REPUBLIC OF SOUTH AFRICA

IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

In the matter between:

GREGORY ERIC HENRY APPELLANT

and

THE STATE RESPONDENT

Coram : SCOTT, STREICHER JJA et NGOEPE AJA
Heard : 9 NOVEMBER 1998

Delivered : 27 NOVEMBER 1998

JUDGMENT

SCOTT JA:

The appellant is a television technician in his late thirties. He was charged in the Cape Provincial Division (Van Zyl J sitting with assessors) with two counts of murder and one count of pointing a firearm in contravention of the Arms and Ammunition Act 75 of 1969. The first count of murder related to the killing of the appellant's ex-wife ('Mrs Henry') and the second to the killing of his ex-mother in law ('Mrs Symon"). The complainant in the alleged statutory offence was Mrs Symon's fiance, Mr Thomas Davids. It was not in dispute that on Sunday 29 January 1995 the appellant shot and killed both women and immediately thereafter pointed a firearm at Mr Davids. The appellant nonetheless pleaded not guilty. The defence raised was one of so-called 'sane automatism'; it put in issue whether the appellant had committed in relation to each count a cognitive or voluntary act capable of giving rise to criminal responsibility. This defence was rejected by the Court a quo and the appellant was accordingly found

guilty on all three counts. He was sentenced to imprisonment for an effective period of 10 years. The present appeal, with the leave of the Court a quo, is against the conviction only.

The events leading up to the fatal shooting and the pointing of the firearm are largely common cause. I summarize them as briefly as the circumstances permit.

The appellant and Mrs Henry were married when he was 21 years old and she 18. Because she was pregnant she could not complete her schooling. The marriage was happy for the first five years. Thereafter their relationship deteriorated. Mrs Henry went to night school in order to matriculate. According to the appellant his wife acquired a number of male friends and this led to tension between them, particularly as he found himself having to look after the children and do the housework while she went out pursuing her own interests. After some years - it is not quite clear when - Mrs Henry instituted an action for divorce on

the grounds of his alleged adultery. The appellant testified that the allegation was based on Mrs Henry's misconstruction of an incident which occurred involving the appellant and a young female who was then boarding with them. He insisted that the allegation was without substance. For a while the appellant and Mrs Henry lived separate lives. Thereafter they reconciled. They sold their house in Mitchel's Plain and moved in with Mrs Henry's mother, Mrs Symon, who lived in Batts Road, Wynberg. After 18 months they moved to Ottery where they bought a house. The marriage remained unhappy. According to the appellant Mrs Henry pursued her career interests at the expense of family life. He was left at home with the children. He said that whenever there was an argument - and there were many - her verbal skills were such that she always appeared to be the winner. This, he said, caused great frustration on his part. In April 1991 Mrs Henry again instituted divorce proceedings, alleging inter alia that the appellant had assaulted her "on numerous occasions". This was denied by the appellant in his evidence; he said

that he had assaulted her only on two occasions.

The couple were finally divorced in October 1993. Mrs Henry and the three children moved in with her mother in Wynberg. The appellant remained on in the former common home in Ottery. In terms of a settlement agreement made an order of Court Mrs Henry was awarded custody of the three minor children, Kelly, Tamyn and Robyn. The appellant's rights of access included the right to have the children with him every alternate weekend. Initially all three daughters spent alternate weekends with the appellant. After a while the elder girls, Kelly and Tamyn, frequently chose to stay at home rather than spend the weekend with their father. According to Kelly, who was 17 at the time of the trial, her father had assaulted her in front of a friend and she had lost respect for him. On the other hand, the youngest daughter, Robyn, who was 9 at the time of the trial, maintained a close relationship with her father. Mrs Henry did not discourage her from doing so and appears to have adopted a flexible approach to the question

of access. She permitted Robyn to spend every weekend with the appellant if she so wished. At one stage Mrs Henry even allowed her to remain with the appellant for a continuous period of some 6 weeks. Generally, however, when Robyn spent the weekend with him, he was required to bring her back home on Sunday evening at about 6 pm in winter and a little later in summer.

After the divorce the appellant and Mrs Henry saw little of each other. There was the occasional altercation; once over a school uniform which the appellant had purchased and once over the payment of maintenance. On each occasion the dispute between them appeared to have been resolved. Generally each maintained a distance from the other and the communication between them, as far as this was necessary, tended to be via the children. When the appellant collected the girls (or Robyn alone) on a Friday he would park outside and hoot for them to come out. When he brought them back on a Sunday evening he would simply drop them off in the street. Both formed relationships with members of the

opposite sex. The appellant was in fact living with another woman at the time of the shooting.

In the meantime and on 30 June 1993, ie some 3 months before the divorce, the appellant had acquired a firearm. It was a 9 mm Parabellum automatic pistol. He said he needed it for protection as the nature of his work was such that on occasions he had to venture into areas which he regarded as being dangerous. It was his habit to carry the weapon on his person at most times. It was kept in a holster on the left side of his body with the butt facing forward so as to enable him to draw the weapon with his right hand.

Robyn spent the weekend commencing Friday, 27 January 1995 with the appellant. On Sunday, 29 January they had lunch with a neighbour. In the late afternoon Robyn asked the appellant if she could spend the night with him so that he could drive her to school the next day. Normally she had to use public transport. He dialled Mrs Henry's number on his cellular telephone and handed it

to Robyn for her to ask her mother if she could spend the night. The answer was no; Mrs Henry wanted Robyn to come home. According to the appellant Robyn was determined to spend the night and at one stage started to cry. He said that it was not unusual for Robyn at the end of a weekend to want to remain with him and she would frequently come up with various excuses as to why she should not go home. Normally he would insist that she go home, telling her that he would see her again the next weekend. On this occasion, however, he decided to telephone Mrs Henry himself and repeat the request; but on hearing his voice, she put the phone down. The appellant then decided to drive with Robyn to Wynberg in order to reason with Mrs Henry and collect Robyn's school uniform so that she could go straight from the appellant's house to school the next morning. On the way to Wynberg Robyn again telephoned her mother with the same request. Once again the answer was no. The appellant said that he had had no more to drink than a beer at lunch time and a double whisky in the late afternoon.

9 As usual the appellant had his firearm with him. It was in the holster which had a safety strap. This had to be unclipped before the weapon could be drawn. It was fully loaded and ready to fire once the safety catch had been released.

On arriving at Mrs Symon's house the first thing the appellant did was to go and look into the window of Mrs Henry's bedroom. On finding her not there and for some reason which is not entirely clear, he went back to his car and moved it to a position directly opposite the front door. He then went to the door and knocked or rang the bell. Robyn accompanied him but he told her to go and wait in the car, which she did. After some while Tamyn came to the door. The appellant told her to ask her mother whether Robyn could spend the night and requested her to fetch Robyn's school uniform. Tamyn retreated into the house and did not return. After about 2 or 3 minutes Kelly came to the door and the appellant repeated what he had said to Tamyn. Again nothing happened. After a

further two or three minutes the appellant called Mrs Henry's name and then walked into the house. The appellant's version of the events up to this stage was largely confirmed by a neighbour, Mrs Herringer, who observed what was happening from her nearby stoep.

It was by then about 8.50 pm and already dark. Mr Davids was sitting chatting with Mrs Symon in the latter's bedroom when he heard the footsteps of someone walking into the house. The next thing he heard was Mrs Henry scream: 'what are you doing in the house, you know you mustn't come into the house?'. Shortly thereafter he heard her scream 'mummy, mummy, mummy'. Gunshots followed. Mrs Symon left the room to investigate. There were more shots. Mr Davids stood up to go and see what had happened, but before he could get to the door the appellant came in. He pointed a firearm at Mr Davids with his finger on the trigger. The appellant said nothing. After a few seconds he turned and left the house. Mr Davids went into the passage where he found the bodies of both Mrs

Henry and Mrs Symon. Mrs Herringer, who of course was outside, had heard Mrs Henry shouting at the appellant to leave the house. Like Mr Davids she did not hear the appellant's voice. However, Kelly, who fled with Tamyn into the back garden, testified that she heard both her mother and her father arguing with each other.

It was common cause that 10 shots had been fired from the appellant's firearm. Three struck Mrs Henry in the area of the chest and abdomen. Another three struck Mrs Symon also in the area of the chest and abdomen. The remaining 4 shots were not accounted for.

The only person able to testify as to the appellant's level of consciousness at the time of the shooting was, of course, the appellant himself. The account he gave in his evidence is the following. He said he entered the house and walked along the passage past the door of Mrs Symon's bedroom on the way to Mrs Henry's bedroom. Before he got there Mrs Henry came out of the bathroom

dressed in her lingere. She immediately shouted at him that he was to leave the house and that he did not belong there. He said he tried to explain to her that Robyn wanted to spend an extra night with him, but she continued to shout at him, ordering him out of the house. He said he remembered her trying to push him out and making a remark to the effect that she was not scared of the firearm. He also remembered her grabbing at the holster and a struggle taking place. In his evidence-in-chief he described what happened next in the following terms:

> 'I was in such a rage and after that I just heard this loud noises zinging in my ears and there was shouting going on...'

At another stage in his evidence he said he also heard banging noises. What he remembered after this, he said, was looking for the exit, because he knew something must have taken place, and storming by mistake into Mrs Symon's room where he observed a grey-haired man (Mr Davids). However, when asked whether he remembered seeing Mrs Symon that night he replied that when he

turned around in the passage he saw 'this blur coming towards [him]'. It is clear from the evidence that this had to relate to something which occurred prior to him going into the room and seeing Mr Davids.

As to what happened thereafter, the appellant testified that he ran outside to his car and found his index finger stuck in the slide of the pistol. I interpose that when it was demonstrated to him in cross-examination that this was not possible (there were two bullets in the chamber) he said that his finger was stuck in front of the trigger. This too was demonstrated to be impossible. He said that on reaching the car he was in tears and he told Robyn that he thought he had shot her mother. In her evidence Robyn volunteered that she heard the appellant say on the stoep "I should have done it a long time ago". This was denied by the appellant. When the denial was put to Robyn in cross-examination and it was suggested by counsel that maybe she was wrong, she agreed. It was common cause that the appellant then drove to a relative in Plumstead where he demanded a

cigarette. He told the relative that he thought he had shot his wife. He was shaking and visibly upset. From there he drove to Hout Bay where, he explained, he normally went when he had to 'sort things out'. There he telephoned his superior who advised him to go to the police station. He followed his superior's advice and was taken into custody.

It is apparent from the aforegoing that the basis upon which the appellant sought to avoid criminal responsibility was not lack of capacity in the sense that he could not distinguish between right and wrong or, if he could, that he was incapable of acting accordingly, (cf S v Campher 1987(1) 940 (A) at 966 F - I) but that at the critical time he was 'acting' in a state of automatism attributable to a cause other than mental pathology. It is trite law that a cognitive or voluntary act is an essential element of criminal responsibility. It is also well established that where the commission of such an act is put in issue on the ground that the absence of voluntariness was attributable to a cause other than mental

pathology, the onus is on the State to establish this element beyond reasonable doubt. (See for eg S v Kalogoropoulos 1993(1) SACR 12 (A); S v Potgieter 1994 (1) SACR 61 (A); S v Kensley 1995(1) SACR 646(A); S v Cunningham 1996(1) SACR 631(A).) As was pointed out in the Cunningham case at 635j - 636b, however, the State in discharging this onus -

> '. 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.'

It has been repeatedly emphasized in the past that defences such as non-pathological automatism require to be carefully scrutinized. (See for eg S v Potgieter, supra at 73 c.) By the very nature of things the only person who can give direct evidence as to the level of consciousness of an accused person at the

time of the commission of the alleged criminal act, is the accused himself. His ipse dixit to the effect that his act was involuntarily and unconsciously committed must therefore be weighed up and considered in the light of all the circumstances and particularly against the alleged criminal conduct viewed objectively. It is not sufficient that there should merely have been a loss of temper. Criminal conduct arising from an argument or some or other emotional conflict is more often than not preceded by some sort of provocation. Loss of temper in the ordinary sense is a common occurrence. It may in appropriate circumstances mitigate; but it does not exonerate. On the other hand, non-pathological loss of cognitive control or consciousness arising from some emotional stimulus and resulting in involuntary conduct, ie psychogenic automatism, is most uncommon. The two must not be confused. Generally speaking expert evidence of a psychiatric nature will be of much assistance to the court in pointing to factors which may be consistent, or inconsistent as the case may be, with involuntary conduct which is non-

pathological and emotion-induced. These, for example, may relate to such matters as the nature of the emotional stimulus which it is alleged served as a trigger mechanism for the condition, or the nature of the behaviour or aspects of it which may be indicative of the presence or absence of awareness and cognitive control.

The task of the Court is not made easier by what was described in evidence as the relatively common occurrence of psychogenic amnesia, viz the subconscious repression of an unacceptable memory. While it would appear from the evidence to be generally accepted that automatism results in amnesia it follows that the converse is not true. In other words, amnesia is not necessarily indicative of automatism. An accused person therefore may quite genuinely have no subsequent recollection of a voluntary act giving rise to criminal responsibility. Here, too, expert evidence may be of assistance. Ultimately, however, it is for the Court to decide the true nature of the alleged criminal conduct which it will do not

only on the basis of the expert evidence but in the light of all the facts and the circumstances of the case.

Against this background I turn to the only issue in the appeal, viz whether the appellant was 'acting' in a state of psychogenic automatism at the relevant time and accordingly could not commit an act or acts giving rise to criminal responsibility. Mr Reyner van Zyl, a clinical psychologist of Cape Town who gave evidence on behalf of the appellant, was of the view that the appellant was indeed in such a state at the time of the shooting. Dr Jedaar, who was called by the State in rebuttal, was of the opposite view. The latter is a psychiatrist employed by the department of psychiatry at the University of Cape Town and a consultant in the forensic unit at Valkenburg Hospital.

It appears from the evidence that there was no difference of opinion of any significance between Mr van Zyl and Dr Jedaar as to the nature of the stimulus or trigger mechanism that was required to induce a state of psychogenic

automatism. There had to be some emotionally charged event or provocation of extraordinary significance to the person concerned and the emotional arousal that it caused had to be of such a nature as to disturb the consciousness of the person concerned to the extent that it resulted in unconscious or automatic behaviour with consequential amnesia. A moment's reflection, I think, reveals the extreme nature of the stimulus that is required. If the position were otherwise, psychogenic automatism would not be the extremely uncommon occurrence that it undoubtedly is.

Dr Jedaar testified that there was nothing that he could find in the appellant's account of what had been said on the fatal evening or in the appellant's account of his own emotions at the time to suggest a stimulus of the kind required to trigger a state of automatism. Nor could he find any indication of a heated emotional tension between the ex-spouses in the preceding months which could have related directly to any of the events mentioned by the appellant as having

occurred immediately prior to the shooting and which notionally could have served as a trigger mechanism. He considered that the strife between the appellant and Mrs Henry would have been at its greatest at the time of the dissolution of the marriage. He pointed out that since then some 15 months had elapsed. During this period there had been little contact between them and the disputes that had arisen had been satisfactorily resolved.

Leaving aside for the moment the appellant's own account of his emotions, the events preceding the shooting do not readily suggest a situation in which the necessary stimulus might be expected to arise. During the 15-month period the appellant had formed a relationship with another woman and was living with her. Mrs Henry had obviously adopted a flexible and indeed a commendably mature attitude to the question of the appellant's rights of access. Certainly as far as Robyn was concerned, she had allowed the appellant a great deal more access than was provided for in the Court order. On the evening in question, however,

she had made it absolutely clear that she wanted Robyn home that night. There was school the next day. Her attitude was hardly unreasonable and the appellant could not have thought otherwise. Nonetheless, he persisted with his attempt to have Robyn spend the night with him. He knew that he was not welcome in Mrs Symon's house. It was his custom when collecting or delivering the girls to remain outside in the car. On this occasion, however, he went to the front door and into the house. His purpose was to confront Mrs Henry. Her reaction in screaming at him to leave the house was hardly unpredictable and could have come as no surprise. In these circumstances it would seem unlikely that what she said would have provided the stimulus necessary to result in a state of automatism on his part. Mr van Zyl appreciated the difficulty, but suggested that what triggered the appellant's state of automatism was his intense frustration arising from Mrs Henry's refusal to let him have Robyn for the extra night. He stressed that the refusal had to be seen in the light of the appellant's over-involvement with

Robyn and the fact that she cried and was insistent that she spend the extra night with him. This explanation strikes me as most unconvincing. For one thing, it overlooks the appellant's own evidence that it was not unusual for Robyn to want to stay with him when it was time to go home at the end of the weekend. He said that she would offer various reasons for not wanting to go home but that he would insist that she did, as he wished to 'stick by the rules'. It follows that the frustration experienced by the appellant at having to return Robyn on the night in question was not something with which he was unfamiliar and with which he had not coped many times before.

It was also contended that the appellant had 'a reservoir of resentment' towards Mrs Henry which had built up during the marriage and that this, together with his feelings of inferiority, had somehow contributed to the trigger mechanism giving rise to automatism. This, too, is unconvincing. Quite apart from the lapse of 15 months the appellant himself conceded that during the marriage he had had

arguments with his wife which were more serious and more heated than the one on the fatal evening. There was no evidence to suggest that anything was said which touched upon some emotional vulnerability of the appellant other than his relationship with Robyn.

The absence of a trigger mechanism becomes all the more apparent when regard is had to the appellant's own account of his emotions at the time. In his evidence in chief (in the passage quoted above) he described himself as being in 'a rage'. In cross-examination, however, he insisted that he was 'calm' when walking into the house. He said that when Mrs Henry shouted at him to leave, he asked her in a 'nice way' if Robyn could spend the night with him. His last recollection, he said, was Mrs Henry saying something to the effect that she was not scared of his firearm and a struggle taking place. This is certainly not indicative of an overwhelming emotional stimulus of the kind required to induce a state of automatism. Initially Dr Jedaar confined his evidence to certain general

observations regarding automatism as he had not interviewed the appellant. At the request of the appellant's counsel the case was later postponed to enable Dr Jedaar to interview the appellant and investigate the matter further. Dr Jedaar subsequently testified that when he interviewed the appellant the latter told him that he recalled grappling with Mrs Henry for possession of the firearm and that he feared that if she gained possession of it she would use it against him. He next heard a receding female voice and a loud banging in his ears. In other words, as Dr Jedaar explained, his subjective experience immediately prior to the shooting was not one of anger or rage as initially suggested, but one of fear. This was not only at variance with the appellant's initial version but was wholly inconsistent with an emotional stimulus of a kind that would induce automatism.

There was much debate both in cross-examination and in argument as to whether the appellant's conduct at the relevant time could be said to have been goal-orientated in the sense of evincing conscious behaviour. If there was

consciousness there could, of course, be no automatism. The difficulty is that unconscious behaviour may appear to be goal-orientated particularly if the conduct in question is something that the automaton has done repeatedly before. On behalf of the appellant it was contended that the shooting by the appellant was behaviour of such a nature. This was disputed by Dr Jedaar. He pointed out that before the shooting the appellant would have had to unfasten the safety strap of his holster, release the safety catch of the pistol and then aim first at Mrs Henry who was shot three times and then aim at Mrs Symon who was similarly shot three times. Even if one disregards the unfastening of the safety strap and the release of the safety catch, the fact that both women were shot is a clear indication in my view of a conscious act of aiming and firing. This is particularly so if regard is had to the evidence of Mr Davids which was to the effect that there had been a lull in the shooting during which Mrs Symons left the room to go and investigate. In these circumstances the shooting was clearly not something that fell into the

category of what Mr van Zyl referred to as 'habitual conduct'. The inference is overwhelming that Mrs Symon was shot while she blocked the appellant's path to the front door. This probably explains why she was shot; the appellant was by then intent on leaving the house.

Another aspect of the appellant's behaviour upon which the State relied in order to demonstrate that he was acting consciously was what Dr Jedaar described as 'avoidance behaviour'. By this he meant the appellant's hurried departure from the scene which on his own version took place even before he had found out what had happened. Dr Jedaar considered this to be wholly inconsistent with the behaviour of a person who had just had an episode of automatism. He testified that he would expect such a person to be in a bewildered and confused state. The appellant, on the other hand, was clearly intent on leaving the scene as soon as possible. His behaviour was that of a person who knew what he had done.

The appellant testified that he had no recollection of the shooting or

for that matter pointing his firearm at Mr Davids. But on his own version he told Robyn immediately on reaching the car that he thought that he had shot Mrs Henry. He said that he had repeated this to a relative in Plumstead a short while later and again to a police officer in Hout Bay. If the appellant had indeed no recollection of the shooting and did not know what had happened there would have been no reason for him to believe that he had shot Mrs Henry. His explanation that he merely assumed this cannot be accepted. On his version, for all he knew, he may have done no more than fire shots into the ceiling. His conduct after the shooting, including his surrender to the police, was clearly that of a person who appreciated what he had done. Two possible inferences arise. The one is that the appellant's evidence that he had no recollection of the shooting was false. The other is that this memory had been subconsciously repressed, ie his amnesia was psychogenic. In either event he would have had, at least for a while, a memory of the shooting and this would be inconsistent with psychogenic

automatism.

The Court a quo was unimpressed by the appellant as a witness and rejected his evidence as false. In doing so it found that he had made a 'clumsy attempt' to fit his evidence 'into the framework required for the defence of automatism'. There was, however, no need for the State to have to establish that the appellant was dishonest in professing to have no memory of committing the offences with which he was charged. If, as postulated above, his amnesia was psychogenic, he could well have believed that he was being truthful. But that would not exonerate him. As I have already indicated, not only is there an absence in the evidence of an identifiable trigger mechanism but the conduct of the appellant both at the time of the shooting and immediately thereafter is indicative of conscious behaviour which is inconsistent with automatism. I interpose that this conclusion is not dependent upon the acceptance of Robyn's evidence to the effect that she heard the appellant say as he left the house, 'I

should have done it a long time ago', and it is accordingly unnecessary to deal with the arguments advanced with regard to it. In the result, no factual basis was established which served to displace the natural inference of voluntariness arising from the appellant's apparently goal-directed behaviour. Expressed differently, the evidence adduced in the court a quo did not establish a reasonable possibility that at the relevant time the appellant was in a state of automatism. It follows that in my view the appellant was correctly convicted on all three counts.

The appeal is dismissed.

- Concur