145/86
/mb

THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

WILLIAM DHLAMINI ..... APPELLANT

and

THE STATE ..... RESPONDENT

CORAM : VILJOEN, GROSSKOPF, JJA et STEYN, AJA

HEARD : 22 SEPTEMBER 1987

DELIVERED : 1 DECEMBER 1987

J U D G M E N T

VILJOEN, JA

I have read the judgment of my Brother Steyn.

I agree that the appeal against the conviction fails

and/.....

and I also agree that on the facts found by the learned Judge he erred in finding that the appellant's conduct constituted gross negligence and that this Court may, consequently, interfere with the sentence. I however do so reluctantly, because I have grave difficulties as far as the factual findings by the learned Judge are concerned.

The sequence of events at the crucial stage of the drama in the kitchen that night unfolded itself in the following stages:

1. The appellant struck the deceased in the face.

2. Grace Motolo and her son Sandile intervened to prevent the appellant from further assaulting the deceased.

3. In retaliation for the assault on her the deceased grabbed a kettle of boiling water and emptied it

on the appellant which caused serious burns on his arms and his body. Some of the boiling water landed on Sandile as well and he beat a hasty retreat.

4. Thereafter the appellant produced his pistol from his pocket and two shots were fired by him. One struck the pelmet above the window and the other one went through the body of the deceased who was at that stage trying to open the back kitchen door. After the bullet had struck her she managed to open the door, went out, collapsed and died outside.

In view of the nature of appellant's defence, as put to the State witnesses, two issues emerged which the Court a quo had to decide. The first one was whether the deceased, before she hurried to the back door to escape from the appellant, had reached for another pot of boiling water which was standing on the stove to empty it onto the appellant. The other

was whether the second shot which killed the deceased was deflected by Goodwill who grabbed the arm of the appellant causing the shot to be fired in the direction of the deceased.

On the first issue the learned trial Judge found (a passage which my Brother Steyn has also quoted):

> "Because of the unsatisfactory features in the State's version to which I have alluded above, I am prepared to give the accused the benefit of the doubt in respect of the first shot and to find that he was entitled to fire the first shot into the pelmet in the reasonable belief that his wife, the deceased, was going to pour water over him again."

In the course of his judgment the learned Judge said:

> "It was patently obvious that all three State witnesses because of this relationship to the deceased were emotionally disturbed by the

death of their relative at the accused's hands. They had been witnesses to the unfortunate and tragic incident in the kitchen of the accused's home when the deceased lost her life. By no stretch of the imagination can they be viewed as objective and impartial witnesses. There are passages in their evidence which even indicate hostility towards the accused. There are contradictions in their evidence. Some on important issues which make it dangerous for me to accept any portion of their evidence which is not corroborated either by objective facts and probabilities or where the accused's evidence is so poor that it provides a safeguard which allows me to rely on certain parts of their evidence which he cannot refute or does not refute or about which he has lied or given contradictory evidence."

I have carefully perused the evidence. There were discrepancies in their evidence but, in my view, they were of a minor nature. From the record

it appears that the only witness who was emotionally disturbed was Gertrude Motolo. I agree that it would be dangerous to have relied on her evidence. On various occasions in the course of her testimony she broke down and cried and from certain passages in her evidence it may be inferred that she was hostile to the appellant. In one passage she referred to him as the murderer. I did not get, on paper I must concede, the same impression of Sibongile and Sandile. The learned Judge made no findings as far as their demeanour was concerned. One must remember that much occurred within the space of a few seconds and it was a changing scene. What was observed by one might not have been observed by the other. Sibongile and Sandile were, it is true, the

brother and sister-in-law of the deceased but it cannot, in my view, be said that, by reason of this relationship it was, per se, patently obvious that they would give biassed evidence against the appellant.

That the deceased reached for a second pot to pour water over the appellant should have been totally rejected by the learned Judge because of the utter improbability thereof. In the first place the pot had no handles and the deceased would have had to pick it up with her bare hands. When this was pointed out to the appellant, he suggested she could have tipped it over. This was a clear afterthought. His evidence, one of the many variations thereof, is that after the water in the kettle had been poured over him, he jumped back. In any

event, why would she empty another container full of hot water over him? She had accomplished her purpose with the water in the kettle. She would, fearing retaliation, immediately try to get away. That she did so is what the State witnesses said. And why would he wait before going into action until he was threatened a second time? The probabilities are that he was so enraged by the first scalding that he acted immediately and impulsively, produced his fire-arm and started to shoot. He could not have entertained the belief, let alone a reasonable belief, that his wife was going to pour water over him again. In my view the State evidence on this issue should have been accepted.

That Goodwill grabbed his arm and that the

shot was deflected, was one of the many defences of the appellant. He varied his version as he went along and it is difficult to ascertain what his real defence was. He seemed to have relied on one or more of the following defences: that when he shot he was not in his senses (automatism or provocation or both?); self-defence; that his arm was grabbed by Goodwill and the direction of the bullet deflected; that he shot merely to frighten her and finally that he did not intend to shoot but that the shots went off accidentally when his arm was grabbed by Goodwill. The learned Judge found as follows:

> "His denial that he fired the first shot to kill is supported by the fact that the bullet ended up in the pelmet and the possibility that the second shot was not

aimed at the deceased cannot be refuted beyond reasonable doubt in the light of his brother's pulling of his arm."

That the one bullet ended up in the pelmet is of course an undisputed fact. That, even in the face of facts from which only one inference can be drawn namely that of an intention to kill, an accused very frequently denies that he had that intention, is common experience. I have looked, but looked in vain, for any indication in the record that the accused deliberately aimed high or away from the deceased so as not to shoot her. While the State evidence is not decisive on the issue as to the effect of the grabbing of the arm of the deceased by Goodwill there are, on a conspectus of the evidence as a whole, features from

which an inference may, in my view, be drawn that the appellant deliberately aimed at the deceased. One such feature is the curious omission by him to state that he deliberately shot high or away from her so as to miss her. During his evidence-in-chief and before performing his remarkable egg-dance among his various defences he testified as follows:

> "Yes? -- When water was thrown onto me, Sandile was burned a little and he let go of me. I turned round to face my wife, because she threw water at me from behind. When I turned round, I saw she was returning to the stove to fetch the pot with water. At that stage I drew a firearm. I do not know how many times I fired, because I had lost my senses. I remember Nklankla came and grabbed me by the arm. That was the last I saw what was happening."

He does not say that he fired to miss. He says he had lost his senses. The impression one gets from this passage is that he shot, not to frighten her, but in blind anger. At what? The inference is that it was at the object which caused his state of mind. If Goodwill did grab his arm, of which he might dimly have been aware, it might have been to avert his aim from the deceased. The first shot might have struck home. While the State witnesses conceded that it was the first shot which struck the pelmet it is to be doubted whether anybody in that room could have been sure where the first shot struck and whether it was the first or second shot which struck the deceased. The shot in the pelmet, whether it was the first or

second one, could have struck there as a result of the grabbing of his arm by Goodwill. By skilful suggestive questioning on the part of his counsel he was coaxed to testify as follows:

> "Now, there has been evidence that the first shot went into the pelmet. -- I saw that.
>
> And that pelmet is actually away from the back, outside the door. It is away from the outside door. It is not in the direction of the back door leading outside.
> -- Yes, very far from the back door.
>
> Are you able to say how the second shot ..., because it has been agreed that there were no more than two shots, how the second shot came to hit the deceased? -- Goodwill came from behind me and pulled away the arm with the firearm and said: Brother, stop."

The witness who could have cleared this matter up was Goodwill. The State did not call him

- due, it seems, to the learned Judge's impatience because he considered that he had heard enough State witnesses on what he considered, too narrowly, in my view, to be the factual issues in the case. Goodwill was, however, made available to counsel for the defence who did not avail herself of the opportunity to call him. The learned Judge could, and in my view, in the interests of justice, should have called Goodwill in terms of s 167 of Act 51 of 1977.

In my view, the appellant was fortunate to have been convicted on the facts found by the learned Judge. I am, however, for purposes of this appeal, obliged to accept those findings. I have warned myself that, being human, I should guard against an inclina-

tion to regard the question of sentence in a light more serious than is warranted by the facts found by the learned Judge a quo. I may add that I do not agree with my Brother Steyn that the deceased's reaction was out of all proportion to the hurt and provocation caused by the blow struck by the appellant. There was no medical evidence that a fist blow would necessarily cause a change in the pigmentation of a dark skin, particularly under the circumstances which prevailed. The shot which passed through her heart must have caused exsanguination as a result of which no mark might have been left on her face. In any event, the humiliation suffered by her when struck a blow, whatever the force of it might have been, in

the presence of all the people in the kitchen must have been a severe humiliation.

However, regard being had to the factual findings of the learned Judge for purposes of a conviction and taking into consideration the factors which personally and peculiarly relate to the appellant, I agree with the sentence proposed by my Brother Steyn.

JUDGE OF APPEAL

GROSSKOPF JA - agrees

WILLIAM DHLAMINI	Appellant
and	
THE STATE	Respondent

Case No 145/86
mp

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

WILLIAM DHLAMINI Appellant

and

THE STATE Respondent

CORAM: VILJOEN, GROSSKOPF, JJA et
STEYN, AJA

HEARD: 22 September 1987

DELIVERED: 1 December 1987

J U D G M E N T

STEYN, AJA .....

STEYN, AJA,

On the 20th September 1985 the appellant was convicted of culpable homicide by STAFFORD, J, sitting without assessors in the Witwatersrand Local Division, and sentenced to 3 years' imprisonment. The appellant was a 29-years-old policeman of 9 years' standing and a first offender. He had been charged with murdering his 22-year-old wife Minah Nomsa Dhlamini (the deceased) at their Dobsonville home on the 5th January 1985. In the summary of relevant facts (attached to the indictment) as amended at the commencement of the trial, it was alleged that he deliberately shot and killed her with a pistol on the evening of the said day. Having found, however, that appellant had acted negligently, the learned Judge convicted him and sentenced him as aforesaid.

No medical evidence was led at the trial but the appellant, who was represented both at the trial and

in .....

in this Court by Miss Bruyns, admitted in terms of sec 220 of Act 51 of 1977 that the deceased died as result of "a bullet wound through the heart" at the place and on the date alleged in the indictment and that the facts and findings recorded in Afrikaans by Dr C J Grobler in the report of the post-mortem examination conducted by him on the body of the deceased on the 7th January 1955 were correct. That report was handed in as exh B. The correctness of photographs of the deceased taken at the time of the post-mortem examination was similarly admitted. The cause of deceased's death was recorded as follows in the report, exh B, and read into the record by Miss Bruyns.

> "Skietwond ingang regter borskas, anterior oksillêre lyn in regter mamma, deur vierde rib regs, deur regter long, deur perikardium, deur hart, regter en linker atrium, deur linkerlong en uit linker borskas, vyfde rib, deur linker mamma lateraal, in deur linker bo-arm mediaal en uit lateraal (alle gate deur dieselfde koeël veroorsaak)."

According .....

According to this report the deceased was a small person whose length was 1,60 m (plus-minus 5' 4") and who weighed 54 kg.

It is common cause that appellant and deceased had grown up together, that at the time of the shooting they had been married for a number of years but were childless, and that they lived at their joint home at no 3124, Dobsonville, together with appellant's two younger brothers, Goodwill (or Nklankla), aged 19 years and in standard 7, and Matthews (or Sipiwe), aged 16 and in standard 6, who were under appellant's care.

It is also common cause that appellant and the deceased were both in the kitchen of their home when the fatal shot was fired by him, and that it was fired from his own 9 mm calibre Star pistol which had by then been in his possession for about 4 years.

The layout of the Dhlamini residence is not in

dispute .....

dispute and a sketch plan thereof was handed in by consent during the trial as exh D. According to that plan it is a rectangular four-room dwelling. There are two adjoining bedrooms, one facing to the front of the building and the other to its rear. Next to the front bedroom is a combined dining- and sittingroom (the sittingroom) and next to the rear bedroom a kitchen adjoining the sittingroom. These two last-mentioned rooms are directly connected by a door in their dividing wall at the corner next to the rear bedroom. The kitchen also has an outside door in the outer side-wall near the corner with the rear wall. This door is fitted with two locks, one above the other and each with its own handle or knob. It opens inwards towards the dividing wall between the kitchen and sittingroom. The kitchen is a small room of 4 x 4 m, the shorther dimension being that of the side-walls. On the 5th January 1985 there was a stove in the kitchen against the inner wall about halfway between the door to the sittingroom and

the side-wall. The stove and outer door were therefore diagonally opposite and very near to each other, not more than 2 - 3 m separating them. In the middle of the rear wall, almost directly opposite the stove, there is a rear window with a pelmet.

Only 4 witnesses testified at the trial, three for the State, and appellant. The State witnesses were all relatives of the deceased, namely, her aunt, Gertrude Mtolo (she and the deceased, however, treated each other as mother and daughter), Gertrude's daughter-in-law, Sibongile and her husband Sandile Mtolo. Although it is common cause that they and the appellant were all present in the kitchen at the time of the shooting there is a wide-ranging conflict between them as to what happened immediately before, during and immediately after the shooting. The State witnesses and appellant not only contradicted each other, there were also mutual contradictions between the State witnesses themselves, inter alia as to the number of

shots .....

shots fired. In addition, and with the exception of Sandile who, because of certain concessions made by him was not cross-examined, all the witnesses were also self-contradic= tory, especially appellant. Despite the poor quality of this evidence there are nevertheless certain salient features which emerged with sufficient clarity therefrom as well as from the admitted and undisputed facts and the probabilities arising therefrom, to enable the learned Judge to come to his aforementioned finding. I will deal with them later.

The earlier events of that day were, however, not materially in dispute and can be summarised as follows:- Shortly before 13h00 appellant arrived home from duty. He had his pistol on him but did not put it down because he left again immediately to fetch Gertrude at her nearby home to come and make peace at his place between the deceased and his two aforementioned younger brothers. They had been

quarrelling .....

quarrelling about the simultaneous playing in the sittingroom of a television set and a radio. The deceased, who was unwell that day, wanted to watch the television and the youngsters wanted to play the radio. Gertrude went and duly restored the peace. The youngsters asked her "forgiveness" for their behaviour and she departed again after having reprimanded appellant for having fetched her, saying to him: "You could have sorted this out with the children and should not have fetched me". After her departure the television set was moved from the sittingroom to the deceased's bedroom, most probably by appellant assisted by the two boys. She then watched the television in the bedroom and the boys played the radio in sittingroom. For a while peace then apparently reigned. As it was getting dark Gertrude, Sibongile and Sandile returned to appellant's house to see how deceased was. They found appellant, deceased and the boys at home.

What .....

What happened thereafter is in dispute and the subject of the aforementioned conflicting versions.

No good purpose will be served in traversing that conflict. In dealing therewith the learned Judge accepted certain portions of each witness's evidence and rejected others. He had good reason to do so. (It must also be mentioned here in passing that in coming to his conclusions on the merits the learned Judge left out of account what appellant had said before a magistrate during proceedings in terms of sec 119 of Act 51 of 1977). I am satisfied that his main findings of fact relating to the sequence of events leading up to and including the shooting cannot be interfered with. In their turn, those findings can be summarised as follows:-

Because of her indisposition the deceased was still lying down in the bedroom and had not yet

prepared .....

prepared food for the appellant and his brothers when Gertrude, Sibongile and Sandile arrived. That dissatis= fied appellant. He went out, bought food, returned therewith and put it down in the kitchen. On the stove a kettle was then on the boil. One of appellant's brothers had also put a pot of rice on the stove to cook. Gertrude and Sibongile had in the meantime chided the deceased for her failure to cook and persuaded her to get up and do so. She went to the kitchen but did not commence cooking. This angered appellant and he struck her in the face with his fist. At that Gertrude and Sandile grabbed hold of him to restrain him. Deceased was so enraged that she grabbed the kettle off the stove, removed the lid and threw its boiling contents over appellant. He was very badly scalded. Sandile was also burnt and he and Gertrude let go of appellant and moved away from him. Appellant drew his pistol and fired a shot in the air. The bullet lodged in the

pelmet .....

pelmet of the kitchen window. The deceased fled to the outside door of the kitchen and struggled with both hands to open it. In doing so her right arm was raised and her right side was turned towards appellant who was still at the stove. As appellant was about to fire a second shot his brother Goodwill grabbed hold of his arm in an attempt to prevent him firing again. It was the arm of the hand in which appellant held the pistol. He had not intended hitting the deceased but as appellant pulled the trigger Goodwill's tugging at his arm deflected the pistol and the bullet struck deceased. As indicated by the admitted post-mortem findings, the bullet missed her raised right arm but passed through her body and other arm from right to left and struck the kitchen wall between the outside door and the corner, about 1 m above the floor. The deceased fled through the door she had managed to open and collapsed outside where she was discovered by appellant as he was on his

way .....

way to hospital in his motor car.

Now follows a portion of appellant's evidence with which the learned Judge dealt in part but which he neither expressly accepted nor rejected. I see no reason for not accepting it. This is the gist of it. When appellant found deceased she was still alive. Instead of going to the hospital he then went and summoned the ambulance and reported the incident at the police station at about 20h00. He waited there in great pain until the arrival of the duty officer at about 01h00. Thereafter he went to the hospital. He was admitted forthwith because of the gravity of his burns and remained there under treatment for 20 days.

It is clear on the evidence accepted by the learned Judge that appellant produced and used his firearm only after he had been scalded by the boiling water thrown on him by the deceased. The appellant's explanation for

doing so was the following: He thought the pot on the stove also contained boiling water and feared that the deceased was on the point of taking it and also throwing its contents over him. He drew his pistol and fired the first shot, shooting high so as not to harm her but merely to frighten her into desisting from doing so. He said in effect that in doing so he was acting in legitimate self-defence. The learned Judge accepted this explanation. He did so in these terms:

> "Because of the unsatisfactory features in the State's evidence to which I have alluded above, I am prepared to give the accused the benefit of the doubt in respect of the first shot and to find that he was entitled to fire the first shot into the pelmet in the reasonable belief that his wife, the deceased, was going to pour water over him again."

By virtue of this finding neither the drawing of the pistol by appellant nor the firing by him of the first shot was unlawful and have to be left out of consideration .....

consideration in deciding upon his guilt or innocence. This the learned Judge did. He based his finding that appellant was guilty of culpable homicide solely upon the firing of the second shot. He framed that finding inter alia in the following terms:-

> "For reasons I have set out above I reject the accused's evidence that the shot went off accidentally, involuntarily or uninten= tionally. I find that the accused deliberately fired a second shot in the confines of the small kitchen where there were at least six people present ..... In my view a reasonable man in the position of the accused would have foreseen the possibility that in firing the second shot in that small kitchen with Goodwill pulling at his arm and telling him to stop shooting, he might cause the death of the deceased or of the other persons in that room. His conduct in firing the second shot despite the fact that he had been provoked, was in pain and had in all probability fired the first shot when he had little time to think rationally was to my mind not only unwarranted but negligent. That negligent conduct led to the death of the deceased."

I agree with this conclusion because I am

satisfied .....

satisfied that despite the severe pain and shock appellant was in, he still had his wits sufficiently about him to form the intention to fire the second shot, and that a reasonable man in appellant's parlous circumstances would nevertheless have foreseen, albeit only dimly, the dangerous possibilities inherent in firing the second shot in the conditions then prevailing as set out by the learned Judge.

The appellant was, therefore, rightly convicted of culpable homicide and his appeal against that convic= tion must fail.

The learned Judge concluded his judgment on the merits by saying: "I deliberately refrain from pronouncing on the degree of negligence until I have heard argument in respect of sentence." Having heard such argument (no evidence in mitigation having been led) he

came to the conclusion that appellant had been grossly negligent in firing the second shot. His main reasons for that finding are set out as follows in his judgment on sentence:

> "I have reconsidered my judgment on the facts, I have looked at the findings that I have made and unfortunately as far as the accused is concerned, I could come to no other conclusion than that the accused's conduct in firing the second shot as I have described, was grossly negligent. The facts, in my view, speak for themselves and do not require any further analisation to substantiate this finding of mine .....
>
> I will also accept Miss Bruyns's argument that the accused in all probability was still under stress to the degree that he had been hurt by the boiling water and provoked to use the gun on the first occasion, and that in all probability clouded his judgment to a degree when it came to firing the second shot. On my findings, however, he had sufficient time to reflect and ought to have realised that to pull the trigger and fire a second shot, might end in tragedy as it very well did."

I differ with respect from the learned Judge's

conclusion .....

conclusion that "the facts speak for themselves" and do not require any further analysis to substantiate the finding of gross negligence. An important fact accepted by the learned Judge himself is that at the time of the second shot appellant's judgment was in all probability "clouded to a degree" by the stress of the pain he was then enduring and the provocation to which he had been subjected. That degree of impairment was probably severe. During the course of his judgment on the merits the learned Judge had found that "it is clear that the accused had been seriously burnt by the deceased. It hurt him. There was undeniable provocation which gave rise to impulsive and unpremeditated behaviour on his part." The description of the "hurt" appellant was suffering at the crucial stage when the second shot was fired, is an understatement. He must then have been in very severe agony; he must clearly also have been in a state of severe shock. And his capacity to fully appreciate the

nature and possible consequences of his actions must have been gravely impaired. Burns and their extreme painfulness, even where the burns are relatively minor, are part of common human experience. So also is the beclouding effect thereof on human judgment, insight and self-control.

It is also clear that by their very nature the events must have followed each other in rapid succession after the deceased had thrown the boiling water over appellant. The second shot must have been fired within a matter of seconds of the first, when the water was still hot upon appellant's body. I consequently disagree with the learned Judge that appellant "had sufficient time to reflect" upon the dangers inherent in firing the second shot. And his capacity to realise that dangerous potential was, in addition, seriously impaired, as aforesaid.

Gross negligence in our common law, both criminal

and .....

and civil, connotes a particular attitude or state of mind characterised by an entire failure to give conside= ration to the consequences of one's actions, in other words, to an attitude of reckless disregard of such consequences. See eg - Rosenthal v Marks 1944 TPD 172 at 180; S v Smith en Andere 1973 (3) SA 217 T at 218 D - F; and Bickle v Joint Ministers of Law and Order 1980 (2) SA 764 R at 770 D - E. To my mind it cannot be said that a reasonable man in the position and condition of appellant at the time of the second shot would have been capable of such disregard in view of the serious impairment of his senses. That this is the way in which the "test of the reasonable man" must be applied is clear from the following passage in the judgment of RUMPFF, CJ in S v van As 1976 (2) SA 921 (A) at 928 C - E:

"In ....

> "In ons reg gebruik ons sedert die gryse verlede die diligens paterfamilias as iemand wat in bepaalde omstandighede op 'n sekere manier sou optree. Wat hy sou doen word as redelik beskou. Ons gebruik nie die diligentissimus paterfamilias nie, en wat die diligens paterfamilias in 'n bepaalde geval sou gedoen het, moet die regterlike beampte na die beste van sy vermoë beslis. Hierdie diligens paterfamilias is natuurlik 'n fiksie en is ook maar al te dikwels nie 'n pater nie. Hy word 'objektief' beskou by die toepassing van die reg, maar skyn wesenlik sowel 'objektief' as 'subjektief' beoordeel te word omdat hy 'n bepaalde groep of soort persone verteenwoordig wat in dieselfde omstandighede verkeer as hy, met dieselfde kennisvermoë. Indien 'n persoon dus nie voorsien nie wat die ander persone in die groep wel kon en moes voorsien het, dan is daardie element van culpa, nl versuim om te voorsien, aanwesig."

The law must take cognisance of the realities of human existence, even in the application of legal fictions to the facts of a particular situation. The learned Judge therefore erred in finding that the appellant was grossly negligent in firing the second shot. That was a serious

misdirection .....

misdirection on the question of appellant's culpability.

He also misdirected himself in other important respects in his judgment on sentence. The learned Judge found that appellant had used his fire-arm "in an attempt to settle a marital squabble." He considered that to be an aggravating feature. But on his own prior finding appellant had initially used the fire-arm lawfully in self-defence, not to "settle a family squabble", but with the intention of preventing the deceased from throwing more boiling water over him. And it is certainly not clear that when he fired the second shot very shortly after the first, he did so to settle the "squabble." Regarding the second shot the learned Judge, in his judgment on sentence, in any event also said the following: "I find in his favour that the pouring of the boiling water over him causing him serious injuries, reduces the moral blameworthiness of his negligent reaction....."

The learned Judge also held it against appellant that he "started the whole incident by hitting the deceased." That he hit her and thus sparked her reaction undoubtedly counts against appellant. But the blow he gave her could not have been a very hard one because it left no mark upon her body. Her reaction was in any case unquestionably out of all proportion to the hurt and provocation caused by that blow. And there is no suggestion in the evidence that he had ever maltreated the deceased in any manner before that fateful evening. And earlier that day he had been a peacemaker together with Gertrude. Undue weight must, therefore, not be attached to that blow. The fact that appellant was by then already an experienced policeman, trained in the use of fire-arms, counts against him and must be accorded due weight. That does not, however, deprive the factors in appellant's favour of their mitigatory effect.

Another .....

Another aspect upon which the learned Judge misdirected himself concerns his finding as to "the demands of society" regarding the punishment to be inflicted upon appellant. This was his conclusion thereon:-

> "As far as the interests of the community are concerned I find that because of the seriousness of the crime it must play an important role. I do not believe that the demands of society in this case could be anything else than that the accused should undergo imprisonment. This demand obviously must be tempered by the other circumstances I have already elaborated on above in this judgment."

The tempering effect alluded to by the learned Judge clearly related in his estimation only to the term of the imprisonment and not to the nature of the punishment. The "other circumstances" referred to by him in the above-quoted passage clearly refer to the mitigating factors he found in favour of appellant. Apart from the clouding of appellant's judgment and the

reduction .....

reduction of his moral blameworthiness already referred to, the learned Judge set out those other circumstances as follows in his judgment on sentence:-

> "I accept that he, in his expression of his love for his wife and the fact that he no longer has her, has shown remorse. He has shown remorse for bringing about her death. It is unlikely that he will commit a crime of this nature again. It was related to the particular circumstances of the case namely the quarrel on that evening and his relationship with his wife at the time. It was, on my finding, a quarrel that should never have gone as far as it did ..... I take into consideration his personal circumstances. He is 29 years of age. He was married. No longer has a wife. He apparently received a formal schooling up until Form 2. No children were born of the marriage. His mother is deceased and his father has re-married, lives in Natal with his new wife's family and as I understand it, Miss Bruyns has told me that he has made a new life in Natal and takes very little or no interest in either the accused or the accused's two younger brothers.
>
> As a result thereof the accused looks after his two younger brothers Matthews and Goodwill, who were referred to in the evidence,

> Matthews 16 and Goodwill 19, who are in standard 7 and standard 6 respectively. They live with him and regularly attend school despite our troubled times. I have been told and I accept that they are entirely dependent upon him. Fortunately they are not young children but it weighs heavily with me that in the event of me sending the accused to jail I would be depriving these boys of support."

This is also not a case of a man quarrelling with his wife and then facilely and unnecessarily resorting to the use of a firearm and killing her in the process.

In the light of the aforegoing it cannot be said that society demands that the punishment of appellant could in this case be nothing else than that he should undergo imprisonment.

Apart from the abovementioned misdirections it is in my estimation also clear that the learned Judge attached undue weight to the seriousness of the crime and underemphasized the mitigatory effect of the factors favouring the appellant. Applying the test in S v Pieters 1987 (3) SA 717 (A) justifying this Court's interference with a discretionary sentence imposed by a

trial .....

trial Court, I am satisfied that the learned Judge could not reasonably have imposed the sentence which he did. This Court is, therefore, at large to reconsider the question of punishment.

Having considered the aggravating and mitigating factors, I am of the opinion that the circumstances of this case do not justify appellant being sent to prison without more. Although a sentence of imprisonment is called for, the interests of society, of the appellant and of justice will be best served by suspending the whole of such sentence conditionally. The term of 3 years' imprisonment is, however, appropriate.

In the result the following orders are made:

1) The appeal against appellant's conviction of culpable homicide is dismissed;

2) The appeal against the sentence is allowed;

3) The .....

3) The sentence imposed by the Court a quo is varied to read as follows:-

> "Three years' imprisonment suspended for five years on condition that the accused be not convicted of culpable homicide involving the use of a fire-arm and which is committed within the period of suspension."

M T STEYN, AJA