CASE NO.253/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

APPELLANT DENVER JOSHUA FRANCIS

AND

RESPONDENT THE STATE

BEFORE: SCHUTZ JA, MELUNSKY AND MADLANGA AJJA

HEARD: 9 MARCH 1999

DELIVERED: 18 MARCH 1999

SCHUTZ JA

J U D G M E N T

SCHUTZ JA:

[1] On 27 February 1995 the appellant fired two shots at Allan Gobey at or

near the latter's home in Syringa road, Woodlands, Pietermaritzburg. The first passed close to his head. The second struck him in the left elbow. Some hours later the appellant shot Gobey's daughter Melanie and killed her. The debate in the appeal is concerned principally with the appellant's state of mind on the evening. He contends that he acted in a state of non-pathological criminal incapacity ("sane automatism") with the results that either he was unable to distinguish right from wrong; or, if he could, that he was unable to control his actions. The court *a quo*, Shearer J sitting with assessors, held that the first shot fired at Gobey constituted an assault with intent to do grievous bodily harm, whilst the second shot might have been fired accidentally. The fatal shot fired at Melanie led to a murder conviction, the form of intent being *dolus eventualis*. The sentence for the murder was 14 years imprisonment and for the assault six months imprisonment.

[2] With leave granted by the trial judge the appellant appeals against the convictions and the sentences. Apart from resisting the appeal, the State contends that on the murder charge it has proved intent in the form of *dolus directus;* and that the firing of the second shot at Gobey was deliberate and not accidental and amounted to the crime of attempted murder, which was the crime charged, and not merely assault with intent . The State asked that the

sentence on the Gobey conviction should be increased because of the substitution of the more serious offence. At the request of the court counsel argued the applicability of s 1 of the Criminal Law Amendment Act 1 of 1988, in the event of a finding that the appellant was not criminally liable whilst his faculties were impaired by alcohol to the extent contemplated by that section.

[3] The following passage in the judgment of Kumleben JA in *S v Potgieter* 1994 (1) SACR 61 (A) at 72 j - 74 b (which includes a quotation) is a useful starting point:

> " '. . . On the other hand, an accused person who relies on non-pathological causes in support of a defence of criminal incapacity is required in evidence to lay a factual foundation for it, sufficient at least to create a reasonable doubt on the point. And ultimately, always, it is for the Court to decide the issue of the accused's criminal responsibility for his actions, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period'
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> "The reliability and truthfulness of the alleged offender is in the nature of the defence a crucial factor in laying such a foundation. This fact, and hence the need to closely examine such evidence, has been stressed in earlier decisions of this Court. . . . The *ipse dixit* of an accused person that the act was involuntarily and unconsciously committed, based on the evidence tendered in support of such assertion, is to be accepted unless it can be said that such evidence 'cannot reasonably be true.'
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> "The need for careful scrutiny of such evidence is rightly stressed. Facts which can be relied upon as indicating that a person was acting in a state of automatism are often consistent with and may, in fact be the reason for, the commission of a deliberate, unlawful act. Thus - as one

> knows - stress, frustration, fatigue and provocation, for instance, may diminish self-control to the extent that, colloquially put, a person 'snaps' and a *conscious* act amounting to a crime results."

[4] By contrast with cases of pathological disturbance of the mental faculties, in cases of "sane automatism" the onus is on the State to establish voluntariness of the accused's act beyond a reasonable doubt: *S v Cunningham* 1996 (1) SACR 631 (A) at 635 I. But, as appears in the immediately following passage in the judgment in that case, in discharging that onus the State 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.

[5] Before embarking upon the appellant's version of events and the evidence of others which may support or contradict his evidence, three uncontentious facts may be mentioned. The appellant has an immature personality. He was obsessed with the deceased, with whom he had a discontinuous love affair. And on the night of the shooting he had had a great deal to drink.

[6] I do not propose to dwell at length on the relationship between the appellant and the deceased, because whatever view one takes of the niceties of their individual conduct, there can be no doubt that the appellant was strongly attracted by her, that he was possessive and jealous of her giving attention to

other men, that he felt that she sometimes played lightly with his ardour, leading him on only to let him down, all of which led to feelings of anger, despair and resentment, feelings sometimes fanned up by alcohol.

[7] He was born in 1970, so that he was 24 at the time of the shooting. He came from a broken home, and from an early age witnessed his father assaulting his mother, thus being yet another casualty of family violence, which is so often handed down from generation to generation. During 1990 he became a fireman. He met the deceased in 1992. She caused him to break with his girlfriend of the time. The deceased is not alive to give her account of the relationship. However, according to the appellant she would break off their relationship intermittently, only to entice him back each time. On an occasion at the Thistle Hotel the appellant slapped her face when she accused him of looking at another woman. More serious was an incident in October 1994 when she told him that it was none of his business that she had gone out with another man. He thereupon struck her several blows, leading to her suffering a black eye. He was so shocked at what he had done, so he said, that he took her to a police station and asked her to charge him. This she did on 1 October 1994, although she later withdrew the charge. He paid the account when she went to her doctor for treatment of her injuries. He phoned her father, Gobey, who told him to stay

away from his daughter. According to him he thereupon started drinking heavily and with a view to killing himself "took all the tablets I could find in the house", only to vomit them up. His mother gave an account of the pills in the house very different to his, and although she tried manfully (if I may be permitted this word) to change her story when a conflict with her son became apparent, there must be a question mark over this episode. What is established is that he twice consulted a psychologist, Mr Nursoo, in October 1994. Although Nursoo recorded that the visit was precipitated by thoughts of suicide, there is no mention of a failed suicide attempt. In the meantime the deceased telephoned him and the relationship was resumed. But the appellant no longer visited the Gobey home, because the deceased's father continued to be upset by the assault on her. In November 1994 the deceased attended the appellant's birthday party at his mother's home and gave him a ring. It was in that same month that he bought the 9 mm Parabellum pistol which was later to cause her death. Thereafter he made a practice of carrying it with him. In December 1994 the deceased telephoned him to say that she had to break off the relationship as her father was putting pressure on her to do so. They stopped seeing each other. When he then telephoned her she said that her father required her to take out a "peace order" forbidding the appellant from coming to the

house. Such an order was issued by the magistrate on 29 December 1994 and served on the appellant. Whether this was only the father's idea depends on the truthfulness of the appellant. The form used was one of some antiquity, as it warned that proceedings would be instituted in term of s 384 of Act 56 of 1955 in the event of further complaint.

[8] Despite the restraining order, at some stage in January 1995 the appellant went to the Gobey home, having first armed himself with Dutch courage. His object, so he said, was to obtain the return of a chain and a Galaxy card which he had previously given to the deceased. There was some conflict as to what exactly happened on this occasion. According to Gobey, upon the appellant's arrival the deceased locked herself in her bedroom and telephoned the police. They later arrived. She passed the peace order through the door and her father gave it to the policemen and asked the appellant to leave, as he was not supposed to be on his property. One of the policemen then took the appellant away from the front door. The appellant disputed some details, but agreed that "Later the cops arrived", and stated that "I told them that I wanted my chain and Galaxy card back from her which they gave me back and I left." This episode speaks for itself. Much more disquieting in the light of later events was evidence given by Gobey. He was asked whether there had been any earlier

indications of the aggression that the appellant displayed on the night of the shooting. He answered: “On several occasions [no date given] he told me that I am going to come home and cry because I am going to find him [the appellant] and Huggy [the deceased] dead in the room.” At the time he did not take these words seriously, because he supposed that the appellant, being a fireman, was learning to save lives not take lives. In cross-examination the appellant conceded that although he did not remember making such a statement, he could not deny that he had, and added “It is possible that I could have said that.” When asked why, he responded “Being angry I suppose.”

[9] Some two weeks after the incident involving the police the deceased telephoned him again. She told him not to be childish and bring back the chain and card. After a visit to the house in her father’s absence he invited her out to lunch. They went to Karkloof Falls. This was in February 1995. They started drinking beer. An argument broke out. She was upset about his drinking and about his pistol, which he had with him. She was worried about it, at which he laughed and told her that it was not for anything in particular, just for shooting birds. At this he took a shot at a tree. She asked him to get rid of the pistol, which he agreed to do. He later advertised it for sale, on 23 February 1995, but did not sell it. While still at Karkloof Falls, at her request they had sexual

intercourse again. After this she told him she was seeing one Reagan Braithwaite. The appellant said that if they were to go out again she would have to break with Braithwaite. She undertook to speak to him about it. (Like the deceased's, Braithwaite's version is also not known as he was dead by the time of the trial.) On 26 February 1995 the appellant picked her up and took het to Campdrift. There she told him that Braithwaite had refused to end their association, and that she felt the same. The appellant was "devastated" and went to his brother's home where he started drinking heavily. This continued for the rest of the day. We now approach the *dénouement*. The next day was to be the fatal day, 27 February 1995.

[10] On that day he met a friend and colleague at a barber shop. After eating some chicken they went to a shooting range to shoot. Whilst there the appellant bought some cartridges. After that a case of 24 cans of beer was bought. The rest of the day was devoted to drinking at the homes of two friends. Another case of beer and a bottle of brandy were bought. I do not intend attempting to trace the details of the drinking, because the State accepts that the appellant's blood alcohol level at the time of the fatal shooting was about 0.28 grams per 100 millilitres of blood. At a stage when the appellant was sitting on the toilet, one of his friends caused a shot to be fired from the appellant's pistol. This

annoyed him and an argument broke out. Thereupon the friends dispersed. According to the defence witness Gilbert, the appellant left in his own car at about 19h00. It is clear that everybody had had a good deal to drink. Gilbert said that he and the appellant chatted as they walked to his car, but the appellant was under the influence. There was a brandy bottle on the back seat but he could not say how full it was.

[11] The appellant's recollection of the events of the day as also of the evening to follow was, he said, patchy, which is consistent both with amnesia caused by alcohol and with an attempt to simulate such a state. There was not always consistency in his recollections of the day as conveyed to different persons at different times. Some of the details described above emanate from three of his friends, who gave evidence for him. However, he did remember the testy conclusion to the day's convivialities. Then there is a large patch. It will be recalled that he drove off from Gilbert's home at about 19h00. His car was later parked in the vicinity of, but not in front of the Gobey home. The distance between the two houses was about 2 kilometres. He claims to know nothing of how it got there. In his evidence he claimed that his next recollection was of *being inside* the home. According to Gobey this must have been some time after 20h30. The intervening period was presumably the one in which he

reached his final decision to enter the home. The resumption of recollection described in evidence (being inside the home) does not accord with what Dr Plankett noted he was told by the appellant, namely that he had no intention of visiting the deceased, but then found himself *outside* her home. Further he said that he remembered *entering the house* and seeing Gobey sitting on the couch. According to the appellant's evidence he remembered very vaguely sitting down in the lounge. Then nothing, until he found himself outside with Gobey and the deceased. He claims to have no recollection of what happened inside the house before the three found themselves outside. The only witness who describes what happened inside at this stage is Gobey. The trial court found him to be a good witness, uninfluenced in veracity by the strong resentment that he must have felt against the appellant. The appellant by contrast, so held the trial court, was not a good witness. Making due allowance for his version involving a sketchy memory of events, his demeanour, found the court, was unpersuasive. There is also a striking feature of his evidence - the absence of any expressions of remorse. Indeed Shearer J remarked that it was as if it was the deceased and not the appellant who was on trial. The result is that a shade of unreality is cast over much of his evidence. Shearer J also drew attention to the conflict in version between the appellant and his mother involving the attempted suicide

incident, already mentioned. There is no good reason to question the credibility finding adverse to the appellant either. But even without this finding, there is nothing to counter Gobey's version of what happened in the house.

[12] According to Gobey, when he got home at about 20h30 the deceased was already in pyjamas and her light was off. The front door was locked. Shortly afterwards, while he was watching television, the appellant suddenly appeared and sat down on the couch. He must have come in through the back door, which was a usual way of ingress. Presumably he had brought his brandy bottle and left it in the kitchen, as later evidence showed that he had the bottle inside the house. The appellant then asked "Where is Huggy"? Gobey responded "Denver, you are not supposed to be here. What are you doing here? You had better go." Gobey's evidence proceeded "When I told him that he said to me what have I got to say to him. It was his lawyer who was picking a fight with me." This was presumably a reference to the peace order. Gobey went to the television set, switched it off and walked towards the front door to open it to ask him to leave. At this the appellant got up, grabbed him, and threw him down on the couch. The appellant took his pistol from his trouser pocket and said "You thought I was fucking around." Next he cocked the pistol and a cartridge was ejected. He fired a shot towards Gobey's head. The bullet passed

close to his ear. Gobey's impression was that the appellant thought he had hit him, because the appellant then ignored him and started kicking down the deceased's bedroom door. When Gobey followed him into the bedroom after it had been forced open he found the appellant standing against the window holding a box which Gobey assumed contained cartridges. The pistol was on the bed and the deceased lay on the floor next to the wardrobe. Gobey tried to get between the pistol and the appellant, but the appellant, who was a much bigger man, again threw him aside. The deceased seized the opportunity to run out of the house. The appellant pursued her and caught her across the road. With his left arm around her neck he started pushing her back towards the house. Gobey tried to get between them, "But he just pushed me off again and that is when he fired the shot that hit me in the arm." The appellant fired with his free right hand. Under cross-examination Gobey said "he pushed me off and fired into my body. So whether he had the intention of killing me or not, I don't know." The bullet wound to his left elbow led to two operations and a 30% loss of use of his arm. Believing that he could do nothing more and that his life was in danger, Gobey ran bleeding from the scene, shouting that the appellant was going to kill his daughter. One of the neighbours called the police. Another neighbour, Mrs Hazel Louw, witnessed a part of the events that occurred

outside. The deceased screamed while the appellant hit her on the head with his fist. When Gobey tried to get her away from him the appellant "pushed him aside and shot at him." The appellant "carried on bashing her with the gun in his hand, he started bashing her on her head and was hitting her and kicking her." After a time she fell and the appellant carried her towards and into the Gobey house. Some time later the police arrived in force and the siege of the house (which contained only the deceased and the appellant at this stage) began. The post-mortem report showed patchy bruising of the whole of the deceased's scalp, apart from bruising on the left forehead and in the mid line upper/lower lip of the mouth.

[13] The appellant claimed to remember very little of the events that occurred outside. It will be remembered that his last prior recollection was that he was in the house and had sat down in the lounge. His evidence proceeds "The next I remember was being outside in the driveway . . . holding Melanie. Her father Mr Gobey being there . . . I remember the sound of a gunshot going off." Under cross-examination he became a little more expansive. He had held the deceased with his left hand. Gobey was there "and there was like a squabble." Asked if he remembered having his pistol, he replied "I remember the sound of a shot, so the gun must have been with me." When a closer description of the "squabble"

was sought he said there was "Just a commotion like Mr Gobey was trying to grab me." He did not remember if any of the three persons present had made a noise. The next thing he remembered was vomiting in the deceased's bedroom. She was also there.

[14] The deceased was now a hostage in her own home, which was being besieged by the police. Meanwhile the appellant was firing off shots intermittently, into the ceiling and through the bedroom window. Gobey later counted 16 bullet holes in the ceiling. Warrant officer Wessels (since deceased) crouched under the bedroom window and tried to talk to the appellant. Wessels asked him to surrender. The appellant's response was "Fuck you. I will not do that. Fuck you." Smit, a constable who was next to Wessels, could hear clearly what the appellant was saying. At a stage Father Müller, who knew the appellant, if not well, joined the police under the window and announced himself. All he earned for his pains was abuse of God, the church and its minister.

[15] At 22h30 the phone rang at the home of Mr Schnoor, the brother-in-law of the appellant. It was the appellant speaking with a slurred voice from the Gobey home. To quote Schnoor's words *"He just told me that he [had] shot Huggy's father and he is going to shoot himself and shoot her as well*." Quite

apart from his expression of future intention, the appellant here for the first, but not the only time, manifested an awareness that he had shot Gobey. The appellant then said that Schnoor should tell the appellant's sisters that he loved them and he loved Schnoor too. He put the phone down.

[16] Schnoor hastened to the scene, to find what he described as a war zone, with police all over. He joined Wessels at the window. The time was about 22h40 . Shots were being fired through the window. Before the appellant shot, he warned those outside of his intention to do so. Schnoor was accompanied by the appellant's brother, and another brother-in-law of Schnoor. The appellant responded to them, saying that he knew he was in trouble because he had already shot Gobey. This was the second time that he manifested this awareness. Indeed the appellant's impression seemed to Schnoor to be that he had killed Gobey. The relations asked Wessels what Gobey's injuries were. Wessels told the appellant what they were and that they were not too bad, but he did not seem to want to believe him, and insisted that the damage was done, so that there was nothing more he could do but take his own life. At some stage the appellant said that if he gave himself up the police would give him a hiding. He was afraid of this. The police were becoming irritated, but then the appellant was persuaded to let one of the family in, and he allowed the door to

be opened to Schnoor, who entered. While opening the door the appellant held the deceased. She opened the door. He held the pistol next to her. Schnoor pushed the door closed. The time was a little after 23h00. The appellant then retreated walking backwards into the bedroom, holding the deceased, with the pistol pointed at her. Schnoor followed.

[17] The deceased was dressed in jeans. Once in the bedroom she sat on the floor between the appellant's legs. He sat with his back to the wall, his pistol in his hand. There was a brandy bottle near him with an inch or inch and a half of fluid in it. The appellant told Schnoor to sit on the bed, which he did. The appellant then said to Schnoor that no one wanted to believe him as to how he felt about the deceased. He had told her what was going to happen and no one listened. He had spoken to her and she did not believe him, because every time he went out with someone else she would telephone him and try to get him away from his next girlfriend. The deceased then held him around the neck and told him that she did love him. She seemed to be afraid. He hit her on her head quite hard with the butt of the pistol and said that she was lying. He then asked Schnoor to pass him a cartridge box lying on the bed. Schnoor told him that it was empty, but the appellant insisted and Schnoor threw the empty box onto the floor in front of him. The appellant then noticed some loose rounds lying on the

bed and asked for them. Schnoor held them in his hand and tried to talk to the appellant, but the appellant again insisted, and Schnoor, somewhat fearful, threw them towards him. Some fell out of his hand when he fumbled, but he picked them up again and loaded them into the pistol's magazine. He drank from the brandy bottle, but this caused him to choke and he started vomiting. Thereupon he got up and said that it was about time that Schnoor left. The appellant said that there was no hope. Schnoor understood him to mean that he was going to carry out his threat. He moved towards the door, but Schnoor warned him not to stay up because there was a policeman at the bathroom window. Schnoor feared he would shoot the appellant. Schnoor said he was not going to leave as he had come for another reason. (In cross-examination a leading question was put to Schnoor to the effect that what he had said in chief was that it was the appellant, not Schnoor, who was to leave, in order to give himself up. Schnoor, readily compliant to cross-examination, agreed despite the plain incorrectness of the proposition. Such a version is quite contrary to the whole tenour of his evidence as well as his actual words.) However that may be, the appellant did sit down again as before and had another drink.

[18] Then, according to Schnoor, "he was getting tired because I could see he was not responding to anything else." Wessels from outside wanted to know

why everything was so quiet. The appellant vomited again and pushed the deceased away with his feet from where she was still sitting between his legs. After vomiting he was "actually dozing." Schnoor thought that this might be his opportunity to gain possession of the pistol. At this moment the deceased moved forward. The appellant seemed to get a fright and he joined his left hand over his right so that there were two hands on the pistol. The fatal shot was fired. The entrance wound was just underneath and to the back of the right armpit. The bullet penetrated the right lung and the jugular, to exit on the right side of the chin. It was argued that the path of the bullet was not consistent with a typical execution shot at the back of the head or neck, but Dr Ingles, the post-mortem doctor, agreed that if the deceased had suddenly leaned forward, the shot could have been aimed to go straight through the head or neck in execution style.

[19] The appellant then held the pistol to his right forehead. Schnoor entreated "Denver, don't do that." The appellant sat with his mouth open. Schnoor went forward, took the pistol and left the house with it. The police burst in. Smit said that the time was about 00h05. Schnoor's estimate of the time that he had been in the house was 30 to 45 minutes. (Smit estimated it as 20 to 30 minutes). According to Schnoor the police kicked and punched the

appellant and hit him with a rifle butt. He shouted to Schnoor "You see, this is what I told you. They are going to hit me . . .. This is what happens."

[20] Schnoor said that he thought that the appellant's hands were handcuffed before he came out. This could not have been so if we are to accept the evidence of two clearly independent witnesses, as the trial court did. The one was the neighbour, Mrs Casey Louw. She said that as the appellant came out he put his fist up. Father Müller , who gave evidence before her, described the appellant's action as a black power salute of sorts. The fact that this first mention of the gesture came out by chance during cross-examination, in itself negates the suggestion that this evidence was concerted. There is no reason for disturbing the trial court's finding that the appellant acted in this manner. Particularly I reject the submission that Father Müller may have fabricated the evidence because the appellant had joined another congregation.

[21] I accept the police evidence that the appellant was taken hastily from the front door to the police van because of the hostile crowd. According to Smit the appellant was run out with a policeman on either side. He was not dragged and he did not stagger. At the police station the appellant understood what was wanted of him when he gave his name and surname and handed over his personal possessions. Although Smit considered the appellant to be under the

influence of liquor, he did not appear to him to be drunk.

[22] To return to the appellant's evidence. I left him with his description of the "squabble" outside, followed by a recollection of vomiting in the deceased's bedroom. His version proceeds. He remembered seeing Schnoor at the door. He remembered the deceased being in her bedroom but did not remember seeing her face. The next that he remembered was being at the Loop Street police station, where someone put a tape on his hand and where policemen shouted at him that he was a murderer. He also remembered a desk and being placed in a crowded cell. After that he remembered speaking to his mother the next day. That is all. On the appellant's evidence he was not able to dispute at all Schnoor's version of the shooting. The trial judge observed that Schnoor was extremely sympathetic towards the accused, possibly because he was his brother-in-law; and that he agreed with virtually every suggestion made to him in cross-examination, even to the extent of agreeing that the fatal shot probably went off accidentally or as the result of a spur of the moment reflex.

[23] The trial court did not take into account the evidence of Mrs Joy Isaacs, an aunt of the deceased, who had also described how the appellant made a clenched fist salute as he emerged from the house. She had given further evidence that bears directly upon the appellant's motives and intentions when

sober. The reason for ignoring her evidence was not based upon its content or her demeanour, but because it might be inferred that she was hostile to the appellant. No doubt she was. She described how on an occasion in 1994 she was at a night club together with her niece, the deceased, who did not have a male escort. The appellant came over to Mrs Isaacs and asked her to take the deceased home. She asked him why, and he answered that he could not bear to be under the same roof as the deceased when they were not going out together, as he could not bear the thought of her being with someone else. He went on to say that if he could not have her, nobody else would. He would kill her first. She asked what he would gain by killing her and he answered that no one else would have her. How was he going to get away with it, she then asked? His response was that he would get very drunk and plead insanity. If the case were to go to court he had friends in high places and would get off. She then asked him why, if he loved the deceased so much, he tormented her so, and whether it was not a case of obsession rather than love. He said yes, he thought it was. The appellant was not smiling when he said these things. Mrs Isaacs did not know quite what to make of all this at the time. Her predominant thought was that the appellant was trying to frighten them, so that the deceased would be taken home, which Mrs Isaacs and her companion did not do. However, she

later warned the deceased to be careful of the appellant, as she did not trust him. She herself had nothing more to do with him. When he gave evidence the appellant agreed only with the first part of what Mrs Isaacs claimed had been said, namely that he had asked her to take the deceased home as he could not bear to be in the same place as her. Shearer J asked him why he should have made such a request, and he gave the strange answer: because he had arrived at the night club first. The rest of the conversation he denied, saying that it was a fabrication on Mrs Isaacs's part.

[24] The defence called several medical or technical witnesses. Much of their evidence was concerned with or based on the later agreed fact that at the time of the fatal shooting the appellant's blood alcohol level was about 0.28 grams per 100 millilitres of blood, which is a very high level. This figure had been derived from the testing of a sample taken from the appellant at the police station at about 03h30 on 28 February 1995. The reading for the sample was 0.21. The trial court paid little attention to these witnesses, because their conclusions were largely based on what they had been told by the appellant or his attorney. None of them had a command of the evidence led at the trial, particularly that of the state, which often placed a slant on the appellant's actions, intentions recollections and versions different from that which he had

put forward. I consider this view to have been justified. Something is to be learned from some of the evidence, but it is of no real help on the central questions in the case.

[25] Dr Dunn, who was called by the State, by contrast, sat through the whole trial. He was the principal psychiatrist at the Midlands Hospital complex. He listed various of the actions of the appellant which he said showed an awareness of what he was doing, were purposeful and some of them of some complexity. The barrage of shots showed a person who had been drinking and who was behaving in an unrestrained fashion, rather than one who had completely lost control of himself. He believed that the appellant was able to distinguish right from wrong, and that, even though he behaved in a disinhibited way, he was able to control his actions. He was confident of the fact that the appellant was aware that his actions could cause the death of the deceased. I do not propose giving further details of his reasons, because he speaks of things on which the court, in the end, will have to decide for itself. It should be added that this being a case of "sane automatism" there is no need of an expert to explain any actual pathology.

Count 2 - Murder

[26] I turn first to the murder count. Has the State discharged the onus, and if

so, in what form? The State has proved events that *prima facie*, at least, establish the appellant's awareness of what he was doing. Despite the drinking bout of the afternoon he was able to drive his car some two kilometres and park it a little distance from the Gobey house. There followed a series of deliberate actions aimed at getting Gobey out of the way and gaining mastery over the deceased, with the eventual object of denying her forever to any other man. These actions will be discussed below under the topic of premeditation. While this was happening he dialed Schnoor and conveyed a coherent message to him. Once the siege was under way he carried on a coherent, if disturbed, conversation with the police, two relations and a minister. When he fired out of the window he showed a nicety of distinction of victim by giving warning each time. Later, when he admitted Schnoor through the front door and retired to the bedroom he was careful to protect himself against police snipers by using the deceased as a shield. Then, he was able to explain to Schnoor what his plan was and why he had adopted it. He asked for a box of cartridges and when it was found to be empty he observed some loose ones, which he insisted be passed to him. Despite some fumbling he loaded them into the pistol. After all was over he was able to trot out between two policemen and give a sufficient account of himself at the police station. However drunk he was these are not the actions of

a man who had no or little idea of what he was doing.

[27] Concerning his ability to appreciate the wrongfulness of his actions, when he phoned Schnoor he mentioned that he had shot Gobey, when he conversed through the window he manifested a realisation that this boded trouble for him, and when he spoke through the window and later to Schnoor inside the house he expressed fear of punishment by the police. His appreciation regarding his conduct towards the deceased could not have been less.

[28] Given his poor credibility, so poor that his version must be rejected as being not reasonably possibly true, there is really nothing to stand against the inferences to be drawn from his conduct as to his appreciation of the nature and wrongfulness of his deeds.

Premeditation - Both Counts

[29] When one assesses the evidence to ascertain whether there was premeditation, a clear and consistent pattern emerges. Perhaps the clearest evidence is that of Mrs Isaacs. The trial court decided to leave it out of account. I am by no means persuaded that it was right to do so, but I will not decide whether to differ, because I consider there to be ample evidence without recourse to hers. Towards the end of 1994 the appellant bought a pistol and made a practice of carrying it with him. There can be no mistake about his

undisputed threats to Gobey that he was going “to find [the appellant] and [the deceased] dead in the room.” On the night of the shooting he entered the home with a loaded pistol, two magazines, a box of cartridges and a bottle of brandy. Almost immediately he menaced Gobey by saying “You thought I was fucking around” and firing a shot which went past his head. This is plainly a reference to his previous threats. His conduct in then leaving Gobey unattended while he battered down the bedroom door, after which he threw down the pistol on the bed, strongly suggests that he thought he had eliminated Gobey as a factor. When the deceased succeeded in fleeing he remorselessly pursued her outside and reduced her to captivity in a brutal fashion. When Gobey sought to intervene he was dealt with forcefully. The content of the phone call to Schnoor shows that he believed that he had shot Gobey (as he had) and expressed the intention of shooting the deceased and himself. Later, when Schnoor was inside the house with him, the appellant said that it was time that Schnoor left and that there was no hope. Schnoor understood this to mean that he was about to execute his threat. Earlier he had said that no-one wished to believe him as to how he felt about the deceased. When he fired the fatal shot he held the pistol with two hands, and the trajectory of the bullet was consistent with a typical execution shot, given the fact that the deceased had suddenly moved forward.

He then put the pistol to his head. Had it not been for Schnoor's entreaties he would presumably have fulfilled the whole design that he had been threatening for some time. Nor when he chose instead to live, was there any remorse at the terrible thing that had happened (that is, if the shot had been unintended). Indeed, when he emerged out of the front door he emerged a victor, in his own eyes.

Dolus Directus - Count 2

[30] I think the State is correct in its submission that the appellant should have been convicted on the basis of *dolus directus*. However befuddled he was when he fired the fatal shot, the shooting was merely the culmination of a design entertained for at least some hours. But I do not think that the conviction should be based only on the appellant's having continued drinking in order to steel himself to act in a state of hopeless drunkenness. Cf *S v Chretien* 1981 (1) SA 1097 (A) at 1105 G - H. Up to the end he could control himself, just as he controlled several other people. Although his powers of self-control were substantially diminished, his actions show that they were not lost. The appeal against conviction on the murder charge must fail.

Sentence - Count 2

[31] Nor do I think that there is any basis for our altering the sentence of 14

years imprisonment. We were addressed in the customary way to the effect that the trial court had not paid sufficient attention to factors personal to the appellant, such as his clean record and his undoubtedly unhappy home background. But no misdirection has been shown. On the other hand, the crime was not only premeditated but brutal, and manifested the highly objectionable feature of one person practically asserting ownership over another. The public is entitled to expect a heavy sentence. As far as drink is concerned (and a great deal was consumed), the trial court has already given the appellant credit for that. Bearing in mind also that I am of the view that *dolus directus* should have been found, I am of the view that the appeal against sentence on the murder charge (count 2) must fail.

Count 1 - Attempted Murder - Conviction

[32] As far as count 1 is concerned, a single count of attempted murder of Gobey was brought. There was no attempt to divide the charge so as to reflect the two shots separately. The trial court convicted the appellant of the offence of assault with intent to commit grievous bodily harm in respect of the first shot (inside the house). The trial court went on to say that the second shot may have resulted

from a purely reflex action when Gobey tried to pull his daughter away from the

deceased. On the evidence I can see no basis for such a finding. It was not the appellant's version, as he had no version. Gobey's evidence was that "he pushed me off and fired into my body." I do not think that his concession that he did not know if the appellant intended to kill him helps the appellant. Mrs Louw's evidence was that the appellant "pushed him aside and shot at him." The left elbow is not far from the heart and lungs. The effect of the evidence is, in my opinion, to show beyond a reasonable doubt that the appellant harboured *dolus eventualis* when he fired, wishing to get Gobey out of the way and reckless of where he shot him in order to do so. It is significant that the appellant's later utterances indicate that he believed that he had not merely shot, but also killed Gobey. In my opinion he should have been convicted of attempted murder in respect of this second shot. With regard to the trial court's finding that the first shot was fired more as a demonstration and without the intention of hitting Gobey (which finding is in my opinion suspect), even though such an act be a serious assault it cannot be assault with intent to commit grievous bodily harm, as the trial court found it to be. However, as there cannot be two convictions arising out of a single count, the assault conviction must fall away.

[33] Where an appeal court is convinced that a trial court, because of a wrong

finding of fact or law, convicted the appellant of a less serious offence than that which, in terms of the indictment, he should have been convicted of, the court of appeal has the power, in terms of s 322 of Act 51 of 1977, to alter the conviction accordingly: *S v E* 1979 (3) SA 973 (A). The State has asked us to do so, and in the light of the evidence already mentioned, I consider it incumbent upon this court to alter the conviction on count 1 to one of attempted murder of Gobey.

Count 1 - Sentence

[34] The circumstances relevant to sentence on count 1 are before us and the subject has been ventilated. In my opinion the sentence of six months imprisonment should be struck out and replaced with a sentence of three years imprisonment, of which two years are to run concurrently with the sentence on count 2. I bear in mind that the shooting of Gobey was not isolated from the murder of the deceased. The effective sentence will therefore be increased from 14 years and six months to 15 years imprisonment.

[35] In the light of the findings on both counts a consideration of s 1 of Act 1 of 1988 falls away.

Order

[36] The appeal against conviction and sentence on count 2 fails.

[37] The appeal against conviction on count 1 fails and the conviction is altered from one of assault with intent to commit grievous bodily harm to one of attempted murder. The sentence on count 1 is increased from six months imprisonment to three years imprisonment, of which two years is to run concurrently with the sentence on count 2.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
MELUNSKY AJA
MADLANGA AJA