



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 815/2019

In the matter between:

JASON THOMAS ROHDE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Rohde v The State* (Case no 815/2019) [2021] ZASCA 134
(5 October 2021)

Coram: SALDULKER, VAN DER MERWE, MOCUMIE and MOKGOHLOA JJA and
POTTERILL AJA

Heard: 16 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 5 October 2021.

Summary: Criminal law – correctness of conviction of murder and obstructing the course of justice – dependent on whether deceased was manually strangled – proved beyond reasonable doubt on evaluation of forensic pathologists' evidence – own observations of trial court in respect of exhibit not put to witnesses – deceased not victim of sustained assault – sentence imposed afresh.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Salie-Hlophe J sitting as court of first instance):

- 1 The appeal against the convictions on counts 1 and 2 is dismissed.
- 2 The appeal against the sentences is upheld.
- 3 The order of the court a quo in respect of sentence is set aside and replaced with the following:
 - ‘(a) On count 1 the accused is sentenced to 15 years’ imprisonment.
 - (b) On count 2 the accused is sentenced to three years’ imprisonment.
 - (c) The sentence on count 2 is ordered to run concurrently with the sentence on count 1.
 - (d) The accused is declared unfit to possess a fire-arm.’
- 4 The abovementioned sentences are deemed to have been imposed on 27 February 2019.

JUDGMENT

Saldulker and Van der Merwe JJA (Mocumie and Mokgohloa JJA and Potteril AJA concurring)

Introduction

[1] Over the weekend of Friday 22 July 2016 to Sunday 24 July 2016, a well-known real estate company held its annual conference at the Spier Hotel near Stellenbosch in the Western Cape. Mr Jason Thomas Rohde, the chief executive officer of the company, attended the conference. His wife, Ms Susan Francis Rohde, accompanied him to the venue and attended the social events associated with the conference. During the morning of 24 July 2016, however, Ms Rohde (the deceased) was found dead in the bathroom of their suite at the hotel. This was shocking news, all the more so because the deceased was

only 47 years of age; the caring mother of three adolescent daughters; in excellent health and a strong-willed and tenacious person.

[2] In due course Mr Rohde (the appellant) was charged in the Western Cape Division of the High Court with the murder of the deceased (count 1) and with defeating or obstructing the course of justice (count 2). Count 2 was based on the allegation that subsequent to the murder of the deceased, the appellant had rearranged the scene of the crime in an attempt to represent that the deceased had committed suicide. The matter proceeded to trial before Salie-Hlophe J. After a protracted hearing the trial court convicted the appellant on both counts. It sentenced him to an effective term of imprisonment of 20 years, that is, 18 years' imprisonment on count 1 and five years' imprisonment on count 2, of which three years' imprisonment were ordered to be served concurrently with the sentence on count 1. The trial court refused the appellant's application for leave to appeal against the convictions and sentences, but this Court subsequently granted him such leave to appeal.

[3] The issue at the heart of the appeal is whether the deceased died as a result of smothering and/or manual strangulation, as the respondent alleged, or whether she committed suicide by hanging herself from a hook affixed to the inside of the bathroom door with the use of the cord of an electric hair curler, as was the appellant's case. The central question is whether the respondent proved beyond a reasonable doubt that the deceased had been killed or whether there was a reasonable possibility that she might have committed suicide. If it was proved that the deceased had been smothered and/or throttled to death by hand, the convictions on both counts must stand. That is so because there is no doubt that only the appellant could have killed the deceased and altered the crime scene to resemble a suicide by hanging. If, on the other hand, there is a reasonable possibility that the deceased took her own life, the appellant, would, of course, be entitled to an acquittal on both counts. As we shall show, the answer to the question turns principally on the expert forensic pathological evidence, which we analyse in detail below. The evidence of the pathologists must be considered against the background and in the context of the evidence set out below.

Background

[4] During the middle of 2015, the appellant entered into a clandestine extramarital affair with a co-employee, Ms Jolene Alterskye. This was revealed to the deceased on 28 February 2016, when she discovered a card that Ms Alterskye had left for the appellant in his luggage. True to her character, the deceased immediately confronted the appellant. The appellant admitted the love affair. On the instructions of the deceased he called Ms Alterskye there and then, with his cell phone on speaker, and called off the affair. Nevertheless, as could be expected, the appellant's affair had a profound effect on the deceased's emotional state and on the state of their matrimonial relationship. As a result, the deceased attended several sessions with a psychologist, Ms Jane Francis Newcombe. The couple also underwent marriage counselling under the guidance of Ms Carol Nader. Both Ms Newcombe and Ms Nader testified at the trial. Unbeknown to the deceased and to Ms Newcombe and Ms Nader, however, the appellant had in the meantime rekindled the love affair with Ms Alterskye.

Evidence concerning the deceased's mental state

[5] Ms Newcombe is a psychologist that the deceased consulted. They had eight sessions since May 2016. During these sessions the deceased informed Ms Newcombe that her husband had an extramarital relationship with Ms Alterskye. The affair had begun in June 2015. Although the appellant made a commitment to stop the affair, the deceased found it difficult to cope with the fact that the appellant had lied to her, struggled to overcome the appellant's infidelity and to cope with the hurt and anguish caused thereby.

[6] The deceased said that the appellant was frustrated about her anxieties and was irritated with her constantly talking about the affair. The deceased wanted to repair the relationship with the appellant but found it difficult to manage the anger and the turmoil that she felt. She said that the affair had turned her life upside down. The deceased feared that she and the appellant would continue to treat each other badly, that she would continue to live in fear and that her family would be exposed to the tension at home. Their marital relationship had been loving, but became distant.

[7] The deceased was anxious when the appellant travelled to Cape Town for his work. She did not tell her family or friends about the affair lest the appellant would be held responsible or disliked. All their friends saw them as a perfect couple. There was no one to talk to about what was happening to her emotionally. This was distressing to her as she was trying to deal with her problems on her own.

[8] The deceased informed Ms Newcombe that the appellant was angry because she wanted to accompany him to the conference in Stellenbosch and was looking for reasons for her not to attend. The deceased wanted to attend the conference for her and the appellant to be seen as a strong, intimate couple and so that Ms Alterskye would not think that there was space for her to be in a relationship with the appellant.

[9] In the last session with Ms Newcombe, there was a discussion to the effect that if she discovered that the affair was still ongoing, the deceased planned to leave the conference and go to her sister who resided in Cape Town. On the Friday evening of the conference, the deceased called her from the Spier Hotel and told her that she had been complimented at the conference for being beautiful and that she had no reason to feel threatened by younger women. Ms Newcombe considered that the deceased was distressed, anxious but not depressed. They had discussed that the deceased had nothing to be ashamed about and was entitled to be there. During the conversation between her and the deceased, which lasted about ten minutes, the deceased came across as being in control and ready to engage in the activities of the evening at the hotel. Later that same evening, she received a message from the deceased that said that she had greeted Ms Alterskye and that she wished she never had to meet her again.

[10] Ms Newcombe was of the view that the deceased had not given up on life and had several protective factors which would have prevented her from being suicidal. The deceased was very involved with and invested in her children. She cared about their development and discipline. She was involved in charitable work in her community. She had close friends and was well liked by others. There was no evidence of impulsivity or acting out behaviour. She progressed well during therapeutic sessions, and had no chronic mental challenges. She gave no indication of potential suicidal behaviour.

[11] Ms Nader was a marriage counsellor to the appellant and the deceased. They had engaged her in marriage counselling sessions with a view to restoring their marriage relationship. Their marriage had taken a strain as a result of the appellant's extramarital affair. Her early impressions of the behaviour of the deceased during the sessions concerned her, and she referred the deceased for onward psychological and medical intervention. Despite Ms Nader's advice not to do so, the deceased insisted to attend the upcoming conference at Spier. This took place during their last session on 20 July 2016. She was informed by the appellant on 27 July 2016 that the deceased had committed suicide.

[12] Dr Larissa Panieri-Peter is a forensic psychiatrist. She confirmed that the appellant had during September 2016 been referred to her for an independent psychiatric evaluation. The purpose was for her to conduct a broad forensic psychiatric assessment as well as to comment on any findings that might or might not in forensic psychiatric terms be congruent or incongruent with an intimate partner homicide. In addition, she was requested to conduct a retrospective independent psychiatric assessment, a so-called psychological autopsy, of the deceased, based on her known history. She was also specifically requested to comment on any features pertaining to the deceased that might or might not, in forensic psychiatric terms, be congruent or incongruent with suicide.¹

[13] According to Dr Panieri-Peter, there was evidence from observed facts, reports of professionals, the appellant, other persons closely linked to the appellant and previous witness testimonies, that the affair resulted in a drastic change in the deceased's demeanour. In addition, Dr Panieri-Peter considered that the deceased's insecurities, vulnerabilities, genetic risk factors to suicide, narcissistic traits, perfectionism and need for the world to see her as being perfect, resulted in the deceased suffering from major depression which increased her risk of suicide.

¹ Psychological autopsy, psychiatric autopsy, retrospective death assessment, reconstructive evaluation and equivocal death analysis. This is a procedure for investigating a person's death by reconstructing what the person thought, felt and did preceding his or her death.

[14] She disagreed with Ms Newcombe that the deceased was not a suicide risk. Even though she confirmed that Ms Newcombe was in a better position than her to make an assessment, because she had consulted with the deceased personally, she believed that the deceased was not properly assessed by the psychologist. However, Dr Panieri-Peter's evidence was based on what she had been told by unidentified and identified people. The identified persons did not include family or close friends of the deceased, except for one of her daughters. They elected not to be interviewed by Dr Panieri-Peter.

[15] Prior to the commencement of the evidence of Dr Panieri-Peter, counsel for the respondent, who had been furnished with her report, indicated that he objected to admission of evidence in accordance with the report. The trial court ruled, however, that it would allow the evidence and that it would 'decide ultimately what weight to attach to the evidence of this witness'. The witness proceeded to give the evidence set out above. She was nevertheless not permitted to conclude her evidence. When the court reconvened on the following morning, the trial judge, without affording counsel an opportunity to address her, made the following ruling:

'In view of the fact that this is my attitude, and unless there's anything that this witness would like to draw to the Court's attention other than what's set out in the report further examination is disallowed. It follows that Mr van Niekerk is not required to cross-examine this witness and this Court furthermore has no questions for this witness.

Accordingly this witness would be excused, thank you.'

We shall revert to the reasons for and the effect of this ruling.

Factual evidence

[16] It is common cause that the appellant called the reception desk at the hotel at 08h22 on 24 July 2016 for assistance to open the bathroom door of the suite. Mr Desmond Daniels, a maintenance worker, was dispatched to unlock the door. He testified that he had received a report that the bathroom door could not open. He went to the room and knocked on the door, which was opened by the appellant. He testified that the appellant informed him that the bathroom door could not open. He turned the handle of the door but the door could not open. He used a screwdriver to open the door.

[17] On opening the door, he saw a person's legs on the floor under the basin. He opened the door approximately 15 centimeters. The door opened with ease and there was no resistance when he pushed the door open. He saw the person's legs from the knees to the feet. The appellant called out to the deceased and went past Mr Daniels into the bathroom. He waited outside the bathroom, where he faced the wall. After the appellant went into the bathroom, there was silence for about 2 to 3 seconds, then the appellant called him to come and help him.

[18] When he entered the bathroom the appellant asked him to assist in removing an electric cord from the neck of the deceased. The appellant held her under the arms from the back so that she faced the witness. The deceased was completely naked and not breathing, and there was a cord around her neck. He illustrated how the cord was hanging around the deceased's neck and from the hook behind the door. The cord was not tight around the neck as he could remove it easily with the appellant holding the deceased. Mr Daniels removed the cord and then went out of the bathroom. The appellant remained in the bathroom with the deceased in his arms.

[19] He confirmed that the door could be unlocked or locked from the outside by using a screwdriver, teaspoon or coin. Under cross-examination, he said that he was not told by the appellant that there was someone inside the bathroom. He opened the door and the body was not against the door.

[20] Mr Mark Thompson knew the appellant and worked with him. He attended the conference at the Spier Hotel. After breakfast on Sunday 24 July 2016 he heard from colleagues that there was trouble in the appellant's room. He went there and arrived at the room at approximately 08h32. He saw the deceased's body lying on the bathroom floor and the appellant seated next to her. The appellant asked for help. He had never performed cardiopulmonary resuscitation (CPR), but he felt he had to do something and proceeded to heavily compress the deceased's chest and to blow into her mouth. He attempted to resuscitate her for between half an hour and 45 minutes. He realised that the deceased's body was cold and that she was dead. During this time the appellant also blew into the deceased's mouth. The deceased's nose began to bleed and the witness wiped off the

blood with a tissue and started to compress her chest again. Under cross-examination he said that even though his arms were aching and he knew that the deceased was dead, he kept going with the CPR-attempt.

[21] Mr Peter Norton, who is married to the deceased's sister, was notified on the Sunday morning of the death of the deceased. He went to the Spier Hotel and found the appellant there with other relatives, including the father of the deceased, Mr Neville Holmes. Mr Holmes enquired from the appellant as to what had happened. The appellant explained that he and the deceased had had a fight. Mr Holmes asked to see the appellant's hands. Mr Norton said that he looked at the appellant's hands when he showed them to Mr Holmes, and that there were no marks on his hands. The evidence of Mr Norton was not disputed.

[22] It is necessary to make reference to the evidence of Captain Marius Petrus Joubert and of Colonel Sharlene Otto. Captain Joubert is an expert in forensic crime scene and bloodstain pattern analysis. Colonel Otto is an expert in DNA analysis. The evidence of these witnesses was not disputed. Captain Joubert attended the scene on the afternoon of 24 July 2016. He found the body of the deceased still lying on the bathroom floor. He observed several bloodstains at the scene. A number of the bloodstains were on the floor in the bedroom, in the passage between the bedroom and the bathroom and in the bathroom. He also found bloodstains on a pillowcase on the right-hand side of the bed (looking at it from the foot), on a pillowcase on the floor to the right of the bed, as well as on the bedsheet and duvet cover. Captain Joubert took extensive photographs of the scene, including of the body of the deceased and of the bloodstains.

[23] Colonel Otto analysed samples that had been taken from the bloodstains. She found the DNA of the deceased in the bloodstains on the floor of the passageway and bathroom, as well as on the duvet cover, the bedsheet, the pillowcase on the bed and the pillowcase on the bedroom floor. She also detected the DNA of the appellant in samples taken from the bloodstains on the bathroom floor, the duvet cover and the pillowcase on the bedroom floor. Captain Joubert expressed the opinion that the bloodstains that had emanated from the appellant were caused by 'most probably a very insignificant small cut' that the appellant may not have been aware of at the time. He also said that the appellant's blood may have

been deposited at any stage during his stay in the room, that is, from Friday 22 July 2016. It was common cause that scrapings that had been taken from underneath the fingernails of the deceased contained only her DNA.

[24] In his defence, the appellant testified that he had met the deceased in 1989, and they had married in 1993. They lived in Australia for some years, after which they returned to South Africa. They had three daughters: their first daughter and then twin daughters. He described the deceased as a perfectionist who was committed to her goals. She would deal with confrontation head on, whilst he would shy away from it. He testified that their relationship had its ups and downs. Whilst their verbal altercations were awful, they never escalated into physical violence. He said that the deceased was devastated and was consumed by his affair with Ms Alterskye. Their relationship suffered as the deceased vacillated between anger and anxiety, which was exacerbated by him withdrawing emotionally from her. Although they attended sessions with a marriage counsellor, he continued with the extra-marital affair. He admitted that he had led a double life, lying to the deceased, his therapist and the marriage counsellor. He testified that the deceased had insisted on attending the conference at the Spier Hotel. The deceased wanted to ensure that he was not seeing Ms Alterskye and also to show that he and the deceased were together. However, the appellant was afraid that the deceased would confront Ms Alterskye and cause a scene.

[25] They arrived at the Spier Hotel at noon on the Friday. They attended the award ceremony on the Saturday evening, which ended at about 22h30. On their way to their hotel room, two co-employees who passed them, invited him to join them at an after-party. The deceased insisted that they return to the suite and would not let him go. Whilst the deceased was undressing he went into the bathroom and began to type a message to Ms Alterskye on his cell phone. The deceased became aware thereof. The deceased was enraged. He retaliated verbally, and wanted to leave the suite. The deceased attempted to physically prevent him from leaving the room. They physically grabbed at and pushed each other. In order to get her out of his way, the appellant grabbed the deceased by the neck and shoved her. During the altercation she was also struck on the side of her face by the

soft part of his forearm. He insisted that the deceased had not been injured by these actions at all.

[26] He managed to leave the suite. The deceased followed him. She was wearing a white towelling gown and no shoes. He got to the room where the after-party was being held and sat on the bed opposite Ms Alterskye. The deceased stood in the doorway telling him to leave the room. He was embarrassed and was afraid that there would be an altercation between Ms Alterskye and the deceased. He got up and left the room. On the way to their room, the deceased grabbed him from behind. He swung his arm back and hit her on the nose with his elbow. Her nose did not bleed. On the way the deceased also fell between a small ledge and a flower bed and cut her toe. In the hotel room the deceased complained about her bleeding toe. He also noticed a graze on her left eyebrow. He undressed and got into the bed. He told the deceased that they were 'finished'. She continued to rant, calling him an adulterer and a cheat.

[27] He fell asleep and did not know at what time the deceased went to bed. The following morning at 7 am, the deceased woke him up and informed him that she had received messages from Ms Alterskye. The deceased was furious and continued to rant. He saw the deceased walk towards the bathroom and heard her shut the door. He fell asleep again. Sometime later he woke up, and tried to get into the bathroom to prepare for the conference breakfast programme. He called out to the deceased to open the door. He thought she was having a bath. He got dressed. He then phoned the deceased and heard her phone ringing in the bathroom. He became concerned and called reception for a maintenance person. He then tried to push the bathroom door open, kicked it and nudged it with his shoulder.

[28] Mr Daniels arrived and the appellant informed him that the bathroom door was locked. Mr Daniels unlocked the door and stepped back. The appellant opened the door a couple of inches, until the door was blocked. The door only partially opened as the deceased was behind the door. The deceased was hanging behind the door in a crouched position. He picked up the deceased and called Daniels to assist him, as he would not have been able to remove the cord from her neck. It was not a loose knot but was very tight around her neck. He testified that Mr Daniels 'wiggled' the knot and slipped it over her head.

[29] He testified that the cord depicted in photographs taken by the police is exactly how the cord was tied to the hook and how the cord was left. He indicated that he had no recollection of how many times the cord was wrapped around her neck. However, he was certain that the tension was taut. He immediately laid the deceased down. Before he proceeded with mouth-to-mouth breathing and chest compressions, he noticed saliva coming out of the left side of the deceased's mouth. He had not previously done CPR. He blew into her mouth and continued to do this until Mr Thompson arrived. He, together with Mr Thompson, continued performing CPR until the paramedics arrived, who after performing certain tests declared the deceased dead on the scene. He denied having caused the deceased's death, in any manner, and further denied obstructing the course of justice by tampering with the scene.

Pathologists' evidence

[30] Four specialist pathologists testified at the trial. The respondent called Dr Akmal Coetzee-Khan and Dr Deidre Kay Abrahams. Dr Geanas Perumal and Dr Isak Adriaan Johannes Loftus testified for the defence.

[31] Dr Coetzee-Khan testified that he was employed by the Department of Health of the Western Cape Provincial Government at the Vredenburg Forensic Pathology Laboratory. Its area of responsibility included the district of Stellenbosch. Dr Coetzee-Khan is an experienced forensic pathologist. By July 2016 he had performed nearly 3 000 medical-legal post-mortem examinations. These included a significant number of cases of hanging, strangulation and suffocation.

[32] At the request of the South African Police Service (SAPS), Dr Coetzee-Khan attended the scene at the Spier Hotel on 24 July 2016. He arrived there at approximately 12h45. He made notes of his observations immediately after the completion of his inspection of the scene. He made use of these notes to compile an incident scene report on 28 July 2016. The injuries to the deceased that he had observed on the scene were more fully described in the report of the post-mortem examination of the body of the deceased that we shall refer to shortly. However, there are a few aspects of Dr Coetzee-

Khan's incident scene report and his evidence in respect thereto, that need mentioning in the light of the argument presented to us on behalf of the appellant.

[33] In the incident scene report, Dr Coetzee-Khan stated that the death of the deceased took place at approximately 05h40 on 24 July 2016. In his evidence in chief he explained that he had based this estimation on a calculation that death had occurred 7 hours and 30 minutes prior to 13h10 (when the calculation was made). He said that this meant that there was a 95 percent probability that death occurred at 05h40, with the possibility of a 2.8 hour (2 hours and 48 minutes) deviation either way.

[34] During cross-examination, however, he conceded that he had misinterpreted the chart generally used for calculating estimations of this nature (referred to as a nomogram). The nomogram provides a crude estimate of time of death based on the actual or adjusted rectal temperature of the body, the mass of the body and the relevant ambient temperature. Dr Coetzee-Khan conceded that on the temperatures and mass that he had applied to the nomogram, he should have said that there was a 95 percent probability that death had occurred during the period from 2 hours 48 minutes prior to 05h40 to 2 hours 48 minutes subsequent to 05h40, that is, between 02h52 and 08h28.

[35] Dr Coetzee-Khan also stated in the incident report:

'Post-mortem lividity is well established, fixed and located posteriorly with contact pallor over the shoulder blades and buttocks. There is no lividity noted anteriorly over the lower limbs. The features of lividity is not consistent with death in an upright position. The post-mortem lividity would indicate death in a supine and lying position.'

He reiterated this position in his evidence in chief.

[36] Lividity is reddish or blueish colouring caused by hypostasis. Hypostasis can for present purposes be described as the accumulation of blood in the lower parts of a body after death, as a result of gravity. The parts of the body that were in contact with the relevant surface at the time when hypostasis developed would typically not exhibit lividity but pallor (paleness). Post-mortem lividity generally commences within 30 to 60 minutes after death,

takes about three to four hours to establish and should be completely established after about six hours.

[37] During cross-examination Dr Coetzee-Khan accepted that hypostasis and lividity could only indicate the position of the body at the time when they developed. Thus, if a person dies in a vertical position but the body is within 30 to 60 minutes thereafter placed in a horizontal position, lividity would be established in the horizontal position. In the light hereof, Dr Coetzee-Khan conceded that the lividity that he had observed could be consistent with the deceased being placed on her back on the bathroom floor within 30 to 60 minutes after she had died as a result of hanging.

[38] In the incident scene report Dr Coetzee-Khan stated that he had recommended to the SAPS that the case be investigated as a possible homicide, that the appellant be examined for injuries and that his passport 'be removed until investigative process is complete to prevent him fleeing the country'. When he was taken to task in cross-examination for making these recommendations, he said that the first two recommendations had been based on his observations at the scene and the last on his previous experiences when potential suspects had fled the country. He commented that it was up to the SAPS to accept or ignore the recommendations.

[39] Dr Coetzee-Khan performed the autopsy on the deceased on 26 July 2016 at the Paarl Forensic Pathology Laboratory. He continuously made contemporaneous notes of his observations and findings during the procedure. He used these notes to compile the formal medical-legal post-mortem examination report that was handed in as an exhibit at the trial. More than 150 colour photographs that had been taken during the autopsy, were also handed in as exhibits.

[40] External examination of the body by Dr Coetzee-Khan revealed that the deceased had sustained multiple fresh bruises, abrasions and scratch marks. In view of the findings of the court a quo that we shall deal with in due course, it is necessary to tabulate these injuries. There were abrasions to the right inferior temporal scalp and right lateral upper neck. There was a scratch mark on the angle of the right lower jaw, a scratch mark on the

left lower jaw and three scratch marks on the left interior neck. Dr Coetzee-Khan opined that the scratch marks were caused by fingernails. He also observed a haematoma to the left upper eyelid with an associated abrasion. This indicated blunt trauma to the face.

[41] He noted an abrasion on the left shoulder with associated bruising. These injuries indicated blunt trauma in the nature of having fallen on or been dragged over a rough surface. There was bruising of the left knee and anterior lower legs. He found bruising and abrasion marks on the knuckles of the left hand, as well as bruising of the left wrist and forearm. The injuries to the arm, wrist and hand were defence type injuries. Dr Coetzee-Khan noted small abrasions on the big toe and second toe of the left foot and the second toe of the right foot. It was accepted at the trial that the deceased was a person that bruised easily. When the appellant's aforesaid version was put to Dr Coetzee-Khan, his response was to the effect that he accepted that most of the aforementioned bruises and abrasions (but not the scratch marks) could be consistent therewith.

[42] Dr Coetzee-Khan testified that there was a contusion of the posterior scalp. A contusion usually means a bruise (haematoma) that does not involve the skin. This was an indication of blunt force to the back of the head. When this was questioned in cross-examination, Dr Coetzee-Khan convincingly explained that he had cut into the scalp contusion to ensure that it was not an artefact (a defect or abnormality that occurred after death).

[43] He detected fractures of the third, fourth and fifth ribs anteriorly on the right-hand side, with surrounding haemorrhages (bleeding) of the intercostal muscles. He also observed haemorrhages of the right anterior chest wall which was indicative of blunt force or trauma to that side of the chest. He conceded that the rib fractures and associated haemorrhages might have been caused by a vigorous attempt at CPR, especially by an unskilled person. He said that there was no fracture of the left ribs and pointed out that this was borne out by the relevant photographs. He further testified that there was contusion of both lungs anteriorly. He accepted, however, that CPR could also have caused the bruising of the lungs.

[44] Dr Coetzee-Khan noted pallor over the tip of the nose, as well as the upper and lower lips. The nose was also slightly deviated to the right. He said that in combination with pharyngeal soft tissue haemorrhages and congestion (increased blood circulation) at the base of the tongue, these features were consistent with external airway obstruction (smothering). He did also say, however, that on its own, pallor is not diagnostic of smothering and that congestion is a non-specific indication of asphyxia (lack of oxygen).

[45] There was no food in the stomach. It did, however, contain approximately 100 millilitres of fluid consisting predominantly of blood. In addition, the small intestines contained 100 to 200 millilitres of altered blood. As there was no source of this blood in the digestive channel (such as an ulcer), the deceased must have swallowed the blood. This meant that over a period of time she had swallowed what was referred to in evidence as a cup of blood (the ingested blood). She could only have done so whilst alive. Dr Coetzee-Khan's opinion was that the contusions of the lungs had been the source of the ingested blood. He said that she had most likely coughed up the blood before ingesting it.

[46] Dr Coetzee-Khan proceeded to give a detailed description of a ligature imprint on the neck of the deceased. In this regard the expert witnesses were agreed that in the case of hanging with a ligature around the neck, friction would generally cause abrasion (removal of the superficial layer of the skin), leading to vital reaction of the skin and tissue affected by the ligature. The vital reaction would cause the ligature imprint post mortem to have a parchment-like (parched) and leathery appearance. If, on the other hand, a ligature was applied post mortem, there could be no vital reaction and the ligature imprint would have a blanched or pale character. There may in such a case be some redness above and below the ligature mark, but that would not be vital reaction but simply displacement of the blood from the blanched area (hyperaemia). One could feel the parched and leathery character of an ante-mortem ligature mark. It therefore goes without saying that for purposes of determining whether a ligature imprint was made before or after death, a physical examination thereof should be preferred over the viewing of photographs of the ligature imprint.

[47] The witness testified that the ligature mark was incomplete. It was situated only on the front and left sides of the neck. It was put to Dr Coetzee-Khan that Dr Perumal had observed a more or less horizontal linear mark at the back of the neck and he was shown photographs thereof. He responded that the mark might have been an artefact caused by the wooden block that had been placed underneath the neck/shoulder area for purposes of dissection of the neck. He pointed out that the mark at the back of the neck on the photographs did not appear parched or leathery.

[48] The mark was more or less horizontal but sloped slightly upwards where it terminated just before the right ear. On the left, it did not enter into the hairline. He said that the mark was not parched or leathery. He testified that the reddened area that could be seen above and below the ligature mark on the left side of the neck, was not vital reaction but post-mortem displacement of blood. He said that in his experience the use of the cord of the electric hair curler on the scene for hanging, would, unlike a softer ligature such as a scarf, have caused friction abrasion. Thus, the absence of vital reaction and resultant parched and leathery imprint was not consistent with ante-mortem application of the ligature.

[49] The experts also agreed that in attempting to determine whether this was a case of hanging or manual strangulation, it was crucial to perform a bloodless neck dissection. The essence of this procedure is the creation of a bloodless field by draining as much blood as possible from the neck area, followed by a layered dissection of the muscles and tissue of the neck. Because the neck tissue is dissected layer by layer, it is not possible to repeat this procedure.

[50] During the bloodless neck dissection performed by Dr Coetzee-Khan, he detected multiple haemorrhages. He detected these haemorrhages at the following locations in the neck: (a) the right sternocleidomastoid muscles; (b) the left sternocleidomastoid muscles; (c) the left anterior neck muscle under the jaw; (d) the left anterior muscles of the cervical spine column; (e) the right submandibular gland; (f) the left para-tracheal lymph node and soft tissue; and (g) the left thyroid-hyoid ligaments and left side of the thyroid gland.

[51] He also observed a fracture of the left superior horn of the thyroid cartilage, with surrounding haemorrhages, indicative of ante-mortem fracture. He dissected the hyoid bone out. This is a u-shaped bone between the chin and the thyroid gland that supports the tongue muscles. The hyoid bone was intact. This was clearly depicted on a photograph. There were, however, haemorrhages to the left of the hyoid bone.

[52] For convenience, and unless the context indicates otherwise, we refer to the fracture of the thyroid cartilage and the aforesaid haemorrhages collectively as 'the neck injuries'. All the neck injuries were located well above the ligature mark. Some of them were directly underneath scratch marks that we have referred to. Importantly, a number of the neck injuries were situated deep into the structures of the neck. The neck injuries thus indicated that considerable force had been applied to the neck that was unrelated to the ligature imprint. The neck injuries were situated on both sides of the neck and were consistent with strangulation by hand. Dr Coetzee-Khan concluded that these observations were consistent with asphyxia following manual strangulation and external airway obstruction and that the features of the ligature imprint were consistent with post-mortem application to the neck.

[53] Dr Abrahams testified that she was the head of the clinical unit of the Paarl Forensic Pathology Laboratory and as such she was the superior of Dr Coetzee-Khan. She said that she had performed approximately 9 000 autopsies, many of which were similar to the case in question. She attended the autopsy of the body of the deceased at the request of Dr Coetzee-Khan, to provide 'a second pair of eyes', as it was presumed that the case would attract a lot of attention. Dr Abrahams confirmed the observations of Dr Coetzee-Khan at the autopsy in all respects. She said that they found that the deceased had been manually strangled and that there was evidence of external airway obstruction or suffocation.

[54] Dr Perumal had been in private practice as a forensic pathologist from 1994 to 2016. During 2016 he took up an appointment as chief forensic pathologist of the Department of Health of the Mpumalanga Province. He is a very experienced forensic pathologist, having performed in excess of 10 000 autopsies.

[55] Dr Perumal performed a second autopsy on the body of the deceased on 1 August 2016 in Braamfontein. He also took photographs of the body. He explained that for various reasons a second autopsy is not ideal. These reasons include that in the reconstruction process (stitching up) of the body after an autopsy, it is not fully returned to the original anatomical position, that it is not easy or at times possible to reconstitute dissected organs or tissue to their original state and that changes are brought about by the onset of decomposition. To this may be added that some features observed at the first autopsy may no longer be available, such as, in this case, the ingested blood. Nevertheless, Dr Perumal's autopsy confirmed the major part of what had been observed at the first autopsy. At the conclusion of Dr Perumal's evidence much of the evidence of Dr Coetzee-Khan and Dr Abrahams that had been disputed during cross-examination, were no longer in dispute. In what follows we discuss the remaining areas of dispute, difference or uncertainty.

[56] Dr Perumal observed that the sixth rib on the right had also been fractured, in addition to the three rib fractures detected at the first autopsy. He observed 'a bit of haemorrhage' associated with these fractures, which indicated that they had occurred whilst there was some blood circulation. He also noticed fractures of the second to fifth ribs on the left. There was no haemorrhage associated with these fractures, which indicated that they had been sustained after blood circulation ceased. In addition, he observed a fracture of the middle part of the sternum, also with no associated haemorrhage.

[57] He expressed the opinion that the fractures of the ribs and sternum, the lung contusions and the haemorrhages of the right interior chest wall could have been caused by attempted CPR. He said that it was not apparent from the photographs that there was pallor of the tip of the nose or the lips. He stated that he did not regard pallor of the nose and lips as objective indicators of smothering. A facial flap dissection, on the other hand, would reveal whether there were underlying bruises of the facial tissue. Unlike Dr Coetzee-Khan, Dr Perumal performed a facial flap dissection and found no evidence of smothering.

[58] Dr Perumal testified that the blood in the stomach and altered blood in the small intestines indicated that there had been two episodes of ingestion of blood. He said that it

was virtually impossible for the ingested blood to have emanated from the pulmonary contusions, as opposed to a vascular injury in the lung. His opinion was that the ingested blood had emanated from bleeding of the deviated nose.

[59] Dr Perumal accepted that the application of a smooth ligature after death, would leave an imprint that was not parched or leathery. In his evidence, Dr Perumal glossed over what he had recorded in his autopsy report in respect of the ligature mark, an aspect that we shall return to. He said that ‘making room for changes in the few days . . . I’d rather defer to the photos taken earlier’. He proceeded to give evidence to the effect that these photographs (taken by Captain Joubert and at the first autopsy) showed that the bulk of the ligature mark had a parched and leathery appearance. This formed the basis of his evidence that, for the most part, the ligature imprint exhibited ante-mortem vital reaction.

[60] Importantly, Dr Perumal did not dispute the evidence that the neck injuries were not situated underneath the ligature mark but were located well above it. Although he repeatedly stated that these types of injuries were frequently seen in cases of hanging, he did not provide an explanation for their distant location from the ligature mark until right at the end of his evidence in re-examination. There he said that as a result of the pull of the body in hanging and the convulsions that occur as part of the process of death ‘a lot of the injuries that are observed, if not all that were observed can be observed in hanging’.

[61] Dr Perumal also referred to the evidence of the appellant that he had observed that a trickle of saliva flowed from the left corner of the mouth of the deceased. Ultimately his opinion was encapsulated in the following:

‘I just want to say because, as I explained at various stages, the findings in the neck could well be as a result of throttling or manual strangulation and I indicate to the Court there are two competing causes . . . , and the injuries that we see could be seen in both scenarios, but because of the appearance of the ligature mark and the saliva, I favoured the version that, or the cause of death that it is more likely to be hanging. The probability is more likely to be hanging. But there is no way I can stand before this Court and say that manual strangulation . . . , is excluded beyond any reasonable doubt. So . . . , I’m not saying in this report that that’s the only diagnosis that I’m entertaining.’

[62] Dr Loftus is a forensic and anatomical pathologist. Since 1994 he practiced predominantly as an anatomical pathologist. He did not perform an autopsy on the body of the deceased. His opinions were based on the evidence that had been presented in the case, especially the photographic evidence.

[63] He agreed with Dr Perumal that the contusions of both lungs could be related to CPR attempts. He also said that in his opinion the ingested blood did not emanate from the lung contusions. The reason for this was that had the lung injuries been so serious as to cause the deceased to cough up and swallow the said quantity of the ingested blood, she would in all probability also have aspirated (inhaled) blood. Aspirated blood would have caused a leopard skin appearance of the surface of the lungs and there was no sign thereof.

[64] Unlike Dr Perumal, Dr Loftus was adamant that there was no fracture of the left superior horn of the thyroid cartilage. He insisted that the defect in the cartilage was an artefact, caused by an incision during the first autopsy. Also, unlike Dr Perumal, he attempted to show that some of the neck injuries corresponded directly to the ligature imprint. We shall analyse this evidence shortly.

Trial court judgment

[65] The trial court found that Ms Newcombe and Ms Nader were reliable witnesses who gave evidence in a credible and trustworthy manner. In respect of Mr Daniels, it held that the differences between his statements and his evidence were not material. It said that notwithstanding the shortcomings in his evidence, it was reliable and credible in all material respects. The court a quo also accepted the evidence of Mr Thompson. The expert evidence of Dr Coetzee-Khan and Dr Abrahams impressed the court. It found their evidence to be trustworthy. It held that the same could not be said of the evidence of Dr Perumal and Dr Loftus. In essence, the court regarded their evidence as not objective. Finally, it rejected the evidence of the appellant as not reasonably possibly true.

[66] The court referred to the pillowcase on the bed with bloodstains that had emanated from the deceased. It can be accepted that two further marks on this pillow were mascara marks that had originated from the deceased as well. The court said that this pillowcase

had been on the side of the bed where the appellant slept and that the deceased had not slept on it. The court proceeded to say:

‘The Court is able to see for itself that the markings on this pillow are identical to the markings on the face of the deceased, as noted at the time of her death. The bloodstain on the left of the pillow, consistent with the abrasion on her left eye, is imprinted twice on the pillow, one slightly above that of the other. This is consistent with the imprint caused by 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.’

[67] As to what had transpired after 07h00 on the morning of 24 July 2016, the court a quo said that the evidence painted a ‘vivid picture’, which included the following:

‘Heated exchanges on the bed must have led to physical violence. At this point the deceased is on the right of the accused and in all likelihood he struck a punch at her, whilst on the bed, hitting her left eye and causing the abrasion to her left occipital bridge with his ring bearing fist. At some point during this “*wrestling match*” the accused manually strangled the deceased. The evidence clearly reveals that the accused manually strangled the deceased and smothered her with a pillow and exerted pressure on her chest resulting in her ribs being broken. Possibly it was at this point that the accused sustained a bleeding defensive wound to his finger. For how long he remained in this position is uncertain, but when he got up, he devised a plan to set a scene telling a story of the deceased ending her own life.’

Fair trial

[68] In its aforesaid ruling during the testimony of Dr Panieri-Peter, the trial court held that the whole of her evidence, including the evidence foreshadowed in her report, was inadmissible. It essentially reasoned that the witness purported to usurp the function of the court and that the evidence was irrelevant. This was true of some, but not all, of the evidence of Dr Panieri-Peter. The appellant correctly contended that the evidence of Dr Panieri-Peter as to whether the deceased had been depressed and had been a suicide risk, was relevant and admissible. The appellant was entitled to lead this evidence, at least to counter the contrary evidence of Ms Newcombe and Ms Nader. The court a quo therefore erred in not allowing this part of the evidence of Dr Panieri-Peter.

[69] We are satisfied, however, that this irregularity did not result in an unfair trial. The important point is that in her evidence prior to the ruling, Dr Panieri-Peter fully set out her opinion in this regard and the reasons therefor. That evidence forms part of the record before us and we are able to afford it the weight that it would deserve. And in the light of the conclusion that we have reached, it is not necessary to analyse this evidence.

Evaluation of pathologists' evidence

[70] We now turn to an evaluation of the divergent opinions of the pathologists. It is well established that this requires a determination of whether and to what extent their opinions are founded on logical reasoning or are otherwise valid. It is about the cogency of the underlying reasoning which lead the experts to their conflicting opinions. See *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) paras 36-39; *Minister of Transport NO and Another v Du Toit and Another* 2007 (1) SA 322 (SCA) para 16; and *Buthlezi v Ndaba* 2013 (5) SA 437 (SCA) para 14.

[71] It is true that Dr Coetzee-Khan erred in respect of the estimation of the time of death and the role of lividity in respect of the cause of death. However, the calculation in terms of the nomogram could provide no more than a crude estimation. Dr Coetzee-Khan's incorrect estimation was made without knowledge of the appellant's version and could not have been aimed at discrediting it. We cannot fathom how this could detract from the reliability of the observations at the first autopsy and resultant conclusions. The same applies to the error in respect of the role of lividity in the incident scene report. On the evidence as a whole the contention that the recommendations to the SAPS indicated that Dr Coetzee-Khan had prejudged the matter, is baseless. At best for the appellant, Dr Coetzee-Khan might have missed the ligature mark at the back of the neck and/or the post-mortem fractures of the ribs on the left and the sternum. Even so, in our view, nothing turns hereon.

[72] There were some troubling aspects of the evidence of Dr Abrahams. These included her stance that a forensic pathologist employed by an accused person would invariably not be impartial, her attempt to defend the errors in respect of the time of death and the role of lividity that Dr Coetzee-Khan had conceded and the general rigidity of her opinions.

There is, however, no reason to question the factual corroboration that her evidence provided to that of Dr Coetzee-Khan.

[73] It will be recalled that Dr Loftus did not perform an autopsy. His suggestion that he performed a digital bloodless field dissection, was quite inaccurate; he only viewed photographs. He jumped to conclusions, which he then expressed in the strongest of terms. To illustrate, he pointed to a darkened area between the clay tiles on the bathroom floor that was visible on photographs taken by Captain Joubert. There were several such areas visible on the photograph, but he pointed to the one between the knees of the body of the deceased on the floor. He not only said that that was fluid, but that it was urine that the deceased had passed at that spot at the moment when she died. He said:

'M'Lady, I believe that and I'm saying it from a position of after taking everything into account, I believe that beyond reasonable doubt the deceased on that morning hanged herself in the bathroom, she didn't die, she didn't die instantaneously, she was rescued if I can call it or taken off from the ligature mark, off from ligature and she was unsuccessfully resuscitated. In that period taken off or let's say since the ligature exerted its force until whenever she passed the urine that was the process of dying.'

[74] Dr Perumal initially also said that, in his opinion, the thyroid cartilage had inadvertently been incised during the neck dissection. In his later evidence he made it clear that he accepted that this was an ante-mortem fracture. This concession had a sound foundation. Both Dr Coetzee-Khan and Dr Abrahams testified that the neck dissection had been performed with care, there were haemorrhages associated with the fracture and the jagged edges thereof could be seen on a close up photograph taken at the first autopsy. Dr Loftus's insistence that this was an artefact was not founded on logical reasoning.

[75] As we have said, Dr Loftus attempted to show that (some of) the neck injuries were in fact spatially related to the ligature mark. In an attempt to show why Dr Coetzee-Khan and Dr Abrahams had erred in this regard, he said that it was technically difficult to correlate the external neck injuries with the internal injuries, because of what he termed the hyperextension of the neck during the bloodless neck dissection. That he had erred in this regard or why, was not put to Dr Coetzee-Khan in cross examination. Dr Abrahams was

confronted with this but testified that they had taken the possibility of distortion into account. It apparently did not occur to Dr Loftus that it was infinitely more difficult for him to perform the correlation exercise at least because, as he lamented, the photographs had been taken from different angles and distances.

[76] In a presentation that formed part of his evidence, Dr Loftus indicated that the haemorrhages of the left sternocleidomastoid corresponded with or appeared to correspond with the ligature mark. His presentation did not deal with any of the other neck injuries in this manner. In evidence he said that the 'quite extensive' haemorrhages of the submandibular gland were in line with the ligature mark. This was plainly wrong. When he dealt in evidence with the aforesaid presentation in respect of the haemorrhages of the left neck muscles, he unexpectedly said that they were in fact not in line with the ligature mark. He suggested that this did not matter, as these haemorrhages had probably been caused by severe muscle contractions during a convulsive death. His evidence in respect of the location of the other neck haemorrhages in relation to the ligature mark was vague and inconclusive. His evidence on this subject was unconvincing, to say the least.

[77] For these reasons the opinions of Dr Loftus that differed from that of the other pathologists were unacceptable.

[78] As we have said, for Dr Perumal the parched and leathery appearance of the ligature mark and the alleged dribbling of saliva tipped the scale in favour of hanging. But this is what he had to say in respect of the ligature mark in his autopsy report:

'Ligature imprint, almost circumferential around the neck. The imprint was for the most part, comprised of a centrally blanched area, averaging 5mm wide. Parts of these blanched areas had associated hyperaemic areas above and below the blanched imprint. The imprint anteriorly sloped upwards towards the right. The imprint on the back of the neck was almost transverse but sloped upwards towards the right. The lack of friction abrasions related to the ligature and the lack of associated oozing of serous fluid, is the reason why there is no dry, parched leathery ligature mark. There were bruises in the imprint on the left side anterolaterally. The imprint in this case is consistent with a smooth ligature like an electrical cord. There were no abrasions or bruises related to the superior or inferior aspects of the ligature imprint.'

[79] According to the evidence a parched and leathery ligature mark is created when the 'oozing of serous fluid' as a result of friction abrasion dries out. Thus, two important observations must be made. First, this description of the appearance of the ligature mark was almost identical to that of Dr Coetzee-Khan. Secondly, as we have demonstrated, Dr Perumal's evidence was that the smooth electrical cord in question had caused extensive friction abrasion and a parched and leathery appearance of the ligature imprint.

[80] There was no suggestion in the evidence that the ligature mark could have undergone a metamorphosis during the period between the first and second autopsies. By latching onto the earlier photographs to support an opinion directly contrary to his detailed written report, Dr Perumal illogically and unacceptably adjusted his opinion on a crucial aspect of the case. It follows that the evidence of Dr Coetzee-Khan and Dr Abrahams as to the appearance of the ligature mark was correctly accepted.

[81] Only the appellant testified that saliva had dribbled from the deceased's mouth. Whatever the reliability of this observation, it could have little weight on its own. Thus, the main pillar of Dr Perumal's essential reasoning crumbled. In the circumstances logical reasoning dictates that the neck injuries were caused by manual strangulation and that the ligature was applied post mortem.

Final analysis

[82] On the evidence it is reasonably possible that all or most of the bruises and abrasions that the deceased sustained, could have been caused by the fall and the altercations that the appellant described. It is not possible to determine how the scalp injury could have been sustained. Dr Coetzee-Khan conceded that the right rib fractures and the contusions of the lungs could have been caused by attempted CPR. The opinion of Dr Perumal that the same could apply to the bleeding of the right anterior chest wall was well supported by authority.

[83] The trial court erred in finding that the deceased had been smothered. There are three reasons why this finding cannot stand. The first is that the trial court made a material factual error. The pillowcase that it examined had been found on the right hand side of the

bed where the deceased slept. The evidence of the appellant in this regard was supported by that of Captain Joubert. Secondly, we accept that there may be circumstances in which a court may have regard to its own observations in respect of an exhibit before it. But save in exceptional circumstances where the observation is clear for all to see (including an appeal court), it should not be relied upon unless it was put to the relevant witnesses and/or the accused person to afford them an opportunity to respond thereto. The far-reaching observations of the trial court in respect of the photograph of the pillowcase were not put to any witnesses or to the appellant and could by no means be said to be clear. The trial court's reliance on its own observations was wholly unjustified. In the third place, the aforesaid evaluation of the expert evidence demonstrated that external airway obstruction was not proved beyond reasonable doubt.

[84] That the deceased did not hang herself, is also supported by the following factors. It is not possible to find beyond reasonable doubt that the source of the ingested blood was the lung contusions. Thus, it is reasonably possible that the ingested blood emanated from nose bleeds. But this also must count against the appellant. According to the evidence the deceased took good care of herself and of her appearance and was not a person to delay things. It is not conceivable that she would not attend to two episodes of nose bleeds but would rather swallow 200 to 250 millilitres of blood, unless she was somehow incapacitated. That is an indication that she did not hang herself.

[85] Counsel for the appellant fairly conceded that there was no reason to doubt the evidence of Mr Daniels in respect of the removal of the cord from the neck of the deceased. He said that the cord had been loosely around her neck and that he easily removed it without having to untie any knot. This too, points away from suicide by hanging. Finally, the fingernail scratch marks that were related to the neck haemorrhages correspond with strangulation by hand.

[86] For these reasons we are satisfied that the respondent proved beyond reasonable doubt that the deceased was killed by manual strangulation and that only thereafter the ligature was applied to her neck. It follows that the court a quo correctly convicted the appellant on both counts.

[87] However, it must regrettably be said that save for the findings that the appellant strangled the deceased and attempted to stage her suicide, the court a quo's 'vivid picture' constituted speculation in respect of both content and sequence. There was no evidential basis for the finding that the appellant had punched the deceased with his ring bearing fist. We have already pointed out that it is reasonably possible that the deceased was not smothered and that the right rib fractures were caused by attempted CPR. It will be recalled that Mr Norton testified that the appellant had no injury on his hands shortly after the incident and that Captain Joubert said that the minute quantities of the appellant's blood could have been deposited at any stage during his stay in the room. These matters need mentioning because they impact on the question of an appropriate sentence, to which we now turn.

Sentence

[88] It will be recalled that the trial court sentenced the appellant to an effective term of 20 years' imprisonment. The trial court, of course, sentenced the appellant on the basis of its factual findings referred to above. In its judgment on sentence, the court a quo accordingly said that the injuries that the appellant had inflicted on the deceased 'were successive and incremental' until they were fatal. On the trial court's findings, the appellant executed a sustained assault on the deceased that included hitting her with his fist, repeatedly smothering her and applying such force to her chest that she suffered rib fractures and lung contusions.

[89] For the reasons already mentioned, these findings do not withstand scrutiny. The appellant must be sentenced on count 1 on the basis that he unlawfully and intentionally killed the deceased by manual strangulation but did not assault her in any other way. It follows that this Court should consider sentence afresh.

[90] Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years' imprisonment in respect of count 1, unless there are substantial and compelling circumstances that justify a departure from the prescribed sentence. In *S v Malgas* 2001 (1) SACR 469 (SCA), Marais JA said that courts should not depart from the prescribed sentence lightly and for flimsy reasons which could not withstand

scrutiny. Substantial circumstances must compel a departure from the prescribed sentence on the basis that it would be disproportionate in the circumstances of the case.

[91] The appellant's personal circumstances are on record. He was 47 years of age at the time of the commission of the offence. He has three adult daughters. He has been a successful businessman and is capable of making a valuable contribution to society. He is a first offender.

[92] However, the appellant committed a very serious crime. He murdered his wife in a brutal and callous manner. The deceased's death must be devastating to her daughters and those who loved her. Regrettably violence against women and children has become a pervasive phenomenon internationally and this country has in recent times seen gender-based violence increase to intolerable and unacceptable proportions. The sentence of this Court must reflect the abhorrence of society with regard to violence against women. Furthermore, it is very important to bear in mind that the appellant is unrepentant and takes no responsibility for his crimes.

[93] After due consideration of all the relevant facts and circumstances, we find no substantial and compelling circumstances that justify a departure from the prescribed sentence of 15 years' imprisonment on count 1. In our view a sentence of three years' imprisonment is appropriate in respect of count 2. In the light of the cumulative effect of the sentences imposed, the sentence on count 2 should in terms of s 280(2) of the Criminal Procedure Act 51 of 1977 be ordered to run concurrently with the sentence on count 1. As the appellant served part of his sentence prior to his release on bail pending the appeal, the sentences must in terms of s 282 of the Criminal Procedure Act be deemed to have been imposed on 27 February 2019.

[94] In the result the following order is made:

- 1 The appeal against the convictions on counts 1 and 2 is dismissed.
- 2 The appeal against the sentences is upheld.
- 3 The order of the court a quo in respect of sentence is set aside and replaced with the following:

- ‘(a) On count 1 the accused is sentenced to 15 years’ imprisonment.
 - (c) On count 2 the accused is sentenced to three years’ imprisonment.
 - (c) The sentence on count 2 is ordered to run concurrently with the sentence on count 1.
 - (d) The accused is declared unfit to possess a fire-arm.’
- 4 The abovementioned sentences are deemed to have been imposed on 27 February 2019.

H SALDULKER
JUDGE OF APPEAL

C H G VAN DER MERWE
JUDGE OF APPEAL

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