CG CASE NUMBER: 351/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DUNCAN RICHARD KENSLEY Appellant

and

THE STATE Respondent

CORAM: E M GROSSKOPF, STEYN et

VAN DEN HEEVER JJA

HEARD ON: 16 FEBRUARY 1995

DELIVERED ON: 9 MARCH 1995

J U D G M E N T

VAN DEN HEEVER JA

The appellant stood trial in the Cape Provincial Division of the Supreme Court on two counts of murder, three of attempted murder, and a contravention of section 39(l)(m) of the Arms and Ammunition Act No 75 of 1969, that is, handling a firearm while under the influence of liquor. He pleaded not guilty on all of these. He elaborated on this, stating that he suffered from amnesia and could not remember (and therefore could neither admit nor deny) the allegations made in the indictment; but, were they to be established, had temporarily lacked criminal capacity at the relevant time. That lack was due not to mental illness or defect as contemplated by section 78(1) of Act 51 of 1977, but was attributable to non-pathological factors, namely a combination of severe emotional stress and intoxication.

He was convicted of culpable homicide, murder, two counts of attempted murder, and the charge under the Arms and Ammunition Act.

The effect of the sentences imposed in November of 1990, ordered to run concurrently save as regards so much as was suspended, is that he is to serve four years of imprisonment, a further six years being conditionally suspended for five years. (He has been out on bail pending this appeal, brought by leave of the court a quo against both his convictions and sentences.)

The evidence of the State witnesses as to the events underpinning the charges, is, understandably in view of his alleged amnesia, largely undisputed. This may be summarized as follows. I refer to the dramatis personae in what follows by their first names or, as regards the two transvestites involved in the events in question, their nicknames.

Adelaide de Sousa, then 18 years old, regarded Yolanda Jallahrs, then 16, as her best friend. Yolanda was friendly with, and until the night in question Adelaide knew by sight, two "girls", usually called

Brooke (as in "Brooke Shields", the film star) and Adele, who were actually males: Deon Brown and Adiel Bekko. They however dress and disguise and regard themselves as women and admit to being homosexual. The inconsequential events leading up to these four leaving for the Westridge City nightclub in Mitchells Plain in the early hours of the morning of Saturday the 20th of May, 1989, are of no moment. The four cadged a lift and arrived there not long before closing time. After a few dances, closing time being at hand, Adelaide saw an acquaintance, Randall Adams, and asked for transport home. He was there on his motorcycle, so went to his friend of at least five years' standing, the appellant, who had arrived earlier by car, and asked him to oblige.

I interpose the appellant's version of the events of the evening up to this stage. He had met up there earlier with Randall and another friend, Shaun van der Westhuizen. The woman, Celeste, with whom the

appellant had a relationship and by whom he had a child, had been abrupt with or ignored him when he visited her parental home earlier where there was a "sort of a party", it being her father's birthday. He had a few drinks but, because of her attitude, he left early, at about eleven. At home he found his family ail asleep so drove to Westridge where he came across Randall and Shaun. They invited him in and had a few drinks together, after which they separated. Randall and Shaun went to the bar and the appellant and his brother-in-law Andre" Cochran were involved in an incident in which the appellant's (licensed) fire-arm, a .45 Remington pistol which he usually carried with him, featured. (He bought this in 1984. He was working at a video shop in Mitchells Plain at the time, used to be summoned after hours to go and check when the burglar alarm went off, "and on occasions I found guys busy breaking in, I couldn't really do anything but chase them with the car which I was

driving at the time". He usually took spare ammunition on his outings, in the headrest of his car, "to protect myself in case of anything happening") He told the court that he had joined Andre" in the foyer of the nightclub. André seemed very drunk. Drinks were ordered. An argument followed between the club bouncer and André, about payment. The bouncer took off his jacket, apparently intent on assaulting André The appellant, who judged André to be vulnerable because of his condition, took off his pistol and put it on the table - he explained, "in case I got into a scuffle with the bouncer that he wouldn't grab the firearm" - went up to the bouncer and told him he would have to hit the appellant first, "before he is going to have a fight with my brother-in-law". Nothing came of this spat. Appellant took up the pistol and was entering the disco when the bouncer told him that firearms were not permitted there, and appellant agreed to put it in the establishment's safe.

Shortly after, he and his two friends Randall and Shaun left. They were still chatting outside, when Adelaide approached Randall and asked for a lift for herself and her friends.

I return to the prosecution version of what followed, omitting irrelevant detail on which this differed from appellant's. The appellant agreed to provide a lift. The group moved off to Yolanda's home in Tulip Street, Lentegeur, Mitchells Plain, the appellant in his car with Shaun and the two genuine and two ostensible females, and Randall following them on his motorcycle. There at Yolanda's suggestion the greater part of the group went off by car, and returned from a shebeen with a bottle of rum, and coca-cola. They all drank in the car, Adelaide, Shaun and Randall less than the others. The appellant and Yolanda went off on Randall's motorcycle to go and get appellant's tape-recorder to provide music for the party in the car. Two further car trips were

undertaken, once to buy something to eat, later to get another bottle of rum. On that occasion Shaun drove the appellant's car. The appellant was in the back seat, petting Yolanda who was well under the weather by then. The appellant suggested they should go to the beach. He transferred his amorous attentions to Brooke, and on arrival at the beach, the pair of them left the car and disappeared into the bushes. According to Adelaide, both were intoxicated, judging by their gait and speech. Randall went off for a long swim. When he had earlier taken a glass out of the cubbyhole, Adelaide saw appellant's gun. She took it out and hid it under the car seat. After a while the appellant and Brooke returned, arms linked amicably. At about seven in the morning, the liquor all gone, they decided to return to Tulip street. Shaun, Randall and Adelaide were reasonably sober, Yolanda very drunk. She had been sleeping on the back seat, was woken and moved to the front. Adelaide,

the appellant and the two transvestites sat in the rear, the appellant now fondling Adele. According to Adelaide, Adele unzipped "her" jeans and the appellant had his hand there, "maar dan ruk sy sy hand weer uit". Adele was trying to steal the appellant's watch from his arm.

Randall (who had been for that long swim at Mnandi Beach) and Adelaide (who drank little because she suffers from asthma) between them gave a reasonably coherent account of the chaotic events that occurred when they stopped in the vicinity of Yolanda's home. According to Randall, an argument had broken out en route among those seated in the back of the car, about the fact (hat the transvestites were men, not women. It became progressively more heated. When the car came to a halt the appellant and the two got out. The appellant was angered by the fact not only that they were men, but that his friends, Shaun and Randall, had kept him in the dark about this fact. Adelaide's

evidence was that in the car the appellant had turned his attention from Adele to her, but she pushed his hand away and said "No". At that, the appellant exclaimed "Oh, you are all men". Brooke got out of the car, by then stationary in front of Yolanda's home. The appellant followed suit. He went after, and hit, Brooke. When Adelaide tried to intervene, he felled her. He demanded his pistol. Adelaide unsuccessfully tried to wake Yolanda, asleep with her head on the driver's leg, and persuade her to flee. Hearing the appellant demand his firearm, Randall says he went to the cubbyhole but heard from Shaun, behind the steering wheel, that Shaun had stuck the weapon into the waist of his own trousers. Randall felt comforted since Shaun was "a lot more sober than the rest of us and a passive natured person". Randall walked with Brooke and Adele intending to take Adelaide into the house when he heard a shot go off. He saw the appellant standing in the street at the car with the pistol in

ibis hand. Then the appellant pointed the firearm at them. They scattered towards the house. Randall went over the garden wall and received a glancing wound in the back. Brooke, by then trying to gain entry to the house, turned and was shot in the stomach. Shaun came into the premises via the gate and knelt behind the wall. Adele heard him plead with appellant not to shoot, but did not see the actual execution. Randall as he lay wounded in the garden, saw the appellant follow Shaun in, repeatedly demanding to know why he hadn't been told that the two "girls" were men, where "You" (Shaun and Randall) "are supposed to be my friends". He was extremely angry, spoke in disjointed phrases, pointed the pistol at Shaun's head and despite Randall's shouted protest, fired. He turned the pistol on Randall but it refused. He tried to clear the chamber and bullets fell out. He then backed out of the, yard. (According to Adele he at some stage also aimed at "her" but the pistol

then also refused.) By that time neighbours were emerging from their homes. Mr Ventura, one of the neighbours, disarmed the appellant. His wife and son between them took charge of the pistol which landed on the ground and summoned the police. Mr Ventura stood with the appellant for about a quarter of an hour until the police arrived. The appellant had cooled down, spoke normally, was quiet, but asked Mrs Ventura when she returned to the scene "mevrou, gee my weer die 'gun' of gee my 'n mes dat ek myself kan doodmaak, hoekom ek het verkeerd gedoen". According to Mr Ventura, the appellant smelled of liquor but was not drunk. His speech was not slurred. When the police arrived, the appellant received a few blows with a baton when he tried to grab the firearm of one of them, constable Kettledas, who testified that, as the appellant did so, "(W) die beskuldigde half geskree dat hulle, met verwysing na die oorledenes, dat hulle horn vir 'n gek gevat het".

According to Kettledas, the appellant's speech and gait were normal. Ketteldas found three shells and two live bullets in the road, and Mrs Ventura handed him a third.

The police found Yolanda dead in a pool of blood on the front seat of the car, Shaun dead in the garden, and Brooke unconscious inside the house. Detective Sergeant Saayman arrived on the scene at about 8h25. The appellant was in the police van by then. He told Saayman that there were bullets concealed in the headrest of his car. Saayman investigated, and found eleven. The appellant did not appear to Saayman to be drunk. Later, at the charge office, Saayman asked him what had happened. The appellant said he did not know.

Yolanda's death was the subject of the first count of murder, Shaun's of the second. The wounding of Randall and Brooke led to conviction on two of the three counts of attempted murder. On the third,

based on the evidence of only Adele who admitted he was very drunk and "went hysterical" and unlike the other two had no wounds to show, the appellant was acquitted.

Dr D R Fowler, registrar in forensic pathology at the University of Cape Town, performed the autopsy on Yolanda. Death had been caused by a contact gunshot wound at the top of her head, surrounded by powder burns, exiting at the base of the skull. He drew blood which was sent for analysis. This revealed a concentration of 0,19 grams of alcohol per 100 ml of blood. According to Dr Fowler she would have been severely under the influence of alcohol and would have shown obvious signs of intoxication. When possibilities as to how the wound had been inflicted were put to him, the tenor of his evidence is that it is unlikely that Yolanda had been shot by someone standing outside the car, but quite possible that the wound could have been inflicted from a gun in its

holster tucked into the waistband of the driver had she been lying with her head on his lap or leg, and the gun twisted so as to point slightly up from horizontal.

According to scientific evidence tendered by the police, material taken from the right hands of both the appellant and Shaun established that both had been in the immediate vicinity when a firearm was fired; or had handled a firearm immediately after it had been discharged. There was none of the residue on Yolanda's hands.

Dr van leperen performed the autopsy on Shaun. He had died from a gunshot wound to the head. The sample of his blood sent off for testing revealed an alcohol content of 0,03 grams per 100 ml of blood.

A blood sample taken from the appellant at 12h57 contained 0,06 grams per 100 ml alcohol at that stage. Although according to the report of Dr Fortuin who examined him then, his face was flushed, eyes

congested and he smelt strongly of alcohol, all his reactions and other physical signs were normal, save that his memory was ticked off on the roneo-ed form on which the report was recorded, as being "vague". Dr Fowler estimated that accepting his blood alcohol content then to have been 0.06%, it would have been anything from 0.16 to 0.26 some five hours earlier, at which time he would probably have been severely under the influence of alcohol.

Warrant Officer de Kock saw the appellant at the charge office at Mitchell's Plain that morning at 9h40. It was he who went through the process intended to remove any prima residue left when a gun is fired that may have been present, from appellant's hands, the material then being sent off for microscopic examination, the result of which has already been mentioned. De Kock asked routine questions accompanying the procedure, such as when last the appellant had fired a gun, and when

last he had washed his hands; and some to satisfy his own curiosity.

According to de Kock, this appellant said that he had nothing to do with the death of "daardie vrou in die kar" but admitted that he had fired at others; that there should be seven rounds in his pistol; and that he was right-handed. He looked normal, acted and spoke normally and did not appear to be intoxicated.

Before calling the final State witness, the prosecutor handed in as exhibit J the record of the proceedings in the magistrate's court on the 22nd of May 1989, when the appellant's attorney is recorded as having asked that he be referred to Valkenberg for observation -

> "om te bepaal of hy eerstens geskik is om sy verhoor te staan en tweedens of hy toerekeningsvatbaar was tydens die pleging van die ten lasgelegde misdrywe ... (B)eskuldigde sal beweer hy weet nie wat gebeur het nie, maar beskuldigde kan onthou hy het op die strand gaan stap met 'n persoon wie (sic) hy gedink het is 'n vrou. Dit het later geblyk die persoon was 'n man. Hierdie voorval asook die

> feit dat hy bale gedrink het voor die voorval het bom hewig ontstel. Wat verder gebeur het weet die beskuldigde nie."

An order was made in terms of section 79(1) of Act 51 of 1977. The ensuing unanimous report in terms of section 79(4)(b), (c) and (d), namely that the appellant was found to be not mentally ill; not certifiable in terms of the Mental Health Act; fit to stand trial in terms of section 77(1) and so on, forms part of exhibit J. Early in the trial, while cross-examining Adelaide, appellant's counsel, Mr Webster, made it clear that his instructions differed from those announced at the proceedings before the magistrate as recorded in exhibit J. The appellant would testify that after returning from buying the second bottle of rum, he felt very drunk and fell asleep leaning against Yolanda in the back of the car where he dreamed that at some stage he was walking along the beach. His next memory was of being shaken by a policeman.

The last witness called by the State was Dr Greenberg, leader of the panel of experts who had contributed to the assessment of the

appellant after the period of observation at Valkenberg. The prosecutor explained that he was not called in relation to his report, the content of which was not disputed. It deals with the appellant's present condition, save in so far as it records that the appellant was not at the time of the alleged offence affected by mental illness or defect. Dr Greenberg was called as an expert witness in relation to the defence raised by appellant of non-pathological lack of criminal capacity at the time of the offences charged.

The main thrust of Dr Greenberg's work and experience is forensic psychiatry. He made it clear that he was au fait with the content of the term "criminal capacity" but that that, and the word "automatism", in relation to persons not suffering from any pathology, were legal terms, not psychiatric ones. Psychiatrists do recognize as pathology which could exclude "criminal capacity" as defined in law, outside factors, such as a blow to the head, which would not render the recipient certifiable in terms of the Mental Disorders Act. He was satisfied that at the time

of the events in question, the appellant suffered from no pathology recognised in psychiatry: he knew what he was doing and was capable of controlling his actions. Though his judgment had been impaired by the consumption of alcohol, his criminal responsibility was therefore still intact. Dr Greenberg gave reasons for doubting - though not excluding the possibility - that the appellant had developed amnesia subsequent to the events of the morning. Poor recall of what had happened could be due to alcohol, to involuntary suppression of memory from the consciousness as a defence mechanism precipitated by extreme stressful events, or to malingering. It was not due in the appellant's instance to any pathology, whether as understood by lawyers or by psychiatrists. There was no history of any loss of memory on previous occasions when the appellant had drunk alcohol, or at all. Had the appellant told someone that he had dreamed that he walked along the beach with a woman who turned out to be a man,

> "this could be explained in terms of a subjective recall of his experience, that is that he ... subjectively perceives the

> events as a dreamlike state because he was intoxicated and because he was emotionally laden ... but ... this is in fact memory recall of events which took place in ... circumstances of alcohol intoxication and related stress factors."

Dr Greenberg regarded any subsequent amnesia as in any event irrelevant to the crucial issue: whether the appellant at the time of the shootings was capable of appreciating the difference between right and wrong, and of acting in accordance with that appreciation. Alcohol does not cause a person to behave in a particular way, it merely disinhibits him and lessens his concern with the consequences of his behaviour. In the same way factors such as anger or sexual arousal may motivate behaviour, explain how such behaviour could happen, so that the person might have certain impulses, which he would be able to control but choose not to control. The liquor he had consumed and his rage as described by the witnesses, would not have robbed him of his freedom of choice but would have impaired his judgment, probably severely, as to the social consequences of his actions. But the appellant's comments during and

immediately after the crucial events and his actions were all consistent

with complex goal-directed behaviour showing that the higher functions

of the brain were involved. Dr Greenberg's evidence was unshaken by

cross-examination, that

> "there were factors which were important in the eventual behaviour of the accused ... These factors were the alcohol, the sexual disinhibition or ... probable sexual arousal, the anger at being deceived, the stress in the [appellant's] personal life at the time surrounding these alleged offences, both financial and personal. I think these factors are all relevant in terms of the [appellant's] mental state. However, in terms of his criminal responsibility, or his capacity to be responsible or appreciate his actions and act accordingly ... [this] was still intact".

It is clear 6om what follows, that Dr Greenberg concedes that that capacity could be impaired to a greater or lesser degree by intoxication along with factors such as frustration and anger, in the sense that his judgment would be impaired: but intoxication with or without motivating incentives would not in his view cause total loss of control because for total loss to occur, the drunk would be so far gone that he

would lack the ability to indulge in goal-directed activity. When it was put to him that the appellant's conduct ran counter to what was regarded by those who knew or had observed and examined him as being his normal personality, Dr Greenberg said that little could be deduced from that: the situation in which the appellant had found himself that morning, was itself not normal.

After the State had closed its case, the appellant testified. He was then 28 years old, had passed standard eight at school, worked as a freight clerk for a shipping firm where he carried a heavy workload, and supported a number of people. These included a five-year-old son from a previous relationship which had lasted two years, and a one-year-old son by Celeste, their relationship having lasted for three years already. His brother being then unemployed had moved in, along with his wife and two children, with the appellant where he lived with his mother and his sister's son in a house owned by the appellant, whose salary was barely sufficient to cover expenses. He told the court of the events

which led up to his being at the nightclub. The reason he gave why he always carried his .45 pistol with him, was that he had no gun safe at home. Having acquired the pistol for purposes of self defence, he kept it constantly fully loaded It is unnecessary to attempt to count the number of drinks of various kinds he said he had that night and through to the early hours of the next morning. He drank a good deal, over a comparatively lengthy period. His condition as regards sobriety was variously described by various witnesses at various stages of the events. What matters, is his state at the time of the shooting.

His evidence leading up to his being impressed to provide transport for Yolanda and her friends to Tulip Street, has been summarised above. His further evidence that, once there, liquor was bought and they sat drinking in the car, accords generally with the State version of events. In the car he removed his pistol and put it in the cubbyhole of the car, since it was "pinching into my side". He left it there when he and Yolanda went off to get the tape recorder because he knew it would be

safe in the custody of his friends. He admits that he made advances to Yolanda, which were favourably received; that they went to buy food and later, more liquor. On this last occasion, Shaun drove. He himself sat in the back of the car with Yolanda and, beyond her, Brooke and Adele. Back in Tulip Street he had "about one or two glasses" from the second bottle of rum that had been acquired. His head started spinning, he felt very, very drunk, put his head on Yolanda's shoulder, closed his eyes, and fell asleep. His evidence in chief continues:

> "What happened whilst you were sleeping? — Whilst I was sleeping I had this dream.
>
> What did you dream? — I dreamt walking along a beachfront.
>
> With whom? — With a girl.
>
> COURT: Any particular girl? — No, it wasn't a particular girl in the dream Your Honour.
>
> MR WEBSTER: What happened? — Well, in this dream, this girl turned out to be a man and not a woman as such.
>
> And how did you react in this dream to this realization? — Well, in the dream I just about ran away.
>
> What is the next thing you recall? — The next thing I recall being shaken by a policeman."

That was in Tulip Street. It seemed to be daylight. The policeman asked him "Wat het jy aangevang, kyk hoe lê die ... mease dood" and beat him with his baton. The appellant collapsed, was put into the police van by two members of the force, and taken off to the charge office. He remembers de Kock instructing him to hold out his hands, and cellotape being pressed against them, but cannot remember being asked the questions and giving the replies to which de Kock testified. He was feeling very confused. He was then taken to Lentegeur hospital.

In his evidence in chief already, the appellant does not dispute the State evidence that immediately after the shooting, he, a reasonably seasoned drinker, was not strongly under the influence of liquor. He says that after being beaten by Kettledas - his version of this implies that that conduct was a needless assault which followed on the latter's accusatory rhetoric - when he was loaded into the police van he was "still slightly drunk, trying to clear my head". He remembers de Kock taking samples from his hands, but not their conversation. He was

confused. His head only started to clear when he was taken to Lentegeur hospital where he remembers a blood sample having been taken. Since hearing the evidence of the State witnesses in court, flashes of memory in regard to what had previously been totally unremembered, are returning: of himself firing off a shot, and standing next to Randall screaming": "You knew, you knew!"

Under cross-examination he said that he had no recollection of getting angry; nor of discovering that two of the women in his company that night were men, or feeling betrayed by his friends in that they may have deceived him by not sharing their knowledge of that fact with him. He would not be upset at being let down by friends, since "we are all human, we all make mistakes in this world"; but thought that friends would withdraw their friendship if they thought him to be homosexual. He had no reason to question the truth of the evidence of Randall, who had been visibly distressed in court at testifying against the appellant. He had kissed Yolanda to whom he had been attracted, not thinking of

his "permanent girlfriend" because he was upset with her, but, he says, he was not sexually aroused by Yolanda nor anticipated sexual intercourse with her later on. He had no difficulty driving Randall's large motorcycle when he went to fetch the tape recorder, and drove his own car when they went off to buy something to eat, for which he had offered to pay. They sat in the car there for a while, then Shaun offered to drive back to Tulip street and he agreed, not because he considered himself incapable but because that would enable him to concentrate on Yolanda. He changed his evidence later and admitted that he would not want the friendship of someone who knowingly saw him getting off with a man who was supposed to be a woman, "because friends are supposed to tell one another things if they see something being done wrong, they are supposed to warn you about it". Had "friends" permitted him to fondle men knowing him to be under the misapprehension that they were women, he would have been upset, "would have felt a fool and disgusted and dirty".

It is unnecessary to set out his evidence under cross-examination in relation to his "dream". It was hardly coherent or satisfactory. Of importance is only that according to that vague dream, he discovered on the beach that the "girl" was a man; but says it was some sixth sense that led to that discovery, which denies Brooke's evidence that the appellant's fondling of Brooke made that fact apparent to the appellant. When Kettledas shook him on the scene, he had no recollection of the events that had just occurred, nor perception that he had done anything wrong. His first memory of having had that dream, was shortly after Kettledas had so shaken him. He did not tell Kettledas of the dream, but says he did tell Sergeant Saayman of having had such a dream (which does not accord with Saayman's evidence). He in fact discovered that Brooke and Adele were men, he says, for the first time when, after telling Saayman of his dream, Saayman told him that he had been in the car with "two queers". (This was never put to Saayman). He had also told his attorney of the dream, and could suggest no reason why the

attorney should have misinterpreted this and given the version recorded by the magistrate in exhibit J when application was made that appellant be sent for observation. He himself had not heard what the attorney told the magistrate. He did not suggest that there were any language difficulties between him and his attorney. There was no investigation about the language in which the two of them communicated; and he said that he understands Afrikaans fairly well - I mention this only because his counsel in argument before us suggested that the difference in language was the probable cause of the difference between the alleged instructions given the attorney and those he himself had received.

In view of the appellant's allegation of amnesia, no direct evidence could be offered by the defence to counter that of the State as to the events on which the charges were based. A few witnesses were called to testify to the appellant's appearance at the scene after the shooting and his personality, and so on. The main defence witness was Dr A F Teggin, a psychiatrist in private practice who assessed the appellant

psychiatrically. I deal first with the other witnesses - who however added little if anything to the total picture - before setting out what that entailed, and what his assessment was.

Mrs Ventura's contribution was that the shots that she had heard, had been fired in quick succession. When the appellant had asked her "gee vir my 'n 'gun' of 'n mes, ek het verkeerd gedoen", he looked "of hy 'n 'drug' in horn het, of hy ver weg is" and started crying. She saw him reach for Kettledas's pistol, and the latter strike him.

The appellant's sister, Claudette Cochran, gave her impression of his personality. She described him as law-abiding, meticulous, not violent or aggressive, responsible. Questioning revealed that she knew neither his past nor his personality as well as she liked to think. Merely as examples, her list of the relatives he was supporting in the home he owned at the time of the incident differs from that given by the appellant himself. When it was put to her that her picture was at variance with some of the common cause facts, such as that he had made two women

pregnant without marrying either of them, and become involved with a total stranger shortly after meeting her while seriously involved with Celeste, the witness offered excuses for her brother.

Celeste's brother-in-law (married to her sister) Williams tried to tell the court that the appellant could not carry his liquor and knew when to stop; which flatly contradicted the appellant's own evidence both as to his capacity and his conduct that night.

Caron Park is a clinical psychologist who recently entered private practice, to whom the appellant was referred by Dr Teggin for a personality assessment. She spent between three and a half and four hours with the appellant in the course of two consultations. I ignore the preliminary explanations and summarize her conclusion: she found him to be

> "an emotionally restricted person who would tend to conform to the needs and expectations of others rather than experience ease in expression of his own feelings and emotional life; ... who used ... alcohol as a coping situation (sic) to compensate for his inability to cope with emotional

> stresses in any better way ..."

(a claim which neither appellant himself nor his sister had made)

> "His lifelong emotional suppression generated an escalation of unexpressed anger and resentments, which under normal situations remained within strong conscious control."

His conduct as described by the State witnesses was in complete contradiction to this established personality profile. Under cross-examination she conceded that she had not consulted any collateral sources of information but relied on what the appellant himself told her; that the team at Valkenberg had had better opportunities of assessing the appellant than she; and that her impression was that, though able at the time of the events in question to distinguish between right and wrong, the appellant "actually experienced quite a considerable degree ... [of] loss of control". She raised the possibility that that loss might have been total.

Dr Teggin met the appellant on three separate occasions, was with him for a total of probably three to four hours. He had seen Ms Park's

report, as well as that of Dr Greenberg. He agreed that the question of amnesia was a totally separate issue from that of criminal capacity; and that the alleged dream to which the appellant testified was probably a partial memory. The major discrepancy between his evidence and that of Dr Greenberg, lies in the fact that in Dr Teggin's view a person may consume alcohol to a point where even though aware of what is going on around him, he loses all self control without necessarily being stuperose or comatose. Because the appellant's conduct had been quite out of character, he was of the view that the disinhibitory effect of alcohol brought to the fore

> "a lot of emotional reactions which are not related in any way to the events of that evening but had in fact been bottled up over months, if not years".

This view was based on the conduct in question being quite atypical:

> "I have been led to believe that the accused has never had any form of an emotional outburst or loss of temper. He is not known for this ... this was the first time he has in fact lost control, which would indicate to me that the bottling up

> ... released an emotional content which had probably dammed up over a long period of time".

He accepted it to be a possibility in theory that in a situation of extreme

anger an individual might be aware of what he is doing and that it is

wrong, but lose all ability to control his actions.

> "Why [do] you refer to that as a theoretical possibility? — ... Where I see that in its commonest situation is men who beat up their wives, usually in a situation of alcohol intoxication coupled with feelings of jealousy which may be morbid jealousy. And I have often had this described to me by such men who are extremely remorseful thereafter and will describe how they were carried away in a rage and were beating their wife in a goal directed way, inflicting damage to her, but completely unable to stop themselves."

Normally goal directed behaviour is a strong indication of awareness and control, but according to him this is not

invariably so. In Dr Teggin's view, the appellant was probably aware of what he was doing but lacked control.

Loss of control may range from partial to total. Though it was for the court to determine where the appellant's

loss lay within that

range, Dr Teggin was of the view that "on the probabilities ... the accused was not able to stop himself.

Appellant's counsel referred to cases such as S v LAUBSCHER 1988 (1) SA 163 (A), 167 F-G; S v STELLMACHER 1983 (2) SA 181 (SWA), 188B; S v CAMPHER 1987 (1) SA 940 (A), 959C, 965H; S v VAN VUUREN 1983 (1) SA 12 (A), 17G-H; S v BAILEY 1982 (3) SA 772 (A), 796C-D for the proposition that non-pathological criminal incapacity has been recognized of late as constituting a complete defence to a criminal charge.

In terms of decisions of this court, the onus then burdens the State to prove beyond reasonable doubt that an accused could not only distinguish between right and wrong but also that he was capable of acting in accordance with that distinction. Cf S v CAMPHER, supra at 966F-I; S v WIID 1990 (1) SACR 561; and S v CALITZ 1990 (1) SACR 119 (A) at 126H. Those decisions cannot possibly mean that the ipse dixit of an accused that in the given situation, whatever that might

be, he was unable to control himself (giving rise to a theoretical possibility as postulated by Dr Teggin that that could be so) must lead to an acquittal. Criminal law for purposes of conviction - sentence may well be a different matter - constitutes a set of norms applicable to sane adult members of society in general, not different norms depending upon the personality of the offender. Then virtue would be punished and indiscipline rewarded: the short-tempered man absolved for the lack of self control required of his more restrained brother. As a matter of self-preservation society expects its members, even when under the influence of alcohol, to keep their emotions sufficiently in check to avoid harming others and the requirement is a realistic one since experience teaches that people normally do. Cf S v SWANEPOEL 1983 (1) SA 434 (A), 458 A-D. It follows that the evidence on which a defence of sane criminal incapacity due to intense emotion is based, should be viewed with circumspection.

In view of his alleged amnesia, the appellant himself did not testify

that he was unable to control himself when he killed or tried to kill his victims, nor what it was that enraged him. On the strength of his "dream", Brooke's evidence that the appellant must have discovered during their adventure at the beach when he rebuffed the appellant's advances that Brooke is a man but their amicable return to the car; the fact that he became enraged only after he had explored Adele's unzippered jeans in the car and so in the presence of his friends; his own denial that he was sexually frustrated by his petting proving unrewarding; his comment to Kettledas that he had been made a fool of; and his evidence that he would not wish to be seen by his peers as being a homosexual; the inference that most readily comes to mind is that his self-esteem was battered by what he regarded as the betrayal of those he had accepted as being his friends. Whatever the reason, it is clear that he was very angry.

The evidence of those on the scene at the time, detailed above, paints a picture of goal-directed behaviour which was sufficiently

complicated, as pointed out by Dr Greenberg, to require conscious intellectual effort. The only evidence possibly raising a doubt whether the appellant's mind was capable of controlling his actions, was that of Dr Teggin.

Cross-examination revealed that the theoretical possibility he postulated did not distinguish between voluntary and involuntary loss of control. The very analogy he offered in support of his theory reveals this. The subsequently remorseful wife-beaters he speaks of, do not generally beat their wives in the presence of other adults. But the court does not have to take judicial cognizance of this fact. Asked whether the appellant would have been able to control himself had a policeman been present, Dr Teggin's answer was that the presence of the policeman would have put the appellant

> "into a different mental state than he was in actual fact when there wasn't a policeman there".

Having conceded on more than one occasion that appellant's goal-

directed behaviour showed impaired control rather than total loss of control, his belief that the appellant "could not stop himself seems to be founded primarily on the fact that the appellant's conduct was so completely out of what he perceived to be the appellant's character.

Dr Greenberg's evidence had already undermined the logic of this conclusion. The circumstances in which the appellant reacted were themselves bizarre. One cannot say what his "normal" reaction should be in a totally abnormal situation. In any event, the picture painted by even such evidence as we have of the appellant's personality, is hardly that of a patient saint. His making sexual advances to what were to him total strangers, because he was ostensibly "avoiding conflict" having left Celeste apparently because she did not treat him with the affection or respect he thought his due, is hardly responsible conduct. The reason he gives for carrying his pistol with him wherever he goes, namely that he has no gun-safe at home, is only a small part of the truth. That would be no reason for having it constantly fully loaded, moreover with spare

ammunition hidden in the headrest of his car. His own version of the incident at the nightclub when he challenged the bouncer shows him to be not averse to conflict. His wanting to take his pistol with him into the disco thereafter was also irresponsible.

In short the totality of the evidence and more especially the direct testimony as to the appellant's conduct immediately before, at the time of, and immediately after the shooting leads to the natural conclusion that would have followed had the point not been specifically raised at the plea stage. That conclusion is not customarily spelled out, being taken for granted, namely that a sane adult despite anger and having consumed liquor, has criminal capacity. The appellant did not himself testify that he was seriously intoxicated, or unable to control himself. The purely theoretical defence evidence adduced was and is no cause for any doubt as to the correctness of the customary common-sense finding. The State accordingly discharged its onus on this issue.

The appellant had a second string to his bow. His counsel argued

that the State failed to establish that the appellant's conduct was in any way causally related to Yolanda's death.

Dr Fowler's evidence made it clear that the wound in the top of her head was incompatible with her having been shot by someone standing outside the car. Advocate Webster submitted that the trial court misdirected itself in rinding it to have been

> "reasonably possible that the shot went off in the course of the struggle between the accused and Shaun for possession of the pistol"

which would have constituted negligence on the part of the appellant. This was pure speculation, he urged; and it equally "reasonably possible" while Shaun was on his own trying to remove the pistol from where he had stuck it inside his trousers.

In my view the trial court can here also not be faulted, save in that it described its inference as to what occurred as merely a "reasonable possibility". It will be remembered that the evidence was that shortly before the fatal shot was fired Shaun was behind the wheel of the car

with Yolanda's head on his lap. He had the gun in its holster stuck into the front of his trousers. The appellant after his assault on Brooke and Yolanda shouted "Where's my gun" and returned to the car. The scientific evidence established that Shaun also had handled or been in the close vicinity of the firearm when it was fired, and the appellant was seen outside the car with it in his hand immediately after the first shot went off. Shaun who was sober and "passive natured" had no reason whatever to handle the gun other than to prevent the angry appellant from achieving his expressed intention, of getting the gun. The conclusion arrived at by the trial court was inevitable.

Finally, we were urged to interfere with the sentences imposed so as to replace effective imprisonment with a totally suspended sentence combined perhaps with community service, or correctional supervision. The appellant is a first offender. Society does not require to be protected against him. He is no common criminal, requires no rehabilitation, acted with significantly diminished responsibility at the critical time, and was

accepted by the trial judge to be "a peace-loving, law-abiding, decent and hardworking person" who has shown sincere remorse. We were referred to a number of cases in which persons found guilty of murder were not incarcerated: S v HARTMANN 1975 (3) SA 532 (C) 537C-G; S v MAYER 1985 (4) SA 332 (ZHC); S v CAMPHER 1987 (1) SA 940 (A); S v WIID 1990 (1) SACR 561 (A) and S v MAYEKISO 1990 (2) SACR 238 (E).

The court a quo gave due weight to the many mitigating factors apparent from the record. The individual sentences imposed were

1. 4 years imprisonment, of which 2 conditionally suspended, in respect of Yolanda's death;
2. 8 years, 4 suspended for the murder of Shaun;
3. 1 year on each of the two counts of attempted murder, i.e. of Brooke and Randall;
4. 6 months in respect of the charge under Act 75 of 1969.

As mentioned earlier, an order that the effective periods of imprisonment

are to run concurrently results in a total of 4 years.

The trial judge carefully weighed all relevant factors and other sentencing options, deciding on effective imprisonment as set out above. The cases to which we were referred are all distinguishable. Apart from other factors, in each of those there was a special relationship between actor and (the single) victim. There was no suggestion that Shaun was in any way involved in the deception practised on the appellant by the transvestites, nor that there was anything morally defensible, as it were, in his having been chosen as a victim. It has been said time and again that the determination of an appropriate sentence is a matter that lies peculiarly within the discretion of the trial judge. It cannot be said that he erred in his view that a non-custodial sentence would not take adequate account of the gravity of the appellant's misconduct or satisfy the natural indignation of society at such conduct. Included in "society" must be also Shaun's relations, and Brooke whom the appellant had not found offensive at the time when he discovered, at the beach, that

Brooke was a man, and who had to undergo two operations to repair the damage caused him by the appellant.

The appeal against the convictions as well as the sentences, is dismissed.

L VAN DEN HEEVER CONCUR: E M GROSSKOPF JA) STEYN JA)