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G.P.-S. J. 445.

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

(APPELLATE DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

CHRISTIAAN H. LOUBSER

Appellant.

versus/teen

THE STATE

Respondent.

Appellant's Attorney ___ *Respondent's Attorney* A.G. (Cape Town)
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate ___ *Respondent's Advocate* ___
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on 3-11-70
Op die rol geplaas vir verhoor op 3-5-71

(C.P.D.)

APPEAL DISMISSED.

REGISTRAR.
23.11.1970

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

CHRISTIAN HENRY LOUBSER ..... APPELLANT.

AND

THE STATE ..... RESPONDENT.

CORAM: WESSELS, J.A., DE VILLIERS et MULLER, A.JJ.A.

HEARD: 3 November 1970. DELIVERED: 23 November 1970.

J U D G M E N T.

WESSELS, J.A. :

The appellant was found guilty of murder with extenuating circumstances by van Winsen, J., and assessors, in the Cape of Good Hope Provincial Division. A sentence of ten years imprisonment was imposed upon him. The appellant now appeals to this Court against the conviction and the sentence imposed upon him, having been granted leave to do so by the presiding Judge.

It is common cause that the deceased, who was the appellant's wife, died on 26 December 1969, as a result

2/.....of

of extensive head injuries sustained in an assault upon her by the appellant during the evening of 24 December 1969. The substantial issue raised before the trial Court related to the appellant's state of mind at the time he committed the assault. It was contended on appellant's behalf that the evidence did not exclude a reasonable possibility that at the critical time he was in fact incapable of forming the requisite intention to kill the deceased. An alternative contention was that, even if it were to be found that the appellant was capable of forming an intention, it was not proved beyond any reasonable doubt that in the circumstances he had in fact at the critical time formed the intention to kill his wife. These contentions were based on evidence led at the trial to the effect that the appellant's mental faculties had been affected by drugs (Drynamyl tablets, referred to in the evidence as "Purple Hearts"), intoxicating liquor and rage. After a detailed consideration thereof, the trial Court concluded that the evidence excluded the reasonable possibility that the appellant's mind had been so affected by the above-mentioned circumstances (i.e., drugs, intoxicating liquor and rage) that he "lost control of himself"

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and was, therefore, "not capable of forming an intention to kill." As to the further issue, namely, whether the evidence established beyond any reasonable doubt that the appellant had in fact formed an intention to kill his wife, the trial Court concluded as follows:

> "So, that leaves then the remaining question as to whether the accused has been proved, in fact, to have entertained the intention to kill. This matter was authoritatively dealt with in the case of the State versus Mini, 1963(3), S.A., 188, the relative passage being from a judgment of Williamson, J.A., at page 192, where he says the following:
>
> 'In order to hold that an accused on a charge of murder did have the requisite mens rea for the commission of that crime, the Court must, of course, find as a subjective fact that the accused did intend to kill the deceased. This fact falls to be established by the State beyond all reasonable doubt. The finding, like any other finding of fact, may be one based on inferences from established facts or circumstances. But no inference can be drawn to this effect unless it is the only reasonably possible inference which can be drawn from the given set of facts or circumstances. To constitute in law an intention to kill there need not, however, be a set purpose to cause death or even a desire to cause death. A person, in law, intends to kill if he deliberately does an act which he, in fact, appreciates might result in the death of another, and he acts recklessly as to whether such death results or not.'
>
> Now, adopting that approach, one must seek to answer the question whether on all facts it is possible

to draw as the only reasonable inference that the accused intended to kill his wife. The facts more particularly relevant to this inquiry, relate to the nature of the assault, the degree of force used, the position on the body to which the force was applied and generally the accused's conduct at the time of the assault. Mr. Cooper, as I have indicated a moment ago, argued that the accused's intention was to be derived in this regard only from those acts which could be said to have caused the death. It will be remembered that Dr. van Niekerk said that he considered that the cause of death was the neuronal damage, namely, the damage which had been caused as a result of the movement in the brain, and that it was his opinion that that damage could only have been caused by the two blows, possibly by the fall, depending on its nature, and also by the fact that she was bodily thrown down to the ground from a height of 2½ to 3 feet.

Dr. Schwär, however, took the view that while it was true that the neuronal damage could only have been occasioned in the manner indicated by Dr. van Niekerk, that all the injuries sustained by the deceased contributed to her death.

Be that as it may, it seems to the Court to be clear that it is not precluded, in considering the question of the presence or otherwise of an intent to kill, from having regard to the fact that the accused also stamped on the deceased. All the surrounding circumstances must be looked to in order to determine whether the accused entertained such an intention. Authority for this particular view - I do not propose to quote it - is to be found in the case of State versus Sigwahla, 1967(4), S.A., page 569. Indeed, the words and the conduct of the accused after the assault may well have a bearing on an issue of this nature.

Regard being had to the savagery of the assault as a whole and the great force applied as was indicated by the evidence of the extensive nature of

> the injuries, this Court entertains no doubt that the only reasonable inference is that the accused, in fact, appreciated that his actions might result in his wife's death, and that he was reckless whether or not that resulted.
>
> In these circumstances we come to the conclusion that the accused, not only was capable of forming the intention to kill, but that, in fact, in law he had that intention. The Court does not wish to find in any way that he had a desire to kill his wife, but as I have indicated from the authority quoted, that is not a necessary ingredient of such an intention."

It is a convenient stage to refer to a submission made before this Court by counsel appearing for the appellant, viz., that in its approach to the question dealt with in the above-quoted passage from the judgment, the trial Court had misdirected itself in limiting its enquiry to "the nature of the assault, the degree of force used, the position on the body to which the force was applied and generally the accused's conduct at the time of the assault." In developing his argument on this aspect of the matter, counsel submitted that in so limiting its approach to the question whether or not the State had proved beyond any reasonable doubt that the appellant had in fact formed the requisite intention, the trial Court failed to have regard to the following relevant

circumstances, namely, (a) that appellant had consumed intoxicating liquor prior to the assault, (b) that a heated argument between him and the deceased had preceded the assault and (c), the cumulative effect of drugs, intoxicating liquor and mounting anger upon the appellant's mind at the time he committed the assault.

In my opinion this submission cannot be upheld. It is, of course, clear from the judgment that the trial Court dealt with the issue in question in two stages. This approach was not only in line with the argument addressed to the Court a quo by counsel who appeared for the appellant, but was in the circumstances the logical approach to that issue. A finding that the State had not proved beyond any reasonable doubt that the appellant was capable of forming an intention to kill would have concluded the enquiry in appellant's favour, because the "nature of the assault", the degree of force used," etc., would then no longer be relevant considerations. Having found, however, that the appellant was in fact capable of forming an intention to kill, the trial Court was of necessity required to embark upon the second, and critical, stage of the

enquiry, namely, whether the State had proved beyond any reasonable doubt that the appellant had in all the circumstances in fact formed that intention. The trial Court's judgment then particularised certain facts which it regarded as "facts more particularly relevant to" the second stage of the enquiry. The relevance of these facts on the issue of intention is beyond question. That these facts were not the only facts relevant to the issue being enquired into is likewise beyond question. In my opinion, however, the terms of the trial Court's judgment do not furnish any justification whatsoever for holding that it dealt with the second stage of the enquiry upon the basis that the only relevant facts were those which were particularised in the part of the judgment, i.e., that the appellant's degree of intoxication and his angry mood following upon the quarrel with the deceased, were irrelevant to the critical factum probandum, namely, whether the appellant in fact formed the intention to kill his wife at the time he assaulted her in the manner described in the evidence. Upon a fair reading of the judgment as a whole, I am satisfied that the trial Court was well aware of the need to determine the probative value of

the "facts more particularly relevant to" the second stage of the enquiry, against the background of the evidence which established (on the earlier finding by the trial Court) that, although the appellant had consumed intoxicating liquor and was involved in a heated argument with his wife prior to assaulting her, he was not so affected thereby that he lost all control of himself. The trial Court considered the "facts more particularly relevant" to the second stage of the inquiry in relation to the condition in which the appellant was at the time of the assault, i.e., a person whose mind was affected by drugs, intoxicating liquor and rage, but not to the extent of rendering him incapable of forming an intention to kill. There was, thus, no misdirection on the part of the trial Court.

It was submitted, in the alternative, on appellant's behalf, that the evidence as a whole did not exclude the reasonable possibility that at the time, and in the circumstances in which, the assault upon the deceased was committed, the appellant in fact did not subjectively foresee the possibility of his assault causing his wife's death. In this connection it must be borne in mind that the trial Court

held that the evidence did not establish that the appellant, motivated by a desire to kill his wife, consciously directed his will toward the bringing about of her death. As to this, the judgment is in the following terms:

> "Regard being had to the savagery of the assault as a whole and the great force applied as was indicated by the evidence of the extensive nature of the injuries, this Court entertains no doubt that the only reasonable inference is that the accused, in fact, appreciated that his actions might result in his wife's death, and that he was reckless whether or not that resulted."

It must be emphasised, at the outset, that the question, whether or not the appellant reflected upon the possible fatal consequences of his conduct at the time he was assaulting the deceased and decided nevertheless to pursue the assault regardless thereof, is essentially one of fact, and the issue is to be determined by the trial Court on all the relevant evidence. This Court will on appeal only interfere with a trial Court's finding of fact if it is satisfied upon adequate grounds that the finding in question is wrong.

The salient background facts, in so far as they are common cause or, at any rate, not disputed, may be

summarised as follows. The appellant and the deceased were married to each other during 1948; the appellant then being in his twenty-third year and his wife a year or so younger. The first child, a son named Albert, was born shortly after the marriage. The second child, a daughter called Ingrid, was born several years later - she was twelve years old when she testified at the trial which took place in April of this year. At first the marriage was a happy one. The appellant was an ambitious man, but his earlier attempts to establish himself in a business were not very successful. At times his financial position was such that he was unable to maintain the standard of living to which he and his wife had become accustomed. This led at times to strained relations between him and her. He was short-tempered and tended to aggressive behaviour under provocation, particularly so, when he was under the influence of intoxicating liquor. As to this, the evidence shows that over the years the appellant's drinking habits changed; initially he was an occasional drinker of beer, thereafter he regularly drank, at times heavily, until he eventually reached the stage of being a pre-addictive alcoholic. In his domestic life he

expected
obedience and submission on the part of his family. Having regard to this background, it is not surprising that relations between the appellant and his family became strained at times. The evidence indicates that he had at times assaulted his wife when he was under the influence of intoxicating liquor. During the year 1965 divorce proceedings were contemplated, but the parties became reconciled. They bought a house at Plumstead, where they stayed up to the time of the deceased's death. In this home the appellant had his private bar, of which he was very proud. The appellant was disappointed in his son's progress at school; he considered his son to be lacking in ambition. As a result of quarrels the son left home. The appellant resented the fact that the children were closer to their mother than to him; they were "mommies children", according to him. In the years preceding the fateful Christmas eve, the appellant's financial position had apparently improved. He was a partner in a sheet metal business, where he often worked under pressure. He was able to buy his wife a motor car, and she learnt to drive. Shortly before her death he had bought her a new motor car. Although the parties had become reconciled in 1965, it

12/.....appears

appears from the evidence of the daughter, Ingrid, that appellant's drinking habits and inherent aggressiveness frequently led to quarrels, which on occasion resulted in appellant assaulting the deceased. It was, however, not suggested in evidence that appellant had on any prior occasion assaulted his wife as brutally as on the occasion with which this appeal is concerned.

It is a convenient stage to detail the events on 24 December which led up to the assault which caused the deceased's death two days later. On the morning of the 24th the appellant went to work as usual. At the factory they were "fantastically busy because it was breaking-up day for the industry." In order to boost his energy, he took Purple Heart tablets, one at approximately 10 a.m. and two more at about 2 p.m. He had a ham roll for lunch. I shall at a later stage refer to medical evidence regarding the effect of these drugs. According to the appallent's evidence, he left the factory at about 4.15 p.m. and drove to the Police Mess in Wynberg. He was on a friendly footing with members of the police force, and occasionaly had drinks with them at the Mess, where intoxicating

liquor was served at a relatively cheap price. He normally drinks whisky, but because he was being entertained by "the younger folk" there, he drank brandy and coca-cola, which was cheaper than whisky. He estimated that he probably had 8 to 10 drinks before leaving the Mess, "..... say between seven and quarter past seven." In his evidence he stated that he had only a vague and somewhat fragmentary recollection of how he came to drive home - a distance of approximately 1½ miles. He apparently managed to travel the distance without any untoward incident, and recalls parking his motor car in the drive-way inside the property. He unlocked the front door, and found that his wife and daughter were not at home. He could not recollect finding and reading a note which his wife had left on the dining-room table explaining her absence. From other evidence, to which I shall presently refer, it appears that he probably read the note, and thereafter tore it up. Appellant recalls that he became very annoyed because his wife was not there to welcome him. His attitude was that she had all day to drive around, and that he expected her to be at home when he arrives there after work, notwithstanding the fact that she

14/.....would

would never know at what time he would arrive home. Appellant saw that a place had been set at the table for him, and he went to the kitchen where he found that a plate of food had been kept for him in the oven. He took the food to the table. He had no recollection as to whether or not he ate the food. He stated that he was "then very annoyed" and went to his private bar where he drank whisky. Asked whether he could recollect how much he had to drink, he replied, "No, I can't recollect how much I had to drink, but I plainly remember coming out of the bar with a glass of liquor and sitting at the table in the dining-room." As to what happened thereafter, he gave the following evidence in examination-in-chief:

> "What is the next thing that you can recall? -- The wife and the daughter came in by the front door. An argument developed.
>
> Can you recollect what the argument was about? -- Vaguely; I think I said to her: I just bought you a new car on your birthday (which was on the 2nd December) and I come home and find you are not there.
>
> Anything else that happened in this argument? -- I can't remember her exact words, but she replied - she became annoyed too and threw the keys; whether she threw the keys at me or on the table, I can't quite recollect.
>
> What is the next thing that you recall?
>
> COURT: Were these the keys of the car? -- The keys of the car.
>
> MR. COOPER: (Cont.): What is the next thing you recollect? -- How I managed to get round the table

I don't know, but I hit her.

You remember hitting her? -- I remember hitting her.

COURT: You got up. You say you remember that? You were sitting down, were you, while you were having the argument? -- Yes.

MR. COOPER: (Cont.): But you say you cannot recollect how you got around the table? -- No.

But you do remember hitting your wife? -- I remember hitting her.

Can you remember with what? -- I am not sure whether I hit her with the fist or with the flat hand.

Can you remember where you struck her? -- I am not quite sure but I think it would be on the head.

What is the next thing you recollect? -- I cannot recollect her falling at all.

You cannot recollect your wife falling at all? -- No.

What is the next thing that you recollect? -- I somehow got out to the front part of the house, and spoke to Mr Copeland.

Do you remember what you said to him? -- No.

What happened after you spoke to him; where did you go? -- I remember sitting on the edge of the stairs, and from that stage I know nothing at all. I woke up at the Police cells.

Have you any recollection of the Police arriving? -- No recollection at all. I wouldn't recognise any of them.

But you have no recollection of them arriving? -- No.

And you say the next thing you remember is when you woke up in the Police cells? -- That is correct.

When was that? -- The following morning.

Which Police cells? -- I was under the impression I was at Diep River.

Where were you, in fact? -- Eventually I asked the Police about the traffic I was hearing and they said no, I was in Wynberg.

Do you know what the effect would be of taking

alcohol after you had taken Purple Hearts? -- Not the faintest idea.

Had you any intention at any time to kill your wife? -- Good God, no.

What did you feel like on Christmas morning 1969? -- A terrific hangover.

What did you realise then? -- At that stage I did not realise at all; I did not realise anything. I was wondering what I was doing there.

And what did you realise about the alcohol you had had the previous day? -- It is difficult to say. One doesn't really realise anything when you get up with a hangover like that; that I drank too much."

In order to complete the picture as to what happened that evening, it is necessary to refer to the evidence of State witnesses, which was in the main not disputed by the appellant. I must add, though, that the reliability of their evidence as to the extent to which appellant had been affected by drugs and intoxicating liquor was questioned by counsel appearing on his behalf. I.e., the correctness of the inferences as to his state of intoxication which these witnesses drew from the appellant's conduct, as observed by them, was put in issue.

Appellant's 12-year-old daughter, who was in standard V1 when she gave evidence, stated that she and her mother left home at about 7 p.m. to deliver Christmas presents

to friends and also a pudding to her brother, who was not staying at the home of his parents at that time. They had been waiting for her father. Her mother left a note explaining where they had gone. They returned in "less than an hour". She was the first to enter the house, and saw her father sitting at the dining-room table. A plate with left-overs of the meal was in front of him. She could not remember seeing a glass on the table. She greeted her father, but her attempt to kiss him was brushed off. He told her he was in a bad mood and that she "must start running". Because he had "lifted his hand" to her mother "many times before" she inferred that appellant was "going to do something" to her mother. From previous experience, she knew what appellant looked like when he was under the influence of liquor. From the fact that his face was flushed, she knew that he had been drinking. According to her he was, however, not "heavily" under the influence of liquor. As to what happened when her mother entered the dining-room, Ingrid testified as follows:

> "Tell us what happened further? You say he told you you had better start running, and he was in a bad mood, you tried to kiss him but you cannot remember whether you did. What happened then? -- Then I moved

to the end of the table and then my mother walked in....
COURT: She hadn't been in the room while you were talking to your father? -- No.

So she came into the room after your father had told you you'd better start running? -- Yes.
MR. LATEGAN: (Cont.): Yes, and then? -- And then my mother walked in and he started to talking to her about something which I cannot remember.

He started to talk to her about something? -- Yes. Something about the car.

Was any comment made on your being absent from the house that evening, or not? -- Yes. We wrote a note about where we were going, and when we came home the note was torn on the table.

Did your father say anything about it? -- I can't quite remember.
COURT: You say before you left you had left a note? -- Yes.

To what effect? -- Where we went.

Why you were away? -- Yes.
MR. LATEGAN: (Cont.): You say he started talking to your mother something about the car. And then? -- And then some more talking went on and on, and my mother put the keys down on the table.
COURT: The car keys? -- Yes. And then he got up; she was at the sink at the time.
MR. LATEGAN: (Cont.): Is that in the kitchen now? -- Yes. She turned and she was halfway up the stairs and he picked the keys from the table and he threw it against - he meant to throw them at her .....
COURT: I am sorry, I am not hearing that. Your father, you say, got up from the table, your mother was standing at the sink in the kitchen. Is that correct? -- No, I am wrong there because he was still sitting at the table when she put the keys down and she went up - she turned to go up the stairs. And then he picked the keys up from the table and he threw it He was still sitting down.

Who started to walk up the stairs? -- My mother.

They had this talk in the dining-room when she put the keys on the table? -- Yes.

What did your mother do after that? -- She turned to go up the stairs.

She went up the stairs. -- But she did not go right up, she went short of halfway.

MR. LATEGAN: (Cont.): Ingrid, if you are not very clear in your mind as to precisely what happened, you can take your time and think out matters clearly before you tell his Lordship. There is no hurry. Tell his Lordship further. He picked the keys up, he was still sitting down, he picked the keys up from the table and threw it - he meant to throw it at her.

Did he go after her then? -- No, he was still sitting down and he picked the keys up, and he meant to throw it at her, and it hit against the wall.

He missed her, in other words? -- Yes.

And then? -- Then she turned round and came down and she was talking again.

Was she angry or was she just talking? -- She was angry. And then he got up and assaulted her.

COURT: That was in the dining-room, was it? -- Yes.

MR. LATEGAN: (Cont.): How did he assault her at first? What was the first assault that he perpetrated on her? -- He hit her first with the fist.

Where? -- On her head.

How many times? -- Twice.

What happened to her? -- She fell down.

Where did she fall down? -- Halfway in the dining-room and in the kitchen.

Sort of into the kitchen with part of her body? -- Yes.

Did she make any noise? -- No.

How did it appear to you, was she still conscious or had she lost consciousness? -- She lost consciousness.

When she fell? -- Yes.

What is the dining-room floor covered with, with a carpet or wood, or slate? -- Wood, but there is a little carpet in between the kitchen and the dining-room.

Did she fall on the wooden floor or? -- On the wooden floor.

Did she just crumple or did she go head-first on to the floor? -- I couldn't tell.

She lay there, and then? -- Then he picked her up.

How did he pick her up? -- Well, he picked her up.

With his hands? -- Yes.

Where did he take hold of her? -- On her clothes, I think.

And? -- And then he banged her down again.

How high did he lift her? -- I couldn't say how many feet but he lifted her quite far from the ground.

Up above his head or just to about the middle of his body.....? -- The middle of his body.

And he banged her down back on to the floor? -- Yes.

Where was that, where did he bang her down? -- Half in the kitchen and half in the dining-room.

COURT: In the same place where your mother had been lying? -- Yes.

He did not move her at all; he just picked her up and banged her down in the same place? -- Yes.

MR. LATEGAN: (Cont.): What happened then? -- Then he lifted his foot and stamped on her head.

How was she lying then? On her back, on her face or on her side? -- On her side.

Which side of her head was he stamping down on? -- On the side of her head.

Did he stamp down hard, or just tap her? -- Hard.

Was your father saying anything while all this went on? -- I don't think he was saying anything.

How many times did he stamp or did he just stamp once? -- I saw two. I saw him stamp her twice, and then I ran out.

On the same place? -- Yes.

Did your father stagger at all? Did it appear to you that he was unsteady on his feet at all during the time when he was balancing himself on one foot and stamping down with the other on her face? -- I didn't really take notice. He appeared steady to me."

Under cross-examination she stated that

she did "not really know" whether he had been drinking "quite a lot". After further questioning she stated that he "did not appear to have had a lot to drink". Ingrid also stated that her mother appeared to be unconscious after she had been knocked down by the two fist blows to the head. She estimated that about quarter of an hour elapsed between the time that she and her mother arrived and the time that she ran outside.

A witness named Copeland, whose home was on the opposite side of the street in which appellant's home was situated, testified as to what he had observed. At about 8 p.m. he had gone "down the road" to have his wife's Christmas present wrapped up. In response to a telephone call from his wife he rushed back home. It was his intention to call in the aid of a friend before going to appellant's home, because he was under the impression that appellant had shot his wife. He, however, saw appellant standing on the pavement in front of his house. Appellant spoke to him, and said, "Come inside, I want you to see what I have done to my wife" - or words to that effect. When he was asked about appellant's condition, he replied as follows:

"How did he appear to you, his condition? Would you say he was sober or was he under the influence of liquor? -- I wouldn't say he was under the influence of liquor. It is difficult to judge exactly. He had been drinking. I mean, I had known him on previous occasions, and I mean, he certainly wasn't drunk.

You had seen him before when he had definitely been under the influence of liquor? -- That is correct, yes.

This evening, judging now from past experience, you say he wasn't exactly under the influence of liquor? -- Well, he wasn't as bad as I had seen him. He did not to me appear to be drunk, to put it that way. But he had been drinking. I do not know where you draw the line between under the influence and ....

Let us not quibble about terms. You thought that he was to some extent under the influence of liquor? -- No, he had been drinking, that is what I thought.

What gave you that impression? -- Did you see him drinking? -- No.

What gave you the impression that he had been drinking? -- Well, ...

Did he smell of liquor? -- No, he did not smell of liquor.

Did he stagger around, lurch when he walked? -- When he went inside it was dark on the pathway, and I think he's got a raised step going towards the front of his house, and he slightly stumbled on the step.

What was his face like? Could you see his face? -- Not very distinctly, no.

What made you think that he had had something to drink, except for this one lurching on the step? -- Nothing.

I am sorry to question you but the Court obviously wants to know why you say the man had been drinking. (I am not cross-examining the witness, M'Lord, I am just trying to elicit from the witness.....)

COURT: You got the impression that he had been drinking, you did not think he was drunk. All Counsel wants

to know is what was it that gave you that impression? -- I will put it this way: I possibly got the impression within minutes of seeing him - I am not saying that when I saw him and looked at him I got the impression he had been drinking.

Then take it that the impression mounted over a period of time. What conveyed that impression to you? -- Well, within twenty minutes, by the time the Police arrived, he changed completely.

To what extent? -- He was sitting down, he was staggering a bit in the house, and while the Police were there he actually lay on the floor.

MR. LATEGAN: (Cont.): You were present when he lay down on the floor? -- That is correct, and he could not get up.

COURT: You say he changed completely within the time that you arrived first and the time the Police got there? -- That is my impression, yes.

MR. LATEGAN: How long did it take for the Police to arrive, roughly? -- I don't know. I thought it was about twenty minutes, it could possibly have been less.

COURT: Did you actually phone for the Police? -- I phoned them twice.

Did you go to your own house? -- That is correct, yes.

After you had had this conversation and went into the house, did you then subsequently go to your house? -- That is correct. He actually told me to go and phone the Police.

MR. LATEGAN: (Cont.): So you weren't with him all the time? -- No, I was not.

You came back later after you had phoned? -- I went and phoned, then I came back, and by then he was sitting on the stairs. I had another look at his wife, I realised she was bleeding fairly badly and I went back again and I said you had better bring the ambulance.

You saw his wife lying in the kitchen? -- That is correct.

Did he have any further discussions with you? --

He said something to the effect: What have I done? You had better go and phone the Police.
COURT: That was the first time when you came there? -- That was the first time, yes."

He also stated that when appellant first spoke to him on the pavement, "he was talking normally."

Under cross-examination Copeland stated that he had seen appellant and spoken to him on prior occasions when he was under the influence of liquor. After the police had arrived on the scene, he got the impression that appellant was then too drunk to raise himself from the floor where he was lying down. Prior to that he had heard appellant murmurring, "What have I done? What have I done?" In answer to questions put by the Court, Copeland testified as follows:

"I just want to get it quite clear again. You said there appeared to be quite a considerable change in his behaviour from the time you first saw him, when you had these words with him outside his gate, and by the time the Police had arrived. What was the nature of that change in his behaviour? -- Well, standing at the gate, when he spoke to me, I did not think to myself that he was drunk, or that he had even been drinking. In other words, I did not have the impression that he had been drinking. When the Police took him away he needed help. So, I mean.....

When you were inside the house and he told you to call the Police did you still retain the impression that he had not been drinking, because you could not

25/.....see

see that he had been drinking? -- We did not speak much. I think about ten minutes progressed and it did appear that he had been drinking.

But it wasn't noticeable at the very beginning? -- No.

And you deduced the fact that there had been quite a considerable change from the fact that he had to be assisted out by the Police? -- When he started speaking later on in the evening it appeared that he had had quite a bit to drink, actually.

What did you hear him say later on in the evening? -- He said: I used my hands, my hands.

Was that when there was talk about a weapon? -- That is correct.

Did he have occasion to say anything else? -- Yes. He did say something. He said - he asked for a drink.

He did ask for a drink? -- That is correct.

Anyway, the sum total is that at the beginning you did not get the impression that he had had anything to drink at all, but towards the end it appeared to you that he was drunk? -- That is correct.

MR. BAKER: Did he ask you for a drink? -- I don't think so.

Or a Policeman? -- I know he asked on numerous occasions for a drink, when I was present.

Alone? -- This I cannot tell you.

You can't remember? -- The circumstances.

He did not have a drink? -- I did not see him have one."

A reservist constable in the South African Police, van Minen, stated in evidence that he arrived at appellant's home at approximately 8.45 p.m. He found appellant sitting on the second step of the staircase leading to the upstairs portion of the house. He stated that he asked appellant

what he had done to his wife, and that appellant thereupon "made a report" to him. He was not asked to enlarge upon the nature of the report. Van Minen did, however, state that appellant spoke "quite coherently". When asked whether he could detect whether appellant was under the influence of liquor, he replied, "He didn't appear to be, no." After he had spoken to appellant, he went to where appellant's injured wife was lying, and examined her. He returned to where appellant was seated. Van Minen testified as follows as to what happened thereafter:

> "Did he talk to you again? -- He did, yes.
> Was he still seated there on the staircase? -- Yes.
> Did he ask you for anything? -- He asked me to give him a drink. He told me his cocktail cabinet was open, I must please give him a drink.
> And I suppose you refused? -- Yes.
> Did he tell you where this cocktail cabinet was? -- Yes, he said it was in the dining-room.
> Did you see whether this cocktail cabinet was, in fact, open? -- No, I did not.
> You were then standing close to the accused? -- Yes, I was standing there.
> Did you get the impression that he was intoxicated at any stage during that evening while you were looking at him? -- No, but he did sort of fall on to the floor. It wasn't exactly a fall; he put his hands down on the floor and knelt forward and lay down on the floor. I think he wasn't really drunk as such, but I think he was pretending to be more drunk than he was.

He was pretending. What gave you that impression? -- He was quite coherent in the beginning but later he sort of reeled about when we took him out of the house.

Did you smell any liquor on his breath? -- Yes.

So he had had liquor? -- Yes, he had had liquor.

At least, he had a smell of liquor? -- He had the smell of liquor, yes.

And later on you say he was reeling about? -- Only as I took him to the van.

You arrived there, if I understand your evidence correctly, shortly before nine? -- That's right.

Was he, when you arrived, more sober ostensibly than he was later in the evening? -- Yes. Oh yes.

What gave you the impression that he was acting like a drunk man? -- Well, I wouldn't have imagined him to be so drunk that he could collapse five minutes after I had seen him. He seemed perfectly all right and five minutes later he fell forward and lay on the floor.

Later on that evening he was taken away? -- Yes.

Do you remember how he was taken away? -- He was taken by myself and another constable. We walked him to the van.

Did you take him away in the van? -- No.

Why not? -- He refused to get into the van.

How did you take him then? -- We took him into a Police car.

Did he say why he did not want to go in the van? -- He said he was a very prominent man and he did not want to be seen sitting in a Police van."

In cross-examination van Minen stated that although appellant was not drunk, he did get the impression that appellant had had "some drinks". He also conceded that he might have been "completely mistaken" in his impression that

appellant was pretending to be more intoxicated than he in fact was.

It is not disputed that at about 9.15 p.m., or shortly thereafter, appellant was lying asleep in Diep River Police Station, apparently deeply under the influence of intoxicating liquor. He was, thereafter, removed to Wynberg Police Station and placed in a cell. Dr. Sacks, District Surgeon for Wynberg, examined appellant at 11 p.m., and found him to be comatose, "not even responding to painful stimuli". According to him appellant was then suffering from acute alcoholic intoxication. Apart from stating that appellant had been "drinking heavily", he declared himself unable to express an opinion as to how much alcohol appellant had consumed or as to when he had taken the liquor.

Dr. Zabow, a specialist psychiatrist, was called as a defence witness. He interviewed the appellant a week before the trial, and went into his background "in fair detail". He had previously been furnished with a copy of the preparatory examination. He attended the trial and heard the evidence of the witnesses, except for some part of Ingrid's

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testimony. In examination-in-chief he stated that appellant is "the sort of person who is quick to anger and then acts impulsively." Dr. Zabow was asked to comment on appellant's evidence that he only had a partial recollection of the events leading up to and following upon the assault. The following questions and answers were recorded:

> "We come to the day in question, the 24th December, 1969. We have this picture, and it is apparently not disputed, that Mr. Loubser drank and consumed a fair amount, and quite a considerable amount, of intoxicating liquor between the hours of, say, 4.30 and 7 o'clock. The precise period is not quite clear on the evidence, but more or less in that nature. We have the next bit of evidence that he is seen at home, he is now in a very aggressive mood - his daughter described how he behaved and how he assaulted his wife. We have the next bit of evidence and that is Mr. Copeland coming in and finding him; first of all seeing him outside, and then seeing him sitting on the stairs, but afterwards he apparently lies down in the house and when the Police arrive he is either at times in a sitting or a lying position, or he is walking about and eventually they take him away. Now, Mr. Loubser, in fact, claims a certain amnesia for certain events; not a total amnesia but a partial amnesia. What is your comment on, first of all, his amnesia? -- I would say that it is consistent with his previous history of alcoholic excess and of his previous history of having had alcoholic blackouts.
>
> He is questioned in detail, for instance, about whether he remembers driving from the Police Mess to his home, and you will recall his evidence, that he can recall being in the lounge where he had drinks, there were friends and they were greeting each other; he cannot recall getting into the car but he does

remember stopping at the garage. He also refers to "a hazy recollection", but he cannot really remember what happened after that time when he was greeting and drinking with people in the lounge and then afterwards when he gets home. What is your comment on that? -- I would accept this as being a reasonable description of how the alcoholic would experience such a thing.

Have you heard this type of story from other alcoholics? -- Yes, this is what I mean, that this is a reasonable description of remembering more or less up to a point, and then things get rather hazy, and then particularly, what must have been for Mr. Loubser a fairly routine procedure, like driving home from the Police Mess to his house. This wasn't strange to him; as he described it, this was a fairly frequent if not daily occurrence, anyway, so that one could quite easily accept that in the process of an alcoholic blackout, in the state of an alcoholic blackout, that he could have routine - what he describes as a vague recollection, which is probably in a sense his own mental attempt to account for the time, rather than a true memory. He has got to sort of account for the gap between leaving the Police Mess and arriving at his house, and when he says he has a vague recollection, he may either have a vague recollection or he may be saying 'I presume that this is what happened because I left there and I arrived there.'

We have it that Mr. Copeland, he spoke to Mr. Copeland and apparently he spoke fairly coherently to Mr. Copeland, and he walked out of his house to his gate and he walked back. Doesn't this rather belie your suggestion, or the accused's story, at least, that he was under the influence of liquor, strongly under the influence of liquor? -- No, particularly if one takes into account the later part of Mr. Copeland's story of how he sat down and eventually sort of lay down, and from there on the description is of a man going into, first, an alcoholic stupor,

and then an alcoholic coma. So that would be quite consistent with the course of events, particularly if he had had some whisky after arriving home and before his wife and daughter arrived back."

Dr. Zabow was asked to comment on the evidence indicating the appellant's progression through all the stages of alcoholic intoxication. He testified as follows:

"Now, if it is postulated, in fact, that he did not have anything to drink after the assault of his wife, what is your comment? Must he have had a considerable amount of liquor to be in this condition? -- He must have had a considerable amount, first at the Police Mess and then he must have had a further amount at home as well too - you see, alcohol is absorbed very rapidly from the stomach; as you drink it, a considerable percentage is absorbed from the stomach and then a further amount from the small intestine. It is excreted very much more slowly than it is absorbed, so that, if I could imagine that he had a certain level in his blood and brain when he got home, now, even a comparatively moderate amount of whisky then would have pushed that level up very rapidly again, so that he could have been very much more intoxicated by a comparatively small amount of additional alcohol.

And does Mr. van Minen's evidence fit in with this opinion when he says that when he arrived at the house, first, the accused was sitting; within five minutes his condition had deteriorated very rapidly because he was now lying on the floor? -- Yes, this would mean almost for certain that he must have had something to drink in that interval between arriving home and the wife and daughter arriving home."

In dealing with the effect of Purple Heart

tablets, Dr. Zabow stated that it was a popular drug with a rather mixed effect, "because you have a combination of a stimulant, the dexedrine, and a sedative or tranquiliser, the amylo-barbitone." Asked what the effect would have been of having alcohol on top of this drug, he replied:

> "I would say that we call a synagistic action, that is to say that the two, particularly the barbiturate, the amylo-barbitone, plus the alcohol would tend to potentiate one another's effect, so that he would be more affected by both, more affected by the amylo-barbitone and more affected by the alcohol than if he took each separately. And the dexedrine might have caused him to be perhaps a little more physically active than just the combination, say, of the alcohol and the amylo-barbitone alone."

The Court asked the witness to comment on the evidence that appellant talked quite rationally to a number of people at a time when, on the defence evidence, he should not have been able to do so because of the effect of alcohol upon him. He replied, "This would be in keeping with what I have called 'alcoholic blackout', where to the observer the alcoholic may appear to be behaving fairly rationally, and yet, once again, have no recollection of that the next day." He added, in reply to further questions put by the Court, that the person's conduct would still be "purposeful". His examination-

in-chief was concluded with the following question and answer:

> "Unless you made a careful examination of the person concerned, would the ordinary layman really be able to say whether or not, or the extent to which the person was under the influence of liquor? --- He may not be able."

In cross-examination Dr. Zabow was asked to describe "the process of remembering". He explained that there are, at least, "four phases to memory: attention, retention, the short-term memory and then the long-term memory." It is implicit in his further evidence on this topic that each phase might be affected by the personality of the person concerned, the emotional circumstances operative at any particular time, the effect of alcohol, etc. Alcohol can affect perception and attention, but it can also affect quite separately the capacity for retention. The alcoholic, i.e., the chronic drinker, does not remember things even though he is still in control of his motor behaviour.

When he was cross-examined in regard to appellant's evidence that he only recalled striking the first blow, he replied as follows to the questions put to him:

> "If after the angry exchange of words between the parties, he remembers striking her once - he does

> remember striking her once - would you expect him to remember striking her the second, perhaps the third, time? --- Not necessarily, no.
>
> Why not? -- As I explained to the Court a bit earlier, there is a sort of graph as to how first, with anger and tension, you can first remember more and then, when the anger and tension and extreme irritability rise above a certain level, you remember nothing at all."

The Court questioned Dr. Zabow in regard to the issue whether or not the appellant was capable at the relevant time of forming an intention to kill his wife, having regard to the quantity of liquor that appeared to have been consumed by him. Dr. Zabow explained, firstly, that he did not use the word "purposefully" as necessarily indicating intentional conduct, but "rather behaving as though one knew what one was doing." He was asked to explain what bearing an ability or inability to recall has on the question whether conduct was intentional or not. As to this Dr. Zabow replied as follows to questions put by the Court:

> "This is a problem that we often have in these cases, certainly as psychiatrists, and in fact the ability to recall is of very little importance - I am talking now as a psychiatrist, not as a jurist - to us whether a person remembers or not in terms of - let me put it this way, except that it is an indication either of the circumstances of what happened, or the person's reaction afterwards to what happened. If you

say that somebody does not remember what he did, it does not follow that he did not know what he was doing at the time he did it.

That is why I put it to you. Could it have some bearing on the degree of his intoxication, the ability or the lack of ability to recall what he was doing? -- Yes. It would indicate that he had had, I can only use the word 'excessive', an excessive amount, or a substantial amount.

In other words, the lack of ability to recall, the greater that is to some extent the greater the degree of his intoxication was? -- Yes.

Is that always a fairly reliable relationship? -- Only in an individual. You could not measure one person against another.

No, but in the individual ~~itself~~ himself, the accused in this case that we are concerned with, the degree of his inability, would that be a reflection of his degree of intoxication? -- In a general sense, yes, it will.

But do I understand you to say it does not give us the answer to whether the degree of intoxication was such that he was unable to form an intention to do what he, in fact, did? -- Do you mean intended to hit her, or.....?

No, intended to, as far as it is relevant in this case, kill her? Let me put it to you in both forms as far as intent in the law is concerned. You probably know this from your experience in Court, that you can intend to kill somebody when you positively and directly intend to put an end to their life; you can also intend to kill them even if you do not desire to do so, but if you in fact do something which you know might cause their death, that is also a form of intent, in our law. We are concerned, inter alia, in this case with the issue as to whether the degree of intoxication under which the accused laboured was such that he was unable to form the intent to kill in either of the two senses which I put to you. I am not asking you to

do so if you cannot, I want to know whether you can express an opinion on your knowledge of the case and on what you have heard here, whether the degree of intoxication under which the accused suffered would make it, either impossible, or unlikely, or improbable that he could have formed the intent to kill in either of the two senses I put to you. -- It is difficult for me to say more than this, but as far as I can see, that when he hit her he intended to hit her. This I think I must accept, that when he hit her, he intended to hit her.

He intended to assault her. But further than that you are not prepared to go...? -- No, I do not think I am able to.....

I am not challenging your inability to do so, I just wanted to know whether you can cast any further light on this. Anyway, you say that his degree of intoxication would not preclude him from forming an intent to hit her when he, in fact, did so? -- In my terms I can only say that that amount of intent must have been there because he recalls getting up and hitting her.

And you are not really able, or perhaps prepared, to express an opinion on whether, in view of his degree of intoxication, he could have intended to kill her in either of the two senses I have mentioned? --- This is so much an impression that I do not know if it is correct to give it, but my impression was, and taking into account the aspects of irritability - I am talking now of irritability in a pathological sense of committing of a violent act which, as it were, becomes out of conscious control once the act has started, that I would accept, that part of it need not be with intent, although the initial act, the initial sort of blow, starts with intent, but there is almost, as it were a - I am not now talking about an alcoholic blackout, but just as it were a blackout of control faculties which would be aggravated by the presence of alcohol,

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which is in any case a cortical inhibitor.

You mean it might well be he was acting like an automaton at a subsequent stage in the assault after the first blow. Is that what you are trying to say, and then had no further control over his actions at all? -- I am trying to avoid the use of the word 'automaton', but this sort of concept, yes.

Obviously we've got to weigh the probabilities or otherwise; would that be a basis on which to explain his subsequent conduct? Would you like to express an opinion on the degree of probability as to whether one could say that his subsequent conduct, after striking the first blow, which I understand you to say he would have done with the intent of doing so, did not affect his subsequent conduct in the further assaults, which is common cause, he committed? -- I am sorry, I did not quite get the last sentence.

What I was saying is this: You tend to distinguish between his first blow which, you say, was intentionally delivered with the object of assaulting her, as I understood it, but you say that it may well be that his persistence in the further assault was not accompanied by an intent to commit those assaults. -- Yes.

And as I understood you, you rather explained the difference between the two stages on this basis that it might possibly be that he was acting in something analogous to an automaton in the second portion of the assault.--Yes.

What I would like you to do, if you can express an opinion on it, whether you think that that explanation is probable or likely or merely possible? -- I would say that knowing something of his previous history, that it is even probable, certainly a strong possibility."

Thereafter Dr. Zabow dealt with the varying degrees of impairment caused by intoxicating liquor. The

following questions by the Court and the witness's answers thereto appear from the record:

> "Yes, I take it, there are degrees of impairment? -- Oh yes.
>
> You would start probably from a fairly minor degree and can build up to a degree which one might in ordinary language describe as an inability to control your actions. -- Yes.
>
> And, I take it, in between the two outer stripes in the spectrum there must be quite a number of.....? Quite a wide range.
>
> ....degrees of lesser control until you get to the stage where the person can no longer exercise control over their actions? -- Yes.
>
> It is that aspect of the matter that we are concerned with. Would you be prepared to express an opinion whether the state of his drunkenness or his being under the influence of liquor was such that he was unable to control, in the positive sense of the word, his actions? -- I would say that his ability to control was impaired and the combination of this impaired ability to control plus the degree of anger which appears to have developed could have than, together, even further lowered the control, the capacity to control.
>
> So that it eventually got to the stage where he was quite unable to control his actions? -- Yes, that would be acceptable to me.
>
> And you think that the degree of intoxication present in the accused in this case, as a matter of a reasonable possibility, could have put him into the position that he was unable to control his actions? -- Yes, particularly, I make this point, because of the subsequent picture as I understand it, of eventually being in an alcoholic coma."

The trial Court found that although the

evidence did not establish that the appellant's will was consciously directed to compassing the death of his wife, he nevertheless acted intentionally in that it was proved beyond any reasonable doubt that he in fact appreciated that his actions might result in his wife's death, and that he was reckless whether or not death ensued. In drawing this inference, the trial Court relied, inter alia, on "the savagery of the assault as a whole and the great force applied as was indicated by the evidence of the extensive nature of the injuries". The injuries which the deceased sustained may be catalogued as follows:

(1) extensive damage to the corpus collosum of the brain, i.e., the connecting bridge of tissue linking the two hemispheres of the brain;
(2) bruising of the brain;
(3) multiple fractures of the upper and lower jaw bones;
(4) fractures of the left cheek bone; and
(5) two lacerations of the left temporal area.

Although the deceased's skull was not fractured, it is clear from the evidence as a whole that a great degree of force was applied in the assault, and moreover, that it was directed to that part of the body (the head) which is generally known to be vulnerable. It appears from the

medical evidence that the brain damage was caused by rotational movement of the brain within the skull. In the case of the deceased this movement could have been caused by the fist blows or the dropping of the head onto the floor or by both. Stamping on the head, while it was on the floor, was in the circumstances less likely to have caused rotational movement of the brain within the skull. Dr. van Niekerk, a neuro-surgeon who attended the deceased in hospital, stated that it was impossible to say whether the fist blows alone or the dropping of the head or the two together caused the brain damage, although the dropping of the head from a height of some 2 - 3 feet appeared to him as "probably more likely". He also agreed that the only injury she had which was a danger to life was the wide-spread brain damage. He, however, qualified his evidence in this regard by saying that he had not "heard the autopsy report". A post-mortem examination was carried out by Dr. Schwär, a specialist pathologist, who is the head of the State Pathology Laboratory in Cape Town. In his report the cause of death is stated to be an extensive head-injury ("n uitgebreide hoofbesering"). In his evidence-in-chief he explained that in his opinion death

was caused by the brain injury and the fractures of the jaw bones and the left cheek bone. He stated that the extensive damage to the corpus collosum showed that there must have been considerable rotational movement of the brain within the skull, i.e., a degree of movement not normally associated with the head being struck by fist blows. As to this he said:

> "Die gewone letsels wat n mens vind in persone wat boks is n subdurale bloeding. Ek het nog nie van hierdie tipe letsels gehoor of gelees, soos ek in hierdie geval gevind het, wat n direkte gevolg was van enkele vuishoue teen die kop."

In cross-examination he explained the significance of the extensive facial injuries, by referring to the shock which those injuries would have caused. The effect of his evidence under cross-examination in regard to the likely cause of the brain injuries is adequately summed up in his answers to questions put by the Court. The record reads as follows:

> "COURT: Just let me take it one step further. It really means that you generally agree with Dr. van Niekerk that those brain injuries are more likely to have occurred either from the two blows by themselves, or the subsequent fall by itself, or together with the two blows, or the subsequent dropping on the ground by itself, or together with the two blows and the fall? -- Or the fall and the drop alone.

In other words, the point is, that the stamping you do not think could have accounted for the brain injuries? -- No."

I have dealt at some length with the evidence relating to the cause of death, because it was argued before the Court a quo that the appellant's intention was to be derived only from those acts which are proved to have caused death, i.e., as I understand the contention, that in seeking to draw the inference that the appellant in fact appreciated that his conduct might result in death, the Court is limited in its enquiry to the acts which are specifically related to the injuries which caused death. If, therefore, it is, e.g., reasonably possible that the brain damage may have resulted from the fist blows alone, the Court is bound to enquire whether at the time those blows were directed to the deceased's head the appellant subjectively appreciated the possibility that death might result. The fact that the appellant thereafter acted in a manner which justifies an inference that he then appreciated the possibility that death might result, does not necessarily justify the further inference that he also appreciated that when he delivered the fist blows. Since it was

reasonably possible that the tramping on the head did not cause the brain damage, it became an irrelevant consideration whether or not at that stage of the assault the appellant subjectively contemplated the possibility that death might result. The trial Court rejected this contention, holding that, irrespective of the question whether brain damage alone or head injuries generally caused the deceased's death, the Court was not precluded from considering the fact that the appellant also stamped on the deceased's head with a considerable degree of force. In this regard the trial Court held that, "All the surrounding circumstances must be looked to in order to determine whether the accused entertained such an intention." For this proposition the trial Court relied on the judgment of this Court in State v. Sigwahla, 1967(4) S.A. 566. In Sigwahla's case the Court was concerned with a single stab wound which penetrated the heart. After having regard to all the surrounding circumstances, the Court concluded that although it was not proved that the accused had directed his will toward the bringing about of the deceased's death, it was established that he subjectively appreciated that his stab in the chest might re-

sult in death and was reckless as to whether death ensued or not. The proposition, as stated above, is of course of general validity, provided it is borne in mind that the "surrounding circumstances" must be relevant to the factum probandum, and be given such weight as the circumstances logically justify. If the factum probandum is the accused's subjective appreciation of the possible consequences of a fist blow delivered to a victim's head, proof of his later subjective appreciation of the possible consequences, e.g., of a subsequent blow to the head of the victim with a heavy hammer, would hardly appear to have any real relevance to the postulated factum probandum. However that might be, and assuming in appellant's favour that the trial Court misdirected itself in this respect, I am satisfied that the argument cannot succeed on appeal, though it may, very well in appropriate circumstances, merit careful consideration.

Having regard to the evidence relevant to the cause of the deceased's death, I am satisfied that it was established beyond any reasonable doubt that Dr. Schwär's opinion is to be accepted, namely, that the head injuries generally, and not only the brain damage, caused the deceased's

death. The cause of death, like any other fact in issue, is to be proved beyond any reasonable doubt; it is not required to be demonstrated as a medically incontrovertible scientific fact. Dr. Schwär is an experienced pathologist and had the advantage of observations made at a post-mortem examination. He was , therefore, well qualified to express an opinion as to the cause of deceased's death. Having regard to the grave injuries caused by the stamping on deceased's head, and the fact that those injuries contributed to the fatal consequences of the assault as a whole, the Court is entitled, in my opinion, to give consideration to the appellant's state of mind during the latter stage of the assault. The fact that the element dolus eventualis may possibly have been absent during the earlier part of the assault, does not in the circumstances of this case assist the appellant.

There remains for consideration the question whether the trial Court was clearly wrong in holding that the appellant, in the condition in which he then was, in fact subjectively appreciated, when he pursued his assault upon the deceased, that death might possibly result from his unlawfull conduct.

It is necessary to refer briefly to the trial Court's assessment of the reliability and credibility of those witnesses who testified in regard to the appellant's conduct during the evening in question. As to this the judgment reads:

> "I might say that all the witnesses I have mentioned so far appeared to be reliable and credible witnesses. Ingrid, despite her years, was in the opinion of the Court an exceptionally good witness. She was composed, intelligent and quite objective in her evidence and reasonably observant. Where she did not remember anything or did not observe anything she was quite open about it and was prepared to admit it. She apparently entertained no ill-feeling towards her father and, indeed, the relationship between herself and her father appeared not to be at all bad."

As to the appellant, the trial Court observed that "as a witness he made a poor impression on the Court". He was "vacillating and unimpressive and not infrequently contradicted himself during cross-examination." In weighing up the totality of the evidence, the trial Court concluded that appellant's evidence as to the quantity of liquor he had consumed, its effect upon him and the extent to which amnesia affected his memory was untrustworthy. This finding must of necessity have a bearing upon the weight to be given to the

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opinions expressed by Dr. Zabow. In this connection I am mindful of the submission made by appellant's counsel that Dr. Zabow's opinions were not based solely on what appellant had told him in consultation. He took into account the appellant's background history - which was not disputed - as well as the evidence which he heard at the trial. It is, however, implicit in his evidence that, in forming his opinion, he had to accept that the appellant's account was trustworthy. His interpretation of the other evidence must obviously have been undertaken upon that assumption. The fact that appellant recalled striking the first blow led Dr. Zabow to express the opinion that at that stage appellant was acting intentionally, i.e., directing his will toward striking the deceased's head with his fist. His opinion as to the possibility that the appellant might thereafter, as a result of mounting rage, have lost control of himself, is based in part at least on the appellant's evidence that he had no recollection of the assault after striking the first blow. If, in this respect, the appellant's account is held to be untrustworthy, it must obviously affect the reliability of Dr. Zabow's opinion. In this regard the trial Court

rejected the appellant's evidence that, although he recollected striking the first blow, he could not remember what happened immediately thereafter. As to this the judgment reads:

> "Moreover, there is one other aspect which I can think I should mention in regard to Dr. Zabow's evidence, and that is, the accused remembers very well that he struck his wife the first blow, and what is surprising is, that if he had done so he would not be aware that almost immediately afterwards he had lost all sense of control. The passage of time between striking the first blow and the second blow, on the evidence, is minimal and one would have thought that if his case was that he was so enraged, so under the influence of liquor, that he was unable to stop himself from continuing to beat his wife, or to assault her, he would have said so. On the contrary, he says nothing of that at all. There is no evidence whatsoever that he lost control of himself. There is nothing to indicate, as far as Ingrid's evidence is concerned, that his conduct was any different towards his wife from the time that the first blow was struck until the time that he stamped on her and she (Ingrid) left the room."

It was submitted by counsel on appellant's behalf that the trial Court overlooked Dr. Zabow's evidence that it was indeed possible that the combined effect of intoxication and rage might have been such as to cause appellant to lose all self-control after striking the first blow. From the psychiatric point of view the appellant's account of the degree of amnesia was, therefore, acceptable. It is, however, apparent from the judgment that the trial Court did not overlook the

evidence in question. The overall impression of the trial Court was, however, that the appellant's evidence in this respect, was not trustworthy.

It was submitted that the trial Court had oversimplified the matter, and had determined the issue of intent without due regard to the background of the appellant as a person who was quick-tempered and prone to act impulsively, particularly when he was under the influence of intoxicating liquor. The likelihood that the appellant acted impulsively and without reflection upon the possible consequences of his conduct, is demonstrated by the fact that he did not use a weapon. Immediately prior to the commencement of the assault the appellant was involved in a quarrel with his wife, who indulged in conduct which was calculated to and did infuriate him, the more so since he was on the evidence to some extent at least under the influence of drugs and intoxicating liquor. In these circumstances it was reasonably possible that it might in fact not have occurred to him that his violent assault might result in death. A mind already impaired to some extent at least by drugs and intoxicating liquor, would not readily

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reflect upon the possible consequences of violent conduct.

An argument of this nature must obviously carry considerable weight when it is addressed to the trial Court at the close of the trial. This Court is, however, not primarily concerned with the question whether, on an appraisal of the evidence recorded at the trial, it appears that there was a reasonable possibility that the appellant did not subjectively appreciate the possibility that his conduct might cause the death of the deceased; the substantial issue on appeal is whether it appears on adequate grounds that the trial Court erred in holding that the State had proved the existence of the relevant intention. In considering this issue, this Court is bound to give due weight to the findings of the trial Court in regard to the reliability and credibility of the witnesses who were called on behalf of the State and of the appellant. I have already summarised the evidence in fair detail, and set out the views of the trial Court in regard to the question of the reliability and credibility of the various persons who testified on oath. In my opinion there is no justification for holding that the trial Court erred in its assessment of the reliability and

credibility of the persons concerned. I am not satisfied that the trial Court erred in concluding that the evidence as a whole excluded the reasonable possibility that the appellant did in fact not subjectively appreciate the possible fatal consequences of his conduct. The picture which emerges from the uncontradicted evidence of Ingrid, Copeland and van Minen, is that of a man who, though he suffered some degree of impairment of his mental faculties, was nevertheless capable of directing his will in a purposeful manner. It must not be overlooked that Ingrid and Copeland had seen appellant on prior occasions when he was affected by intoxicating liquor, and were thus qualified to express an opinion as to the degree of his intoxication at the critical time. The appellant deliberately directed his violent assault to the deceased's head, a part of the body which is generally known to be most vulnerable. In all the circumstances it cannot reasonably be supposed that it might in fact not have occurred to him that he might fatally injure his wife. The rapid deterioration in the appellant's ability to control his motor behaviour, which set in after the assault, as testified to by Copeland and van Minen, is explainable upon

the basis that he had consumed intoxicating liquor at home shortly before the arrival of the deceased and Ingrid.

The appeal is dismissed.

A.J. Van Heerden

DE VILLIERS, A.J.A.
MULLER, A.J.A. } CONCUR.