased's neck. The fact that the accused had by this time already applied the fatal force to the deceased, makes such a determination unnecessary for the purposes of this judgement*". The trial court further found that the ligature mark was superficial and that there were no underlying associate injuries which could have resulted in her death or which could have contributed thereto. [93]

40. In finding that there were no underlying associated injuries which could have resulted in the deceased's death, the trial court lost sight of evidence as to the mechanism of death by hanging. There are different mechanisms when force is applied to the neck which can cause death: obstruction of the airways, obstruction of the veins, obstruction of the arteries and acute neurogenic

[93] Volume 34, p 6692, lines 11-18

cardiac arrest and often a combination thereof.[94] In cases of hanging, it is not only injuries underlying the ligature that is relevant. Neck injuries, although anatomically removed from the actual sight of the ligature mark, can be caused by hanging because of the pull of the body and the convulsions that occur as part of the process of death. Perumal was of the view that a lot of the injuries that were observed to the neck of the deceased, if not all, could have been caused by hanging.[95]

41. Loftus pointed out that there was haemorrhage adjacent to the level of the carotid sinus which means there was trauma in that area while the deceased was still alive and that can cause death because of the cardiogenic stimulation.[96]

42. Perumal was of the opinion that the deceased was still alive when the ligature imprint was made. He stated that if the ligature was applied after the deceased had died, he would have expected to see the blanched area visible on the right front throughout the neck. Secondly, appellant testified that there was saliva coming out of the corner of the deceased's mouth. This, Perumal

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[94] Loftus : Volume 22, p 4366, line 22 to p 4369, line 12
[95] Perumal : Volume 22, p 4251, line 17 to p 4252, line 4
[96] Volume 22, p 4331, lines 6-24

explained, is caused by pressure on the salivary glands and is a classical feature of ante-mortem hanging.[97]

43. Loftus further pointed out that there was haemorrhage below the ligature mark and that is the type of haemorrhage that one would expect if the ligature was applied and had its effect ante-mortem.[98]

44. It is submitted that this evidence by Perumal and Loftus, supported by medical literature, are strongly supportive of the appellant's evidence that the deceased had committed suicide.

B. <u>THE ASSAULT AND SMOTHERING IN THE BEDROOM</u>:

(i) <u>Facial imprint and where the deceased slept</u>[99]

45. The trial court found it could see from the faint traces of blood and mascara on a pillow that it is *"---consistent with a repeat smothering action consistent with the pillow being pushed down more than once in order to sustain the pressure on the face of the deceased and to get a further grip in the course of smothering her"* and the imprint was consistent with *" --- her face sucked or pushed right into the pillow.."* [100]. It is submitted that the trial court

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[97] Perumal : Volume 21, p 4134, line 15 to p 4135, line 16 and Loftus, Volume 22, p 4336, line 20 to page p 4338, line 3

[98] Volume 22, p 4314, line 3 to p 4315, line 25

[99] Judgement : Volume 34, p 6687, line 4 to p 6688, line 10

[100] Volume 34, p 6687, line 4 to p 6688, line 10

erred in accepting its own view of what the pillow marks could and did indicate and so acted as a witness in the trial[101].

46. Captain Joubert ("Joubert")[102], a blood spatter expert called by the State, testified that the marks on the pillow prove that the deceased slept on the pillow on the right-hand side of the bed[103].

47. The trial court, however, found that the deceased never slept on that pillow (B13), as that pillow was on the side the appellant slept[104]. This incorrect finding had a material knock on effect in the judgement. Had the trial court took into account what Joubert testified, it would have accepted that the pillow was the deceased's and that she had slept on it which explains the blood and mascara marks. The blood on the pillow consistent with the eyebrow injury also confirms that the deceased was injured there before she went to bed that night, probably from her earlier fall.

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[101] See **S v M** 2000 (1) SACR 484 (W) re judicial notice and that a court cannot be a witness in a case before it

[102] Volume 3, p 605, Photo 52

[103] Volume 14, p 2761, line 6 and p 2762, lines 1-10

[104] Volume 33, p 6535, footnote 49 and p 6650, lines 1-5. There is some confusion in the judgement as to which pillow is being talked about. B11 or B13. This footnote clearly refers to B13, the one on the RHS of the bed as does the reference on P6650. See judgement regarding the wrong numbering of B11 and B13 at Volume 33 the last page, p 6652, line 4 to Volume 34 the first page p 6653, line 3. At Volume 33, p 6628, line 2 the trial court says Abrahams is referring to pillow B13. Pillow B13 or pillow B11 seen on photograph 38, 39 and 40 in Volume 3, pp 595 and 596

(ii) Appellant hit the deceased with his fist[105]

48. The finding that appellant hit the deceased with his left fist[106] with her on the left side of the bed does not tie in with the evidence of:

48.1 the deceased sleeping on the right-hand side of the bed on pillow B13; and

48.2 that pillow having blood on it consistent with the deceased having injured herself before she went to bed.

49. Loftus explains in detail with reference to photographs, scientific authorities and common sense why this injury is not caused by a fist blow and it is submitted no reason exists to doubt his evidence.[107] So did Perumal.[108]

(iii) Appellant fractured the ribs of the deceased

50. Both appellant and Thompson were novices at doing CPR. Thompson weighed in excess of 100 kg. They used *"lots of force"* to the deceased's chest and compressed her ribs for approximately 30 to 40 minutes[109]. Rib fractures are commonly associated with CPR.

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105 Judgement : p 6684, line 12
106 A marriage ring is on the left hand
107 Volume 22, p 4357, line 15 to p 4361, line 5
108 Volume 21, p 4189, lines 8-16
109 Volume 7, p 1228, lines 9-13

51. Kahn claims that the contusion injuries to the right lung occurred ante-mortem a few minutes to an hour before she died and before she was suffocated, and the proof thereof is blood in the stomach and intestines[110].

52. Both Perumal and Loftus relate the contusion to the right lung to the rib damage occurred by CPR administered to the deceased. The contusion would not have caused her to cough up and ingest blood.[111] They gave cogent and compelling reasons for their views. Loftus makes the point that the urine and stool seen by Thompson on the floor of the bathroom indicates that is where and when the deceased died i.e. during the administration of CPR and therefore what Kahn found in any event ties in with CPR causing the injury[112].

C. APPELLANT DRAGGED THE DECEASED TO THE BATHROOM[113]

53. The trial court relied on a small abrasion on the deceased's shoulder and on her toes and an alleged faecal smear outside the bathroom to reach its conclusion. There were no carpet fibres found on the deceased as would be expected if she was injured

[110] Volume 7, p 1317, line 10 to p 1319, line 6
[111] Judgement : Volume 34, p 6690, lines 6-9
[112] Volume 22, p 4395, line 14 to p 4396, line 2
[113] Judgement : Volume 34, p 6690, lines 12-15

in any dragging over a carpet nor were any blood stains found on the carpet. Furthermore, logic dictates that it would have been either the shoulder or the toe injured if she was dragged, not both – the injuries were on opposite sides of her body.

54. Bloodstains on her side of the bed confirm that her toes were injured before she went to bed.

55. The trial court further found that a stain Kahn said was faeces outside the bathroom door, proved that the appellant dragged the deceased to the bathroom. Joubert however identified the mark found outside the bathroom[114] door as a swipe pattern blood stain[115].

D. APPELLANT COULD NOT LIFT THE DECEASED UP UNAIDED SO HE LAID HER FLAT ON THE FLOOR AND WOUND THE CORD AROUND HER NECK:[116]

56. It is the evidence of both the appellant and Daniels that appellant was able to and in fact did lift the deceased up unaided.

E. APPELLANT LOCKED THE DOOR:

57. There is no evidence to support the inferential reasoning of the

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[114] Exhibit "GG1", Volume 4, p 731, para 11.3 and photos 3910 and 2911 at pp 751, 757, 758 and 759

[115] Volume 7, p 1282, line 24 to p 1283 line 7

[116] Volume 34, p 3390, lines 14 -18

trial court that appellant knew how to lock the bathroom door from the outside.[117] The lock is not there to be easily opened.

F. THE DECEASED SUICIDAL?

58. The trial court found that it was "*highly improbable*" that the deceased would have hanged herself. It is respectfully submitted that the trial court erred in so finding, bearing in mind what preceded her actions that morning and the previous night.

G. CONCLUSION:

59. It is accordingly submitted that the findings of the trial court regarding what happened that morning are not only speculative, they are also not consistent with all the proved facts and were not the only reasonable inferences that can be drawn from those facts.

MATERIAL IRREGULARITY:

60. It is respectfully submitted that it rendered the trial unfair when the trial court accepted evidence regarding the deceased not being suicidal, yet refused to allow the contrary evidence presented by Panieri-Peter. Panieri-Peter was not allowed to complete her evidence and therefore it could not have been

[117] Judgement : Volume 34, p 6690, lines 15-18

known what would or could have been said by her in order to allow the trial court a proper opportunity to assess her evidence in the light of other evidence that corroborated it.

61. Appellant's right to adduce evidence, guaranteed by section 35(3)(i) of the Constitution was clearly infringed alternatively, the trial court's refusal to allow her to complete her testimony constituted a material irregularity.

62. It is respectfully submitted that it will not be necessary for this court to consider and decide on the irregularity should this Court be in agreement with the appellant submissions with regard to his convictions.

CONCLUSION ON THE CONVICTIONS:

63. In the premises, it is respectfully submitted that the trial court erred in convicting the appellant. Appellant accordingly seeks an order in the following terms:

"The appeal is allowed, the convictions on both counts are set aside and the appellant is found not guilty and is discharged."

AD SENTENCE:

64. The record of the evidence regarding sentence does not form

part of the record filed with this Court. Certain exhibits were also not included. The evidence on sentence and the missing exhibits will be collated in a supplementary volume as soon as the lockdown is lifted and it can be prepared. Leave will accordingly be sought to supplement the record and to supplement the heads of argument on sentence.

65. Sentencing is pre-eminently in the discretion of the trail court. A court of appeal may interfere if the trail court misdirected itself or the discretion has not been exercised properly. A mere misdirection is not sufficient to entitle the appellate court to interfere with sentence, it must be of such a nature that it shows, directly or inferentially that the court did not exercise its discretion at all, or exercised it improperly or unreasonably.[118] It is respectfully submitted that the trial court misdirected itself in imposing sentence on the appellant. The nature, degree and seriousness of the misdirections justify this Court's interference in the sentences imposed.

66. The trial court misdirected itself in finding that the appellant had the direct intention to kill the deceased[119] and in sentencing him in accordance with that finding. The trial court based its judgement on the murder conviction on the finding that a

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[118] **S v Pillay** 1977(4) SA 531 (A) at 535 E-F
[119] Volume 34, p 6705, line 11

"wrestling match" associated with highly emotional circumstances and a heated exchange between appellant and the deceased had led to physical violence and that appellant strangled and smothered the deceased during that "wrestling match".[120] It is submitted that these facts do not justify anything more than a finding of *dolus eventualis*.

67. The trial court wanted to send a strong message that violence against women will not be tolerated. However, appellant is not a violent person. The deceased had told Newcombe he was not[121] and the 22 years of marriage was proof of his character in this regard. This was also confirmed by the psychologists and psychiatrists who testified. The events of 24 July 2016 were out of character and not in any way connected to a battered woman syndrome. The trial court further erred in not giving sufficient weight to the following factors:

67.1 Appellant's age and clean record;

67.2 His non-violent nature;

67.3 The needs of the children and his family;

67.4 The highly charged emotional confrontation that appellant

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[120] Volume 34, p 6689, line 19 to p 6690, line 6
[121] Newcombe : Volume 10, p 1856, lines 15-17

acted in; and

67.5 That he has been a hard working provider for his family and an asset to society.

68. The trail court further misdirected itself in:

68.1 Arriving at and relying on conclusions that were not justified by the evidence.[122]

68.2 Finding that the deceased was alive for some time after being fatally injured and that the injuries inflicted on her were successive and incremental and appellant had time to reflect and desist.[123]

69. It is further submitted that the sentences imposed were shockingly inappropriate.

70. This Court is consequently at large to consider sentencing the appellant afresh.

71. It is submitted that substantial and compelling circumstances exist justifying a deviation from the prescribed minimum sentence

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[122] The faecal smear, the drag mark, the finding that the deceased lived for some time after the injuries were inflicted while appellant was premeditatedly belittling her were facts not in the record

[123] Volume 34, p 6720, lines 1-5

of 15 years' imprisonment in respect of the murder conviction.[124] These circumstances are the fact that the appellant acted with *dolus eventualis* in circumstances of high emotion that led to physical violence between the deceased and the appellant and that appellant is not a violent person and has no previous convictions.

72. In the premises it is respectfully submitted that the Court will set aside the sentences imposed on both counts and replace them with just and suitable sentences.

FRANCOIS VAN ZYL SC
WILLIAM KING SC
Counsel for the Appellant
Chambers
22 April 2020

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[124] In terms of section 51(3) of the Criminal Law Amendment Act, 104 of 1997