Case No 241/95
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

JOHN VERNEY CUNNINGHAM APPELLANT

and

THE STATE RESPONDENT

CORAM: VAN HEERDEN, VIVIER et SCOTT JJA HEARD: 20 FEBRUARY 1996 DELIVERED: 14 MARCH 1996

J U D G M E N T

SCOTT JA/...

SCOTT JA:

The appellant, an unmarried accountant in his late thirties, was charged in the regional court with one count of murder, one count of attempted murder and three contraventions under s 118 of the Road Traffic Act 29 of 1989. The charges arose out of a collision on 6 March 1993 between a motor vehicle driven by the appellant and two cyclists at the intersection of Main road and Steenberg road, Retreat, in the Cape. One of the cyclists died of his injuries; the other has been left with a paralysed arm. The statutory offences related to the appellant's failure to stop immediately after the collision and his failure to ascertain the nature and extent of the damage and the injuries sustained in the collision. The defence raised at the trial was one of so called "sane automatism". It was contended on behalf of the appellant that at the time of (the collision and immediately thereafter he was acting in a state of automatism and that the

prosecution had failed to prove a voluntary act on his part of the kind required for criminal responsibility. The trial court rejected this defence but found that while the appellant had been negligent he had not acted intentionally as alleged by the State. On the count of murder he was accordingly convicted of culpable homicide, but acquitted on the count of attempted murder. He was also acquitted on the three statutory counts on the basis of his confused condition following the impact which was a severe one. He was sentenced to 3 years correctional supervision in terms of s 276(l)(h) of the Criminal Procedure Act 51 of 1977 and in addition to 4 years imprisonment conditionally suspended for 4 years. In terms of s 55 of the Road Traffic Act his driver's license was suspended for 2 years.

On appeal to the Cape Provisional Division the conviction was confirmed but the sentence was altered by the substitution of a period of 2 years suspended imprisonment for the 4 year period imposed by the

regional magistrate. In addition, the court a quo added a proviso to the order suspending the appellant's driver's license, authorising him to apply after 3 months for the cancellation of the suspension order "on proof that he has fully recovered his mental health". With the necessary leave the appellant appeals to this Court against his conviction of culpable homicide. There was some doubt whether, in addition, leave had been granted against the sentence as altered, but on the assumption that it had, Mr Veldhuizen who appeared for the appellant in all three courts, abandoned the appeal against sentence. In my view he was correct in doing so.

The collision and the manner of the appellant's driving were not in dispute. Where the collision occurred, Main road runs from approximately north to south. Steenberg road runs from east to west and joins Main road on its western side to form a "T" intersection. For a short distance on the southern side of the intersection Main road has two lanes

for northbound traffic; the left lane is for traffic turning left into Steenberg road; the right lane is for traffic travelling north through the intersection. Similarly, on the northern side of the intersection Main road has two lanes for southbound traffic; the right lane being for traffic turning right and proceeding west into Steenberg road and the left lane being for traffic proceeding south. The intersection is controlled by traffic lights.

On 6 March 1993 at about 6.20 am the vehicle driven by the appellant approached the intersection from the south travelling at a speed which the witnesses described as being in excess of the speed limit. The traffic lights were red for vehicles travelling in Main road. There was one stationary motor car in the right hand lane on the southern side of the intersection. On the opposite side of the intersection two cyclists were in the right hand lane waiting for the lights to change before proceeding up Steenberg road. (There were other cyclists and a motor car in the left lane.)

The appellant hooted and then proceeded to overtake the stationary motor car and continue through the intersection on the incorrect side of the road and against the red light. His vehicle collided with both cyclists in the right hand lane. The deceased's left leg was ripped off with the impact, leaving the appellant spattered with blood. The vehicle returned to its correct side of the road and continued on for several hundred metres before moving again onto its incorrect side of the road and apparently colliding with a refuse bin.

When the police arrived on the scene the appellant was out of his motor car and was being held down by a number of bystanders, presumably to prevent him from leaving the scene. The appellant fiercely resisted their efforts to restrain him. With much difficulty the police managed to handcuff him and bundle him into the police van. While this was being done the appellant shouted and swore at them. According to one

of the policemen on the scene the appellant appeared to be confused and unable to explain what had happened. Once in the van he lay on his back and kicked the roof shouting to be let out and laughing. In due course he was taken to the police station where he appeared to quieten down. From there he was taken to the district surgeon who examined him at 8.20 am. He was found not to be under the influence of alcohol and subsequent analysis of a blood sample taken at the time revealed the absence of any alcohol. The district surgeon observed nothing abnormal in the appellant's behaviour in the course of his clinical examination.

At about midday the investigating officer, Detective Bean, took a written statement from the appellant. He said the appellant was anxious to make the statement under oath. This, however, Mr Bean refused to permit as he felt it might prejudice the appellant; He described the appellant as being careful and precise when making the statement. He

stood next to Mr Bean to ensure that what he said was written down correctly. At no time did he complain that he could not remember what had happened. According to Mr Bean he appeared quite normal. I shall return to the appellant's statement in due course.

In his evidence the appellant testified that he had no recollection of the accident whatsoever. He said that his first recollection after leaving Hout Bay, where he had gone in the early hours of the morning, was that of finding himself in the police van. His account of the preceding events was briefly as follows. For some weeks he had carried a heavy burden at work which he had found particularly stressful; so much so that he had decided to stay at home on the 4th and 5th of March in order to relax. On the evening of 5 March he went out for a drink with a young lady whom he had met only a short while before. After collecting her at her flat in Cape Town they went to a tavern where he had a single drink.

He described his companion's behaviour as "odd" in that she left him sitting alone for a long period while she chatted to her friends. (She in fact gave evidence for the State and turned out to be a Mrs Cronje although she had given another name to the appellant.) They thereafter went to a club in Newlands of which the appellant was a member. He said that he was embarrassed by her behaviour which he found inappropriate. She drank too much and eventually the waiter refused to serve her more liquor. He said this caused him to become highly agitated and they left the club and went to his flat in Kenilworth. He felt very tired and wanted to go to bed. He said he offered to get her a taxi home or to take her home himself after he had had a rest. He said he left her in the lounge and went to bed. At about 2.30 am he was woken up by a telephone call from a security firm because his burglar alarm had gone off. He went back to sleep but was again awakened by the telephone. This time it was an ex-boyfriend of Mrs

Cronje who told the appellant that she had come to his flat in Wynberg and that she had been molested. The appellant testified that the impression he gained was that the caller thought that he, the appellant, had molested Mrs Cronje. This apparent accusation caused him to become very upset and agitated. Shortly thereafter - and it was then about 4 am - the ex-boyfriend arrived to fetch Mrs Cronje's keys which she had left in the lounge. He explained to the appellant that it was not suggested that it was he who had molested Mrs Cronje but that this had occurred while she was on her way to Wynberg. He also told him that Mrs Cronje was what he described as a "high class" prostitute. According to the appellant this information caused him to be even more upset as he had taken her to his club and they had been seen together.

The appellant explained that because he had not eaten he decided to go to a restaurant in Rondebosch. There he had something to

eat and two soft drinks. As he still felt extremely upset and agitated he decided to go to Hout Bay in the hope of being taken on as a member of the crew on a fishing vessel for a single trip. He explained that he had done this before and that he had found that it helped him to relax. He was, however, unable to find a fishing vessel going out to sea and he decided to go back home. He testified that his last recollection before finding himself in the back of the police van was actually leaving Hout Bay in his motor car. Had the appellant taken the shortest route to Kenilworth, ie over Constantia Nek, he would not have had any reason to drive in Main road, Retreat. He was unable to explain why he should have been there, save possibly that he had taken a wrong turning or that he had taken the long route around Chapman's Peak and through Fish Hoek.

In support of the defence of "sane automatism" much reliance was placed on the opinion of Dr Quail, a practising psychiatrist of Cape

Town, who gave evidence on behalf of the appellant. In his view the most plausible explanation for the appellant's behaviour was automatism. This view, however, was not shared by professor Zabow who is the principal specialist psychiatrist at Valkenburg hospital and who gave evidence on behalf of the State. In his opinion the inference of automatism was not justified.

The magistrate accepted the opinion of Professor Zabow as being more consistent with the facts and, as he expressed it, "more in line with the common sense approach". On behalf of the appellant both in this Court and the court below it was argued that the magistrate had erred in doing so and that there was at least a reasonable possibility that on the morning in question the appellant had acted in a state of automatism.

Before turning to deal in more detail with the differing opinions of the psychiatrists in the light of the facts (which were largely

common cause) it is appropriate to make certain general observations regarding the legal principles applicable in matters of this kind. Criminal responsibility presupposes a voluntary act (or omission) on the part of the wrongdoer. Automatism therefore necessarily precludes criminal responsibility. As far as the onus of proof is concerned, a distinction is drawn between automatism attributable to a morbid or pathological disturbance of the mental faculties, whether temporary or permanent, and so called "sane automatism" which is attributable to some non-pathological cause and which is of a temporary nature. In accordance with the presumption of sanity the onus in the case of the former is upon the accused and is to be discharged in a balance of probabilities. Where it is sought to place reliance on the latter, the onus remains on the State to establish the voluntariness of the act beyond a reasonable doubt. See S v Mahlinza 1967(1) SA 408 (A) at 419 A - C; S

vCampher 1987(1) SA 940 (A) at 966 F -I; S v Trickett 1973(3) SA 526 (T) at 530 A - 3D.

In discharging the onus upon it the State, however, is assisted by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily. Common sense dictates that before this inference will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged actus reus and, if involuntary, that this was attributable to some cause other than mental pathology. See S v Trickett supra at 532 G - 533 A, 537 D,- F. It follows that in most if not all cases medical evidence of an expert nature will be necessary to lay a factual foundation for the defence and to displace the inference just mentioned. But ultimately it is for the court to decide the issue of the

voluntary nature or otherwise of the alleged act and indeed the accused's criminal responsibility for his actions. In doing so it will have regard not only to the expert evidence but to all the facts of the case, including the nature of the accused's actions during the relevant period. See S v Kalosoropoulos 1993(1) SACR 12 (A) at 21 i - 22 a; S v Potgieter 1994(1) SACR 61 (A) at 72 h - 73 b.

Professor Zabow first saw the appellant on 30 March 1993, ie some three weeks after the collision. The appellant told him that he was not sure which route he had taken from Hout Bay but that he remembered hooting and seeing cyclists in front of him. He said that he realised that he had hit more than one; that his first thoughts were to go to the police station and that he realised that there was blood on his clothes which had come through the sun-roof. He told Professor Zabow also that his motor car stopped after it had hit something on the right hand side of the road and

that he remained sitting in the car. He said that the next thing he recalled was being in the police van with his arms handcuffed. This account of the incident was in certain significant respects similar to the statement which he gave to Mr Bean a few hours after the event. The relevant portion of the statement reads:

> "At approximately 06:30 I was approaching the intersection on Main road.
>
> I noticed a group of cyclists some of whom were crossing my line of vision. I sounded my hooter to warn them but unfortunately hit something. I had tried to avoid hitting those crossing the intersection when I had hit something.
>
> The thought crossed my mind at that moment to go to the nearest Police station in case there had been serious injuries. I stopped my car further down the road when I realized I was of a mind not suitable for driving."

When the appellant subsequently consulted Dr Quail on 25 May 1993, ie about two months after he had been seen by Dr Zabow, he told him that his first recollection after leaving Hout Bay was that of being

locked up in the back of a police van. This, as previously indicated, was also his evidence at the trial.

Dr Quail suggested two possibilities to explain this contradiction. The one was that at the time of making his statement and consulting with professor Zabow the appellant had reconstructed what had happened on the basis of what he had been told. The other was that he did have a sketchy recollection of the accident but because it was so unpleasant he had subconsciously expunged it from his memory, resulting in what is known as psychogenic amnesia.

The first possibility seems to be remote. In relating to professor Zabow what had happened the appellant distinguished between what he could recall and what he could not. He said, for example, that he did not recall going through the intersection. Also, his account of the thoughts that he said passed through his mind, if he was being truthful,

would seem inconsistant with reconstruction. The same is true of obvious inaccuracies in his account to the police.

If the appellant was being truthful (and neither psychiatrist thought he was not) the only acceptable explanation for his subsequent inability to recall what he had told professor Zabow is psychogenic amnesia. But once this is accepted it follows that subsequent to the collision the appellant did not have total amnesia in relation to the critical period. Professor Zabow testified that typically amnesia is present in the case of automatism; that the automatism is normally of a relatively short duration (unlike the period suggested in the present case) and that the reactions of hooting and overtaking the vehicle ahead indicated an awareness and a degree of cognitive functioning which in his experience were inconsistent with automatism.

Dr Quail, on the other hand, expressed the view based on a

textbook to which he referred that a patchy and confused recollection is not necessarily inconsistent with automatism. Similarly, he did not think that conduct such as hooting and overtaking excluded his diagnosis of automatism as being the likely explanation for the appellant's conduct.

But the real difficulty confronting the automatism theory is the total lack of an adequate stimulus or "trigger mechanism" which would ordinarily be required to give rise to such a condition. Dr Quail conceded that he was at a loss to identify a "trigger mechanism" but felt that this did not preclude his diagnosis in that, given the appellant's emotional state at the time, even something as innoxuous as the frustration of not getting a place on a fishing vessel may have been sufficient. This hypothesis was not put to professor Zabow in cross-examination and the court was not afforded the benefit of his opinion on the matter. Nonetheless, it strikes me as fanciful. Leaving aside physical trauma or some pharmacological cause,

experience tells one that people do not in the absence of an organic cause (in which event the automatism would not be "sane") lapse into a state of automatism without some emotionally charged event of extraordinary significance to the individual concerned which serves as a trigger. If this were not so, "sane automatism" would be a common occurrence and not extremely uncommon as Dr Quail acknowledged it to be. Indeed, most people are exposed from time to time to emotional knocks of some kind or other.

It was not in dispute that the appellant had been under stress at work; nor was it disputed that he found the behaviour of Mrs Cronje at his club embarrassing. Later he was upset by the suggestion (based on a misunderstanding which was subsequently rectified) that he had molested Mrs Cronje. He was also upset by the information that Mrs Cronje was allegedly a prostitute. But all this did not cause him to lapse into a state

of automatism. He was able to describe in detail how he had driven to a restaurant in Rondebosch and what he had had to eat and drink. Thereafter he drove to Hout Bay via Kloof Nek which would have taken some while. Admittedly he was unable to get a position as a crew member on a fishing boat but his inability to do so could hardly have been of great importance to him. He himself made no mention of being frustrated or in any way upset by this. It was also suggested on behalf of the appellant that there may have been something else that happened at Hout Bay that triggered off the automatism. But there was no basis for such a suggestion. The appellant made no mention of any such incident although he recalled actually leaving Hout Bay in his motor car.

In my view, therefore, there was no evidence of an event which could have served as a trigger for automatism. The absence of such an event was emphasized by professor Zabow in his evidence and weighed

heavily with the trial court in accepting the conclusion of professor Zabow and rejecting that of Dr Quail.

The principal if not the only factors relied upon in support of a diagnosis of automatism were (i) the appellant's apparent amnesia and (ii) his untoward and out of character behaviour.

As far as the amnesia is concerned, it was not disputed that there were any number of possible causes, and in the absence of other indicators its presence did not justify a diagnosis of automatism. As to the behaviour of the appellant and in particular the manner of his driving, the evidence revealed that the appellant had a history of hypomanic behaviour for which he had been treated as a voluntary in-patient at Valkenburg hospital in 1984. He had also received treatment at about this time as a private" patient of Dr Quail. The condition on that occasion had been triggered by the stress associated with the writing of examinations. When

the appellant was seen at Valkenburg hospital shortly after the collision symptoms of early hypomania were again observed. According to professor Zabow the behaviour of the appellant on the night of 5 March, ie the night before the collision, was consistent with such a condition. The evidence of Mrs Cronje as to what transpired that night differed from that of the appellant in certain minor respects which are not material to the questions in issue. What is of significance, however, particularly from a psychiatric point of view, is her evidence that the appellant's behaviour differed from when she had seen him last. She described him as talking "figures and stuff" as if she were not present and "like a robot". Commenting on this, professor Zabow thought it indicated a lack of adequate concentration on what was happening around him. Indeed, the fact that he should have been talking "figures" suggests a preoccupation with his problems at work.

Prior to the collision, therefore, the appellant was emotionally

upset; he was showing early symptoms of hypomania, and had shortly before been preoccupied with his problems to the extent of not adequately concentrating on what was happening around him. In these circumstances the fact that the manner of his driving should have been out of character is understandable.

To sum up, as far as the manner of the appellant's driving immediately prior to the collision is concerned, no factual foundation was established which was sufficient to displace the inference of voluntariness or, in other words, sufficient to establish a reasonable possibility that he drove in a state of automatism. It follows that in my view the appellant was correctly convicted of culpable homicide.

The position immediately after the collision is different in that it appeared that the appellant sustained a blow on the head in the collision which professor Zabow considered may have resulted in a slight retrograde

amnesia. In these circumstances and because the magistrate considered that the appellant may have been in a confused state immediately after the impact he was acquitted of the statutory charges relating to his failing to stop immediately.

The appeal is dismissed.

D G SCOTT

VAN HEERDEN JA

VIVIER JA

- CONCUR