237/92

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Case No 85/1990

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ARTHUR KALOGOROPOULOS Appellant

and

THE STATE Respondent

CORAM: BOTHA, EKSTEEN et VAN DEN HEEVER JJA

HEARD: 13 NOVEMBER 1992

DELIVERED: 30 NOVEMBER 1992

JUDGMENT

BOTHA JA:-

This is a Greek tragedy, in which the dramatis personae are:

Athanasius Kalogoropoulos, a 52-year old baker, the appellant.

Dafni, his wife, some 21 years younger.

Dimitra, his 13-year old daughter.

Macheras, his business partner and friend (but suspected by the appellant of having an affair with Dafni).

Charitomeni, wife of Macheras.

Dora, housemaid in the appellant's home.

Julia, her cousin.

Stefanos, husband of Dafni's sister.

Stergiou, husband of the appellant's sister (and self-confessed erstwhile lover of Dafni).

The scene alternates between the appellant's home in Craighall Park, Johannesburg, and a

nearby supermarket run by the appellant and Macheras, assisted by Dafni and Charitomeni. The time is the afternoon of 16 February 1988. The appellant, on an errand to buy something for the shop, drives past his home and sees Macheras's car parked in the yard. He thinks that Macheras is visiting Dafni with improper intentions, and resolves to question them on their return to the shop. Later he does this, but discreetly. The answers he gets make him believe that Dafni and Macheras are hiding the fact that they spent time together at the house earlier in the afternoon. The appellant goes to the house and questions Dora about visitors. Dora insists that no one visited the home during the afternoon. Then the appellant finds, on the ground outside the kitchen door, a number of cigarette stubs of the brand habitually smoked by Macheras. He now believes that his suspicions are well-founded. He is overcome with

jealousy and despair. He finds a bottle of vodka, half filled with the liquor, and gulps down all of it. He goes back to the shop. He has with him a revolver, which it is his habit to carry on him always. At the shop, he finds Dafni and Macheras in the small office of the business, drinking whisky. (It is now near the closing time of the shop, and it is the custom of the two couples to have drinks in the office at that time.) The appellant pours himself a glass nearly full of whisky and drinks it down. He takes out the revolver and cocks it. He accuses Dafni and Macheras of having had sexual relations that afternoon. They deny it. A heated altercation ensues, lasting some time. In the course of it Dafni and the appellant swear at each other; the appellant threatens to shoot Dafni; Macheras moves towards the appellant, but is pushed back onto a chair; Charitomeni enters; and the appellant

waves the revolver in his hand to and fro, pointing it between Dafni and Macheras. A shot goes off, hitting Dafni and wounding her. As she falls to the floor, Charitomeni shouts: "You have killed her!" Further shots are fired in rapid succession. Two of them strike Macheras in the chest, killing him. Another hits and wounds Charitomeni. The revolver is now empty. The appellant throws it down on the desk and leaves the office and the building, damaging the outside door in his exit.

On to the next act of the drama. The appellant drives home and parks his car outside the house. He goes inside, opens the safe where the fire-arms are kept, and arms himself with a pistol. Dimitra is present. He asks her where Dora is, and is told that she is in her room, which is in an outbuilding at the back of a courtyard. The appellant goes into the yard, where the family dog

playfully jumps against him. He shoots the dog, firing two shots and fatally wounding it. In Dora's room he finds Dora and Julia. He tells Dora: "I shoot you because I will not trust you again". He fires two shots into her chest, killing her. He leaves the room, but returns after a short while and instructs Julia to go to the TV room in the house and to look after the children, explaining that he has killed Dafni and Macheras in the shop. He also asks Julia whether Dora is dead, and is told that she is. Back in the house, he makes telephone calls to a number of relatives, telling them that he has shot Dafni, Macheras and Charitomeni. He drinks some whisky from a bottle. He takes a shotgun, loads it, and sits down with it on his lap. At some stage he fires a shot into the ceiling. Enter Stefanos, his wife and his father-in-law. The appellant threatens to kill them and aims the gun at them. Stefanos

tries to take the gun away, but fails, the appellant holding on to it. A telephone call is received from the appellant's brother. The appellant tells him that he has killed Macheras. He also says to Stefanos: "I killed George", referring to Macheras. On being asked why he did so, the appellant replies that he caught "them" sleeping together all afternoon on the sofa. He tells Stefanos that he also shot the maid and that he emptied the pistol on her (which is true). He offers to show Stefanos where he shot the maid, and they go into the courtyard. On seeing the dog, apparently dead, Stefanos declines to go further and they go back into the house. In the meantime all the other people in the house have slipped out. Stefanos, at an opportune moment, while the appellant's back is turned, does the same. The police arrive and surround the house. After a while the appellant comes out, his hands in the air. He is

arrested and taken away. The curtain falls.

The appellant was charged in the Witwatersrand Local Division before GORDON AJ and two assessors, as follows:

Count 1: Murder - the killing of Macheras.

Count 2: Murder - the killing of Dora.

Count 3: Attempted murder - the wounding of Dafni.

Count 4: Attempted murder - the wounding of Charitomeni.

He was convicted and sentenced as follows:

Count 1: Culpable homicide - 5 years' imprisonment, to run concurrently with the sentence on Count 2.

Count 2: Murder - 8 years' imprisonment.

Count 3: Common assault - 2 years' imprisonment, to run concurrently with

the sentence on Count 1.

Count 4: Common assault - 2 years' imprisonment, to run concurrently with the sentence on Count 1.

An application to the trial Judge for leave to appeal against the convictions on Counts 1, 2 and 4 and the sentences on all the counts was granted.

At the commencement of the trial, following upon the appellant's plea of not guilty on all the counts, a statement signed by the appellant and stating the basis of his defence was handed in, in terms of section 115 of the Criminal Procedure Act 51 of 1977. The statement records the events of the earlier part of the fateful afternoon and then continues, from the point when the appellant returned to the shop, found Dafni and Macheras drinking whisky, and he himself swallowed a glass of whisky, as follows:

"7. The accused habitually carried a revolver on his person for security reasons. He drew the revolver and cocked it with the intention of frightening his wife into admitting that she had in fact spent time with the deceased at his home earlier that afternoon.

8. An altercation took place between the accused, his wife and the deceased. The deceased's wife, Charitomeni, came into the small office where the altercation was taking place at some stage.

9. During the altercation the accused was shaking the cocked revolver at his wife, and a shot went off.

10. The deceased's wife exclaimed, 'You've killed her!'

11. The accused has no recollection of any of the events that may have occurred subsequent to this exclamation up to the time that he found himself as a patient at the Johannesburg Hospital in Parktown.

12. The accused did not intend to shoot his wife, Dafni, nor to injure her, but merely frighten her to induce her to admit that the deceased was her lover.

13. The accused says that having suffered from retrograde amnesia, he was informed when at the hospital and thereafter that he had committed the acts which have given rise to the charges against him.

14. The events of the 16th Feb 1988 were a culmination of numerous other provocative acts by the accused's wife who habitually and derisively referred to the twenty-one years difference in their ages; rejected him both publicly and privately; spurned, ridiculed and taunted him with increasing intensity; and, knowing that he was jealous and deeply in love with her, fanned his jealousy by her conduct.

15. The accused contends that due to the vast quantity of liquor which he consumed in a short period of time, more particularly having regard to the provocation referred to in paragraph 14 above and (save in relation to the facts set out in paragraphs 7, 8 and 9 above), the exclamation in paragraph 10 above, he was unable:

(a) to form the intention required to commit the alleged crimes; and

(b) to appreciate the wrongfulness of his actions or act in accordance with such appreciation; and

(c) to engage in any purposeful behaviour."

In régard to this defence the trial Court heard the evidence of two psychiatrists, Dr B Jeppe,

called by the appellant, and Dr M Vorster, called by the State. For the moment it will suffice to mention the tenor of their evidence in broad terms. (I shall consider it in more detail later.) Dr Jeppe and Dr Vorster were agreed that the appellant experienced a genuine amnesia as from the moment when the first shot was fired and Charitomeni exclaimed "You have killed her". Dr Jeppe was of the view that as from that moment the appellant was "totally unable to exert proper control over his actions" and that this condition subsisted when he shot Dora. Dr Vorster differentiated between the shooting in the office and the shooting of Dora. Her view was that in the office, more or less from the time the first shot was fired, the appellant was unable to act in accordance with an appreciation of the wrongfulness of what he was doing, but that when he left the office, he was once again "in control", and that he was not

experiencing a "loss of control" when he shot Dora.

It is now necessary to consider the basis upon which the trial Court returned the verdicts mentioned above. Regrettably, it is no easy task to discover what that basis was, as will appear from what follows. The trial Judge and the assessors were unanimous in respect of the verdict of murder on Count 2 (the killing of Dora), but there was a difference of opinion in regard to the other counts. The verdicts on Counts 1, 3 and 4 were returned by the majority of the Court, the majority being the assessors. It appears from the judgment of the trial Judge that his view was that the appellant should be convicted on those counts respectively of murder (Macheras), attempted murder (Dafni) and assault with intent to do grievous bodily harm (Charitomeni). The assessors, as we now know, voted for culpable homicide (Macheras) and common assault (Dafni and

Charitomeni). The difficulty in ascertaining the reasoning on which the assessors' verdicts were based arises from the judgment delivered by the trial Judge. In a judgment running into nearly 90 pages he refers to the views of the assessors in only the last two of those - and then in no more than three sentences. Moreover, in the earlier parts of his judgment, when dealing with the impressions made by the lay witnesses in the case and in making findings of credibility and reliability, he speaks throughout in the first person singular; and again, when commenting on the expert evidence of the psychiatrists and on the principles of law to be applied, the phraseology is the same.

It is clear that the trial Judge has not complied with the duty to give reasons for the decisions or findings of the majority of the Court upon questions of fact (see section 146 of the

Criminal Procedure Act 51 of 1977 and S v Masuku and Others 1985 (3) SA 908 (A) at 912 C-J). His failure to do so has caused needless problems for all concerned in the appeal. In this unfortunate state of affairs, we are called upon to consider the appellant's defence afresh, in the light of the evidence on the record. As to the basis upon which the assessors arrived at their verdicts on Counts 1, 3 and 4, counsel for the appellant argued that they must have found as a fact that the appellant was unable at the time of the shooting in the shop to act in accordance with his appreciation of the wrongfulness of his actions. On that basis, counsel said, the verdicts of common assault on Counts 3 and 4 were explicable as having been founded on the appellant's pointing of the fire-arm prior to the shooting itself; but the verdict of culpable homicide on Count 1 was insupportable and (so it was contended)

the trial Judge must have misdirected the assessors as to the legal principles relating to criminal incapacity. I cannot agree. It is elementary that the appellant could not have been found guilty of any offence in respect of the killing of Macheras if at that time he was unable to act in accordance with his appreciation of the wrongfulness of his actions (i e if the second leg of the test for criminal capacity was not satisfied). This proposition was in the forefront throughout the trial: it was put forward pertinently in the appellant's statement in terms of section 115; and it was canvassed at length in the evidence of the two psychiatrists. In the circumstances it is inconceivable, I consider, that the trial Judge could have misdirected the assessors on the law, or that they could have laboured under any misapprehension about it (they were both practising counsel of long standing at the Bar).

The real basis for the assessors' verdicts lies more readily at hand: it can be gathered with sufficient certainty, I think, from the cursory remarks of the trial Judge in the concluding passages of his judgment. They read as follows:

> "There are however differences in degree. Although I find that there was control, the extent of that control may be a factor which has to be borne in mind. Indeed in this case there are differences between my own view and the views of my assessors on certain aspects of responsibility in regard to the shooting in the office.
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> On counts 1 and 3, count 1 being the killing of George Macheras, count 3, the attempt to kill Dafni, I am of opinion that these charges have been proved beyond reasonable doubt. In my view, the anger of the accused was directed equally against both these persons. He was so aroused that he shot and intended to kill. Luckily for him, he did not kill Dafni. Both my assessors, however, are of the view that while accepting his capacity to act, while accepting his knowledge and appreciation that what he did was wrong, because of stress and his alcoholic condition, on count 1, the finding should be one of culpable homicide and on count 3, one of common assault. I am of course bound by

their decision as it is the majority decision.

Dealing with count 4, the attempt to kill Charitomeni Macheras, there is also a difference. I am of opinion that a distinction must be drawn between the intention to kill George and Dafni on the one hand and the intention to act against Charitomeni on the other. While he did become angry sufficiently so as to shoot her, on the facts I disagree with Dr Vorster if she says that he had nothing against her, although at one stage Dr Vorster was constrained to admit that he might have had something against her. In view of the fact that she was shot in the arm from such close quarters and in view of what preceded this act, I cannot find that the only inference in this instance was to murder her. He may possibly have had a lesser intent. But by the use of a firearm, the least of such intent would be an intent to do grievous bodily harm. In my judgment, I find that he is guilty of an assault with intent to do grievous bodily harm on count 4. My assessors, however, for similar reasoning as set out previously, have come to the conclusion that the finding should be one of common assault. I am similarly bound by this finding.

On count 2 we are all unanimously of the view that the accused is guilty of the charge as charged, that is the charge of wrongfully, unlawfully and intentionally killing Dora Seleke and therefore guilty on

count 2 as charged."

It will be seen that, in relation to the killing of Macheras, the trial Judge expresses the view that the appellant had "shot and intended to kill", while directly afterwards he records that the assessors' view was that the finding on that count should be one of culpable homicide. The point of contrast is obviously the intention to kill. The assessors found that the intention to kill had not been proved "because of stress and his alcoholic condition"; I take this to mean that the facts of the case did not justify the inference of an intention to kill, either direct or indirect. That the appellant's intention, as an inference of fact, was the point of difference between the trial Judge and the assessors appears again, in relation to count 4, from the trial Judge's references to an intention to kill and to a "lesser intent", and to the assessors' "similar reasoning" as

before in bringing in their verdict. In the context, therefore, it seems to me that the trial Judge's mention of the acceptance by the assessors of the appellant's "capacity to act" and "his knowledge and appreciation that what he did was wrong" can only be understood as meaning that the assessors were satisfied (as was the trial Judge) that both legs of the test for criminal capacity were satisfied. Accordingly they must have rejected the appellant's defence in that respect, as also the opinions of the psychiatrists, to the extent that these purported to support the defence.

It follows, therefore, that the enquiry before this Court is whether the evidence before the trial Court warranted its rejection of the appellant's defence of lack of criminal capacity. In this enquiry it is of no moment whether or not the appellant intended to kill Macheras when he shot at him,

for, on the hypothesis that the trial Judge was right in finding such an intention, the assessors' verdict of culpable homicide would nonetheless be unassailable, in accordance with the judgment in S v Ngubane 1985 (3) SA 677 (A). Similarly, if it is supposed, hypothetically, that the assessors were wrong, in fact or in law, in convicting the appellant of no more than common assault in respect of the shooting of Dafni and Charitomeni and not of the more serious offences of attempted murder or assault with intent to do grievous bodily harm, that would not be a ground for setting aside the verdicts on Counts 3 and 4. Consequently the differences of view between the trial Judge and the assessors in regard to the verdicts on Counts 1, 3 and 4 can be left out of further consideration.

The question of the appellant's criminal capacity falls to be considered with reference to the

circumstances leading up to the shootings and the appellant's conduct before, during and after the shootings, on the one hand, and on the other, the evidence of the psychiatrists. As to the former, a number of factual issues arose from the evidence of the State witnesses and the evidence given by the appellant. I mention some of them, briefly. Dimitra testified that she was present in the house with the appellant at the time just before he went to the shop and the shooting there took place. She said that the appellant told her he was going to kill someone, that he gave her R2 to keep it a secret, and that he said she would read about it in the papers. The appellant denied that Dimitra was present in the house at the time and that such a conversation ever took place. Dafni in her evidence gave an account of the causes of unhappiness in the marriage that was wholly at variance with the evidence given by the appellant in

that regard, the gist of which is reflected in para 14 of the appellant's statement in terms of section 115, quoted above. She denied that the appellant had any reason to be jealous. The appellant testified that Dafni had had a sexual affair with Stergiou some years before, and Stergiou, called as a witness by the appellant, confirmed it. Dafni denied it. As to the events in the office before the first shot was fired, the evidence of Dafni and Charitomeni differed from that of the appellant in regard to sequence and some details. In regard to the firing of the first shot, the appellant's evidence that Charitomeni shouted "You have killed her" was denied by Dafni and Charitomeni.

In his judgment the trial Judge said that Dafni, in first denying and then playing down the affair with Stergiou, had not been frank with the Court, although her reluctance to admit an intimate

relationship could readily be appreciated. Apart from that mild criticism the trial Judge found that Dimitra, Dafni and Charitomeni were all impressive, honest and credible witnesses. Consequently he rejected the appellant's evidence on all the points of conflict. As has been mentioned earlier, the trial Judge's comments and findings on the witnesses were without exception couched in the first person singular. There is no hint in the judgment of the trial Judge that the assessors shared his views in this regard. It is difficult to imagine that the Judge did not discuss these matters with his assessors before delivering judgment, but there are, in my view, insuperable difficulties in the way of surmising that the assessors agreed with the Judge's assessment of the witnesses. Firstly, the tenor of the judgment as a whole strongly suggests the contrary. Secondly, if the assessors had accepted

Dimitra's evidence referred to above, (i e that the appellant had told her he was going to kill someone) it would be difficult to understand their verdicts on Counts 1 and 3. Thirdly, and most importantly, the trial Judge's findings under discussion are, with respect, unsatisfactory on the face of the record. To begin with Dafni. At the time of her affair with Stergiou the appellant secretly recorded some of her telephone conversations with Stergiou on a tape, which he kept. At the trial the tape was produced and played. Dafni flatly denied that it was her voice that was recorded on it. After an adjournment overnight, she admitted that it was her voice, but explained that she had merely been playing up to Stergiou at the request of the appellant, in order to maintain the family ties. With this she persisted at length, even though further parts of the tape revealed more and more exchanges of undoubted

intimacy and amorousness. On the record, she was a blatant and persistent liar. Moreover, on reading her lengthy evidence in the record I have a clear impression of a woman filled with bitterness, hatred and bias against the appellant. Shortly before the trial the appellant's attorney sought permission from Dafni to interview Dimitra. Dafni did not comply with the request, but instead promptly took Dimitra to counsel for the State for an interview, and in that way she became a State witness. The danger that the 13-year old child might have been influenced by her mother was inherent in the situation, and very real. There was thus an additional reason for treating her evidence with caution, apart from the usual cautionary approach to youthful witnesses (which was not alluded to by the trial Judge). On paper her evidence is anything but convincing, particularly in regard to the inherently unlikely

account of how the appellant confided in her and then bribed her to keep quiet. As to Charitomeni, the record of her evidence reveals a distinct weakness of memory in regard to the details of the events in the office. As for the appellant, there are unsatisfactory passages in his evidence, but on the whole the record does not reveal that he was caught out in any deliberate falsehoods.

Counsel for the State, stressing the advantages of the trial Judge in having heard and seen the witnesses, urged us not to discard his findings in that respect. I cannot accede to the argument. The question is not whether there is sufficient warrant in the record for us to disregard the credibility findings of the Court a quo. The question is whether we are entitled to assume that the assessors, being the majority of the Court a quo, shared the views expressed by the trial Judge, being the minority, in

the extraordinary circumstances of this case, as outlined above. For the reasons given above, I am of the view that we are not so entitled. In my opinion we are bound to consider the appeal on the record and without having regard to the credibility findings of the trial Judge. In regard to the disputes of fact arising from the evidence of the State witnesses as opposed to the evidence of the appellant, I am unable on the record to find that the appellant's evidence cannot reasonably be true. It follows, therefore, that in the area where there are such disputes of fact the defence of criminal incapacity must be considered on the basis of the facts deposed to by the appellant.

Those facts have been summarized at the commencement of this judgment, in describing the events up to and including Charitomeni's shout on the first shot being fired in the office. From that

point on it will be recalled that the appellant, according to his evidence, suffered from amnesia. My summary of the facts over the second period rests mainly on the evidence of Julia and Stefanos, which was rightly not challenged by counsel for the appellant. To the limited extent that it rests on other evidence, it is not controversial and was also not challenged. I accept, furthermore, the evidence given by the appellant in regard to what is said in para 14 of his section 115 statement. It is not necessary to enter upon the details of that evidence.

In one respect I disagree with the argument on the facts presented by counsel for the appellant. He submitted that we should find that the first shot in the office was fired accidentally. In my opinion the appellant's own evidence does not permit of such a finding. The appellant is an expert with fire-

arms; target shooting was his hobby. It appears from his evidence that when he took out the revolver, cocked it and pointed it at the space between Dafni and Macheras, he was confident, by reason of his expertise, that he would not harm either of them. He explained with precision that he kept his finger, not on the trigger, but well behind it, within the encasement housing the trigger. It is clear that in order to fire, that finger had to be moved deliberately, away from where it was and onto the trigger. The appellant could not explain how that had happened. In the absence of such an explanation there is, in my view, no basis in fact for displacing the prima facie inference flowing from the known facts, viz that the shot was fired deliberately. There are no facts in evidence (as opposed to conjecture) upon which the possibility of an accident could be based. Consequently, while I shall accept, on the

footing of it being reasonably possible, the appellant's evidence that he did not go to the office and did not confront Dafni with the intention of shooting her (see para 12 of the section 115 statement, quoted earlier), I am unable to find that it is reasonably possible that the first shot was fired accidentally.

The appellant said in evidence that he felt dizzy in the office, due to the liquor he had imbibed. It is clear on the record that he was accustomed to regular and heavy drinking. The State witnesses who observed him in the office and subsequently at the house differed widely in their perceptions of his state of sobriety or inebriation. It would serve no purpose to enter upon the details of their evidence in this regard. The appellant was injured in the course of his arrest and was taken to hospital. There a sample of his blood was taken, which was later tested for alcohol level. On the

basis of the result and of the facts relating to the quantities of liquor consumed by the appellant, the time periods involved, and so forth, expert medical evidence was received by the trial Court which showed that the appellant's blood alcohol level both at the time of the shooting in the office and at the time of the shooting of Dora was probably about 0,24 gram per 100 ml. This evidence was undisputed. What effect the intake of liquor had on the appellant falls to be determined with reference to the evidence of his actual conduct and to the evidence of the psychiatrists.

I turn, then, to a consideration of the evidence of Dr Jeppe and Dr Vorster. In this regard we are not hampered, nor assisted, by findings of credibility or reliability on the part of the trial Judge. It is common cause that both the psychiatrists were well qualified to give expert evidence in

their field, and that they did so in good faith, honestly and without bias. We are in as good a position to assess the evidence on its merits as was the Court a quo.

The doctors were agreed that the appellant did not suffer from any mental illness or defect. Psychologically he presented as a normal individual with normal intelligence and sound judgment. The only comments forthcoming about his personality which are worth mentioning are, from Dr Jeppe, that he is "rather a timid individual, especially in regard to his relationship with ..... his wife, by whom he appeared to feel emasculated, although he appeared to be desperately attached to her", and, from Dr Vorster, that "in his personality he feels a little inadequate"; "he was able to assert himself, but in terms of his relationship with his wife, his feeling of inadequacy made that assertion more difficult".

The doctors were also agreed that the appellant genuinely suffered from amnesia as claimed by him. It was caused, they said, by the intake of alcohol (possibly coupled with emotional stress, according to Dr Jeppe). The appellant had what is generally known as an alcoholic black-out. It differs vitally from automatism. This was explained in clear terms by Dr Vorster. In automatism there is no conscious thought, but as to a black-out she said:

> "A blackout or a blankout as Dr Jeppe used the term, occurs in people who are either heavy drinkers or alcoholics, where they act quite normally and they are quite normal, but afterwards have no memory for what they have done. So, during the time that they are performing the actions, they are conscious, they are voluntary. They can perform any kind of actions, but the only difference is that afterwards they cannot remember what they have done. So, during that time that they have performed those actions, they are liable for everything they are doing, because there is conscious thought."

Again:

> "..... the salient point about blankout, is that the person is quite normal. They are simply not laying down memory banks. So, they could be doing any kind of work, any kind of task. The only difference is they are not laying down memory banks, so they are capable of performing any actions and are liable for those actions. (Court intervenes)
> COURT They are what? -- They are liable for those actions in an alcoholic blackout."

When cross-examined about the appellant's alleged lack of control at the time when he shot Dora, Dr Vorster repeatedly refuted the notion that the appellant's black-out had anything to do with the question of control; she stressed that it merely explains the memory loss and that it was not a factor to be taken into account in regard to the question of control at all. There is nothing in Dr Jeppe's evidence to controvert these views of Dr Vorster. (Dr Jeppe referred at some length to scientific literature on

automatic actions and automatism, but since it is common cause that the appellant was not acting in a state of automatism this evidence takes the matter no further.) Consequently, on the expert evidence in this case the appellant's amnesia has no direct bearing at all on the issue of his criminal capacity.

The criminal incapacity which is relied on in this case is of the kind which is described in judgments of this Court as non-pathological criminal incapacity (see e g S v Laubscher 1988 (1) SA 163 (A), S v Calitz 1990 (1) SACR 119 (A), and S v Wiid 1990 (1) SACR 561 (A)). It has been said that in a case of this kind psychiatric evidence is not as indispensable as it is when criminal incapacity is sought to be attributed to pathological causes. On the other hand, an accused person who relies on non-pathological causes in support of a defence of crimi-

nal incapacity is required in evidence to lay a factual foundation for it, sufficient at least to create a reasonable doubt on the point. And ultimately, always, it is for the Court to decide the issue of the accused's criminal responsibility for his actions, having regard to the expert evidence and to all the facts of the case, including the nature of the accused's actions during the relevant period. These observations taken from the decided cases lead me to pass some preliminary comments on the nature of the psychiatric evidence which is to be considered in this particular case. Both Dr Jeppe and Dr Vorster in expressing their opinions about the appellant's mental state at the relevant time focussed attention mainly on the appellant's loss of control. This must be taken to pertain to the second leg of the test for criminal capacity, viz the ability to act in accordance with an appreciation of wrongfulness. A perusal

of the evidence on the record shows that the opinions expressed concerning the appellant's control over his actions did not purport to rest on the exercise of any specialized scientific or technical procedures or expertise. The opinions were certainly not presented in that way. The expression "loss of control" was not put forward as a term of art peculiar to the discipline of psychiatry or perhaps psychology. It was not suggested that the views expressed were derived from arcane knowledge of the workings of the human mind, to which psychiatrists alone have access by virtue of their training or experience. Instead, what the doctors were about in their evidence in this case was to take the facts deposed to in the trial and to draw inferences therefrom as to the appellant's control over his actions, or the lack of it. Drawing inferences as to the state of a normal man's mind from the objective facts relating

to his conduct is an exercise which is not unique to the psychiatric or psychological professions. Courts of law perform the exercise daily, constantly. In the circumstances of this case I perceive no cause for this Court to have any hesitancy in considering the opinions of the psychiatrists on their merits, in accordance with our own experience of, and insight into, human behaviour, and in deciding itself upon the inferences that are to be drawn from the objective facts relating to the appellant's actions.

The above remarks are appropriate to substantially the whole of the psychiatrists' evidence regarding the appellant's loss of control. (I am leaving aside now the evidence relating to the appellant's amnesia, referred to earlier.) By way of illustration it will be convenient to refer now to their treatment of one particular fact: the appellant's shooting of the dog. It will be recalled that

the appellant shot the dog very shortly before he shot Dora. In regard to the question of the appellant's loss of control at the time of the shooting of Dora, the doctors disagreed in their views. Their disagreement centred around the inferences that could be drawn from the fact that the appellant had shot the dog. Dr Jeppe's view appears from the closing passages of his evidence, when he was being questioned by the trial Judge. In regard to the shooting in the office, Dr Jeppe had told the trial Judge that he believed the appellant was "not fully aware of what was going on" and that he could not "fully control his behaviour at that time". The trial Judge then proceeded to question him about the shooting of Dora, as follows:

> "Now, I go to the next part. Would you say the same conditions apply bearing in mind all the factors that you have heard in cross-examination and in examination-in-chief, the same factors would apply to the shooting of Dora in the field that he is

not aware, not fully controlled, anger yes, emotion yes. All those things to the nth degree, but the dividing line, where the curtain drops between that and a non-appreciation of his act, would that apply to Dora? -- My lord, I find it difficult to separate that shooting, the shooting of Dora, from the shooting of the dog, which to me is an indication of his unawareness of the whole situation. I mean that was such a pointless, purposeless action that to me it was a part of the same thing.

Well, the dog jumped on him according to the child and he shot the dog and that ... -- He need not have, my lord.

But while he was on his way to perform this act or something or other, but with Dora there is a suggested reason as put in cross-examination. All this is hypothetical. -- Yes, my lord.

That there is a suggested reason. Now, would you say that that would apply or would you say it does not apply here? -- It must have applied to a certain degree, my lord. There seems to be, as I have said, when I replied to the prosecutor, a certain purposefulness in asking where she was, taking out the gun. There was a certain purpose to it, but my feeling about it is, that the balance of his mind was still disturbed. That I think that because of the shooting of the dog, which seemed to me so to be an indication of his state of mind at the time."

Dr Vorster's evidence on this aspect reads as follows (under cross-examination):

> MR BIZOS But now, Dr Vorster, assume that you and Dr Jeppe are correct that there was this condition present at the time when the accused did whatever he did in the office. Let us assume that. Would it, that act in itself, the injuring of his wife, the shooting of George Macheras, seeing them both on the floor, seeing Mrs Macheras's arm bleeding, would that not have added to his loss of control? What I mean by that is, was that not an additional stimulus to enhance the loss of control, if that was possible? -- It may have been, but if one looks at his subsequent actions, they are not the actions of a person who has a loss of control.
>
> Now, let us just examine that. (Court intervenes)
>
> COURT Do you say that, I am sorry, but you say that the subsequent actions, what did you, what were your words about that? -- Are not the actions of a person who has a loss of control.
>
> MR BIZOS Let us assume that the shooting of the late Dora Seleke was within minutes, three to five minutes of the first shooting, the shooting of the dog was 30 seconds or at the most a minute before the shooting of Dora Seleke. Would that not indicate that there was this, this loss of control that was present at the office, continued right up to the time of the shooting of the

dog and the shooting of the late Dora Seleke? -- No, it is not the time period that impresses me. It is his activities during that time. Had he had a continued loss of control, in fact one would have expected random shootings of everybody he met. Not intentional actions as have been described over the past few days.

Well, let us have a look. What intentional actions do you say there were? -- The discussion of the shootings with persons at the house. The approaching of the daughter and asking her where the maid was, the going to the safe to collect firearms, the walking to the room, shooting the dog on the way, the ordering out of Julia out of the room and then the shooting of Dora.

Well ... -- Subsequent to that the return to the house and the telling of the persons there what he had done. His actions to me sound logical, planned and intended.

Well ... (Court intervenes)

COURT Logical, sorry? -- Planned and intended.

MR BIZOS How does the ...

COURT Logical, planned? -- And intended.

MR BIZOS What, how does the killing of the dog fit into this picture? -- I am not saying Mr Kalogoropoulos was not angry anymore. I feel that he was still angry and he was still jealous but he did not have the same loss of control. I can only speculate that perhaps the dog jumped up on

> him and he was irritated.
>
> But ... -- I cannot answer that question with facts. I am not saying that Mr Kalogoropoulos was not angry at that point. What I am saying was that he had not lost control."

These passages speak for themselves as illustrating the nature of the evidence under consideration, and as remarked upon above. I agree entirely with the views and the conclusion of Dr Vorster on this point. But I would have rejected the contrary views and conclusion of Dr Jeppe in any event, even if Dr Vorster had not given voice to her disagreement.

Having said that, the issue of the appellant's criminal capacity at the time when he shot Dora can be disposed of at once, and briefly. All of his actions after he left the office, and the whole of his outward conduct then, proclaim that he was well aware of what he was doing and that he was well

in control of himself. There is no need to list his actions here; they appear from the summary given at the outset of this judgment, and most of them are mentioned in the extract from Dr Vorster's evidence quoted above. The manifestation of rational, planned and controlled conduct is not disturbed by his shooting of the dog. To suggest otherwise is no more than pure theory, and fanciful at that. And so there is no foundation of fact for the notion that the appellant, when he shot Dora, was unable to control his action in so doing, that he was unable to act in accordance with his appreciation of the wrongfulness of his conduct. Such a notion does not arise by inference from the facts; it is no more than pure conjecture. As such it cannot sustain a reasonable possibility of criminal incapacity.

What, then, of the shooting in the office? In his written report, confirmed in evidence, Dr

Jeppe concluded as follows (his mention of "a tremendous emotional blow" refers to Charitomeni's shout "You have killed her"):

> "It is my opinion that as a result of emotional stress, extending over many months, intensified by the excessive use of alcohol and brought to a climax by a tremendous emotional blow, the accused was precipitated into a state of dissociation in which he had a diminished awareness of what was going on and he became totally unable to exert proper control over his actions on the evening of Tuesday, 16 February, 1988, which eventuated in the death of George Macheras and Dora Seleke and the injuries to Dafni Kalogoropoulos and Charitomeni Macheras."

It will be seen that Dr Jeppe spoke of "diminished awareness" and "proper control". His understanding of these concepts became clear in the course of his evidence, in a manner detracting very substantially from the initial impact of his opinion. So, at the conclusion of his evidence-in-chief, he replied to a question of the trial Judge:

> "He was shattered psychologically, my lord,

> by what he thought had happened, that he had killed his wife, because he had heard the shout, you have killed her. And of course the effect of the alcohol blurred his control in any event. I believe that the combination of the two, my lord, made it, diminished his ability to be fully aware of what was happening and certainly diminished his ability to control his behaviour."

In my view this statement of Dr Jeppe's opinion falls clearly short of signifying a lack of criminal capacity, for it does not postulate an inability to appreciate wrongfulness, nor an inability to act in accordance with such appreciation, but merely a diminishment of awareness and control. And that this was indeed Dr Jeppe's stand becomes abundantly clear on reading his evidence under cross-examination, from which I quote, by way of illustration, the following statements:

> "I have no doubt that his responsibility was diminished..... It is difficult really, my lord, to work it back and assess what degree of responsibility there was ..... I cannot really put a percentage

onto it. Obviously that is the sort of thing the court will have to decide."

"Yes, there is a gray area between the two, I suspect, my lord, between diminished responsibility and how diminished it is, but diminished responsibility I have no doubt about. How diminished I am less certain about....."

(Questioned by the trial Judge about the shooting of Macheras:)

"..... are you contending for the medico-legal proposition that he did not appreciate that what he was doing was wrong? -- I think it was a part of this whole emotional explosion, my lord. I do not think it was sort of singled out as a separate, deliberate act. He was in, I used the term 'unhinged'. He was not fully aware of what was going on. It is not, I believe that - this is in fact my belief - that he was not aware of the fact that he was, of the enormity of the situation. I do not believe he could fully control his behaviour at that time.

Yes, not fully control would be a difficult medico-legal angle in solving the problem that I have to decide here. -- Yes, my lord."

Dr Vörster's opinions on the shooting in the office appear from the following extracts from

her evidence-in-chief and under cross-examination:

> "I think we have a build-up of anger here. We have a build-up of alcohol and therefore we have a gradual build-up of loss of control. While he was pointing the firearm between two of the victims, there we still see that the accused is in control."
>
> (With reference to Charitomeni's shout:)
>
> "I think he had his finger on the trigger at that stage. It was at that point where he lost control and that is exactly why he carried on shooting and did not stop. If he had been controlled, he would have then stopped."
>
> "A man who loses his temper, does that man lose control? -- He was no longer able to act in accordance with his appreciation of wrongfulness."
>
> "What does this loss of self-control of whatever stage amount to in your opinion? -- In my opinion. It would amount to an inability to act in accordance with appreciation of wrongfulness.
>
> Is that comment made in view of the facts and circumstances before this court? -- Yes."
>
> "Yes, and the combination of anger, alcohol and the fact that he was still in this alcoholic blankout, how could he really have controlled himself, if he was

> unable to control himself earlier, Dr Vorster? -- First of all, one must not add in the alcoholic blankout, as I have stressed on so many occasions. It merely explains the memory loss. As to the anger, the extreme anger, as I see it at the office, was with all the shouting and the swearing and the arguing, jealousy, all combined to make him lose control. (Court intervenes)
>
> COURT All combined? -- All combined to make him lose control at that point, but that when he left the office, he once again was in control. The blankout, the alcoholic blankout is not a factor to be taken into account here at all. Not at all. It is merely an explanation of the memory loss."

Reading these passages it is clear that Dr Vorster's opinion about the appellant's loss of control in the office, in contradistinction to the position when he shot Dora, was based upon two facts only: first, that he kept on shooting; and second, that there was shouting, swearing and arguing. These are the only reasons which can be gleaned from her evidence as a whole for differentiating between the

situation in the office and the situation when he shot Dora. I do not agree with Dr Vorster's interpretation of these facts, nor with the inference she draws from them, for the reasons following.

The shooting in the office could not have lasted for more than a couple of seconds. Immediately before that short space of time the appellant was in control of himself; that is not in doubt. Immediately after it he was again in control of himself; so Dr Vorster says herself (as I have indicated, for good and compelling reasons). He then replaces the emptied revolver with a loaded pistol and, having just shot three people, proceeds to shoot a fourth. On the face of his conduct before and after, it seems to me almost inconceivable that in the brief interval in between he was deprived of self-control. I cannot see any significance in the fact that he "kept on" shooting in the office. The

firing there ceased when the revolver was empty; but it did not stop altogether. It was resumed when the appellant fetched a replacement and found his next victim; and again he shot until the fire-arm was empty (it just happened to have less ammunition in it). If he had lost control in the office, I cannot accept that, on regaining control, he would simply carry on shooting. Viewed in that light, the fact of the shouting, swearing and arguing in the office is not of any significance either. The appellant shot Dora (and the dog) because he was angry and emotionally upset, but while in a frame of mind where he could exert self-control. I can see no reason for surmising that he did not shoot Dafni, Macheras and Charitomeni for the same reasons and while in exactly the same frame of mind. There is, indeed, no foundation in fact for differentiating between the appellant's state of mind during the couple of seconds

that it took him to fire the shots in the office, and his state of mind before and after that episode. Such a differentiation can only be a matter for conjecture. It cannot give rise to an inference, and it cannot constitute a reasonable possibility.

For these reasons the defence of criminal incapacity fails, and so does the appeal against the convictions.

Finally, I turn to the appeal against the sentences. Counsel for the appellant was not able to point to any misdirection in the remarks made by the trial Judge when passing sentence. He submitted that it could be inferred from the sentences imposed that the trial Judge was giving effect to his own view of what the verdicts should have been, and relied in this respect on the sentences of 2 years' imprisonment for common assault on Counts 3 and 4. He also urged that the effective period of imprisonment of 8

years was unduly harsh. I cannot agree. The inference contended for is wholly unwarranted. The sentences on Counts 3 and 4 are not excessive, and the trial Judge was lenient in allowing them, as well as the sentence on Count 1, to run concurrently with the sentence on Count 2. And in my view due recognition is given to the mitigating circumstances of the case in the effective period of imprisonment imposed.

The appeal is dismissed.

A S BOTHA JA

EKSTEEN JA

CONCUR

VAN DEN HEEVER JA