LL

Case No 129/1986

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

PERCIVAL ROBERT GOOSEN Appellant

and

THE STATE Respondent

CORAM: JOUBERT, BOTHA et NESTADT JJA

HEARD: 21 SEPTEMBER 1987

DELIVERED: 30 SEPTEMBER 1987

JUDGMENT

/BOTHA JA ...

BOTHA JA:-

The appellant was convicted of murder with extenuating circumstances by SPOELSTRA J and assessors in the Circuit Court at Potchefstroom. He was sentenced to 5 years' imprisonment. With the leave of the trial Judge, he appeals against his conviction.

It is common cause that the appellant killed his wife (the deceased) on 16 April 1985 at about 8 o'clock in the evening, in their joint bedroom of the house in which they were living in Fochville. The following facts are also common cause. Immediately prior to the killing the deceased and the appellant were lying on the double bed in their bedroom, talking to each other. She was dressed in a gown and he in a pair of trousers. Under the mattress of the bed, on his side of it, the appellant was wont to keep a revolver and a bayonet. He reached out, took the revolver from under the mattress and at close range fired two shots into the deceased's chest.

/One ...

One bullet entered the deceased's body just under the left clavicle and the other went through her left breast. Then the appellant removed the bayonet from under the mattress and stabbed the deceased three times with it, on the left side of her chest. Each of the five wounds inflicted upon the deceased could in itself have been fatal. Thereafter the appellant went into the kitchen of the house, where there were three young children present (two were children of the deceased from a previous marriage, and one was a boy born out of the marriage between the appellant and the deceased, named Adlen). One of the children asked the appellant whether they might have Milo to drink, whereupon the appellant gave them permission to do so. The appellant took from the kitchen a bottle containing some brandy and returned to the bedroom, where he poured himself a drink and drank it. The appellant also telephoned his mother. He told her that he had killed the deceased and asked her to come and fetch the children.

/At ...

At 9.30 p m the police arrived at the house, and shortly thereafter, a doctor. The appellant was found lying on the double bed, next to the body of the deceased. On a bed-table next to the appellant a container of Halcion tablets was found. It was empty. Halcion is a sedative, a sleep-inducing drug. The appellant was in a comatose condition, resulting from the synergistic effect of his intake during that afternoon and evening of liquor and Halcion tablets. On the bed-table next to the appellant there was also found a piece of paper (some kind of circular letter) on which the appellant had scribbled some notes. This was exh F. On the following morning at about 10 a m the appellant made a statement to the police. That was exh G. These exhibits will be dealt with later.

At the commencement of the trial counsel who appeared for the appellant handed up to the Court a written statement in terms of section 115 of the Criminal

/Procedure ...

Procedure Act 51 of 1977, in which the basis of the appellant's defence to the charge was set out. The appellant confirmed the contents of the statement and signed it in Court. It reads as follows:

"1. The accused and the deceased, Lea Jacoba Goosen, were married to each other.

2. The marriage relationship was marred by a long history of marital problems, brought about by a drinking problem and the infidelity of the deceased.

3. On the 16 April 1985 and at the common home of the accused and the deceased at Fochville, an argument broke out between them during the course of which the deceased acted in a manner constituting intense provocation.

4. Both the accused and the deceased had had a considerable quantity of alcohol at the time of the argument. The accused had also taken four sleeping tablets which the deceased had given to him.

5. The accused admits that during the argument he shot the deceased twice with a revolver, and that he stabbed her with a bayonet, thereby causing her death.

6. The accused denies, however, that he is criminally responsible for his acts as set out in paragraph 5 above, and states that the cumulative effect of:

(i) his intoxication;

/(ii) ...

(ii) the intake of sleeping tablets;

(iii) provocation by the deceased;

(iv) and his severe emotional stress

was such that he did not act voluntarily; that he did not have the necessary criminal capacity at the time of the act, and that he was unable to form the requisite intention to kill the deceased."

It will be seen from the concluding part of the statement that the appellant's defence rested on three grounds, namely, that at the time of the killing of the deceased there was on his part an absence of (1) any voluntary act, (2) criminal capacity, and (3) an intention to kill. As to (3), the onus was, of course, on the State to prove that the appellant had the requisite intention. As to (2) and (3), I shall assume, for the purposes of this judgment (but without expressing any opinion thereon), that the onus was also on the State to prove that the appellant acted voluntarily and that he had criminal capacity ("toerekeningsvatbaarheid"). In the latter regard there was no suggestion that the appellant

/was ...

was suffering from any mental disorder of a pathological nature at the time of the killing. The crux of his case, in relation to all three of the grounds of defence raised, was that immediately before the killing of the deceased she had said something to him which caused him to "break down" and to lose his self-control, with the result that he was temporarily unable to control his acts. On this score the defence case perforce rested primarily on the evidence of the appellant himself. On the basis of the remarks I have made regarding the onus, the enquiry must be whether the appellant's evidence could reasonably possibly be true, and that requires an assessment of his conduct before, during and after his assault on the deceased. The appellant's evidence will be examined presently.

Apart from his own evidence, the appellant relied on the evidence of two expert witnesses called on his behalf. The one was Dr Klatzow, an expert in biochemistry. He testified that the combined intake of

/alcohol ...

alcohol and Halcion tablets could result in the diminishing of one's social and moral inhibitions, the impairment of one's ability to make a rational judgment, and, sometimes, in paradoxical reactions such as rage and aggression. He was not, however, qualified to express an opinion on the condition of the appellant at the time of the killing of the deceased. The other expert was Mr Carnie, a clinical psychologist, who had had a number of interviews with the appellant with a view to evaluating his personality traits and his psychological condition at the time of the killing of the deceased. In brief, the opinions expressed by Carnie were the following: the appellant's personality traits were such that he was especially susceptible to a loss of self-control caused by emotional stress; on the basis of the appellant's account to him of certain events and incidents over a few weeks before the day of the killing, these were of sufficient intensity to have induced feelings of severe emotional

/stress ...

stress in the appellant; on the basis of the appellant's account to him, and his evidence in Court, as to the events immediately preceding the killing and the killing itself, the appellant at the time of the killing had lost inner control over his conscious actions, to the extent that the entire act of killing was beyond his conscious control (at one stage the witness said his reactions were totally out of control, but later he said that there was not a total loss of control, but a loss of effective, conscious control); the appellant's loss of control was the cumulative effect of his pre-existing personality structure, his intake of liquor and of Halcion tablets before the event, serious provocation by the deceased, and his severe emotional distress. In his written report compiled before the trial Carnie had stated that at the time of the killing the appellant, whilst able to appreciate the wrongfulness of his actions, was unable to act in accordance with that appreciation due to severe emotional stress.

/In ...

In his evidence at the trial Carnie testified that he had come to the conclusion, having heard the evidence of the appellant and Dr Klatzow, that the appellant at the time of the killing was not able to appreciate the wrongfulness of his acts, nor even to act consciously.

I turn to the evidence of the appellant, and I refer first to some matters of background mentioned in his statement in terms of section 115, as quoted earlier. With regard to the marriage relationship (para 2) the appellant testified that the deceased frequently drank to excess and that she had had an adulterous affair with one Van der Sandt. The appellant described a number of events and incidents in which the behaviour of the deceased caused embarrassment and problems in the marriage. It is not necessary to go into details, but it must be observed that the appellant did not say in his evidence that the conduct of the deceased prior to the day on which she was killed had caused him to suffer emotional stress,

/whether ...

whether severe or otherwise. His evidence rather conveys the impression that he was well able to cope with the problems as they arose. He said that he loved the deceased and that he believed that she would overcome her drinking problem and her infatuation with Van der Sandt. With regard to the reference in para 4 to the quantity of alcohol the appellant and the deceased had consumed before the argument between them arose (the argument is also mentioned in para 3), it should be noted first that the appellant's evidence did not, in fact, reflect that there was any "argument" before the killing, as will appear presently. As to the alcohol, the appellant testified that the deceased arrived at his place of business on the fateful day at about 4.30 in the afternoon. She was under the influence of liquor. She bought a bottle of brandy and poured drinks for the appellant, herself and others who were present. Over a period of about 1½ hours the appellant and the deceased each had 3

/double ...

double tots of brandy. They then went home. There, at the request of the deceased the appellant poured each of them another drink of brandy, consisting of more than a double tot, which they drank. (Later, at 9.45 p m, the doctor who had gone to the house and found the appellant in a coma took a blood sample of the appellant, which was subsequently analysed to reveal that the alcohol content of the appellant's blood, expressed in the usual way, was 0,20. An analysis of the deceased's blood showed that in her case the alcohol content, expressed in the same way, was 0,32.) Finally, in para 4 of the appellant's statement it is mentioned that he had taken 4 sleeping tablets which the deceased had given him. This is an absolutely vital feature of the case, and I shall deal fully with the appellant's evidence in regard thereto in a moment. At this stage it will be convenient to mention that the trial Court disbelieved and rejected the appellant's evidence on this point. It found that the appellant had taken the sleeping tablets (Halcion)

/after ...

after he had killed the deceased.

I come now to the appellant's evidence as to what happened at the crucial time just before and during his killing of the deceased. The account he gave in examination-in-chief was quite brief. Taking up his account at the stage where he had poured drinks for himself and the deceased in the kitchen, his evidence continued as follows:

> "What happened then? --- Then I went back to the bedroom with the drinks, and then she burnt some photographs out. She burnt - I smelt something burning and when I got into the room I saw that she had burnt some photographs out. Then she said to me "Seeing that you are tired here are some pills, then you will have a good sleep tonight", which she drank every night she drank of these pills.
>
> How many did she give you? --- Four.
>
> Did you have any suspicion at all that it might have been too many? --- No.
>
> Are you accustomed to taking sleeping pills? --- No, no tablets.
>
> Did you not think that you would have a good night's sleep in any event because you were tired? --- No."

/The ...

The appellant then went on to say that he finished his drink, that he took off his shirt, shoes and socks, and that he lay down on the bed. The deceased showed him a dress that she had bought and then changed into her gown. His evidence continued:

> "Yes? --- Then she got into bed. Then she said there is something she wants to tell me. Then she told me about Mr Van der Sandt. And I asked her "Now what about the kids, you cannot just leave the kids?"
>
> COURT: What did she say in regard to Van der Sandt? --- She loves this Van der Sandt, she loves me and she loves Van der Sandt, and obviously I will fall into a deep sleep, if I wake up she will be gone with the kids with Van der Sandt.
>
> MR VERMEULEN Yes? --- Your Honour, then I just broke down.
>
> COURT: You broke down? --- Yes.
>
> MR VERMEULEN: In what way? --- I took the pistol and I shot her. I just lost self-control and I stabbed her.
>
> COURT: And after you had lost your self-control and ..? --- I stabbed her.
>
> After you shot ... (intervention) ... I lost self-control and I shot her, I was not myself.
>
> Yes? --- And then I saw what I had done and I phoned my mother."

/The ...

The tenor of this evidence is quite clear. The deceased gave the appellant sleeping pills in order to cause him to fall into a deep sleep. When he awoke, she would have left him with the children and Van der Sandt. It was this prospect that caused him to break down and to lose his self-control. There is no suggestion here that the deceased gave him the tablets with the intention of killing him. When he used the expression "if I wake up", it was in the sense of "when I wake up." That is perfectly plain.

In cross-examination, however, the appellant changed his evidence drastically. This came about when he was confronted with the notes he had written on the piece of paper that was found next to his bed (exh F), as referred to earlier. The appellant had made no mention of this in his evidence-in-chief. On the paper, in three different places, the appellant had written the following:

/"All ...

"All money due
to me must
go to Adlen
and my Mom must look after (him)."

"My maat
George (nie my broer)
kry die man
asb vir my wat
my huwelik so gemaak het
Percy."

"His phone no. 01491-2161
Ask for
Cheeta v.d. Sandt him

W.D Levels

Done this
He was the cause!
Percy."

There can be no doubt at all that these notes were written in contemplation of the appellant's own imminent death. The notes themselves proclaim this so clearly that no further elaboration is necessary. Exh F is obviously not compatible with the appellant's evidence-in-chief as to why he had broken down and lost control over himself.

/The ...

The trial Judge observed in his judgment that the appellant "was most unhappy" when confronted with this document. His attempted explanation of the notes was that the deceased had conveyed to him that it was her intention to kill him when she gave him the tablets to drink. Part of the appellant's evidence, when questioned by the trial Judge, reads as follows:

> "Let us regard that as the front or the first page. If one reads these words "All money due to me must go to Adlen, and my mom must look after him" - why do you think you would have written these words? --- Because of her saying to me if I ever wake up with the tablets I had.
>
> Why did you think the tablets were going to affect you? --- She said to me that she doubts if I will wake up with the tablets.
>
> She doubts ..? --- If I will wake up with the tablets, she is going to leave with this other man and the kids.
>
> When did she say that? --- She said that in the bed that night.
>
> When she gave the tablets to you? --- No, when she was speaking about Van der Sandt.
>
> Was that after you had the tablets? --- Just before it happened.
>
> Do you say that at that stage you were

/of ...

of the view that she was busy poisoning you? Trying to kill you? --- It would be.

Well, did you think that or did you not think that? --- I must have, if I wrote this I must have. Like I say I did not have ... (intervention).

Well, if you thought that why did you never suggest that before this moment? --- Your Honour, like I said earlier, she said if I ever wake up.

Well, you said that - if I recall correctly you were going to fall in a very deep sleep and ... (intervention) ... --- That is if I ever wake up.

And when you wake up she will be gone with Van der Sandt and the kids? --- And the kids, that is correct.

Do these words suggest to you that she was trying to kill you or to poison you? --- Or take my life, or take my life.

That she was busy taking your life? --- It could have been. I mean that is what she said to me.

But why - if you inferred that at the time and if you are still of the view, why did you not suggest that before I started questioning you on this document? --- Yes, but I did suggest that. I said she said if you ever wake up, if you ever ... (intervention).

She said when you wake up? --- Or when you wake up.

She will be gone with Van der Sandt and the kids? --- That is correct.

/Not ...

Not if ever. --- Yes, yes.

Your evidence never suggested, and I am sure Counsel appearing for you never were of the view that your evidence would be to the effect that you were of the view that you are not going to wake up again? --- Like I say I was not in my state of mind when this was written. I mean I must have thought then well, Percy, you are not going to ever wake up, if I wrote things like this.

If it was not any action on her part then it must have been some other action? --- Well, no, it is from her part.

What other action could have endangered your life on that particular evening? --- The thing is with the alcohol and the pills she gave me, telling me that if you ever wake up."

This evidence of the appellant cannot possibly be true, for a number of reasons. In the first place the appellant did not mention to his mother, when he telephoned her, that he was facing death because the deceased had given him an overdose of tablets, as one would certainly have expected him to do if it were the truth. In the second place the appellant made no mention of the taking of the tablets at all in the statement he made to the police on the following day, exh G. That statement

/reads ...

reads as follows:

"Ja, op bg. datum en ongeveer 16h00 het ek en my vrou (oorledene) konst. Botha en sy vrou in my besigheid gesit en gesels. Op daardie stadium het my vrou 'n liter Richeleu brandewyn bestel. Ons het toe gesit en gesels en kort-kort 'n drankie gedrink. Om ongeveer 18h00 is ek en my vrou toe weg huis toe. Ek het vir my vrou gesê ek is moeg en wil vroeg gaan slaap. Ons was om ongeveer 18h30 in ons kamer waar ons in die bed gelê en gesels het. Ek het toe weer vir ek en my vrou 'n drankie ingegooi. Op daardie stadium het my vrou vir my gesê daar is iets wat sy my wil sê. Ek het haar toe gevra wat dit is waarop sy gesê het sy is verlief op 'n ander man. Ek het haar gevra nou wat van ons kinders waarop sy gesê het die ander persoon aanvaar hulle. Ek het toe gesê nie my seun nie. Ek het my rewolwer onder die bed uitgehaal en my vrou twee skote in die bors geskiet. Nadat ek die tweede skoot geskiet het, het ek eers besef wat ek gedoen het. Ek het toe my bayonet onder die bed uitgehaal en my vrou in die bors gesteek. Ek kan nie sê hoekom ek haar met die bayonet gesteek het nie.

Ek het toe my moeder gekontak en vir haar gesê ek het my vrou geskiet. Ek kan onthou ek het baie gehuil. My moeder het vir my gevra waar is die kinders waarop ek gesê het hulle is in die huis. Sy het toe gesê sy kom hulle haal.

Ek het toe vir my weer 'n dop brandewyn ingegooi en weet nie wat verder gebeur het nie."

/His ...

His failure to mention the tablets in this statement, the appellant sought to explain by saying that he was shocked and not himself when he made it. The explanation is unacceptable. The policeman who took down the statement testified that although the appellant might have been shocked, he had no difficulty or problem in recounting the events in a coherent, logical and chronological manner. The statement itself proclaims that the appellant must have been in full possession of all his faculties when he made it. The omission to make any mention of the tablets is a very weighty pointer to the fact that the tablets played no role at all in the killing of the deceased. In the third place, if the deceased had tried to kill the appellant, to his knowledge, by giving him an overdose of tablets, it is inconceivable that he would have acted in the way he did after he had killed her. As stated earlier, it was common cause (the appellant admitted it in his evidence) that he went into the kitchen,

/spoke ...

spoke to the children, fetched some brandy, returned to the bedroom, and drank it. On his evidence the appellant must have done these things, expecting that he was going to die, and he must then have lain down on the bed, awaiting his death. That cannot be believed and is not reasonably possible.

The conclusion is that the whole of the appellant's evidence relating to the conduct of the deceased in giving the Halcion tablets to him was patently false. The trial Court was fully justified in rejecting it. On that footing exh F was in fact what on the face of it it clearly purports to be: a suicide note. The appellant emphatically and repeatedly denied that it was such, but in the context of the appellant's other evidence his denial must suffer the same fate as his other evidence: it must be rejected as false beyond reasonable doubt. That being so, the inference is inescapable that the appellant took the Halcion tablets after he had killed the deceased. The trial Court's finding to that effect is

/unassailable ...

unassailable.

The result of the above analysis is that the very foundation of the appellant's defence is wholly destroyed. That applies to all three of the grounds on which the defence was sought to be based. In view of the fact that the appellant's evidence does not afford any acceptable explanation for his alleged breaking down and loss of self-control, there is no evidential basis for sustaining a reasonable possibility that he was acting involuntarily, or unconsciously, or without criminal capacity, when he killed the deceased, nor is there any basis for displacing the inference that he intended to kill her, which arises from the manner in which he did so. In the latter regard I would cite two further passages from his evidence (which must be compared with what he had said in his statement to the police, exh G):

> "Did you experience any physical effects of the sleeping tablets and the alcohol when you in fact shot the deceased? --- No well, like I say I just lost control, it ... (pause).

/But ...

But you did not feel drowsy or anything like that? --- I did feel drowsy, I mean I was numb at my cheeks.

Going through your evidence-in-chief one seemed to gain the impression that you still knew what was going on when you shot the deceased? Is that the correct impression? --- Yes, but I could not control myself."

"Now can you say whether the shooting and the stabbing took place in one course of action, or was it divided into separate compartments? Did you first shoot and then have a look and then stab? --- I shot her and then I saw what I had done and I just took the knife and I - the bayonet and I stabbed her.

Well, what do you mean when you say you saw what you had done after having shot her? --- I could not control myself.

COURT: What was your last reply? --- I could not control myself. I could not ..? --- Control myself.

MR. VERMEULEN: Can you think of any explanation or reason why you stabbed as well as shot? --- I have got no explanation for that."

It follows from what has been said above that the evidence of Mr Carnie cannot avail the appellant. The factual basis on which his opinions were based having fallen away, his opinions must necessarily fall away too.

/I ...

I would add that he made it clear in his evidence that his opinions were based on the cumulative effect of the various factors enumerated earlier in this judgment, and that he was unable to ascribe any separate value to any individual factor. Hence, when once it appears that one important factor taken into account by Carnie must be left out of consideration, namely that the appellant had been influenced by the taking of the Halcion tablets before the killing, his opinions are perforce deprived of any validity they might have had otherwise. I would add also that Carnie was not aware of the suicide note when he interviewed the appellant and prepared his report. In his evidence he was unable to provide a rational explanation of the suicide note. He said that it reflected ambivalent feelings on the part of the appellant, that it showed a state of panic and an hysterical reaction. However, none of these comments can resolve the problems created for the appellant by the existence of the suicide

/note ...

note, as discussed above.

For the above reasons the appellant was correctly convicted of murder.

The appeal is dismissed.

A.S. BOTHA JA

JOUBERT JA

CONCUR

NESTADT JA