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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CONSTANCE EILEEN POTGIETER ..... Appellant

and

THE STATE ..... Respondent

CORAM: HOEXTER, KUMLEBEN JJA et VAN COLLER AJA

HEARD: 5 NOVEMBER 1993

DELIVERED: 29 NOVEMBER 1993

J U D G M E N T

KUMLEBEN, JA/...

2 The

appellant, a thirty-six-year old woman, stood trial before Jansen J in the South Eastern Cape Local Division of the Supreme Court on a charge of murder. The State alleged that she had intentionally and unlawfully killed the deceased, Badian Stow Bosch, with whom she was living as his wife. Whilst admitting that she fired the fatal shot, she pleaded not guilty on the grounds, briefly stated at this stage, that she did so in a state of "sane automatism" , or was impelled by an irresistible impulse, and that she therefore lacked the legal capacity to commit a criminal act. This defence was rejected as false in the court a quo and the appellant was found guilty as charged. A sentence of seven years imprisonment was imposed. With leave granted, her appeal is before us as regards both conviction and sentence.

I refer firstly to the evidence given by

the appellant. She was married to Jan Potgieter. They had three children: a boy Brandon and two daughters, Cyndee and Shannon; their respective ages being 15, 13 and 10. She first met the deceased in 1984 and within a week had fallen in love with him. She expected the relationship to be a lasting one as he said that he wished to share his life with her. This led to her divorcing her husband in December of that year, thus terminating a marriage which had not been a happy one. Early in 1985, whilst she was still living on her own, the deceased told her that he was having an affair with a married woman to whom he was equally attached. This caused the appellant to break off their relationship, only to resume it within a few months. At the start of 1986 she moved in with him. She had been awarded custody of the three children. He said that he did not want them in the way and they were placed at boarding school.

4 In about 1987 they decided to purchase a house and she contributed R10 000,00, a sum awarded to her at the time of her divorce. It was also agreed that the property would be registered in their names jointly. However, he transferred it into his name only. When she questioned him about this, he said that if she did not accept the position she could "clear out" and added that he would repay the R10 000,00 when in a position to do so. She accepted the situation because she was in love with him. The children were taken out of boarding school and returned to live at home. He imposed a condition that they were to stay in their own bedrooms. He was unpleasant to the children and his attitude towards her deteriorated. He drank excessively, was foul-mouthed and often assaulted her by hitting her. He failed to provide her with money for the purchase of household provisions or her personal needs and she

was obliged to borrow R5 000,00 to make ends meet. There were, however, times when he was agreeable and considerate. She remained with him because she continued to love him despite his conduct, was materially dependent on him and hoped that his repeated promises to behave decently would be kept.

One morning in 1988 she asked him why he did not want her and the children to be with him on that day. He reacted by hitting her. She fell from the bed and he started kicking her where she lay. A pistol had been bought for her use. It lay on the floor on her side of the bed. She picked it up and "waved it in front of him" telling him to leave her alone. He desisted and asked her to hand the firearm over to him. she obliged whereupon he resumed the assault and said that he would lay a charge against her for pointing a pistol at him. She was forced to telephone some friends to come over and pacify him.

(After this incident the pistol was always kept in a safe where it remained until the afternoon preceding the night on which the deceased was shot.) She was pregnant at the time of this assault which was apparently the cause of a subsequent miscarriage or therapeutic abortion.

In 1989 whilst on a trip overseas he drank excessively and the assaults continued, so much so that she decided to leave him on their return. She, however, again fell pregnant and on this account she remained with him. They had planned this pregnancy, yet on hearing the news he insisted that she should have an abortion. When she was eight months pregnant he chased her from their home. She consulted an attorney who advised her to return. She was in a despondent and depressed frame of mind and recorded some details of his misconduct and her reactions and emotions in a notebook which was handed in as exhibit

K. It is a graphic account of misconduct up until the time of writing and records the extent to which his behaviour undermined her emotionally. It reads as follows:

> "1984 Dec: I got divorced.
> My life centred around Badian. I thought that I had found everything I always wanted. Little did I know that he was using me to boost his ego and fill his sexual needs. It wasn't long before I realised that he hated my kids and was very unkind towards them. Brandon was 8, Shannon 7 and Cyndee 3. Little innocent kids who had a hard enough life without having him to make it worse. For the next 5 years I was thrown between them and him. I cannot begin to explain what I went through. My kids have never liked him and begged me often to leave him. I have been torn apart for all these years. He has abused me physically, verbally, mentally and socially. Foul language is his 2nd nature when speaking to me. He has lied and cheated on me. I found the house we are living in and gave him R10 00 0 deposit to buy it as he had nothing -with the agreement that it would be put jointly into our names and that my 2 kids could leave boarding school and live with us. He agreed to everything. But behind my back he had the house registered in his name only. We fought for months about that and all he would say was ' if you don't like it F... off.

Today 6 years later he is never at home, never tells me anything just expects me to serve him, run after him and be sweet and loving all the time. He drinks non stop. If I don't do what he wants, my life is made worse than what it is. The sad thing now is that I'm 6 months pregnant and the treatment is getting worse. But I get blamed for everything. I don't have a hope in hell of defending myself. He runs me down to my friends with a pack of lies. It's so humiliating that is not worth living if I'm such a bad useless person. I have been driven to many things many times because I snap. For eg. I tried to shoot him once. He hit me so badly after that, I was almost pulp.

I have no family here to help me, no money and totally stranded. I have to upset my kids schooling to more and it's a major upheaval that doesn't concern him at all. All he wants is for me to loose this baby so that he can kick me out. He doesn't want to kick me out now because to the public he wants to create the perfect image. He wants me to leave on my own by making my life hell so everyone will think he did nothing, I left on my own accord. This baby was a mistake made by both of us and obviously made at a time when we loved each other. Now the poor thing is being thrown around before it's ever born. He doesn't love it and has no concern for my health or the baby's. He is only on an ego trip that he can actually make one. The thought of loving the baby alone and raising it on my own hurts me so that I can't think straight.

> He has some good qualities and can be a wonderful person as long as things go his way and he can be a bachelor and have a slave at home. The trust and respect have gone and there is only an empty shell left and I am left holding the can of bad memories. I am 35 and my life could have been so good. I know that I will have to go to court and have a big battle for him to pay for the baby because he will be as spiteful as possible, why.
>
> Dear God - please help me get through this. I must move to my parents in Durban and try and make a new life with an illegitimate child that is if I don' t give it up for adoption. I don' t want to be punished but I have no option. Some desperate couple will love the baby and give it a better life. I recognize my faults and admit them. But he refuses to and as far as I know only God is perfect and always will be. If I try to be nice he lets me down all the time - I just have no faith in him anymore. Our relationship is rotten and I'm so unhappy that I can't wait to get out and be free of him."

After the baby, Tyrone, was born his attitude changed. He became a proud father, but only for a while. He decided that they should get married and a wedding date was set, namely, Saturday 8 December 1990. However, on the Thursday before that Saturday

a dispute arose between them because she wanted their antenuptial contract to provide some security for her and the child. This difficulty was not resolved and so on the morning of the wedding he called it off. She was however obliged to attend the "reception" at which the postponement of their marriage was announced to the would-be wedding guests.

In January 1991 they decided to separate for a period so she went to stay with relatives. At his request she returned to him towards the end of March 1991. The pattern of inconsistent and deplorable behaviour continued. Initially he was kind and considerate saying that he wanted to marry her in August. But he soon reverted to his former miscon-duct .

On 28 April 1991 he grossly humiliated her in front of the children. The next morning she decided to go to see him at his office and discuss

their problems. There he again humiliated her by swearing at her in the presence of his brother Gary. On Saturday 5 May 1991 he returned home at lunch time and took her with the baby to the Port Elizabeth agricultural show. Once there he met up with some friends. He thereafter paid no attention to her until it was time for them to return home. Later that afternoon at about 6h30 he told her that they had been invited to visit friends. She dressed for the occasion only to be told that because she had taken so long he had decided against going. As she was upset and tired she went to bed whilst he watched television. Despite all this, when he did join her in bed they slept together.

On the Sunday morning she tried to speak to him in their bedroom. He reacted by swearing at her, saying that he was not interested in the baby, that he had not fathered it and that she was "a waste of

white skin". She said that she was quite prepared to leave him if he would only assist her with some money and undertake to support their baby. He refused saying that as far as he was concerned she could "rot in the gutter". When he left their bedroom she followed him, upset and crying. She pleaded with him to at least help to support the baby financially. His reaction was to hit her and try to push her down the stairs leading from the upper storey of their duplex to the ground floor but she managed to hang on to the railing, when the deceased had gone to their bathroom she told Brandon to telephone his father to collect him and his sister Cyndee (Shannon was not at the home at the time) . The other two children were duly fetched and taken away.

She next telephoned the deceased's sister-in-law, Mrs Kay Bosch, to tell her that the deceased had assaulted her and that she planned to leave him

but added that Mrs Bosch should not mention this to her husband Gary.

Later, after the deceased had left the home, she telephoned a friend, Mrs Denise Haller. She also told her that she "was being assaulted" and asked whether Mrs Haller would come to their home and assist her. Mrs Haller said she did not want to become thus involved but suggested that she should come and stay in the safety of her home. The appellant, when asked during cross-examination why she had declined this offer, said that the purpose of the call was to find out whether Mrs Haller would be available if she needed help: she hoped that by nightfall the appellant would have calmed down "because that's what normally always happened". ("I just wanted a place to stay for that night. My intention was to leave on the Monday, and I hoped that he would have calmed down so that I could be

there that night and I - I couldn't accept the fact that he would actually throw the baby out".)

She next telephoned Mr Britz of Houdini Locksmiths and explained to him that she needed money and a gun from a locked safe for a journey she proposed taking on the Monday morning. She had finally decided to leave him and go to her parents in Durban. She could not find the key to the safe. (It is an upright unit in what may be described as a small store-room partially under the staircase on the ground floor.) Mr Britz arrived and opened the safe. He told her that there was no money in it. This was after they had both looked in a satchel where the deceased normally kept his "hot money". There were two handguns in the safe. He asked her which one she wanted. As she remembers, he handed her pistol to her. The two magazines for the pistol were also kept in the safe. These were also taken out. She removed

the pistol from its holster and placed one of the magazines in it. She then returned it to the holster and placed it and the spare magazine in her handbag. As far as she remembered, the pistol was unloaded (uncocked) when she did so. She thinks she put the key to the store-room in a bowl in the kitchen after both she and Britz had left the former room. As Britz was about to leave the duplex, the deceased returned. He was angry and shouted at Britz telling him to leave. She told him to comply to avoid trouble. Under cross-examination she was asked whether it was Britz's presence that had angered him; whether the deceased knew or must have inferred that she had employed Britz to open the safe; and whether the deceased knew that she was now in possession of her pistol. The cross-examination in this regard reads as follows:

"On the deceased's return to your house Mr Britz

was still there? --- Yes.

He was very angry on finding him there? ---He was angry.
I don't know why he was angry. He was angry. He was angry from the night before.

What did he say to you when he got back? He had words with Britz, Britz left, what was the deceased's reaction to you? --- He just started shouting at me, who gives me the right to touch what belongs to him.

What was he referring to? --- Going into the safe, I suppose, taking money, or just opening the safe. It belonged to him.

Was he aware of the fact that Britz had opened the safe? ---- I don't know.

That he had the idea that you were fiddling with his things as you'd put it? --- Yes.

Did he say anything about the safe?-------I can just remember him screaming and shouting at me. I just (interrupted)

I asked you was the question of the safe and it being opened, was it discussed? --- Not that I can remember, he just that he - who gave me the right to touch his things.

You wanted to hide the fact that you'd removed the firearm, your firearm from the safe? --- I didn't hide anything.

But did you tell him about it? --- I just said I want to get what's rightfully mine because I am leaving the next day.

Did you tell him about the firearm? --- I didn't get a chance to.

COURT: But you are referring to things that belong to you that you removed from the safe. --- Yes.

So what else was in the safe that belonged to you? --- Nothing.

So it could only have been the firearm? --- Yes M'Lord.

So he knew you removed the firearm? --- Well I suppose he must have, I'm not sure M'Lord.

MR PRETORIUS: It wasn't discussed specifically? --- Nothing was discussed."

She, the baby and Britz were in the lounge at the time the deceased arrived. After Britz left, he chased her, with the baby in her arms, around this room. She tried to escape but he was too fast for her. At the kitchen door he started hitting her against it, so much so that the door was damaged.

The baby was screaming and she was hysterical. She managed to get out of the house after she had been struck on the head several times. She told him that she was going to the police station and he just laughed at her.

Since she could not use her car because its key was in the duplex, she walked to the Walmer Gardens Hotel and asked someone there to telephone the police to come to her duplex. She returned to her home and waited for the police to arrive. She had asked that they be telephoned because she just wanted protection for the night at her home. She had decided against accepting Mrs Mailer's offer of a place for the night.

Whilst she was waiting outside for the police to arrive, a mutual friend, Mr Shaun Smith, drove up and stopped next to her. She told him about the assaults and he asked whether she would like him

to speak to the deceased. She declined the offer because, as she felt, it would not have helped and she wished to lay a charge. After Smith had left she was still waiting there when the deceased arrived, drove up onto the pavement in his car and forced her to retreat up against a wall. He told her to take all her "brats" and see that she was out of the house by that evening. He then drove off.

His departure afforded her the opportunity to collect her motor car keys and drive to the police station to lay a charge of assault and to seek police protection until she departed for Durban. At the police station she was told that, because a detective was not on duty on a Sunday, she should come back the next day to lay a charge. She said in her evidence:

> "I told them that I had taken the gun out of the safe through Houdinis and that I was scared of the man I was living with. I gave them his name. That he would come to the police station and make trouble, because at a previous time

> when I waved it in front of him he said that he was going to report me. And because of the friends the Bosch family have got in the police, I was scared the police would not believe me.
>
> Yes? --- They asked me if a policeman had ever come to see me to take a statement and I said 'no.' I asked them if they could sleep in my flat that night or hang around outside in the area and they said no, they could not."

She also asked a policeman in what circumstances she was entitled to point a firearm but she cannot remember the details of this part of the conversation. She returned to her home because Shannon, who had been out horse-riding that day, would be returning. She waited outside until she arrived.

When Shannon came the two of them did not enter the home because the deceased was there. Instead they went by car to see Mrs June Armstrong. Her husband was employed in the Bosch family firm in their family business. She stayed there until it was

1 dark before returning to the duplex. During this entire period the pistol in its holster and the spare magazine were in her handbag slung over her shoulder. On returning home she went upstairs to put the baby to bed.

(The interior of both levels of the duplex are depicted on a plan, and in a series of photo-graphs. For a proper understanding of the layout, I annex to this judgment, as annexure A, the scale plan of both floors of this unit. The section of the interior wall between, on the one side, the en suite bathroom and, on the other, the bedroom and the landing area (marked "gang") is 1 1/2 metres in length. The large double bed is approximately 2 metres in length and 1 metre in width. The level top surface of the cupboard, in which the basin is incor-porated, is referred to in evidence as the "vanity slab".)

To resume the appellant's narrative, she went upstairs and put the baby to bed in one bedroom and told Shannon to go to bed in the other. In the baby's room, after putting him to bed, she took the pistol in its holster from the handbag and left the latter in the child's room with the spare magazine containing live cartridges still in it. She removed the pistol "because my daughter goes into the baby's room every morning before me and I did not want her to get hold of the gun in my bag. She would not come into my room because she was not allowed to". She put the pistol still in its holster on the vanity slab. She took a bath and went downstairs to prepare a bottle for the baby. The deceased was sitting in the lounge. She asked him if she could make him some coffee. He did not answer her so she went upstairs to bed. She fell asleep and at one stage she remembers the duvet being pulled or drawn from her. She

infers from that that this was when he too had come to bed.

She woke up at some stage during the night with the baby crying. She heard loud music downstairs. Without turning on any lights upstairs she went downstairs to see what was going on and to make another bottle for the baby. She found the deceased in a lounge chair looking at the static pattern on the television screen. No lights were on downstairs. She could see the top half of his body and it was unclad. He normally slept naked but she cannot say whether he was wearing the pair of shorts which were later found lying on the floor at the foot of his bed. The loud music came from the television set. She asked him to turn the music down but he ignored her. She went back upstairs to the baby's room and gave him his bottle and settled him. As she reached her room, the appellant arrived at the doorway at

more or less the same time. She thinks she was the first to enter. She asked him please to turn down the music. He grabbed her by the upper arms "and threw [her] against the wall" between the bedroom and bathroom. Her last recollection is of him shouting something at her as she saw his blurred image moving away from her towards the bedroom window in slow motion. She remembered nothing further until she "heard a loud bang". (At a later stage on seeing her baby she said a picture came to mind, a "flash back", of her taking the pistol from the vanity slab.) She realised that she had the pistol in her hand and that she must have fired a shot. She put the bedroom lights on. (Prior to doing so the only light on in the unit was one in the other bathroom which apparently provided some illumination upstairs.) She found herself standing in the main bedroom in the area near the bathroom door. The

deceased was lying on his back. She realised that she might have shot him. He was making strange sounds. She telephoned her ex-husband because she was frightened and needed help. She has no clear recollection of what occurred after he arrived. She remembers seeing Or Lang, the district surgeon. She told him that her head was sore. She did not see the appellant drinking that night. (The undisputed evidence is that he was sober.)

Other uncontested evidence proved that he was shot at 3hl0. Colonel Jonker arrived at 4h31. The deceased was lying in bed naked with the duvet covering the lower half of his body. He gave the appellant the customary warning but she was hysterical, crying and in no condition to make a statement. Later that morning at 9h22 he did interview her in his office at the Louis le Grange police station. He asked her inter alia whether she

wanted to summon her attorney, and whether she wished to make a statement, to which questions she replied affirmatively. Her attorney, Mr Kitshoff, arrived at 09h55. He consulted privately with her at the police station until 12h27 by which time a statement written out by her attorney was completed. This was signed by her and handed in as exhibit 0.

Earlier that morning at about 05h00 Dr Lang, the district surgeon, had come to the duplex. He examined the body and found a gun shot wound. The bullet had entered the back of the right chest, passing upwards, forwards and towards the left. It penetrated through the right chest cavity, the base of the right lung, the heart, the upper lobe of the left lung. The exit wound was on the anterior-lateral aspect of the left chest. A secondary entrance wound was found on the inner aspect of the left upper arm where the bullet had lodged beneath the skin. The

doctor said the deceased after being shot would have lost consciousness within seconds and died within five minutes at the most. He also examined the appellant. She complained of pain on the left side of her jaw and at the back of her head: she was tender over these areas. There were no signs of bruising or of any other injury. She also had a loose tooth, the lower left incisor. She explained to the doctor that she had been assaulted: "He hit me and the baby this afternoon, on the back door." Dr Lang said he would have expected bruising on her description of the assault. The baby was uninjured which he found surprising if, as she had told the police, the baby had been thrown down the stairs. When he told her that the deceased was dead she hysterically shouted "No". The doctor recommended that the appellant should he sent for observation in terms of s 77 of the Criminal Procedure Act 51 of

1977. Such an order of court was granted. She was detained for this purpose at the Valkenburg Mental Hospital and examined by psychiatrists in accordance with the provisions of s 79 of that Act. Their findings were that she was not mentally ill and was fit to stand trial. Thereafter she consulted a private psychiatrist, Dr Potgieter, who gave evidence on her behalf. On 18 June 1991 Dr Potgieter took a detailed statement from her which appears in his psychiatric report handed in as exhibit EE.

Detective Warrant Officer Benade, with reference to the course of the bullet through the body of the deceased and the arm injury, drew a series of sketches depicting the possible positions of the deceased when the shot was fired. He was trained to undertake such a task and had the necessary experience. The injuries, taken in conjunction with certain other undisputed evidence,

proved beyond any doubt that the deceased at the time he was shot was lying in bed on his side facing away from the bathroom in the position of the drawing attached to this judgment, annexure B. The accuracy of this sketch was not disputed.

Most of the lay persons featuring in the appellant's narrative testified for the State. Their evidence confirms hers in many respects. There were contradictions though - some significant, but most immaterial or capable of an innocent explanation. For reasons later to emerge, the evidence of two of them, Mr Britz and Warrant Officer Barendse, needs to be referred to in some detail.

According to Britz, he telephoned the appellant in response to a call by her. She asked him to open a safe because she needed money urgently. She never told him that she wanted the pistol from the safe. He tried to put her off but she repeated

that it was for this purpose that the safe had to be opened immediately. He went to her home. The key of the store-room was in the door and it was locked. She explained that she had lost the key to the safe. He opened it and saw two handguns in holsters and a shotgun bag ("the satchel" referred to by her). He then walked from the safe and she entered the room and went up to it. From outside the store-room he glanced back and saw that her hand was in the satchel. She mentioned to him that was where the "hot money" was kept. He occupied himself by playing with the baby outside the store-room until she rejoined him saying that she had "got what she wanted". (The firm impression is that he acted correctly and professionally in leaving her on her own at the safe after he had opened it.) He had broken the lock to open the safe. She asked him whether he could cut keys but he explained that the

lock would have to be replaced and that this could not be done on a Sunday. She enquired whether this could be done the next day in such a way that the existing keys would fit the new lock. When he replied affirmatively , she requested him to do so. He left the store-room, locked it and gave the appellant the key. When he handed it to her he noticed a pistol magazine lying on the table just outside the store-room which was not there before he opened the safe. (This was the spare magazine which she had temporarily placed there whilst putting the other magazine into the pistol.) He asked her about it. Her answer was that she always carries a gun on her person for protection, implying that this in some way accounts for the magazine being there. (She did not say that it belonged to the pistol just taken from the safe.) At that stage when the two of them were in the lounge, a motor car pulled up outside.

She told him that it was the father of the child arriving but that she could handle the situation. The deceased came in "looking wild and angry", asked Britz what he was doing there, and before he could answer stormed upstairs telling him to leave the house before he called the police.

It is to be noted that Britz gives a very different account of his visit to that related by the appellant. On his evidence she did not mention a gun when she asked him to open the safe, only money. He was at no stage involved in removing the pistol and did not see her do so. She was anxious that he should repair the safe in such a way that the same key or keys could be used. On his evidence there is no indication that the deceased noticed that he (Britz) had opened the safe or that the pistol had been removed. The inescapable inference to be drawn from his evidence is that she did not at that stage

intend leaving for Durban the next morning. If this were her intention, there was no need to arrange for the safe to be repaired on the Monday in such a way that the same keys could be used. She could simply have locked the store-room door - as Britz in fact did - and retained or hidden the key. (In her state-ment to Dr Potgieter she said that when Britz handed the store-room key to her she put it in her handbag.) By the time the deceased found out that his safe had been opened she would have left. Furthermore, according to his evidence she did not openly take the pistol. The statement that she always carries a pistol on her person is false and wholly inconsistent with Britz knowing that she had just removed one from the safe. As Britz described the arrival of the deceased, one cannot conclude that the latter realised that his safe had been forcibly opened and the pistol taken from it.

W O Barendse stated that he was on duty that Saturday at the Walmer police station. At about 15h00 the appellant arrived there and appeared to be upset and in need of help. She told him that she had called in a locksmith to obtain the pistol, that the deceased arrived when Britz was there and chased him out and that the deceased thereupon assaulted her. She asked whether she was entitled to lay a charge. She also enquired whether a policeman could spend the night at their home. After he had explained that this could not be done, he asked her whether she could not go to friends for the night. Her reply was that she had no friends in Port Elizabeth. He also offered to send a policeman to speak to the appellant about his conduct but she said that this would not help. She told him that she had on a previous occasion pointed a firearm at the deceased and she asked him whether he had as a result laid a charge.

He said that it was unlikely, inasmuch as she had not been approached by an investigating detective in connection with any such complaint. She asked whether she was entitled to point a firearm at a person who was assaulting her. He explained that this was permitted if it was necessary to do so in self-defence - if her life was in danger.

Mr de Bruyn, who represented the appellant in the court a quo and before us, handed in a plea explanation. After formally admitting that the appellant fired one shot at the deceased, her defence is thus disclosed in this document.

> "2. Except as admitted in 1 above, the accused denies each and every element of the charge against her, and the State is put to the proof thereof.
>
> 3. Further, and in any event, and without derogating from the generality of paragraph 2 above, the accused pleads that at the time of the alleged crime she acted involuntarily in that she acted without being able to appreciate the wrongfulness of her act and therefore acted

in a state of automatism;

alternatively

she acted whilst suffering from, and subject to, an irresistible impulse and whilst unable to act in accordance with an appreciation of the wrongfulness of her act.

The accused therefore pleads that she is not criminally accountable or responsible for the said act.

4. The unaccountability set out in paragraph 3 above was non-pathological of nature, was of a temporary nature and was not due to any permanent or temporary mental illness or defect as envisaged by Act 51 of 1977."

Thus, to apply to this case what was said by Botha JA in the recent decision, of S v Kalogoropoulos 1993(1) SACR 12 (A) 21h - 22a:

"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, for example, S v Laubscher 1988 (1) SA 163 (A), S v Calitz 1990 (1) SACR 119 (A), and S v Wild 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 criminal 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."

The reliability and truthfulness of the alleged offender is in the nature of the defence a crucial factor in laying such foundation. This fact, and hence the need to closely examine such evidence, has been stressed in earlier decisions of this court. For instance, in R v H 1962 (1) SA 197 (A) 208 A -C it was observed that:

> "(D)efences such as automatism and amnesia require to be carefully scrutinised. That they are supported by medical evidence, although of great assistance to the Court, will not necessarily relieve the Court from its duty of careful scrutiny for, in the nature of things, such medical evidence must often be based upon

> the hypothesis that the accused is giving a truthful account of the events in question. (Cf. R. v. Kennedy, 1951 (4) S.A. 431 (A.D.) at p. 438, and R. v. Horn, 1944 N.P.D. 176)."

(See too S v Trickett 1973(3) SA 526(T).)

The ipsi dixit of an accused person that the act was involuntarily and unconsciously committed, based on evidence tendered in support of such assertion, is to be accepted unless it can be said that such evidence "cannot reasonably be true" - S v Kalogoropoulos (supra) 20a. (Cf too S v Mahlinza 1967(1) SA 408 (A) 419C). The following passage in S v Wild, 1990 (1) SACR 561 (A) 564C - D is to the same effect:

> "Indien die vraag ontstaan of die ontoerekeningsvatbaarheid van 'n beskuldigde die gevolg is van geesteskrankheid of van 'n geestesversteuring wat nie deur geesteskrankheid veroorsaak is nie, en indien daar 'n grondslag gele word in die getuienis vir 'n beroep op ontoerekeningsvatbaarheid nie deur geesteskrankheid veroorsaak nie, moet uitsluitsel gegee word ten gunste van die beskuldigde indien daar 'n redelike twyfel oor

> die oorsaak van sy ontoerekeningsvatbaarheid bestaan."

The judgment in this regard cites with approval the following observation in Hiemstra Suid-Afrikaanse Strafproses 4de Uitgawe 189:

> "Daar moet getuienis van die kant van die beskuldigde wees wat sterk genoeg is om twyfel te laat ontstaan oor die vrywilligheid van die beweerde daad of versuim. Dit moet gerugsteun word deur geneeskundige of ander deskundige getuienis wat aantoon dat die onwillekeurige gedraging heel moontlik te wyte was aan oorsake anders as geestesongesteldheid of geestesgebrek. As aan die einde van die verhoor daar twyfel bestaan of die gedraging willekeurig was of nie, moet die beskuldigde die voordeel van die twyfel geniet."

(See too Prof C W H Schmidt: "Laying the Foundation for a Defence of Sane Automatism" Volume 90 (1973) S.A.L.J. 329 in which the author at 333 expresses the view, for the reasons stated in the article, that "the accused has to adduce evidence from which a

reasonable alternative inference can be drawn" that he acted unconsciously).

The need for careful scrutiny of such evidence is rightly stressed. Facts which can be relied upon as indicating that a person was acting in a state of automatism are often consistent with, in fact the reason for, the commission of a deliberate, unlawful act. Thus - as one knows - stress, frustration, fatigue and provocation, for instance, may diminish self-control to the extent that, colloquially put, a person "snaps" and a <u>conscious</u> act amounting to a crime results. Similarly, subsequent manifestations of certain emotions, such as fear, panic, guilt and shame, may be present after either a deliberate or an involuntary act has been committed. The facts - particularly those summarised thus far - must therefore be closely examined to determine where the truth lies.

41 Counsel for the respondent, Mr Pretorius, argued in the first place that the visits and communications to the various persons during the course of the Sunday were proof that the appellant had at that stage already decided to kill the deceased. The submission was along these lines: she went out of her way to inform others of the assaults upon her in order that their evidence would corroborate her when she later relied upon the assaults to justify her deed; she, as it were, paved the way for the murder.

Her conduct as regards such visits and telephone calls is perplexing in many respects. Had she genuinely intended leaving on the Monday morning, and if she was as fearful of spending the night at her home on her own with the deceased as her actions suggest, the obvious decision would have been to take up the offers of both W O Barendse and Mrs Haller.

She would then have removed her possessions and those of the baby from the duplex with police protection and spent the night in safety with Mrs Haller. Her explanation, previously referred to, that she hoped that by nightfall the appellant would have calmed down and that she did not believe that he would actually "throw the baby out" is unconvincing, especially if the assault upon her in the kitchen was as severe as she alleged. Her enquiry at the police station about the pointing of a firearm related, she said, to the incident when she "waved the pistol" at the deceased: she was anxious to know whether he had laid a charge of pointing a firearm and, if so, whether it was still pending. It is difficult to understand why she should have been concerned about an incident that had not had any repercussions for more than two years. As already pointed out, the evidence of Britz refutes the assertion that when he

was with her she had decided to leave for Durban the following morning: this was not the reason for her arranging for the safe to be opened on Sunday in order to remove the pistol from it. In any event, having opened the safe that afternoon, there was no reason why she could not have left the pistol in the safe or somewhere in the store-room behind its locked door unless she contemplated that she might need it, or planned to use it. Finally, it is somewhat difficult to understand the reason she gave for the telephone call to Mrs Kay Bosch.

Notwithstanding these features of her conduct that Sunday - and a number of other questions for which there does not appear to be any ready or entirely satisfactory answer - I consider, as the court ai quo did, that such planning was not proved. I do so for two main reasons. First, if she intended to murder the deceased at the time of her visit to

the Walmer police station, it is unlikely that she would have asked that a policeman spend the night at their home, even if to her knowledge there was no more than a remote chance of their acceding to such a request. Second - and this is the more cogent reason it is more probable in the light of what W O Barendse told her that, if forethought was given to the killing at an early stage, she would have decided to commit the offence in a manner simulating self-defence and relied on this false ground to exonerate her.

But the important question remains, viz, whether she acted in a state of automatism. This depends primarily on whether she can be believed in her account of what took place from when she says she went upstairs to put the baby to bed until the shot was fired. I shall refer to this time span as the "pertinent period".

Counsel for the appellant submitted that in considering this aspect of the case, and in deciding whether the appellant's evidence was false, the trial court misdirected itself in certain material respects. I proceed to address the argument on each alleged misdirection.

The holster: As a reason for concluding that the pistol was not on the vanity slab the court relied on the fact that the holster was not discovered by the police, or any other official or person, who arrived on the scene shortly after the shooting and took note of various details, particularly in the bathroom and bedroom. The court concluded that:

> "The fact that the holster was not observed in either the bathroom or the bedroom, leads to the conclusion that the accused either did not put the pistol on the vanity slab, or that she hid the holster after the shot was fired. The last proposition appears to me improbable, because there would be no logic in hiding the holster

> but leaving the pistol for everybody to see. That leaves as the only conclusion that the accused did not put the holster with the pistol in the holster in the bathroom on the vanity slab, or if she put it there when she arrived in the bathroom after she had removed it from her handbag, she did not leave it there when she decided to retire to bed. This finding makes a defence of sane automatism highly improbable, as the accused must then at the time she 'decided' to use the pistol, consciously have walked to where she had put the pistol, removed it from the holster, without taking the holster out of that place and then fired the shot at the deceased."

The reasoning is thus that because the holster was not observed in the bathroom or bedroom the pistol could not have been taken from the vanity slab. It is true that Col Jonker, for instance, said that he took careful note of what was in those two rooms. But, as Mr de Bruyn pointed out, no one searched particularly for the holster because at that stage it was not known that it featured in the case. One would have expected it. to have been left on the

vanity slab or dropped on the bathroom floor where it would have been seen. But it is possible that it might have been discarded on or under a large bundle of washing and other articles of clothing lying on the bathroom floor close to the interleading door. In that event it could perhaps have been overlooked. The evidence, it must be noted, did not reveal where the holster actually was immediately before or shortly after the shooting: it was found only on the Tuesday concealed in the bathroom where it had been deliberately placed by someone intent on incriminating the appellant. Thus the failure to come upon or notice the holster that night does not necessarily warrant the inference that it could not have been in the bathroom when the shot was fired. In the circumstances, whether or not It ought to be deemed a misdirection, it is safer to leave this suggested reason out of account in deciding whether the pistol

was taken from the vanity slab.

The appellant positioned herself before firing the shot. According to a reconstruction of the shooting, based on the position of the deceased in bed and the direction of fire as reconstructed from the course of the bullet wound, the appellant could not have been in the interleading doorway when she fired. The court deduced that she must have moved a pace or two to her right. "That movement", the learned judge said, "in my mind indicates nothing else than an intentional, conscious act." This conclusion is based on an answer given by the psychiatrist, Dr Potgieter, to the following question put by the court: "Sou u verwag sy sou vuur presies daar waar sy uit die badkamer uitkom; of sou sy beweeg as ' n outomaat om ' n beter posisie te kry om te vuur op hom?" Answer: "As ' n outomaat sou ek nie glo dat sy in ' n optimale posisie sou beweeg om hom

te dood nie, want dit sou inklinasie impliseer." (I emphasise.) But on the accepted reconstruction, the place from which the shot was fired was not the optimal, or even an optimal, position. She could have shot as effectively from the doorway or she could have simply moved in a direct line from the doorway closer to the deceased. Both of these options would have respectively placed her in as good a position, and in a better position to shoot him. This reasoning is flawed in a further respect. The movement for a distance of one or two paces to the right is estimated on the supposition that the shot was fired close to the wall between the bedroom and the bathroom, that is, at a distance of about three metres from the deceased. But one does not know how close she was to the deceased when she shot him. She could have been leaning over the bed to do so. The closer she was, the more acute the angle between an

imaginary line drawn from the doorway to the deceased and the reconstructed line of fire, and the shorter the lateral movement to the right must have been. There is thus no certainty that she moved to the extent estimated or that the movement to the right was significant. In any event, Dr Potgieter was of the view that such a slight and uncomplicated movement could have been feasibly executed in a state of automatism. In placing strong reliance on this fact the court therefore, with respect, misdirected itself.

"I shot Badian." The judgment deals thus with this remark.

> "What is important is that on her version she only entertained the thought that she might have shot the deceased. Nevertheless, without ascertaining the true fact, she told her ex-husband; 'I shot Badian.' This report further negates the state of automatism."

It is true that she did say under cross-examination

that she realised that she must have possibly "hit him" when she fired the shot, that she was frightened and that for this reason she telephoned her ex-husband. However, she also said she heard a strange sound emanating from him before she did so. On her evidence in this regard, despite her statement about having possibly struck him, there can be no doubt that she realised from the moment "the loud bang" brought her to her senses that she had shot the deceased. Taking this statement into account as a reason for rejecting her defence did, in my respectful view, also amount to a misdirection.

The deceased was most probably asleep when the fatal shot was fired: The reasons for this important finding appear from the following passage in the judgment:

> "An additional factor that convinced me that the accused's story is not reasonably possibly true, is that the deceased was most probably asleep

> when the fatal shot was fired. His position in the bed alone, makes that probable. Dr Potgieter's alternative suggestion that his position indicates a form of rejection, amounts to nothing more than speculation.
>
> When the deceased went to bed he was sober; no alcohol was found in his blood. Had he not been asleep, he would have heard the sound of the cocking of the pistol and he would most probably have taken action." (I emphasise.)

Thus this conclusion was based on two considerations: first, the posture of the deceased as he lay on the bed; and second, the fact that he would have heard the cocking of the pistol and the release of the safety catch had he not been asleep. The second reason relied upon was based on tests conducted in the court-room to determine the degree of audibility of these two preparatory steps. Jansen J in his judgment explained what was done:

> "Then I requested a sergeant to cock the pistol and requested the witness [Dr Potgieter] to listen to that and then, when the clear sound of the cocking of the pistol was heard by everybody

in court, the following reply from Dr Potgieter came:

> 'Daar is dalk een element wat ons dalk hier moet byvoeg net; op haar getuienis was daar nog die harde geluid van die televisie ook.'

Then I said to him:

> 'Hoor net daar. Is dit nie 'n kenmerkende geluid wat in die ruimte van hierdie kamer baie duidelik deur hom moes gehoor gewees het indien hy nie ...'

Then he interrupted me and he said: 'Korrek.' I completed my question:

> "... geslaap het nie.'

And he repeated his reply; 'korrek.'
I put to him:

> 'Sou u nie verwag het dat hy sou reageer het as hy dan nie wakker was, as hy ..."

Then he interrupted me:

> 'Mens sou verwag hy sou reageer ja, as hy wakker gewees het.'

The possibility that the TV was so loud that the noise thereof would have prevented the deceased from hearing the very clear, distinguishable sound of the cocking of the pistol, does not impress me."

The fact that Dr Potgieter ultimately said that he would have expected the deceased to have heard and reacted to those noises had he been awake, is not the determinant. The question is an objective one and Dr Potgieter was in no better position than the court to decide it. That aside, without knowing the degree of the noise caused by the music, the validity of the test to support the inference that the deceased was probably asleep is open to some doubt.

A further finding of fact, understandably not challenged by the defence, calls for comment. The court had "no doubt at all that the deceased knew that the accused was in possession of a pistol". I do not consider that this can be accepted with any degree of certainty. The evidence, if anything, points the other way. I have referred to the evidence of Britz, according to which the deceased

stormed passed him without any enquiry about the reason for his presence there, or without indicating to him that he knew or surmised that he had been summoned to forcibly open the safe. The evidence of the appellant in this regard, quoted earlier in the judgment, was hesitant and most equivocal. She could go no further than to say that she supposed he must have known that she had removed the firearm: she was not sure that its removal was ever discussed. If the deceased on entering his home, or afterwards, had realised that she had caused the safe to be opened and was in possession of the pistol, it is to my mind inconceivable that he would not have questioned her about it, particularly bearing in mind that when it was last handled by her she had threatened him with it: in fact, according to her notebook, she had tried to shoot him with it. Furthermore, if he had said anything to her with such knowledge, he would

not have let the matter rest with the general remark about fiddling with his belongings. He would obviously have wanted to know what she was up to in breaking into his safe and removing her pistol. In this regard it is noteworthy that in her statement to Dr Potgieter and recorded by him on 18 June 1991, to which I have referred, she makes no mention of the deceased having spoken to her about tampering with his possessions as he stormed upstairs. His note reads:

> "He was playing with the baby when I saw Badian coming home. I panicked and told the locksmith to leave if he started any trouble. He chased the locksmith out of the house and started shouting and swearing at me and trying to get hold of me. I had my bag over my shoulder and was holding the baby. I begged him to leave me alone because I was just gathering my belongings to leave the next day. He started chasing me and I ran into the kitchen to go out of the kitchen door to my car. But he caught me at the door and started hitting me, striking the baby at the same time."

57 In the light of these comments on the judgment and the misdirections to which I have referred, the prudent and proper approach is to examine the evidence relating to the pertinent period with reliance upon the record alone. (Of 5 v Kalogoropoulos (supra) 17a.)

Turning to her evidence relating to that period, one has difficulty in accepting that the deceased came to bed, returned downstairs to sit naked in the dark in front of the static television screen and after ignoring her, followed her upstairs and assaulted her. If he had decided to pass the time in this unconventional way, it is far more likely that he would have been wearing his shorts which were found discarded at the foot of his bed. (In that event on her version he would have had to remove them after pushing her against the wall and before she fired the shot.) It is also significant

that in her initial statement, carefully prepared with the assistance of her attorney, she did not say that the deceased came to bed, went downstairs and that she was assaulted when he returned to the room following her. In that detailed statement she said:

> "The deceased came to bed and he got into bed. He pulled the blankets off me. The music was still playing. I was confused. He pushed me against the wall. I can remember that the deceased spoke to me but cannot remember what he told me. I from then I cannot remember anything."

It is most unlikely that during that consultation she would not have remembered, or would have omitted, the fact that she had gone downstairs to make the bottle, that the deceased was so peculiarly occupied downstairs and that he had followed her upstairs to the bedroom before he assaulted her. However, though relevant, this aspect of the case is perhaps

not central to the enquiry.

The crucial question is whether she was telling the truth when she said that the pistol was placed on the vanity slab. This is a vital aspect of the case for if it was there it would have been at hand for her to pick it up in a state of automatism. But if in fact it was fetched from her handbag or from some other place this defence would have to be viewed in a very different light. On her evidence, the other important question, related to the critical one, is whether the pistol was taken from the handbag <u>at the time and for the reason</u> she alleges and was left for a period on the vanity slab. If, as she stated, she was concerned about leaving the pistol in the child's room, the most natural thing to have done would have been to remove the handbag with its potentially dangerous contents from that room. And if her concern was that Shannon might look

through the contents of the handbag, she would have removed the other magazine as well. But assuming for the moment that she did take the pistol from the handbag as she alleges she did, one cannot accept that she would have left it on the vanity slab. She must have realised that the deceased would most probably at some stage enter the bathroom before retiring to bed and would see the pistol there. If she had taken it from the safe for the journey to Durban, or for any other purpose, this was not the place where she would have left it. I have already drawn attention to the fact that it cannot be assumed that the deceased knew that she had removed the pistol from the safe and was in possession of it. But even on such premise, the proposition that she would have left it on the vanity slab remains implausible. As I have indicated, he would in all probability have seen it or there was at least a

chance that he would have. And if he did there can be no doubt that he would have removed it and questioned her about it, more particularly since - as already remarked - when she had last handled the pistol she had, according to her notebook, tried to shoot him with it. The appellant could furnish no reason for leaving the handbag in the child's room or for putting the pistol on the vanity slab: she simply said that she did not know why she had done so. The only explanation tendered by Dr Potgieter, and adopted by counsel in argument, was that at that stage as a result of tension, stress and fatigue she was not acting rationally. But her own evidence belies this. She went downstairs, made the baby's bottle, offered to make some coffee for the deceased and took a bath. And if as she said she removed the pistol in case Shannon should come upon it in the

morning, this shows responsible foresight and clarity of thought on her part.

I agree with the conclusion of the trial court on the other cardinal issue, namely, that the deceased was probably asleep having regard to his position at the time the shot was fired. It is a typical sleeping posture. In fact, to my mind, the only reasonable inference to be drawn from the accepted evidence is that when shot he was either asleep or perhaps lying awake but reposed and about to sleep. The only other explanation, the one proffered by Dr Potgieter and repeated in argument, is that, having assaulted her by throwing or pushing her against the wall, the deceased promptly returned to his side of the bed and figuratively and literally turned his back on her. I am unable to regard this as anything more than a remote, if not a far-fetched,

possibility.

There are some other aspects of her evidence which cast further doubt on her account of what took place during the pertinent period or which reflect adversely on her credibility in general.

The defence had access to an official pocket book of Col Jonker in which he had made certain contemporaneous entries relating to this alleged offence. He referred to this book from the outset of his evidence. Under cross-examination his attention was drawn by counsel to the following entry: "Major [as he then was] everything happened so fast. He said I must go, I am a waste of a white skin." Col Jonker explained that the appellant had said this to him at the charge office when she was first brought in and before her request to call her attorney. It is rather strange that she tendered this explanation for the shooting when according to her evidence in

court this remark was made when they were in bed on the Sunday morning. If she decided to say anything, one would have expected her to have referred to the assault in the bedroom that night and perhaps added that she was thereafter not conscious of what she was doing. Her detailed statement (exhibit 0) corresponds, one notes, with her evidence in court as to when this derisive remark was passed.

During cross-examination she was referred to the statement recorded in her notebook: "I have been driven to many things many times because I snap. For e g I tried to shoot him once". Under cross-examination her attempts to avoid admitting that these words mean what they say were manifestly false. Thus the concluding portion of the cross-examination on this topic reads as follows:

> "When you wrote this were you attempting to give a true reflection of what happened? ---- No I was just very upset about the fact that I actually

> picked up the gun and waved it, it was dangerous.
>
> But why did you write, 'I tried to shoot him once' --- Because an accident could have happened."

A reluctance to divulge what in truth gave rise to this entry is perhaps in the circumstances understandable, but these answers do evince a lack of frankness with the court and a capacity to be untruthful if needs be.

To recapitulate, on an appraisal of all the evidence I deduce that:

(i) The appellant was in many respects an untruthful witness. This finding is based on improbabilities and contradictions in her own evidence, and on the discrepancies between her testimony and that of Britz, whose evidence was not challenged and whose veracity is beyond question.

(ii) One may, however, readily accept that she

was assaulted by the deceased that Sunday. The evidence of Dr Lang (broken tooth and tender jaw) and that of Col Jonker (damaged kitchen door) tend to confirm this. But whether such assaults took place at times in the manner described by her is questionable.

(iii) The pistol was not taken from the safe because she was leaving for Durban the next morning (though it may well have been initially removed by her for the purpose of self-protection) and it was not removed openly in the presence of Britz.

(iv) The pistol when it was used that night was not taken from the vanity slab.

(v) The deceased was asleep at the time the shot was fired or, if not asleep, had not assaulted the appellant as described by her seconds before lying down.

These findings constrain me to conclude

that her account of what took place over the pertinent period cannot be reasonably true and that the trial court was correct in rejecting it as false. It follows that the factual foundation on which to consider the validity of the defences raised automatism and irresistible impulse - is absent. Dr Potgieter's opinion that the appellant was most probably acting in a state of automatism was based on the assumption that her evidence was truthful in all material respects. He readily conceded that if it fell to be rejected his thesis no longer held.

In point of fact Dr Potgieter accepted her account virtually without qualification or reservation. Initially, after consulting with her and reflecting on the matter, he concluded that automatism was the probable explanation for her conduct. Having attended the trial and listened to her evidence in court, he felt more certain of his

diagnosis: he altered his conclusion of "waarskynlik" to "heel waarskynlik" in the light of her testimony. He was asked on what grounds did he have any reservation at all - why he could not express his final conclusion as a certainty. His reply was that it was only her contradiction about where she had put the store-room key that cast doubt in his mind on her honesty and reliability. This appears from the following exchange between the court and the witness:

> HOF: Maar dokter net om aan te sluit by hierdie punt, soos die advokaat vir u stel, soos ek u ook nou verstaan het, hy het u gevra of daar enigiets in hierdie saak is wat u skepties laat oor die kwessie van die verweer van outomatisme, en u het gese baie min? --- Baie min.
>
> Nou wat is die baie min? --- Die enigste teestrydigheid wat vir my opvallend is is die teestrydigheid ten opsigte van die sleutel wat haar eerlikheid vir my in verdenking (tussenbeide)
>
> Basies waar sy dit sou geplaas het? --- Haar eerlikheid moontlik onder verdenking kan plaas,

> maar ek kan aan die anderkant ook 'n verklaring gee waarom dit kan gebeur soos wat ek aan die Hof verduidelik net. Andersins vind ek geen rede om suspisieus of agterdogtig te wees nie."

I am unable to agree that it was only in this one respect that her evidence was defective.

In the light of my conclusion that the necessary factual basis is wanting, it is strictly speaking unnecessary to comment on the psychiatric evidence. I do, however, propose to do so and review it on the supposition that the evidence of the appellant is acceptable as regards the pertinent period: more particularly, on the assumption that the pistol was on the vanity slab and that the position of the deceased when shot can be reconciled with her story.

Dr Potgieter said that from his research on the subject of automatism and his study of the authorities on the subject, he extracted certain

criteria which, if satisfied, pointed to or established automatism. Dr Kaliski, was called by the prosecution in rebuttal. He was an equally highly qualified psychiatrist and had observed the appellant and reported on her mental status in terms of s 79 of the said Act. He too was in attendance at the trial. He agreed with his colleague that those criteria were relevant to any such enquiry. The two specialists, however, disagreed to an extent on the disposition and character of the appellant; the extent to which each of these criteria was satisfied; and whether they cumulatively led to the conclusion that automatism was a reasonable inference to be drawn from a proper appraisal of all the evidence.

Dr Kaliski was of the view, based on his observations of the appellant's behaviour at Valkenberg and her evidence in court, that she was "a lot tougher than we give her credit for" and that

within limits she was capable of standing up for herself. Her own evidence of what she endured at the hands of the deceased over a long period of time tends to confirm this. Her rather robust remark to Miss Fairers when asking her to telephone the police from the Walmer Gardens Hotel is hardly that of a diffident or demure person: "tell the police not to send any arsehole to [me]".

Amongst the criteria relied upon by Dr Potgieter were the fact that the appellant had no past history of acts of violence and that the killing was not planned beforehand during the course of the Sunday. He also referred to her subsequent reaction and emotional condition when she realised that she had killed the deceased. Dr Kaliski, not without some sceptisism and certain reservations, accepted that these facts were consistent with automatism but, quite rightly in my view, stressed that they ere as

consistent with one being provoked or driven to act violently and consciously and thereafter becoming distraught, even hysterical, in the realisation of what had happened and its implications. As he in plain language observed:

> "Some people when they snap, they smash up a place, some people when they snap, they assault other people. When under provocation, having given a long background of say stress, whatever, when under provocation a person snaps and smashes up things and then afterwards says 'I don't know what came over me, that is just not me, I don't even remember doing it.' We are quite happy to say that person had just lost his temper. When the same person goes through the same sequence, but instead of destroying items in the environment, he assaults [fatally] somebody, we somehow feel compelled to give it a different name, we want to call it dissociative state or something else."

The state of amnesia is a further factor referred to by Dr Potgieter. It is true, as Dr Kalisky pointed out, "when a person acts in a state of automatism, there must be an amnesia", but the

opposite does not necessarily hold. According to Dr Kaliski, psychogenic amnesia, which he described as "forgetting the disagreeable" after the event, is relatively common in a situation such as that with which the appellant was confronted. In any event, one must add, the fact or assumption of an amnesia depends upon the appellant being truthful in saying she remembers nothing: it is not a condition easily capable of objective proof.

The remaining consideration or indicium is whether there was simulation on the part of the appellant. Dr Potgieter's evidence in this regard is as follows:

> "Wat is u opinie daaromtrent [simulasie] (tussenbeide)----Ek gaan net opsommend se dat my opinie nadat ek die konsekwentheid opmerk van wat sy vir my ten tye van ons aanvanklike konsultasies gegee het en wat ek hier in die Hof in gehoor het laat by my geen twyfel dat ten opsigte van die gebeure van daardie spesifieke oomblik van die outomatisme absoluut konsekwent weergegee is volgens alle inligting tans tot my

beskikking.

HOF: Beteken dit dat simulasie volgens u uitgeskakel word? --- Dit is nie totaal uitgeskakel nie. Simulasie kan nooit totaal uitgeskakel word nie. Uiters onwaarskynlik.

MNR DE BRUYN: U se dis uiters onwaarskynlik? — - Uiters onwaarskynlik. Ek kan nie glo dat die beskuldigde psigiatries so gesofistikeerd is dat sy sulke tipiese fenomene soos terugflitse kan simuleer nie."

This conclusion is in part based on Dr Potgieter's general conclusion that the appellant was truthful in all respects, save for the one minor contradiction to which I have referred. Dr Kaliski, on the other hand, quite apart from the assessment of her truthfulness as a witness, does not accept that her description of the final scene is consistent with automatic behaviour. He points out that in her account to him, she said that the deceased "shoved her against the wall, the back of her head hit the wall, he was saying things ...., he then went down

on the bed and she heard an explosion, she had not left the room, she cannot remember fetching the gun. She remembers running down the steps to get her ex-husband". He emphasizes that on this version, she must have seen him go "down on the bed" before any automatism set in. Dr Kaliski, focussing his attention on the final episode, disputed the conclusion of his colleague that the appellant acted involuntarily. He said:

> "If I may proceed to the actual automatism or automatic behaviour, you know you can get lost and lost in definitions M'Lord, but the central point to be made about an automatism, the behaviour has to be automatic. And this is where we, this is the actual crux of it. The definition given to the Court yesterday had a very important qualification. That yes, behaviour can be complex but it is apparently purposeful. I think the word used in Afrikaans was ' klaarblyklik' . And in this article I have by Prof. Pfennig who is the author in London, in his introduction to the concepts of defining automatism, he says that the first thing to go in the automatism is a person's higher order functions, which he describes as the higher order function of reasoning, judgment and

> intelligence. What this means is the person's ability to meaningfully interact with his environment, his awareness of what he is doing, and to actually act in a very precise goal-directed fashion in the environment, must be diminished."

He proceeds to point out at various stages in his evidence that the actions of the appellant, from the time she was pushed against the wall, were not of a routine or automatic nature. They involved a number of relatively complicated and "goal-directed" steps resulting in a single lethal shot being discharged. She had to locate the pistol at a place where it was not normally kept, that is, on the vanity slab. She had to remove it from the holster (other evidence was that it was a tight fit); she had to cock the pistol and release the safety catch; and thereafter in relative darkness she had to aim at the target on the bed.

I must confess to difficulty in accepting

that all this could have been done automatically and on this issue, if it were necessary, I would accept Dr Kaliski's conclusion in preference to that of Dr Potgieter. In expressing this view, I take into account Dr Potgieter's over sanguine view, as I see it, of the appellant's honesty and the comments made in regard to his criteria which, again as I see it, places them in a perspective which reduces their cogency to a material extent.

During the hearing of the appeal, I should mention, no separate argument was advanced in respect of the alternative defence of irresistible impulse. It was correctly accepted that should the appellant's evidence be rejected, this defence would also fail.

In the result I consider that the conviction must stand and the question of sentence thus calls for attention.

The appellant has in considerable detail told the story of the deceased's inconsiderate, inconsistent, and at times brutish behaviour over a period of some six or seven years. In doing so, she readily acknowledged that there were good times but the overall picture is one of a deteriorating relationship. It culminated in a weekend of particularly deplorable conduct on the part of the deceased. In reviewing her evidence, one must nevertheless bear in mind that her testimony in this regard stands virtually alone; that one can only speculate to what extent, if any, the deceased would have been able to dispute her evidence; that in certain respects she was not a truthful witness; and that, as the court a quo found, she was probably prone to some exaggeration. However, having said this, there is reliable "self-corroboration" of her testimony as regards their relationship. It is most

unlikely that what she recorded in her notebook is not a substantially correct account of her experiences, particularly since one of the entries is an admission against interest ("I tried to shoot him once"). This account, written about two years before the offence was committed, has the mark of a genuine cri de coeur. It would seem that his ill-treatment of her persisted up and until the fateful weekend. On the Sunday itself, Britz confirmed that when he was called to the duplex the appellant seemed very upset; and he said that when the deceased arrived "he was wild and angry". Independent evidence confirms, as I have said, that a serious assault upon her ensued. Her resultant concern and agitated state of mind is borne out by her actions as testified to by the persons with whom she came into contact on that Sunday after she had been assaulted. The true account of what immediately preceded the shooting has not

been disclosed by the appellant but in all probability a further assault or the realisation that he had finally rejected her, or a combination of both these circumstances, caused her to act as she did. Her first explanation, the one to Col Jonker, ("everthing happened so fast. He said I must go, I am a waste of a white skin") is perhaps, as far as it goes, a true reflection of what took place. Thus, though it is impossible - and would be inappropriate - to make any positive findings, one must assume in her favour that, over a long period of time, her life with the deceased had been hardly bearable; that her decision to shoot him came at a time when she was emotionally distraught; and that for this reason at the time she fired the shot she was unable to exercise a normal degree of self-control. The trial court was implicitly of the same view saying to her that: "At the time of shooting you felt rejected and

humiliated, you were tired and emotionally upset."

In the course of a careful and comprehensive judgment on sentence, the learned judge likewise concluded that it was a crime of passion as a result of the deceased "abusing, rejecting and humiliating" her. He went on to relate her personal circumstances according to the evidence before him, saying:

> "Dr Potgieter in his report set out in detail important facts. I am not going to mention all the facts he referred to. They are on record and I take them into account. You will be 37 on the 21st March this year. You are a first offender, you are the mother of 4 children who all mean a lot to you. You were involved with the deceased for about 6 years. 1 accept that you loved him, in spite of the fact that he assaulted you, that he humiliated you and that he psychologically abused you. You became a very unhappy person and even before the unfortunate event when the deceased was killed, you were suffering from depression and showed suicidal tendencies. According to Dr Potgieter, you were suffering from major depression in July and October last year and he had to prescribe an anti-depressant. According to Dr Potgieter you at the time expressed a wish to die, to be with

the deceased, as you put it.

I accept that there is a strong relationship between you and your children and in particular a very strong bond between you and Tyron. You sought comfort in attending bible-study classes, you are not a violent person and society need not be protected against you. I accept that you have remorse for what you have done and that you are still mourning the death of the deceased. You realise that you have his blood on your hands and you will have his death on your conscience for the rest of your life.

On the other hand, I cannot close my eyes to the fact that you, to a certain extent, were the author of your own misfortune. In spite of the fact that the deceased abused you, you decided to stay with him."

and the learned judge concluded with these words:

"I have, in determining the period of imprisonment, taken into account your personal circumstances, the crime you committed and in particular the circumstances under which you committed it, and the interests of society. I have never lost sight of the fact that the main purposes of punishment are deterrent, preventive, reformative and retributive, but that the last aspect, retributive, has tended to yield ground to the aspects of prevention and correction. I have also tried to allow you as much mercy as I could under the circumstances of

this case." The retributive element was thus regarded as paramount and, one infers, it was acknowledged that in the instant case the other objectives of punishment are of far less significance.

Previous decisions quoted by counsel for the defence in his address on sentence led Jansen J to say:

> "[that] there is an increase over the last couple of years of cases where a person, who had allegedly been the cause of abuse in an unhappy relationship, was killed by the so-called innocent partner."

I am not certain whether the inference of an increase can be reliably drawn from that source, or that such a conclusion ought to carry weight in a case of genuine abuse. But, be that as it may, the observation seems to suggest that the sentence imposed was intended to be primarily an exemplary one

in the light of the increased prevalence of this sort of offence. In this regard, though in a wholly different context, Miller J in S v Khulu 1975(2) SA 518 (N) 521 E - G observed that:

> "[A]n 'exemplary' sentence may be justified only where the injustice thereby done to the individual is 'moderate'; a degree of injustice in that sense may be a lesser evil than the neglect of the broad interests of society which sometimes require that severe sentences, possibly in excess of the true deserts of the offender in the particular circumstances of his case, should be imposed for deterrent effect. But I cannot conceive of any principle which could justify, for the sake of deterrence, the imposition of a sentence grossly in excess of what, in the circumstances of a particular case and having regard only to the crime and the degree of the particular offender's moral reprehensibility, would be a just and fair punishment."

In all the circumstances I am, with due respect, of the view that the retributive element was overstressed, that the mitigating circumstances are in this case exceptional, that the sentence imposed

is in the result unduly harsh. Accordingly this court is obliged to consider the sentence afresh. In doing so, counsel's plea for a wholly suspended sentence for such a serious offence cannot be entertained.

There is, however, another sentencing option which prima facie commends itself and warrants careful consideration. I refer to the innovative introduction of correctional supervision as an authorised punishment as now provided for inter alia in paragraph (h) of s 276(1) of the Criminal Procedure Act 51 of 1977 as amended. This new provision came into operation in respect of the magisterial district of Port Elizabeth on 8 May 1992 by virtue of Proclamation No 43, 1992 published in the Government Gazette of 8 May 1992. It was therefore not a permissible punishment when sentence was passed in this case. It would, however, be

entirely competent for the trial court to consider the suitability of such a sentence on remittal of the case to pass sentence afresh: cf Prokureur-generaal, Noord-Kaap v Hart 1990(1) SA 49(A) and S v R 1993(1) SA 476(A) 485.)

In the latter decision this court (per Kriegler AJA) discussed in detail the merits and application of this type of sentence. After pointing out that it may include provision for monitoring, house arrest, community service the judgment proceeds at 488 B - J:

> "vir die doeleindes van die huidige saak kan die aandag toegespits word op enkele aspekte van hierdie vonnisopsie. Geeneen van die maatreels word in die Wysigingswet omskryf nie, waaruit afgelei kan word dat die Wetgewer dit aan straftoemeters oorlaat om, binne die raamwerk wat die generieke terme aandui, na goeddunke inhoud en beslag daaraan te gee. So, byvoorbeeld, is huisarres 'n onomskrewe en onomlynde maatreel wat deur die straftoemeter beskryf en omlyn kan word met verwysing na spesifieke ure van die dag en dae van die week. Die soepelheid van die maatreel bied ook ander

moontlikhede.

Kragtens art 276A(l)(b) van die Strafproseswet (soos ingevoeg by art 42 van die Wysigingswet) mag die termyn van korrektiewe toesig tot drie jaar beloop. Huisarres vir so 'n lang termyn sou 'n swaar straf wees; dit staan egter 'n straftoemeter vry om monitering en inskakeling by 'n program van sielkundige behandeling vir drie jaar voor te skryf en huisarres van 'n korter duur. Die term 'rehabilitasie- of ander programme' is nog breer en laat ruimte vir oordeelkundige individualisering om nommerpas te wees vir 'n bepaalde persoon in bepaalde omstandighede. Daarbenewens is dit opvallend dat daar, afgesien van die breedheid van die gespesifiseerde maatreels, boonop nog voorsiening gemaak word vir 'enige ander vorm van behandeling, beheer of toesig ... ten einde die oogmerke van korrektiewe toesig te verwesenlik.' Beide huisarres en 'n rehabilitasieprogram is in casu pertinent op die voorgrond.

Artikel 84(2) sluit aan by die voorgaande, veral wat betref die voorbehoud daarby, wat in wese bepaal dat 'n toesiggeval wat by hofbeskikking aan korrektiewe toesig onderworpe is, soos 'n onveroordeelde gevangene behandel word wanneer hy in 'n gevangenis opgeneem word. Dit beklemtoon dat korrektiewe toesig ' n eie- en andersoortige strafvorm is, en dat diegene wat daaraan onderwerp word wesenlik verskil van gevonnisde gevangenes. Die Wetgewer het dus duidelik onderskei tussen twee soorte misdadigers, naamlik die wat deur

> gevangesetting van die gemeenskap afgesonder moet word en die wat strafwaardig is maar nie uit die gemeenskap verwyder hoef te word nie. Wat meer is, die Wetgewer het ondubbelsinnig deur die klemverskuiwing, wat uit die Wysigingswet as geheel spreek, aangedui dat
> straf, hervormend maar desnoods hoogs
> bestraffend, nie noodwendig of selfs primer deur opsluiting in 'n gevangenis haalbaar is nie. Maar die wetgewende gesag so duidelik sy wens uitgespreek het en waar die uitvoerende gesag (blykens die wetsinwerkingstellende proklamasies) paraat is om die nodige administratiewe rugsteuning te verskaf, is dit die plig van regsprekers om die middele wat so vrylik tot hul beskikking gestel is daadwerklik op te neem. In die besonder moet daar ingesien word dat daar nou gevoelige straf toegemeet kan word sonder gevangesetting, met al die bekende nadele aan laasgenoemde verbonde vir beide die prisonier en die bree gemeenskap. 'n Vonnis van korrektiewe toesig kan tewens so saamgestel word dat dit vir die veroordeelde meer beswaar as korttermyn gevangenisstraf - ingevolge art 276A(l)(b) van die Strafproseswet mag 'n hof immers korrektiewe toesig vir 'n tydperk van soveel as drie jaar ople." (I emphasise.)

The offence under consideration in that decision was far less grave than the present one. Nevertheless, much that was stressed in the above passage applies

in the present case and I draw particular attention to the fact that the conditions imposed can make the sentence a suitably severe one. The appellant certainly does not fall within the category of persons who need to be removed from the open community. Imprisonment could, and probably would, have a devastating effect on her and her children, particularly the youngest, who was the product of this traumatic and tragic relationship. The appellant has been offered re-employment, were she not to be immured. If a correctional supervision order is found to be the appropriate one, and if stringent conditions are imposed, I venture to suggest that such a sentence would commend itself as fair and just to a person conversant with all the facts.

In the result the appeal is partly successful. The conviction is confirmed, but the

sentence is set aside. The matter is remitted to the trial court to sentence the appellant afresh, after due compliance with the provisions of s 276 A(l)(a) of the Criminal Procedure Act to correctional supervision in terms of s 276(1)(h) of that Act or, if for good reason the appellant is found not to be fit for such a sentence, to otherwise sentence her in the light of the views expressed in this judgment.

M E KUMLEBEN
JUDGE OF APPEAL

HOEXTER JA
- CONCUR
VAN COLLER AJA

See original judgement sketch.

See original judgement sketch.