CASE NO: 62/93

N v H

GORDON ALAN INGRAM v THE STATE

SMALBERGER, JA :-

CASE NO: 62/93
N v H

TN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GORDON ALAN INGRAM

Appellant

and

THE STATE Respondent

CORAM: HEFER, SMALBERGER et
NIENABER, JJA

HEARD: 30 AUGUST 1994

DELIVERED: 15 SEPTEMBER 1994

J U D G M E N T

SMALBERGER, JA:

On the night of 31 March 1991 the appellant fatally shot his wife, Gillian Deborah Ingram ("the deceased"), at their home in

Bryanston. Consequent thereon the appellant was indicted in the Witwatersrand Local Division on a charge of murder. He raised the defence of non-pathological criminal incapacity. This defence was rejected by the Court a quo (GORDON, AJ, and assessors) and the appellant was found guilty as charged. He was sentenced to 8 years imprisonment, half of which was conditionally suspended. He now appeals with the necessary leave against both his conviction and sentence.

The following facts are either common cause or not in dispute for the purposes of the present appeal. The appellant and the deceased were married in 1972. They had two teenage children, Dagny and Dylan (both of whom testified at the trial). The marriage was essentially an unhappy and tempestuous one. The deceased had an alcohol problem and periodically formed liaisons with other men. She received treatment for alcoholism in 1988 and 1990 but without lasting success. By the time of her death she

had reverted to her old drinking habits. When under the influence of liquor she frequently used to be abusive towards the appellant and the children. Her conduct towards the latter particularly distressed the appellant. The children at times had to assist the deceased to bed because of her inebriated condition, using some measure of force when necessary. The appellant and the deceased were in the throes of protracted divorce proceedings although they still shared a common bedroom. Despite all their problems and marital friction the appellant still held out hope for a reconciliation. He described their relationship as a "love/hate" one.

At about noon on the day of the shooting the appellant and the children went to a barbecue at his parents' home, which was some distance away. The deceased, as was her practice, stayed at home. (This was due, at least in part, to the strained relationships that existed between the appellant and the deceased and their respective parents-in-law.) By that time the deceased already

showed signs of intoxication. In the course of the visit to his parents' home the appellant consumed a considerable amount of alcohol. He drank regularly, and at times heavily, but apparently had a high tolerance to alcohol - in colloquial terms he could "hold his liquor". The appellant and the children eventually returned home at about 20:00.

The sequence of events that occurred from the time of their return home until the shooting of the deceased is as follows. On their arrival the deceased was in her bedroom. She was under the influence of liquor. She eventually went to the kitchen where she and the appellant became involved in a heated argument. At that stage the children were in the lounge. They heard crockery breaking in the kitchen. When the arguing stopped they went to the kitchen. By that time the appellant had gone outside with a drink (alcoholic) in his hand. The children decided, after picking up the broken crockery, to take the deceased to her bedroom. She

resisted violently and hurled abuse at them. They managed to drag her along the passage. As they passed the bathroom the appellant appeared. He pushed the deceased into the bathroom and tried to close the door behind her. She put her hand between the door and the frame to prevent it from closing. The appellant did not persist with his attempt to shut her up in the bathroom. She managed to open the door. The children ultimately succeeded in getting her to the bedroom, using handcuffs for this purpose (a strategy successfully employed previously).

The subsequent events appear from the following passage in Dagny's evidence:

> "Then Dagny? -- Then when we got her to the bedroom, the main bedroom, she wanted to go back to the kitchen and fetch cigarettes and a drink, so I said that I would go and I went and on the way that is when I saw that the safe door was open. I did not take any notice of that and I went through to the kitchen and my dad was standing there drinking something. I did not speak to him and I fetched her cigarettes and I went back to the bedroom.

COURT: What about the drink, did you fetch her a drink? -- No. And well, then I was standing in the doorway and my mom and my brother were in front of me and then my dad was behind me and he had his hands behind his back and he had like a strange look on his face. MR HANNON: Yes? --And so I said to my mom and my brother, you know, I tried to tell them that something was wrong but they could not hear me so 1 tried to tell them again and then I looked at my dad again and he had the gun. And then he fired a shot and me and my brother ran. My mom sort of fell one way and we passed my dad and we ran to the office and then I phoned the police."

After she telephoned the police the appellant came to the study. Her evidence proceeds:

"My dad came back and he was crying and he like took me and my brother on his knee and he hugged us and he said: What have I done and he just kept repeating it.

COURT: He said what? -- What have I done, what have I done.

MR HANNON: He kept repeating it, m'lord. -- Over and over again.

Yes? — And he said something to the effect of: I could not stand what she was doing to you anymore.

Yes. Was he crying - upset I think you said? -- Ja, he was

crying, shaking and he was crying a lot ...."

After a while the appellant made arrangements to take the children to their paternal grandparents. He drove them there. Later he handed himself over to the police. He was taken to a district surgeon in the early hours of the morning. He was found to be under the influence of liquor and emotionally blunted. A blood sample was taken (this occurred some four hours after the shooting). The blood sample was later found to contain a concentration of alcohol of .27 grams per 100 millilitre unit which would ordinarily be indicative of someone well under the influence of liquor.

When the appellant left home with his children the fatally injured deceased was left behind. The only other person on the premises was a certain Lovemore who worked for the appellant as a gardener. It is not clear from the evidence who telephoned for medical assistance. When the police arrived the paramedics were

in the process of removing the deceased to hospital. She was still alive. An emergency operation was performed upon her. Post-operatively her condition deteriorated and she died a few hours later. Her cause of death was found to be "gunshot wound of shoulder : haemorrhage".

The events that immediately preceded and followed upon the shooting of the deceased, as set out above, appear from the undisputed and acceptable evidence of Dagny and Dylan. The appellant claimed a partial amnesia in respect of such events, having only a patchy recall of what occurred. It is unnecessary to set out the extent of such recall. It can be accepted that the appellant has a partial amnesia for the events in question. Such amnesia, however, is not diagnostically significant. It is common cause that the appellant drank heavily on the afternoon and evening of the shooting and was intoxicated, probably significantly so, when the shooting occurred. He was also in a heightened emotional state.

His partial amnesia is attributable to these factors. It is also common cause that such amnesia per se is not relevant to the issue of his culpability.

The guilt or innocence of the appellant depends upon whether, as put forward in his defence, he was suffering from a temporary non-pathological incapacity when he shot the deceased and was therefore criminally unaccountable for his conduct. Accountability in this context depends upon a person's ability to (1) distinguish between right and wrong and (2) exercise restraint or control over his or her actions which are unlawful. If either of these psychological characteristics is absent the person concerned would not be criminally responsible for his conduct (S v Laubscher 1988(1) SA 163 (A) at 166F-J).

The legal position with regard to the defence of non-pathological criminal incapacity has recently been dealt with authoritatively by this Court in S v Kalogoropoulos 1993(1) SACR

12(A) and S v Poteieter 1994(1) SACR 61(A). As appears from these decisions it is ultimately "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" (S v Kalogoropoulos at 21j - 22a; S v Potgieter at 73a). Once the evidential foundation is laid the onus is on the State to rebut the defence; if on the totality of the evidence doubt exists as to whether an accused's claim that he acted involuntarily could reasonably be true, the accused is entitled to the benefit of such doubt (S v Potgieter at 73e). A matter such as the present calls for a careful consideration of the evidence. As pointed out in S v Potgieter (at 73j to 74b):

> "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 conscious 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."

Two psychiatrists, Dr Shevel (for the appellant) and Dr Vorster (for the State) testified with regard to the appellant's mental capacity at the time of the shooting. After setting out the two elements of accountability referred to above, the Court a guo remarked:

> "On the facts of this case it is clear that the accused had the volition, the intent, to commit the deed. Both psychiatrists are of the firm view that this was the case and it was not contended otherwise. The issue in the case lies in the ambit of the second of the above elements, the element put forward by Dr Shevel, with strong disagreement by Dr Vorster, namely that there was an inability to exercise restraint or control after he had formed the intent to shoot and kill her."

Mr Harmon, for the appellant, accepted this as a correct summation of the position.

Dr Shevel, a practising psychiatrist, conducted lengthy interviews with the appellant and Dagny. He compiled a comprehensive report which he handed in at the trial. His evidence is encapsulated in the concluding portion of his report. It reads:

> "I can only infer that at some stage while the deceased was taken to the bedroom by her children or was in the bedroom, the accused went to the study, took the pistol and returned to the bedroom where he shot the deceased. In the past the accused had previously isolated the deceased and this had been successful in giving everyone breathing space. On this occasion the accused was unable to isolate the deceased in the bathroom and she was taken to the bedroom by Dylan or Dylan and Dagny together. The most likely trigger mechanism would have been at the point where the accused realised his attempts at isolating his wife had failed, a method which had been successful in the past. This implies that there must have been some volition on the part of the accused and that he was most likely able to form some intent, although he has amnesia for these specific actions. From Dagny's report of the argument between the accused and the deceased and Dagny's perception of the accused's emotional

> state on different occasions at significant times, the accused was most probably in a heightened emotional state. This heightened emotional state had been aggravated by a slow build-up of stress over the preceding months due to the marital disharmony, and had been precipitated by the argument between the accused and the deceased. The accused had been drinking during the afternoon and the early part of the evening. He most probably continued drinking during the argument with the deceased in the kitchen. This, in addition to other information available to me, would imply that at the material time the accused was intoxicated. The accused's heightened emotional state combined with the intoxicating and disinhibitory effects of alcohol would almost certainly render the accused incapable of exercising self-control or restraint. His inability to correctly monitor his actions in order to resist his intentions, was not due to any pathological state."

Dr Vorster is the senior psychiatrist and head of the forensic unit at Sterkfontein Hospital. She did not consult with the appellant but had been provided with a transcript of his evidence. She was present in court throughout the hearing. She disagreed with Dr Shevel in two basic respects:

> "Firstly 1 disagree with the fact that there was a trigger which heightened his emotional tension and secondly I disagree with the fact that he was unable to stop himself because of this heightened emotional state."

In the course of her evidence Dr Vorster handed in a diagram in the nature of a flow sheet in which she analysed the relevant events of the afternoon and evening, with particular reference to the appellant's conduct. These events, according to Dr Vorster, illustrated that the appellant had acted in a purposeful manner throughout and negated any suggestion of there having been a trigger mechanism. She concluded:

> "If one looks at the actions of the evening from the argument on that background one sees rather an intentional, purposeful activity. As Dr Shevel said, he formed the intention to shoot his wife. He embarked on a series of complex activities in order to reach that goal. He did not simply say in some inebriated fashion stagger up to the bedroom and let off a series of shots at random but shot once and missed and then followed her into the bedroom to shoot the second time. In addition we have his actions after the shooting which were

> also purposeful and goal-directed. From this one must conclude that his mental state was such that he knew what he was doing was wrong and could act in accordance with such appreciation."

The Court a quo gave careful consideration to the respective views of Dr Shevel and Dr Vorster. It ultimately concluded that on an overall conspectus of all the evidence the views of Dr Vorster were preferable to those of Dr Shevel. I am unpersuaded, for the reasons that follow, that it erred in coming to that conclusion.

The underlying premise of Dr Shevel's evidence is the existence of some trigger mechanism. This mechanism, according to Dr Shevel, was the appellant's inability to isolate the deceased (in this case, in the bathroom), something he had succeeded in doing previously and which had helped to subdue her. But as Dr Vorster correctly pointed out, this was by no means a unique situation. The appellant had on previous occasions failed to isolate and restrain the deceased. There is no rational reason why on this

particular occasion such failure should have operated as a trigger mechanism when it had not done so before. And in any event his subsequent conduct, in my view correctly designated by Dr Vorster as purposeful, militates against there being any such trigger mechanism.

It is common cause that the appellant was initially able to form the necessary intent to shoot and kill the deceased. This intention was formed after the bathroom episode. The appellant was at the time, according to Dr Shevel, able to distinguish between right and wrong. I have difficulty in appreciating why, if he was able to do so, he was not equally capable of exercising the necessary restraint. There was no subsequent incident which could have accounted for, or contributed to, an inability to control his actions. If he was incapable of restraint one would have expected him to act in a manner consonant with such inability - to fetch his pistol, return to the deceased and shoot her without any significant

intervening pauses. This, however, is not what happened. The longer the time lapse before the shooting, the more complex the intervening actions, the less likely it becomes that the appellant acted out of control because of an inability to restrain himself.

After the bathroom incident the appellant went to fetch his pistol. He testified that he had earlier that day taken the pistol out of the gun safe in his study in order to clean it. He intended using it for target practice the following day. When he left the house with the children he locked the study door (which had a special safety insert in the lock) leaving the loaded and ready-to-fire pistol on his study desk. If that is so, he presumably also left the gun safe, which contained two shotguns and an additional firearm, open, because when Dagny went to fetch the deceased's cigarettes in the kitchen she noticed that its door was standing open. The appellant appears to have been extremely careful with firearms, particularly after the deceased once obtained possession of his pistol and

threatened to shoot the children. He dismantled the pistol and hid its various pieces in different places. However, the deceased managed to find each piece and re-assemble the pistol. He then entrusted the pistol to the police for safekeeping until he had a gun safe installed. It seems highly unlikely, and out of character, that he would have left the pistol lying on the study desk and the gun safe open when he departed the house, leaving the deceased there alone, even allowing for the fact that he had locked the study door. The probabilities are that his pistol was not where he claimed it was when he went to fetch it that night, and that he only removed it from the gun safe then. In any event, on a proper evaluation of the evidence, the very least he did was to first unlock the study door, a task made more complex than usual because of the special nature of the lock. After taking the pistol he did not proceed forthwith to the bedroom to shoot the deceased as one might have expected if he was acting without restraint. Instead he went to the

kitchen to have a drink. That is where Dagny saw him. Only then did he go to the bedroom. There Dagny, who was standing in the bedroom door, noticed him behind her with his hands behind his back. This suggests that he was trying to hide the pistol from sight - a consideration which points strongly to his being conscious of what he was about. The appellant then fired the first shot, missing the deceased. The second shot was not fired immediately thereafter, but only after he had entered the bedroom. He did not fire continuously as one might have expected from someone with no control over his actions. The fact that he must have stopped firing because he saw that the deceased had been hit shows an understanding of what was happening and an ability to exercise control. His later remarks in the study to the children also indicate an awareness of what he had done and an appreciation of his wrongful conduct. He thereafter continued to act in a purposeful manner - enquiring whether the police had been telephoned,

restraining Dagny from going to the deceased, contacting his parents, making arrangements with regard to the children and driving them approximately 30 kilometres to his parents' home. Overall there was no manifestation in his conduct of a total loss of control.

In the circumstances the court a quo was entitled to accept the evidence of Dr Vorster in preference to that of Dr Shevel and consequently to hold that the appellant was able throughout to distinguish between right and wrong and to exercise restraint or control over his unlawful actions. He was therefore criminally accountable for his conduct. It follows that the appellant's appeal against his conviction must fail.

I turn now to the question of sentence. The appellant's circumstances evoke strong feelings of sympathy. He was the victim of unhappy home circumstances which impinged upon the welfare of his children whom, it can be accepted, he loves dearly.

The tragic consequences of his deed will probably live with him forever. The learned trial judge correctly held that the appellant had acted under circumstances of diminished responsibility. He appreciated the need to give full effect thereto in arriving at a proper sentence. He sought guidance in relation to the vexed question of sentence in certain past decisions of this Court. He no doubt bore in mind that a sentence must be individualised and each matter dealt with according to its own peculiar facts. He then went on to say:

> "What distinguishes this case from the cases quoted is the behaviour of the accused after the shooting. His conduct, his emotions indicated an awareness of his acts. In my view there was a refusal to come to the assistance of this woman whose suffering at the time must have been extreme. This is an important factor that [must] be borne in mind."

There would appear to be implicit in this statement a finding that the appellant acted in callous and wilful disregard of the plight of the deceased. The evidence does not, in my view, justify such

finding beyond all reasonable doubt. From what the appellant said and did immediately after the shooting it may be inferred that he genuinely believed at the time that the deceased was dead. True, later events must have made him realise that she was not. But he may well still have thought that she was beyond human assistance. When he stopped Dagny from going to the deceased he was probably acting in Dagny's interests by preventing her from being exposed to the traumatic sight of her dying mother rather than restraining her from going to the deceased's assistance. His state of intoxication and emotional stress at the time was not conducive to totally rational thought and behaviour. His primary concern at that stage appears to have been the immediate welfare of the children. In the circumstances it is not the only reasonable inference that he callously refused to go to her assistance, or deliberately stopped anyone else from doing so. There was accordingly a material misdirection by the trial judge which leaves

this Court at large to consider the question of sentence afresh.

It is trite law that the determination of an appropriate sentence requires that proper regard be had to the triad of the crime, the criminal and the interests of society. A sentence must also, in fitting cases, be tempered with mercy. Murder, in any form, remains a serious crime which usually calls for severe punishment. Circumstances, however, vary and the punishment must ultimately fit the true nature and seriousness of the crime. The interests of society are not best served by too harsh a sentence; but equally so they are not properly served by one that is too lenient. One must always strive for a proper balance. In doing so due regard must be had to the objects of punishment. In this respect the trial judge held, in my view correctly, that the deterrent aspect of punishment does not play a major role in the present instance. The appellant is not ever likely to repeat what he did. Deterrence is therefore only relevant in the context of the effect any sentence may have on

prospective offenders. A suspended period of imprisonment is accordingly rendered largely superfluous.

It was urged upon us in argument that correctional supervision in terms of sec 276(1)(h) of the Criminal Procedure Act 51 of 1977 would be an appropriate sentence for the appellant. This sentencing option was not applicable at the time when sentence was passed, but has became available since. It would therefore be competent for the trial judge to consider the suitability of such a sentence if the matter were remitted to him to pass sentence afresh fS v R 1993(1) SA 476 (A) at 485; S v Poteieter (supra) at 86j).

As was pointed out in S v R (at 488G) the legislature, by the introduction of this option, has sought to distinguish between two types of offenders: those who ought to be removed from society and imprisoned and those who, although deserving of punishment, should not be so removed. Correctional supervision can be coupled with appropriate conditions to make it a suitably severe

sentence even for serious offenders. It therefore allows for the imposition of an adequate sentence without resorting to imprisonment with all its attendant negative consequences for both the prisoner and society. As correctional supervision under sec 276(l)(h) can, in terms of sec 276A(l)(b), only be imposed for a period not exceeding three years, it is not a sentence that readily lends itself to the very serious category of crimes (which would normally call for higher sentences) and should therefore not be too lightly imposed in such cases.

It seems to me, taking all relevant considerations into account, that punishment for an effective period of more than three years is not required in the present case. Equally so it seems to me that the circumstances do not necessitate the removal of the appellant from society; provided he otherwise qualifies for correctional supervision he can be suitably punished using the means available under that sentencing option (cf S v Potgieter (supra): S v Larsen 1994(2)

SACR 149(A)). To adopt the words of KUMLEBEN, JA, in the Potgieter case at 88d:

> "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."

As correctional supervision can only be imposed after a report of a probation officer or a correctional official has been obtained the proper course to adopt is to remit the matter to the trial Court to sentence the appellant afresh. In the result 1 propose making an order similar to that made in S v Potgieter (supra) at 88e.

The appeal succeeds in part. 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 276A(l)(a) of the Criminal Procedure Act, and after receiving such further evidence as may be profferred, to correctional supervision in terms of s 276(l)(h) of that Act or, if for good reason

the appellant is found not to be fit for such a sentence, to otherwise sentence him in the light of the views expressed in this judgment.

J W SMALBERGER
JUDGE OF APPEAL

HEFER, JA) NIENABER,
JA) CONCUR