

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate)

DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

Capital

EMLYN AUBREY OWEN

Appellant.

versus/teen

THE QUEEN

Respondent.

Appellant's Attorney
Prokureur van AppellantRespondent's Attorney
Prokureur van RespondentAppellant's Advocate
Advokaat van AppellantRespondent's Advocate
Advokaat van RespondentSet down for hearing on: Tuesday, 17th Dec, 1954.
Op die rol geplaas vir verhoor op:—(WLD)
2.14.1954

— Appeal on appeal. Entry allowed. Appeal against conviction and sentence, but the sentence is set aside and the case is remitted to the trial court to be re-tried from the stage of the evidence. (See written judgment.)
Advocate, Drogen, 1954/55
Procurator, 1954/55

IN THE SUPREME COURT OF SOUTH AFRICA(WITWATERSRAND LOCAL DIVISION).

In the matter of:

R E G I N A

versus

EMLYN AUBREY OWEN

J U D G M E N T

THERON, A.J.: In this case the Accused is charged with having, on the 1st February, 1956, and at Johannesburg wrongfully and
10 maliciously killed and murdered Florence Gwendolyn May Crutchfield.

The Deceased and witness John Martin Roberts, though not married lived together as man and wife at 24, King Edward Mansions, Pritchard Street, Johannesburg. For that reason, reference throughout this trial has been made to the Deceased as Mrs. Roberts.

The tenants of King Edward Mansions, including the Deceased, received notification to vacate the premises on the 31st January, 1956. Responding to this notice, the Deceased packed her belongings in preparation of her leaving this room.
20 The fact is proved by what was found in the room on the morning of the 2nd February last. Among others, there was found a roll of blankets at the top end of the bed rolled up and tied by means of a rope; certain oddments of furniture as well as other containers tied with rope were also found in this room.

The Deceased's reputed husband was at the time detained in the Fort having been detained on the 24th January in connection with some charge unassociated with her death.

Some tenants considered this building to be an unsavoury

one with danger lurking in the dark passages because of frequenters who habitually consumed liquor to excess and the immoral tendencies of some of the occupants in certain rooms. At the time of the death of the Deceased, certain four persons including her reputed husband were detained on allegations of conducting a brothel in this very building.

The Deceased herself was to figure as a Crown witness against them. She was a woman of approximately
10 54 years of age and she was described by her reputed husband as an alcoholic.

At the time of her death, the Deceased was certainly deeply intoxicated if not paralytic. The examination of her blood revealed a .35% weight over volume which is indicative of the extent of her intoxication depending upon her resistance to the effect of alcohol.

Due to a broken knee and some other infirmity in the other knee, she used crutches to get about. These
20 crutches were found in the North-West corner of her room on the morning of the 2nd February.

On the 29th January the Deceased visited her reputed husband at the Fort. He certainly observed no injuries upon her and she seemed to be in good health. There is no evidence about the further movements of the Deceased between this visit and the 1st February last. At approximately 10.30 in the morning of 1st February, 1956 Mrs. Scott saw the Deceased in her room. She appeared healthy and had no signs of injuries.

30 Between 6.30 and 7 p.m. in the evening of the 1st Mrs. King, another tenant in the same building, saw the

-- Deceased --

Deceased in room 24. She was alone and appeared to be in good health with no signs of any injury but she was clearly under the influence of liquor at that stage.

At approximately 11 a.m. on the 2nd February, the witness Scott visited the room of the Deceased and receiving no response to her knocks on the door, she tried the handle and found it to be locked. She called the Native cleaner, obtained his duplicate key, unlocked the door and entered the room. She immediately noticed
10 the body of the Deceased sprawled over the unmade bed near the door. The scene was left undisturbed and the door securely locked while the witness summoned the police. At 12.10 the same day Sergt. le Roux arrived on the scene. He caused photographs to be taken and a plan to be prepared. He furthermore summoned the district surgeon, Dr. Krausey, who arrived there at approximately 2.30 p.m.

The body of the Deceased was found lying on its back upon the uncovered mattress of a single bed. The
20 body lay across the bed with the head close to the right side of the bed and about 2'6" down from the head of the bed with the tied roll of blankets above it. The body lay at an angle across the bed with its long axis pointing down to the lower left foot of the bed. The legs were apart at an angle of approximately 60 degrees, the right leg being straight and the heel resting over the lower upright of the bed. The left knee was flexed over the edge of the bed. The left elbow was acutely flexed with the left hand resting, palm downwards, upon the
30 upper chest. The right elbow was flexed at right angles and the arm resting on the bed with the palm down near

the right hip, with a lady's handkerchief under the hand.

The lower aspect of the body was bare. A pair of bloomers were found near the body on the left side, as may be seen on the photograph, Exh. "D". The right leg was stockinged, with a shoe on the right foot. The left leg had no stocking on and the shoe was found on the ground close to the left foot. The stocking on the right leg was suspended and attached by a strap from the suspender belt round the medial aspect of the Deceased's thigh.

- 10 The brown skirt worn was moved upwards, fully exposing her genitalia. Dry blood was found as issued from her nose and mouth and this obviously trickled upwards over the forehead on the right and also down the left side of the cheek.

Dr. Krausey conducted a post mortem examination on the body on the 3rd February, 1956 and he concluded that the cause of death was strangulation. On the front of the neck he found an almost horizontally situated abraded compression mark commencing on the left side of the neck
20 2½" and 1" posterior to the lobe of the left ear; it passed anteriorly and slightly downwards, crossing the middle line of the front of the neck at the level of the superior thyroid notch. It passed to the right, and posteriorly becoming less defined and disappearing on the right side of the neck at a point approximately 1½" below and 1" anterior to the right lobe.

The compression mark was deepest and most prominent on the left side of the neck from a point 2½" from the middle, to a point 1" to the right of the middle
30 line over a length of 3". At its widest and deepest at a point 1" to the left of the middle line, it measured ½" in width. This tapered off to the left where it became

ill-defined at its termination on the left side.

On the right side, from a point 1" to the right of the middle line there was a fanning out of the abraded area which at its widest was approximately $1\frac{1}{4}$ " in width. Some of the marks can be seen on photographs, Exhs. "C1" and "C2".

Of the further abrasions described by this witness I need mention only the following: Over the left cheek was found a $1\frac{1}{4}$ " from the mid-line and $\frac{3}{4}$ " below the
10 left angle of the mouth, a freshly abraded area of about $\frac{1}{8}$ ". Over the middle of the right clavicle was found a freshly bruised area of $1\frac{1}{2}$ " x $\frac{3}{4}$ ". Over the back of the right hand was found a freshly, irregular abraded area of $2\frac{1}{2}$ " x $1\frac{1}{2}$ ". There were multiple fresh bruises irregularly distributed over the lower two-thirds of the right arm varying in size from $1\frac{1}{2}$ " to 1" in diameter, counting
seven in all. Over the right elbow was a fresh bruise $\frac{3}{4}$ " in diameter. On the left forearm was found an irregular
fresh bruise of $1\frac{1}{2}$ " x $1\frac{1}{2}$ ". There were
20 several irregular small fresh bruises distributed over the lower half of both shins and the front of the left ankle.

The tongue was slightly protruding between the teeth, a common feature in cases of strangulation. The right surface of the lower lip was bruised in a small area. On the upper lip on the right side was a superficial laceration; so also was there a bruising of the left side of the upper lip.

Over the left side of the head behind the ear
30 was a haemorrhage under the skin of 2" x 1".

Furthermore, Dr. Krausey found most of the

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features common in cases of strangulation to be present. No injury was found to the genital track. Certain bruises were found on the stomach and at the back of the neck. Vaginal smears taken by this witness proved negative in the test for spermatozoa. As to whether the assailant had intercourse with the Deceased, cannot with any degree of certainty be ascertained, although at first glance, at the body as it was found, the suspicion was immediately prompted that such was the case.

10 The injuries and many bruises were indicative of and consistent with a violent attack upon and a degree of resistance by the Deceased.

 Basing his opinion upon the injuries and numerous bruises he found and of the scene as he saw it, Dr. Krausey is of the opinion that the assailant either used a rope, a cord or a woman's nylon or silk stocking to cause the strangulation. This most probably was carried out while the Deceased was prostrate on her back; the ligature was pressed with force upon the front of her
20 neck round to the left and right side as indicated by the marks seen on Exhs. "C1" and "C2". This witness is of the opinion that the ligature was not tied round the neck of the Deceased and by application of force tightened round her neck.

 We find, upon the evidence before us, that the Deceased was most probably in the position upon the bed as shown in the photographs, Exhs. "A", "B" and "D", when she was strangled by her assailant. He pressed down the ligature, holding it down with both hands, thus
30 accounting for the fanning-out of the ligature marks below the left and right ears of the Deceased and

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Judgment.

accounting for the bruise found below these marks on the right side of the neck.

In the room of the Deceased were found, near the bed on the right side and close to the bed on the floor, a length of electric cord as also three lengths of string or rope similar to that used in tying the roll of blankets on the bed. In the same area dried bloodstains were found. Further down, near the lower end of the bed, as can be seen from the photograph Exh. "B", there was a brown carton tied with string or rope similar to that used on
10 the blanket and to that found on the floor. Upon this carton were the two handbags belonging to the Deceased - the one a red one and the other black. The black one was open. Underneath the red bag was found a stocking to which was attached the ripped off strap of a suspender belt still buckled onto the stocking. It is now produced in Court in that condition.

The broken portion of the strap is revealed on Exh. "B" at the corner of the carton, nearest to the bed. This stocking corresponds in detail with the stocking found on the Deceased's right leg. It is clear the strap attached to it was ripped off
20 the suspender belt worn by the Deceased. If this stocking was the one used to strangle the Deceased with, the irresistible conclusion is that the assailant, after strangling the Deceased therewith, placed it on the carton, handling either both handbags or at least the red one, to have it placed on top of the stocking on the carton.

A further irresistible inference is that the assailant forcibly pulled the stocking off the left leg of the Deceased, ripped the strap off the suspender belt worn by the Deceased and while the Deceased was in the bed on her back the assailant with
30 sufficient force and employing both hands pulled the stocking tightly over the front of the neck of the Deceased, restricting

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her breathing and thus extinguishing her life.

The articles enumerated in Exh. "F" were submitted to the Institute of Medical Research for scientific examination. Among these articles there were three pieces of rope found on the ground in the Deceased's room, and the stocking recovered from the carton under the red handbag. The three pieces of rope as also the stocking contain certain stains which upon microscopic tests proved to be stains of blood and a further precipitant test proved these stains to be stains of primate or human blood.

10 Close to the pieces of rope on the ground, blood stains were observed. Dr. Krausey, although not dogmatic in his expression of opinion, considered it likely that these stains were caused by blood trickling down the right side of the head of the Deceased with her head slightly downwards to the top. If this view is correct, then it seems probable that in this way blood came in contact with the pieces of rope on the ground in close proximity thereto; but how can the blood on the stocking be accounted for? It is to be observed that two stains were found upon the stocking approximately 9" apart. We return to this
20 aspect later.

The door of the Deceased's bedroom was fitted with a yale lock which would lock the door when the latch was dropped and the door slammed to.

The witness Roberts testified to the identity of the portable radio set produced in Court, Exh. 4. This he positively identifies as the wireless set belonging to the Deceased. When he last occupied this room 24 with the Deceased, this wireless was in that room. Secondly, he identified the pair of spectacles and the brown case, Exhs. 5 and 6, the property of the Deceased.

30 The witness Shaw stated in evidence that between 7.30 and 8 p.m. on the evening of the 1st February last, he was in the bar

of the Sterling Hotel, Johannesburg. He was there playing darts and on an occasion of going to the bar counter to purchase a drink he noticed the Accused entering the bar, carrying a parcel wrapped in brown paper. He greeted the Accused by saying, "Hallo, Len; how are you?" The Accused returned the greeting and said he was fine. In the bar the Accused offered to sell him the portable radio, Exh. 4, which at the time was wrapped in brown paper but the Accused was holding it by the handle. Shaw was uncertain whether the Accused wanted £2 or £2.10. -d. for the set. Nevertheless, 10 because he only possessed £1 he offered to purchase the set for £1. After bargaining about the price, he eventually paid the £1 for the set. He says the Accused at no time was in any doubt as to what he had in his hand and what was contained in the brown paper wrapping.

Shaw identified the set as Exh. 4, as the radio which he purchased from the Accused. Upon paying the Accused the £1, he demanded a receipt from him. Paper was produced and a stamp was produced.. The Accused wrote out the receipt, the exhibit before the Court, and handed it to the witness.

20 Later the same evening another witness, Lawrence, and a witness Britnell visited the bar of the Sterliig Hotel after attending a meeting. While the two of them were standing in the private bar discussing cricket, they each had before them a glass of beer. The Accused came up to them. Britnell states that he knew the Accused by sight and as he usually does to acquaintances, greeted the Accused by a handshake. According to these two witnesses, the Accused invited them to have a drink with him. They declined because their drinks were before them, whereupon the Accused asked them whether they would mind if he ordered himself 30 a drink and joined their company, to which they agreed. It was evident that the Accused had already consumed liquor but did

with any degree of certainty. They estimate it to be between 10.30 and 11 p.m.

The next day, the 2nd February, the witness Pienaar Senior met the Accused in the Cellars Exchange Beer Hall in Johannesburg. This was in the afternoon. There he purchased from the Accused a pair of spectacles, Exh. 5 and a case, Exh. 6 for 7/6d. Pienaar stated that upon a previous occasion, a day or more before the 2nd, he enquired from a friend whether he knew where a secondhand pair of spectacles could be purchased as he
10 needed a pair for his wife. He said the Accused was present and heard this conversation. That is why, on the 2nd February, the Accused asked him whether he was still looking for a pair of spectacles and so came to offer the spectacles in its case for sale. In cross-examination he expressed the view that the Accused quite evidently had consumed some liquor but he appeared to be normal. When asked where he had obtained these spectacles, the Accused explained that it belonged to a lady friend of his but she no longer required them.

The next Crown witness, Claremont Pienaar, the son of the
20 previous witness, stated that he was a clerk in the local Magistrate's Court; that on the afternoon of the 2nd February, after office hours, he visited the Cellar Exchange Beer Hall where he met the Accused. From there the two of them went to the Guild Hall, arriving there at approximately 6 p.m. He said he thought the Accused knew that he was employed in the Magistrate's Court, and he stated, "Die Beskuldigde en ek het oor allerhande dinge begin praat. Toe sê hy, 'Ek het 'n vrou vermoor'. Hy het uit sy eie vry wil daaroor begin praat. Die eerste wat hy aan my gevra het was wat hy daaromtrent kon doen, wat sy kanse
30 is om af te kom en ek moet aan hom raad gee en die klas van goed. Toe sê ek vir hom ek kan hom nie raad gee nie, hy moet na die

Polisie gaan of na 'n prokureur".

He further stated that the Accused mentioned the time when he is alleged to have strangled this woman as the previous day, that is the 1st. Thereafter, in the evening of the 3rd February this witness again met the Accused in the same beer hall. The topic of discussion again turned to the murder of this woman. The witness questioned the Accused about the matter and according to Pienaar the Accused mentioned the name of the woman as Roberts, stating that she was approximately 50 years of age and had blonde
10 hair.

When asked how it was done, the Accused is alleged to have stated, "Hy het dit met 'n kous gedoen. Hy het gesê hy het haar nie onsedelik aangerand nie; hy het haar net vermoor".

Pienaar stated that his reason for questioning the Accused was to compare his description with the newspaper account of the alleged murder.

In cross-examination, the witness added: "The Accused stated he had suffered from a black-out. The last incident he could remember, he was sleeping in the bedroom of a certain other
20 woman. In the course of conversation the Accused passed the remark, 'I've done some bitch in'".

According to this witness's recollection, this remark was made on the occasion of the discussion on the Thursday.

The Accused denied having met the witness Pienaar in the late afternoon of the 3rd, that is the Friday. He contended that on that day he was with his sister in another hotel. Be that as it may.

The witness stated that the Accused further mentioned to him that he had noticed boxes in the room of this woman which
30 were tied up with rope and that the police alleged a rope was used to strangle this woman since rope was found in the room. That

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theory was incorrect, he said. He had used a stocking.

The next Crown witness was v.d. Merwe, a friend of the Accused. He stated that after going off duty and at about 5 p.m. he went to the Cellars Exchange Beer Hall where he met the Accused. The Accused called him aside and then told him, "I have strangled a woman, and when I left she was still choking or it may be that she was still coughing".

Some mention was made by the Accused of, "I got a good cut out of it". The latter statement, however, may have been made
10 in connection with insurance money the Accused was expecting to receive from the Unemployment Bureau. However that may be, the one fact which emerges is that again the Accused mentioned having strangled a woman. V.d. Merwe has known the Accused for approximately four years and according to his evidence the Accused knew what he was about.

At about 10.30 p.m. on the 3rd February, Sergt. Kluyt proceeded to the Grand Station Hotel, Jeppe, where he arrested the Accused who was then under the influence of liquor. Thereafter, while the Accused was detained in the Police cells, this witness
20 questioned the Accused about the radio, Exh. 4, and the spectacles and case, Exhs. 5 and 6. The Accused was informed that evidence was available to prove that these articles came from the room of the Deceased and that these were sold by the Accused. An explanation was demanded of it. He stated, "I do not know how I got the radio and the glasses".

On the 6th February, 1956, the Accused made a statement to Mr. Steenkamp, the Additional Magistrate of Johannesburg. At the time the only persons present in the Magistrate's office were the Accused and Mr. Steenkamp. They were sitting at opposite
30 sides of the table, very close to one another. Before taking down the statement, Mr. Steenkamp satisfied himself that the

Accused was at ease and in his sound and sober senses and that he was voluntary in making the statement.

Mr. Steenkamp in evidence stated that he meticulously recorded every word spoken by the Accused. Thereafter, he read the statement over to the Accused, who confirmed and signed it. Mr. Steenkamp says his usual practice is, when taking down statements of this kind, that when an accused person makes that portion of the statement which inculcates him he usually repeats aloud the words spoken while writing them down. He thinks he did so on this
10 occasion but cannot be sure. However, he says when reading over the statement to the Accused the latter must have heard every word unless he suffered from some defective hearing, which is not the case. The statement read as follows - I eliminate the preamble; I start with -

"The following questions were put to him:

Have you made a similar statement of the same nature in connection with this occurrence to any other person, and if so to whom and when and under what circumstances? ---
Yes, I made a similar statement on the 4th February,
20 1956, to the C.I.D. - I do not know his name - at Marshall Square. I think it was Lieut. Jooste. I was warned that I need not say anything and I elected to make a statement voluntarily. He questioned me and I answered him.

What is your reason for wishing to make this statement to me? --- I would like to get it off my mind.

When were you arrested? --- On Friday, the 3rd February, 1956 in the evening. I 'phoned the C.I.D.

Has any person in any manner whatsoever forced you or influenced you to come and make a statement to me?
30 --- No. I, Emlyn Aubrey Owen, freely and voluntarily and after I have been warned by the Magistrate that I am

--- not ---

not obliged to make any statement but that if I elect to do so it will be reduced in writing and may be used as evidence against me, declare without any undue influence having been exercised upon me: On 3/3/56 in the evening I 'phoned the Police and told them that I wished to confess to the murder of Mrs. Roberts. They came and arrested me at the hotel, I think at the Station Hotel in Jeppe, and they took me to Marshall Square. I then told them that I think I killed Mrs. Roberts but I don't know why. This murder took place on the 1st February, 1956. I had been drinking very heavily lately. I went up to see her husband, Mr. Roberts. It was in the evening. I knocked on the door of Mr. and Mrs. Roberts' room. Mrs. Roberts answered and I walked into the room. She was lying on the bed. I remember taking her stocking off and strangling her. I then left and went to an hotel and started drinking again. The following morning I got up and went to the hotel where I drank the whole day. That night I slept in St. Louis building. The following morning I left there at about 10 a.m. and went to the hotel and had a beer there and walked into town where I played dominoes and drank until the afternoon, when I went to a tea room bioscope. After the show, I went to my sister in Fairview where her husband and I had a drink. We then went to the Station Hotel in Jeppe where we drank. I then got up and 'phoned the C.I.D. at Marshall Square. I told them where I was 'phoning from and that I wanted to confess to the murder of Mrs. Roberts and that I saw it in the paper. The C.I.D. came and arrested me in the hotel".

This statement was then signed by the Accused, and not only was it signed but he initialled every page of it.

So far, I have given in some detail a picture of the Crown evidence. I now turn to the evidence of the defence. Firstly, the evidence of the Accused himself: He is a young man of approximately 33 years of age. He appeared, as is reasonably to be expected in the circumstances, to be somewhat nervous in the witness box. He has a good appearance, and speaking for myself, I do not think his demeanour could be criticised. He was on the 1st
 10 February unemployed, having left his last employment as assistant to a local private detective agency on the 15th December, 1955. Prior thereto he was engaged from time to time in various employment but was unable to settle down to any particular employment. He stated that he has for some time been addicted to liquor and during the latter part of January he was drinking heavily.

In about September, 1955, he met the Deceased and her reputed husband in room 24, King Edward Mansions. He visited them again some time in November, 1955. He thereafter again visited the room of the Deceased on the 1st February, 1956. The
 20 Accused stated that upon the occasion of his first visit to Mr. and Mrs. Roberts in September last year, Roberts was in bed suffering from broken ribs and injuries sustained in an assault upon him in the very room they occupied.

He says he spent some time with them. He does not say whether Mrs. Roberts was under the influence of liquor on that occasion, although he mentioned having some wine with them.

Not being a friend of the couple, he did not visit them again yet in November he visited them again to see how Roberts was. He found him up and about, recovered ^{from} his broken ribs.

30 In his evidence-in-chief he stated that his reason for visiting room 24 again in the evening of the 1st February, 1956

was to see how Roberts was after his September injuries. He described his movements on the 1st February as follows: That he spent some time drinking in the Exchange Cellars Bar. In fact, he said he spent the whole day drinking without having any food. At about 6.30 to 6.45 he went to the Guild Hall Bar where he consumed more liquor. He then decided to visit a lady friend, a certain Mrs. Lindsay, living in the St. Louis Mansions. He has no recollection of reaching Mrs. Lindsay that evening but upon passing King Edward Mansions he suddenly decided to call in on Mr. Roberts to
10 see how he was after his injuries. If this reason is true, the Accused must at the time still have had control of his mental faculties and his memory certainly was not a blank.

In cross-examination he sought somewhat to change the reason for his visit to the room. He there stated, "I cannot say why I went to see them in February. I thought I would go and ask Mr. Roberts to come and have a drink with me at the hotel". Later he stated there were really two reasons, namely to see how Roberts was after his previous injury and to invite him out for a drink. Be that as it may. He said he was dizzy and not clear in the head
20 due to the effect of alcohol consumed. He remembers going to a room. He cannot remember the number. The door was slightly ajar and light was on inside the room. He knocked at the door. The Deceased opened the door. She stood in the doorway while he remained standing outside in the passage. He asked her whether uncle Jack, Mr. Roberts, was there. She said "No", and asked what he wanted to see him about and he replied, "Just to see how he was". There the conversation ended and he turned round to leave and as he turned round he saw the glow of a light in the passage, unlighted previously. This was about 7.30 p.m., he says. He
30 was unable to remember anything after that but when he came round he found himself sitting in the bar in the Sterling Hotel, a block

away from King Edward Mansions. There the witness Shaw came up to him and said, "Hullo, how are you; what have you got with you?" "I lifted it up onto the counter and said, 'I think it looks like a radio'. He asked me, 'What are you going to do with it?' to which I replied, 'Well, I will sell it'". Prior thereto, he had no knowledge of what was contained in the brown paper parcel. He however identified the radio as Exh. 4 before this Court. He stated it was wrapped in brown paper but there were two bars visible which looked like the selection knobs of a radio, from which he
10 concluded that it was a radio. He there and then sold the radio to Shaw for £1. He offered it for sale for £2.10. -d. but Shaw would only pay £1 and he stated that he then suggested to Shaw, "Make it half - £1.5. -d. Then I let him have it for £1". He stated that Shaw demanded a receipt which he wrote out and handed to Shaw, the receipt now before the Court.

He said that Shaw dictated the terms of the receipt to him. He merely wrote it out and signed it. This, of course, is denied by Shaw. However, thereafter he continued drinking until about 10 p.m. when he decided to go home. Upon passing the King
20 Edward Mansions he decided to call in on Roberts to see whether Roberts had returned and if he was there he intended inviting him to a drink. He went to the Deceased's room and found the door slightly ajar. He knocked, but received no reply. He knocked again and received yet no reply. He continued. "I pushed the door open and saw Mrs. Roberts lying across the bed. Her head was upon the roll of blankets at the head of the bed. Her head was upon the right side of the roll. Her left leg was hanging off the bed and her right leg was on the edge of the bed near the end. She was dressed. Her dress was down towards her knees.
30 I took her by the leg and shook her, and I said, 'Hey, hey!' She grunted as if she was asleep. I saw a stocking near her leg

on the edge of the bed. I picked up the stocking and threw it towards her face in order to waken her. It missed and fell to the floor. She made a grunting noise. I said to myself, 'Ja, drunk again'. I had seen her under the influence of liquor before. I then turned round and I realised that if I did wake her up she might create a scene, so I left. I pulled the door to. The door did not lock. I left the door like that in case Roberts returned so that he could then enter. As I closed the door and looked up the dark passage, I saw the glow of a cigarette as though someone
10 was taking a draw at a cigarette. I then left".

He further stated that while in the room he saw a bottle and on the bottle was a label. From that he could see it was wine. He stated that the Deceased appeared to be asleep and he saw no injuries upon her.

He was shown the photographs now before the Court but could not account for the position the Deceased was found to be in after she was strangled.

On the 2nd February, on his way to the Labour Bureau he felt in his pocket for his cigarettes when he discovered the
20 spectacles and case, Exhs. 5 and 6, in his pocket. He could not explain how these came to be in his pocket but concluded that because his mother was at the time behaving queerly he thought she might have put it in his pocket. He thought it to be a pair of her spectacles and that she no longer used them. Later the same day he visited the Exchange Beer Hall where he spent practically the whole day drinking. He met Pienaar Senior and playing darts with him he then took the spectacles out and asked Pienaar whether he wanted to buy them. Pienaar stated that if it suited his eye-sight he would purchase it for his wife who
30 required a pair and her eyesight was much the same as his own. Pienaar tried it on and then purchased the pair of spectacles and

the case for 7/6d.

Throughout his evidence the Accused persisted that he could not explain how he came to be in possession of the radio, the spectacles and the case which he sold to Shaw and Pienaar respectively. The Accused stated he has no recollection of meeting the witnesses Lawrence and Britnell and speaking to them. He denied having seen the witness Pienaar on the late afternoon of the 2nd February. He says that he saw him and there was no discussion of any import - only between 1 and 2 on the 2nd.

10 He also denies having seen Pienaar on the late afternoon of the 3rd February. In the premises he says he feels constrained to deny that he made any statement to him concerning the death of this woman. He however remembers speaking to the witness v.d. Merwe on the 2nd February. His evidence is, "I remember saying, 'I think I saw a dead woman last night'. I am uncertain about the word 'dead'". What he however does remember is discussing with v.d. Merwe his expected unemployment duplicate card which was to come from Pretoria and on which he could draw arrear monies and in this regard making the remark, "When it comes I will get the
20 money which will be a good cut" - a somewhat unusual remark to make about money to which he would be entitled. Nevertheless, v.d. Merwe agrees the remark may well have been passed in this regard. The importance of it is only in relation to the proof that the Accused when speaking to v.d. Merwe knew what he was about; although having consumed alcohol he still had a clear memory of events and appears to have had command of his mental faculties. He stated in evidence that he cannot remember telling v.d. Merwe in what state he saw the woman the previous night though he remembered mentioning that she coughed as he left the
30 room.

On the morning of the 3rd February the Accused stated

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he woke up in Mrs. Lindsay's room. He did not know how he got there nor did he have any memory of any events from Wednesday, the 1st, until that morning.

Friday afternoon and evening, he says, he spent in the company of his sister and brother-in-law and they again consumed a large quantity of liquor. He could not recall having a meal with them.

He remembered visiting an hotel where he saw a newspaper containing a report of the Deceased's death. He thereupon 'phoned
10 the Police. He remembered the number. He asked to speak to Col. Olivier because he noticed from the paper that he was in charge of the investigation. Of all these details the Accused still has a clear memory. The same evening he was arrested at the hotel from where he 'phoned. Thereafter, on February 6th, he made a statement to the Additional Magistrate, Mr. Steenkamp. In evidence he challenged the correctness of this statement in its most vital aspect. He stated that the Magistrate when recording this portion of his statement asked him to speak slower and he suggested that because he was speaking faster than the Magistrate
20 could record, an error crept into the statement and he stated that when the Magistrate thereafter read over the statement to him the Magistrate's voice became soft and somewhat inaudible so that he could not hear the wrong part of the statement when it was read over to him. The portion of the statement which he denied reads, "I remember taking her stocking off and strangling her".

We have no hesitation in unreservedly accepting the evidence of Mr. Steenkamp in this regard. Not only is he an experienced Magistrate but he appears to us as being a very careful person and when reading the whole of his statement it gives
30 one the impression of his fair manner of approach.

Furthermore, the facts proved establish beyond a doubt

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Judgment.

that the Deceased's stocking was ripped off her leg, tearing the suspender strap attached to the stocking from the belt worn by the Deceased. This stocking was found to have two human bloodstains upon it. As I have stated before, this could only have got onto the stocking if it was used upon the neck of the Deceased and in no other way.

10 Upon the proved facts we therefore find that the stocking was used by the assailant to strangle the Deceased. In using the stocking, the fanning out of the marks on the extremities near the lobes of the ears can be accounted for, which would not be if a fairly thin rope was used. In the result, therefore, this portion of the statement fits in with the proved facts, namely that the assailant pulled off the Deceased's stocking and strangled her with it.

20 Next we analyse the context of the statement and the setting therein of the disputed passage. We also conclude that this passage fits in to make sense, namely: "I knocked on the door of Mr. and Mrs. Roberts' room, which Mrs. Roberts answered and I walked into the room. She was lying on the bed. I remember taking her stocking off and strangling her. I then went to the hotel and started drinking again."

30 We also reject the evidence of the Accused as untrue when stating that on the 6th February when he made this statement he was still suffering from the effects of alcohol and not in clear mind. As I have already said, the evidence proves beyond doubt that early in the evening of the 1st February last at about 7.30 p.m. an assailant violently pulled the stocking off the left leg of the Deceased and proceeded to strangle her by pressing it

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Judgment.

down with both hands on the middle front of her throat while she was on her back upon this bed. It also seems an irresistible conclusion from the fact that the assailant pulled off her bloomers and pushed up her clothing to expose the genitalia as is to be seen from the photographs produced.

The important questions remaining are, has the Crown proved beyond all reasonable doubt that the Accused committed

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this deed and secondly, if this be so proved has the Crown further proved beyond reasonable doubt that though the Accused was under the influence of liquor his mind was not so obscured or affected by liquor as to cause him to be incapable of appreciating what he was doing or incapable of realising the probable consequences of his acts or of forming an intention to kill. As the case is one of murder, proof of the intention to kill is part of the Crown's case.

In our view the evidence links together in the following way: The Accused was at the time without any income. A day or
 10 more before the 1st February he was present and heard Pienaar enquiring about where he could purchase a secondhand pair of spectacles. In the evening of the 1st February at approximately 7.30 p.m. to 8 p.m. in the bar of the Sterling Hotel the Accused sold to the witness Shaw the radio, Exh. 4, for £1 and gave Shaw the receipt, Exh. "H", which he wrote out himself unaided. This radio was removed from the room of the Deceased a block away from this hotel. On the 2nd February and at the Cellars Beer Hall the Accused enquired from the witness Pienaar whether he still wished to purchase a secondhand pair of spectacles and there sold to
 20 Pienaar the spectacles, Exh. 5, in the case, Exh. 6, these having been removed from the room of the Deceased the previous evening. The Accused informed Pienaar that the spectacles belonged to a lady friend of his and that she no longer required them.

In his confession freely and voluntarily made to the Magistrate, the Accused admitted taking the Deceased's stocking off and strangling her. Upon this evidence alone we have unanimously come to the conclusion that it has been proved beyond a reasonable doubt that the Accused was the person who strangled the Deceased.

30 There is, however, further evidence of statements made by the Accused to various witnesses. The admissibility of these

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statements require consideration. These witnesses were not peace officers within the meaning of the provisions of the Criminal Procedure Act. Mr. Wulfsohn for the Accused did not object to the evidence of these witnesses. On the contrary, he wished the evidence to be adduced in order to base thereon the argument on the issue of the alleged amnesia suffered by the Accused at the time. Nevertheless, I have to decide whether the Crown has proved beyond a reasonable doubt that the Accused was in his sound and sober senses when he made these statements and made them freely and voluntarily. At the various times when making these statements, he had been consuming alcohol and was to an extent affected thereby but in my view, upon a careful analysis of the statements themselves and the general circumstances in which they were made, I am satisfied that he nevertheless knew what he was saying and realised the import of it. I am also satisfied that he made these statements freely and voluntarily notwithstanding that in the one instance he answered questions asked by the witness Pienaar Junior. In my view this issue is governed by the ratio accidendi in the case of Rex v. Blythe (1940 A.D., p.355) and Rex v. Ramsammy (1954 Vol. 2, S.A.L.R., page 491).

The fact that liquor taken by the Accused probably made him more inclined to talk does not in my view affect the vital issue, namely his knowledge and appreciation of what he was saying and what he was about. I may mention only a few factors which persuade me to come to the view that he knew what he was saying and speaking to the witness Lawrence and Britnell. The Accused recognised Britnell, and greeted him and joined their party in a rational manner. Nothing in his behaviour indicated to the witness that he did not know what he was about. His mentioning the expected publication in the press of the killing of the Deceased is indicative of reason. The details given

correspond with what was in fact found, of which he must have had knowledge. The statements made to Pienaar Junior equally prove, by its accurate detail and the seeking of advice from the Clerk of the Court, to come from a person knowing what he was about. He was able to remember the theory developed by the Police namely that the Deceased was outraged and strangled by means of a rope because rope was found in the room, and he discounted this theory. Therefrom, his senses of reasoning were seemingly unaffected.

When speaking to v.d. Merwe he made mention of getting
10 a good cut out of something. At the trial he remembered the remark and the context in which it was made and corrected v.d. Merwe's impression in this regard. Furthermore, when generally analysing the evidence in regard to the effect of alcohol upon him, I have taken into consideration that on the 3rd February, after consuming a good deal of liquor, he was able to remember the telephone number of the Police, to dial that number, to ask to speak to the officer in charge of that investigation, able to read a newspaper account and furthermore to remember the number then given to him to contact Col. Olivier. Upon all the facts,
20 therefore, I have come to the conclusion that these statements are admissible in evidence. Taking them into consideration in addition to the facts already listed, there can be no doubt that the Accused is responsible for the killing of the Deceased.

The Accused testified to visiting the Deceased's room twice that evening. I have already related his evidence in this regard. We have to consider the truthfulness or otherwise of his evidence in this regard. We have no hesitation in rejecting his evidence of a second visit to the room of the Deceased as false. In his confession to the Magistrate he mentioned only the
30 one visit and no mention was made of suffering an amnesia upon that occasion.

Secondly, we have found that the stocking was ripped off the leg of the Deceased and used in strangling the Deceased, only one stocking being found loose in the room. It is untrue that this stocking was lying loose at the foot of the bed and furthermore that he lifted this stocking to throw at the face of the sleeping woman. Furthermore, the position where this stocking was found with the blood on it, completely discounts his version of having thrown the stocking at the face of the woman asleep on this bed. Taking into consideration the time of the Accused selling the
10 Deceased's radio to the witness Shaw, we have come to the conclusion that the killing of the Deceased by the Accused took place during the visit by him to her room at about 7.30 p.m. that evening; that he then removed the radio and spectacles from her room. He had undoubtedly handled the handbags upon the carton next to the bed after the strangulation of the Deceased. That accounts for the recovery of the stocking from under the red handbag.

It also seems probable that he removed the spectacles in
its case from the black handbag but about/there is not the degree
of certainty to find it as a fact.

20 We turn, now, to the question of whether the Crown has proved beyond a reasonable doubt that the Accused was at the time of the offence quite capable of realising what he was doing and of forming the intention to act and to achieve and appreciate the consequences of his acts, whether in all the circumstances the Accused had the intention to kill when he did act; whether he designed to kill before he reached the room or for some reason or other determined upon it while in the Deceased's room is in our view not material to the determination of this case.

In this regard the Defence is that by reason of the
30 amount of liquor that the Accused had consumed, the Accused was so affected that during the crucial period he suffered from a

patchy amnesia induced by alcohol and in consequence he was incapable of forming the intention to kill. The fact that a patchy amnesia may be considered to be a temporary insanity and where the defence raised is one of insanity, the onus is upon the Accused person to establish his insanity upon the grounds of probability. I am of the view that in this case it remains an onus upon the Crown to satisfy this Court beyond a reasonable doubt that the Accused was at the crucial time capable of forming the intention to kill.

10 The evidence as to the amount of liquor consumed by the Accused on the day in question prior to his visit to the Deceased's room, is inconclusive. The Accused stated he consumed so much alcohol that he was dizzy. He nevertheless remembered deciding to visit a lady friend, Mrs. Lindsay but he does not remember reaching her room. He however remembered going to the Deceased's room earlier that evening.

 We may here conveniently deal with the evidence of Mrs. Lindsay and Mrs. Welthagen called by the Defence. If it were essential for the determination of this case to determine upon
20 the acceptability of their evidence, we would unanimously reject the evidence of Mrs. Lindsay as very unsatisfactory and untrue. Her version of the events is in conflict with the evidence of Mrs. Welthagen who can remember being present in Mrs. Lindsay's room on the occasion when the Accused visited there and when Mrs. Welthagen remonstrated with the Accused about his drinking habits. Although she cannot be sure that this took place on the evening of the 1st February, she is however positive that on no occasion was any mention made of her daughter's suspected pregnancy and that the Accused produced his divorce papers to satisfy her that
30 he was in law entitled to marry her daughter.

 Assuming we were to accept the evidence of Mrs. Lindsay,

we would be compelled to come to the conclusion that the visit to Mrs. Lindsay, if it did take place, was in point of time after the killing of the Deceased and secondly by his producing his divorce papers to satisfy Mrs. Welthagen that he was in law entitled to marry her daughter, would be sufficient to prove, in our view, that at that time the Accused although affected by liquor knew what he was about. However, we return to the events more proximate to the killing to determine what his condition was at that time.

10 It has been proved that between 7.30 and 8 p.m. on the 1st February the Accused offered the portable radio before the Court for sale to the witness Shaw. This radio had very shortly before been removed from the Deceased's room only a block away from the hotel and in this hotel the Accused concluded the sale. The time taken to walk from the Deceased's room to this hotel is so short that his condition in the bar was somewhat equal to his condition in the room. We accept the evidence of the witness Shaw that the Accused greeted him in the usual manner, that the Accused knew what he was carrying, namely a radio, that the
20 Accused bargained about the price of the radio and that at his request the Accused gave him the receipt which the Accused wrote out unaided. These facts satisfy us beyond a reasonable doubt that when selling this radio the Accused was capable of reasoning, capable of knowing what he was about and capable of appreciating the consequences of his act. The receipt in itself proved the rational mind of the author. It is dated in the proper place and not only is the digit £1 written but in brackets the amount is written out. The receipt is signed. Although in that regard there is the unusual feature of the Accused signing
30 "A.E." instead of "E.A." for his initials, he may well employ the two interchangeable methods to sign. But what is more

important is the manner in which the stamp was cancelled by the Accused.

We accept the evidence of Shaw that he did not dictate the terms of this receipt and we find that the Accused falsely stated that he merely wrote down what was dictated to him by Shaw.

Assuming, however, that Shaw did in fact stand there dictating the terms of the receipt to the Accused, the manner of response and the accurate recording thereof compels us to conclude that the Accused was capable of understanding what he
 10 was doing. Furthermore, the taking of the spectacles and the case from the Deceased's room is important. According to the evidence of Pienaar Senior the Accused knew of an avenue of disposal of these articles and we are compelled to the conclusion that when taking these articles the Accused commanded sufficient reasoning to realise that he would have no difficulty in converting these into money, he was short of that at the time. He took the spectacles and the very next day he sold it to Pienaar at their first meeting without having offered it for sale to anyone else.

20 The description given to Pienaar Junior of what he observed in the Deceased's room and what he did is in our view conclusive of his mental capability at the time.

Furthermore, the detailed description he gave in this Court of what he saw in that room is important. Having found as
 we have
 we/done that he visited the Deceased's room once that evening, we are driven to the conclusion that the description given relates to that visit and that upon that occasion he could not possibly have suffered from any patchy amnesia. He observed parcels tied up with rope; he observed a bottle containing
 30 wine, according to the label; he observed, probably, strings lying on the floor. And what is more, he was able to discount

the Police theory of events in regard to the Deceased. He remembers how she was dressed and how she was lying.

The evidence of the two psychiatrists was given due consideration but in so far as these two expressions of opinion are based on assumed facts, not the facts proved in this case, their opinions are of little importance and, in fact, irrelevant. True, they both agree that the Accused is of a low mental grouping. They place him in the category of a child of ten or twelve. Be that as it may. His behaviour in this Court and the appreciation
10 of difficulties that he may be confronted with and the manner he dealt with those, has impressed us that the Accused's mentality is not quite so poor as given by the medical witnesses.

Upon all the facts, we have unanimously come to the conclusion that the Crown has proved beyond a reasonable doubt that at the time of the killing, although affected by liquor consumed, the behaviour of the Accused would manifest that he was capable of realising what he was doing and of forming the intention to act and to achieve and appreciate the consequences of his acts.

The false account of the Accused in testifying to a
20 second visit to the room and there leaving the Deceased alive and asleep, is clearly an endeavour to support his so-called patchy amnesia alleged to have been suffered on the occasion of the first visit and so allocate the details of his statement to Pienaar as to what he saw on the second occasion and furthermore to leave the possible escape that it may be inferred that someone other than the Accused committed this deed. For this reason, the phantom cigarette smoker in the dark passage was introduced by the Accused.

In the result we unanimously find that the Crown has proved beyond all reasonable doubt that the Accused maliciously
30 killed and murdered the Deceased. He is accordingly found guilty of MURDER as charged.
