THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 196/2001

In the matter between:

GRAEME MICHAEL EADIE

APPELLANT

and

THE STATE

RESPONDENT

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Coram: ***Olivier, Streicher and Navsa JJA***

Date of hearing: **19 February 2002**
Date of delivery: **27 March 2002**

Summary: **Defence of non-pathological criminal incapacity due to a combination of emotional stress provocation and intoxication – not distinct from sane automatism – test for non-pathological criminal incapacity – factors to be considered in evaluating veracity of defence.**

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JUDGMENT

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NAVSA JA:

[1] During the very early hours of the morning of Saturday 12 June 1999 on Ou Kaapseweg near Fish Hoek, the appellant assaulted Kevin Andrew Duncan ("the deceased") and beat him to death in circumstances described in popular language as road rage. The appellant stood trial in the Cape Provincial Division of the High Court, before Griesel J, on a charge of murder and on a charge of obstructing the ends of justice. In respect of the second charge it was alleged that after the commission of the murder the appellant disposed of a hockey stick which he used in the attack on the deceased so that it could not be found by the police, and further, that he attempted to mislead the police by falsely showing them a pair of jeans other than the blood splattered pair he was wearing at the relevant time. The appellant admitted that he assaulted and killed the deceased. His defence was one of temporary non-pathological criminal incapacity resulting from a combination of severe emotional stress, provocation and a measure of intoxication, thus placing in

dispute that at the material time he could distinguish between right and wrong and that he could act in accordance with that distinction. The appellant's defence was rejected and he was convicted on both charges. On the murder charge the appellant was sentenced to fifteen-years' imprisonment, five years of which were conditionally suspended. On the charge of obstructing the ends of justice the appellant was sentenced to imprisonment for 9 months. It was ordered that this sentence run concurrently with the sentence imposed in respect of his conviction on the murder charge. The judgment of the Court below is reported as ***S v Eadie (1)*** **2001(1) SACR 172(C)**. The appellant appeals, with the leave of the Court below, against his conviction on the charge of murder. The primary issue in this appeal is whether the appellant lacked criminal capacity at the time that he killed the deceased. Before us it was conceded on behalf of the appellant that at the relevant time he was able to distinguish between right and wrong. It was contested that he was able to act in accordance with that appreciation. It was submitted, before us, in the alternative, (in the event of a finding that the appellant did not lack criminal capacity), that the State failed to prove beyond reasonable doubt that the appellant had *dolus* in either the form of *dolus directus* or *dolus eventualis* and that it should be found that a proper verdict in the totality of the circumstances of the case is one of culpable homicide.

[2] It is well established that when an accused person raises a defence of

temporary non-pathological criminal incapacity, the State bears the *onus* to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this Court that:

(i) in discharging the *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;

(ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;

(iii) evidence in support of such a defence must be carefully scrutinised;

(iv) it is for the Court to decide the question of the accused's criminal capacity, 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.

***S v Calitz* 1990 (1) SACR 119 (A)** at **126 h- 127 c; *S v Wiid* 1990 (1) SACR 561 (A)** at **564 b – g; *S v Potgieter* 1994 (1) SACR 61 (A)** at **72 j – 73 h; *S v Cunningham* 1996 (1) SACR 631 (A)** at **635 i - 636 c; *S v Francis* 1999 (1) SACR 650 (SCA)** at **652 c – h**.

[3] I will in due course deal with the test for criminal capacity as laid down in this Court and with contributions by academic writers. In the course of this judgment I will consider whether the boundaries of the defence in question have been inappropriately extended, particularly in decisions of Provincial or Local Divisions of the High Court, so as to negatively affect public confidence in the administration of justice.

[4] At this stage it is necessary to consider the facts of the present case and the basis on which the Court below reached its conclusions. It is not disputed that at the time of the attack on the deceased the appellant was subjected to a number of stressors. He was experiencing financial difficulties, problems at work, tensions in his marriage and was in a depressed state. The events that led to the death of the deceased and the surrounding circumstances are largely common cause. There

is a dispute about the manner in which the assault was perpetrated, which is dealt with in the summary that follows.

[5] The appellant, presently 37 years old, is a keen sportsman and a competitive hockey player. On Friday 11 June 1999, accompanied by his wife, he attended a function of the Fish Hoek Hockey club held at the Holiday Inn in Woodstock, Cape Town. During the course of the night he consumed at least seven bottles of beer. After the function the appellant and his wife joined another couple for a late meal at a restaurant in Rondebosch, where he consumed at least two more bottles of beer and two Irish Coffees. In the early hours of Saturday morning the appellant and his wife drove home in their Volkswagen Jetta motor vehicle ("the Jetta"), stopping at his mother's house to pick up their two young children. They drove along OuKaapseweg in a southerly direction towards Fish Hoek. As they travelled home with the children asleep on the backseat they became aware of the headlights of a motor vehicle coming up behind them. The deceased was the driver and sole occupant of this vehicle, a Toyota Corolla ("the Toyota"). He drove right up to the Jetta, overtook them, and in the process flashed his headlights, which were on bright. The deceased then slowed down considerably. The appellant remained behind him for a short distance. When the deceased reduced his speed to approximately 40 kmph the appellant overtook him. The deceased increased his speed and once again drove up close to the Jetta's rear bumper, keeping his headlights on bright. The appellant accelerated but could not put distance between them. The Toyota overtook the Jetta once more and the process described earlier was repeated - the deceased slowed down and the appellant overtook him but could not get away. The appellant became angry and concerned about his family's safety. He stopped the Jetta at a set of traffic lights relatively close to his home. The Toyota stopped behind him. The appellant got out of the Jetta, took a hockey stick from behind the driver's seat, and walked towards the Toyota. At this point the appellant's wife drove off in the Jetta. The deceased remained seated behind the steering wheel of the stationary Toyota. The appellant initially intended to smash the Toyota's headlights. He changed his mind and decided to smash the windscreen. When the appellant got close to the Toyota the deceased opened the driver's door, prompting him to divert his attention from the windscreen and to lunge at the deceased with the hockey stick, which broke into two parts as it struck the vehicle. The appellant became extremely angry. He succeeded in opening the driver's door of the Toyota after it was kicked at him and closed again by the deceased. The appellant punched the deceased against the head whilst he was still in the Toyota and continued the assault by punching him repeatedly. He pulled the deceased out of the vehicle and into the road. The deceased fell. The appellant repeatedly and savagely stamped on the deceased's

head with the heel of his shoe. The appellant broke the deceased's nose by stamping on it with his heel.

[6] The appellant testified that whilst he was assaulting the deceased he could feel himself shouting but did not hear any sound. He could see some things clearly whilst others were blurred. He felt as if he was in a fish bowl. When he pulled the deceased out of the Toyota he felt no weight. In perpetrating the assault he felt that he was 'going, going, going'. He experienced these sensations from the time that the hockey stick broke. The appellant could nevertheless recall and relate what happened in the detail set out above.

[7] Mr Graham Hill ("Hill"), a motorist who drove past the scene witnessed at least part of the attack on the deceased and testified in support of the State's case. He supplied a slightly different version of the assault, testifying that the appellant used the hockey stick as a weapon, jabbing it at the deceased whilst he was still seated in the Toyota.

[8] The appellant testified that after he assaulted the deceased he did not realise where he was. His wife returned to the scene a short while after her initial departure and repeatedly called his name without receiving a response. The appellant eventually heard his wife call his name and walked to the Jetta. His wife drove him home in silence. After the appellant arrived at home he decided almost immediately to return to the scene. There was no one else at the scene. He established that the deceased was dead and unsuccessfully attempted to dial an emergency number on his cell-phone. Soon thereafter a tow-truck driven by Mr Jan Eksteen ("Eksteen") arrived at the scene. Eksteen saw that the jeans worn by the appellant was blood splattered. The appellant told Eksteen that he was at the scene attempting to assist the deceased, deliberately creating the impression that he was an innocent bystander. The police arrived a short while later and the appellant repeated his explanation for being at the scene. He supplied the police with his personal particulars and departed, but not before surreptitiously removing the hockey stick from the scene. He disposed of the stick by throwing it into bushes some distance away. Later, he was requested by the police to return to the scene to point out the position of the hockey stick. He was also requested to bring along with him the blood splattered jeans he had on earlier. He returned and could of course not point out where he had left the hockey stick. He presented the police with jeans different from the pair he wore at the time of the assault on the deceased. Eksteen pointed this out to the police, resulting in the appellant eventually disclosing the truth. He was arrested and thereafter gave his full co-operation to the police. He took the police to the place where he had disposed of the broken hockey stick. Only one part of the stick was recovered.

[9] Blood-alcohol tests conducted on the appellant, the results of which are

uncontested, revealed that his blood-alcohol level at the time of the assault was in the region of 0,15 grams/100 ml. A post-mortem examination of the deceased revealed that his blood-alcohol level at the time of death was 0,17 grams /100ml. Both blood-alcohol levels are significantly beyond the legal limit. The post-mortem examination established that the deceased sustained significant fractures of the facial bones and skull. The deceased died as a result of these injuries, which, according to Dr Van der Heyde who conducted the post-mortem examination, were caused by the application of a considerable degree of blunt force.

[10] The appellant sought to persuade the Court below that an incident that occurred in Johannesburg during 1990 played a part in precipitating the assault which led to the deceased's death. I set out a summary of his version of that incident. The appellant and a friend who were in Johannesburg on business, found, upon their return to their vehicle in a parking lot, that they were parked in by another motorist. When that motorist eventually arrived he drove off without an apology. The appellant and his friend drove after the offending motorist to seek an explanation for his behaviour. The other motorist was unrepentant. There was an exchange of verbal abuse and offensive gestures. In a sudden twist the other motorist ended up pursuing the appellant and his friend, flashing his lights at them. The appellant's vehicle struck the pavement and he was forced to stop. The other motorist confronted and assaulted the appellant. Within a short while other vehicles and people surrounded the appellant and his friend. One of the persons who arrived on the scene was dressed in a police uniform. The others appeared to be policemen in civilian dress. The appellant was assaulted by the policemen and rendered unconscious. He sustained a fractured cheekbone, a broken nose, a dislocated jaw and a number of bruises and abrasions.

[11] To complete the historical background it is necessary to record that during 1986, after a term of border duty as a national serviceman in the army, the appellant suffered a mental breakdown - he held a firearm to his chin and held people at bay. In consequence he was admitted to 1 Military Hospital and was assessed as suffering from an adjustment disorder with mood and behavioural changes. Psychometric testing revealed compulsive traits, poor impulse control and a potential for destructive behaviour. He received no treatment to address this condition and the results of the tests were not conveyed to him.

[12] I turn to deal with the evidence in the Court below, of a psychologist and two psychiatrists who all conducted interviews with the appellant and who were supplied with the background and historical details set out earlier in this judgment. Mr Stephen Lay ("Lay"), a psychologist employed at Valkenberg Hospital's forensic unit, testified in support of the State's case. He assessed the appellant as someone who bottled up his emotions and who had personality problems, which

gave rise to difficulties in his employment, family and other relationships. Lay thought it highly unlikely that the incident in Hillbrow in 1990 played any part as a trigger or otherwise in the appellant's assault on the deceased. There were no indications that it resulted in a post- traumatic stress syndrome in the appellant. On the contrary, the appellant was emphatic that in assaulting the deceased he was motivated by anger and that the anger was caused by the fact that the deceased had attempted to run him off the road. Lay accepted that the intake of alcohol during the time preceding the assault on the deceased played some role in the appellant's conduct.

[13] Lay considered it important that the appellant approached the Toyota with the intention of perpetrating a violent act. His actions were rational, purposeful and goal-directed. The appellant had the "cognitive wherewithal" to realise that the deceased had fallen after the first blow and had been rendered unconscious. His assertions of being disoriented after the assault on the deceased should be seen against this background. Lay thought it relevant that the appellant had a full recall of the events in question yet stated that he was disoriented after the event and could not hear his wife calling him. Lay was unwilling to concede that the appellant had "lost control" at the time he perpetrated the assault on the deceased. He stated that this expression which is not a clinical term is used much too loosely - it is vague and too general. Even though Lay stated that the question of whether or not the appellant had criminal capacity at the relevant time was debatable, it is clear from his evidence as a whole that he held the view that the appellant exercised poor impulse control. Lay did not accept that the appellant lacked criminal capacity when he assaulted and killed the deceased.

[14] Dr Sean Kaliski ("Kaliski"), a psychiatrist and head of the forensic psychiatric unit at Valkenberg Hospital also testified in support of the State's case. In his view the appellant was able to appreciate the wrongfulness of the acts perpetrated by him and to act accordingly. It is clear from his evidence that he is sceptical of the defence in question. In ninety percent of cases in which he testified the defence was the same as the one raised in the present case. In his experience the defence has never been successfully established - he conceded that this conclusion was based on an assumption that courts accepted his view on the validity of the defence. Kaliski saw no difference in a defence of sane automatism and the defence asserted in the present case and went on to describe the characteristics of sane automatism. A person who acts in a state of sane automatism would typically have been subjected to a great deal of stress producing a state of internal tension building to a climax which in most cases is reached after the person concerned has endured ongoing humiliation and abuse. The climax is triggered by an event unusual in its intensity or unpredictable in its occurrence.

When one acts in this state one's cognitive functions are absent. This means that actions are unplanned and one is unable to appreciate surrounding events. Acts perpetrated in this state may appear to be purposeful but should typically be out of character. When the period of automatism has passed the person concerned comes to his senses, is bewildered and horrified by the results of such actions and lends assistance to the victim. There would be no concerted effort to escape from the scene. Persons acting in this manner usually claim amnesia.

[15] Kaliski commented on the appellant's claim that he lost control over his physical acts as follows. If the appellant did not know what he was doing his actions would have been less goal-directed. He would have been flailing about indiscriminately and the deceased would have been struck by chance. The appellant's assertion that he "lost control" must be carefully examined. The expression itself is used too loosely. It is common for people to lose their temper and to commit regrettable acts when they should have known better. An example is that of a sportsman who commits a blatant foul in full view of a referee. The appellant did not show any signs of a post-traumatic stress syndrome following on the incident in Johannesburg in 1990. There were no recurring thoughts, nightmares or flashbacks related to that incident supportive of this assertion. Even though the appellant had in the past not engaged in acts involving the degree of violence seen in the attack on the deceased, he nevertheless had a history of engaging in regrettable conduct and acting impulsively. After the attack on the deceased the appellant did not show signs of true disorientation because he eventually responded to his wife's shouts and found his way to the Jetta. The appellant and his wife took their children home before he returned to the scene. This indicates that he had presence of mind. The appellant would have been more convincing had he not made an attempt to deceive the police. The appellant was subjected to provocation and other stressors but faced no more than scores of people who do not resort to this kind of behaviour. The sensations experienced by him during and immediately after the assault are not unusual in persons who are extremely angry.

[16] Kaliski accepted that courts have held that in certain circumstances a combination of factors such as stress, provocation and the disinhibiting effects of alcohol may cause a person to lack criminal capacity. His experience, however, led him to conclude that temper and rage disinhibits people but does not rob them of control. Kaliski stated that he may be willing to concede the validity of a defence of non-pathological criminal incapacity due to stress and provocation in the face of compelling facts.

[17] Dr Ashraf Jedaar ("Jedaar") a psychiatrist employed at Valkenberg Hospital's forensic unit from 1992 - 1999 and presently in private practice, testified

in support of the appellant's case. In his view the appellant's description of the sensations experienced by him during the attack on the deceased is indicative of an altered state of consciousness, referred to in psychiatry as a dissociative state. It indicated a heightened emotional state, which affected his cognitive functions and led to an inability to control his behaviour. I quote the following part of his evidence:

> "So although there was a perception or at least a recognition that there was an injury inflicted on the deceased, he was unable to control the continued assault on the deceased due to his disturbed cognition."

[18] Jedaar considered it important that the appellant was concerned about the safety of his family. Jedaar was of the view that whilst the deceased was pursuing him the appellant re-experienced the event that took place in Hillbrow during 1990. He took issue with Kaliski and stated that a defence of sane automatism differs from the defence asserted by the appellant, in that a person acting in a state of sane automatism has an absolute absence of cognitive control due to intense emotional arousal whereas the appellant had intact but disturbed cognition due to emotional factors. Jedaar was of the view that the appellant's purposeful, goal-directed and well-co-ordinated behaviour masks the fact that his cognition had been disturbed.

[19] The essence of Jedaar's conclusions is that given the stressors operating on the appellant, the effect of the alcohol consumed by him, his personality and the provocation by the deceased, he reached a point where his emotional state was such that his actions were involuntary. Jedaar conceded that in this heightened emotional state the appellant would have been able to make decisions about what

and whom he wanted to attack. According to Jedaar the appellant lost his power to make decisions from the time that the hockey stick broke due to the perceived threat from the deceased. This was the trigger that deprived him of the power to make decisions. Jedaar stated, without substantiation, that from that moment on the appellant was unable to change his decision.

[20] Jedaar accepted that the success of the appellant's defence depended on the court's acceptance of his evidence that he was unable to control his actions at the relevant time. Jedaar conceded that persons who have not had their cognitive ability disturbed might well experience the sensations experienced by the appellant. He accepted that if a person was enraged he or she could be concentrating so heavily on perpetrating an assault that external stimuli such as being called by name would be excluded. Jedaar conceded that in the absence of the disassociative sensations experienced by the appellant his actions are consistent with conscious decision making. He accepted that there was nothing exceptional about the depression and anxiety experienced by the appellant. Jedaar expressed the view that the event that occurred in Johannesburg in1990 had to be viewed as part of the totality of circumstances in order to assess whether the appellant lacked criminal capacity at the relevant time.

[21] Counsel for the state referred Jedaar to his evidence in another case in which he testified that it is only in the context of mental illness that a person can be driven by an irresistible impulse. He attempted to distinguish his evidence in the present case by stating that the appellant was acting with his cognitive faculties intact but distorted. According to Jedaar the assault flowed from the appellant's heightened emotional state, not from a conscious decision. However, Jedaar accepted that the appellant's detailed description of the assault perpetrated by him negatives any suggestion of automatism.

[22] Griesel J, at **178 a - b** of the judgment in the Court below, referred to the "confusion" between the defence of temporary non-pathological criminal incapacity and sane automatism. He dealt with the view adopted by writers like Snyman in ***Criminal Law*** (**3rd ed)**, at **54**, **152** and **153** that sane automatism and temporary non-pathological criminal capacity are separate and distinct defences. With reference, *inter alia*, to ***S v Francis***, *supra*, at **651 h,** where Schutz JA equated non-pathological incapacity to sane automatism, the learned judge concluded that the distinction might be one without a difference. Griesel J states

the following at **178 b**:

> "At the same time, however, it is clear that in many instances the defences of criminal incapacity and automatism coincide. This is so because a person who is deprived of self-control is both incapable of a voluntary act and at the same time lacks criminal capacity."

[23] Griesel J reminded himself that courts have scrutinised the asserted defence with circumspection and went on to assess the psychiatric and other evidence. He considered that the appellant's behaviour at the relevant time was focused and goal-directed and took into account against the appellant his deceitful behaviour after the incident. The learned judge formed the view that the appellant's blow-by-blow account of events indicated conscious behaviour. He took into account that witnesses who saw the appellant at the scene after the assault, described him as behaving normally. The learned judge accepted Hill's account of the assault and rejected the appellant's to the extent that it conflicted with Hill's evidence. Griesel J thought Hill's version of events was probable and was corroborated by the accused's efforts to get rid of the hockey stick. He formed the view that neither the Court nor the psychiatrists could rely on the appellant's version relating to his defence of criminal incapacity. He rejected the appellan's claim that the stressors referred to earlier in this judgment contributed to his incapacity at the relevant time stating (at **183 i**):

> "Hundreds of thousands of people daily find themselves in similar or worse

> situations, yet they do not go out clubbing fellow - motorists to death when their anger may be provoked."

Griesel J concluded that the incident that occurred in Johannesburg in 1990 played no part in the attack on the deceased and concluded that the appellant did not lose control - he simply lost his temper. Having rejected the appellant's defence of criminal incapacity, the learned judge considered whether the appellant had the necessary intention to commit murder. Having regard to the savage and sustained nature of the attack on the deceased and that it was directed at the head of the deceased, he concluded that the appellant had the necessary intention to kill.

[24] Appellant's counsel submitted that the Court below confused the defence of automatism and the defence of non-pathological criminal incapacity and that Griesel J failed to appreciate that since the appellant was able to distinguish between right and wrong his cognitive faculties were in place and goal-directed behaviour could be expected. It was contended that the learned judge misdirected himself when he took into account, against the appellant, that his behaviour was focused and goal-directed. It was submitted that he should have concluded that the appellant was unable to control himself due to the emotional stress and provocation he was subjected to. Reliance was placed on the following statement in ***South African Criminal Law and Procedure*** **(2nd ed)**, **Vol 1** by Burchell and

Hunt at 274:

> "…it does not have to be shown that the accused's conduct was involuntary in the sense that it was automatic or purely reflexive, for then the accused would be exempt from criminal liability on the ground that his act was not one of which the criminal law takes cognizance, and the question of criminal capacity ("toerekeningsvatbaarheid") does not arise. The determining factor, it seems, is the question of self control – whether, in all the circumstances of the case … the accused ***"could not resist or refrain from this act, or was unable to control himself to the extent of***
> ***refraining from committing the act…"***
> (emphasis added)

Counsel for the appellant also relied on the following decisions of the Provincial and Local Divisions of the High Court in which, he submitted, the defence of non-pathological criminal incapacity was upheld, notwithstanding that the accused persons conducted themselves in a goal-directed manner: ***S v Arnold* 1985 (3) SA 256 (C)**; ***S v Nursingh* 1995 (2) SACR 331 (D)**; ***S v Moses* 1996 (1) SACR 701 (C)**; ***S v Gesualdo* 1997 (2) SACR 68 (W)**.

Reliance was also placed on the minority judgment in a decision of this court in ***S v Campher* 1987(1) SA 940 (A)** where, at **956 C**, the following appears:

> "As leek op hierdie gebied meen ek egter dat die feit dat die appellante na die tyd besef het dat sy die oorledene geskiet het die Hof nie verhinder om tot 'n bevinding te geraak dat die appellante se emosies so 'n breekpunt bereik het en haar so oorweldig het dat sy nie op die kritieke oomblik kon weerstand bied nie."

Appellant's counsel submitted that the decision of this Court in ***S v Wiid* 1990 (1)**

SACR 561 (A) supported his case.

[25] There is a great deal of confusion about the proper application of the test for criminal capacity. What follows, is an examination of the historical development of the asserted defence, a consideration of relevant judgments of this Court and of the other decisions referred to in the preceding paragraph. Thereafter I will refer to criticisms by academic writers about the manner in which the test has been applied.

[26] In our law, criminal incapacity due to mental illness is classified as pathological incapacity. Where it is due to factors such as intoxication, provocation and emotional stress it is termed non-pathological incapacity. The term non-pathological incapacity was coined for the first time by Joubert JA in ***S v Laubscher* 1988 (1) SA 163 (A)** at **167 D - I**. As pointed out by Snyman in ***Criminal Law***, supra, at **152**, Joubert JA wanted to separate this defence from that of mental illness created by section 78 of the Criminal Procedure Act 51 of 1977. In ***S v Chretien***, **1981 (1) SA 1097 (A)** which preceded the ***Laubscher*** case, it was determined by this Court that persons who were so intoxicated that their acts were merely uncontrolled muscular movements are not criminally liable, because their acts are not recognised as such for purposes of criminal liability and that those who committed acts which were more than mere uncontrolled muscular movements but were so intoxicated so as not to appreciate what they were doing, or were unable to appreciate the difference between right and wrong would lack criminal capacity and would accordingly escape criminal liability. Reacting to the charge that it would be against the public interest if courts were to encourage the idea that drunkenness can be an excuse for crime, Rumpff CJ said the following at **1105 F – 1106 H**:

> "Na my mening is dit verkiesliker om te aanvaar dat, indien dit uit die getuienis blyk dat 'n beskuldigde werklik so besope was dat hy inderdaad nie besef het wat hy gedoen het nie, die publieke beleid (die regsoortuiging van die gemeenskap) nie vereis dat van die suiwer regswetenskaplike benadering afgesien moet word nie en dat die beskuldigde 'n straf moet ondergaan bloot omdat hy vrywillig 'n toestand bereik het waarin hy juridies nie kan handel nie of ontoerekeningsvatbaar is ... Die probleem lê mi nie soseer in die beginsel wat toegepas behoort te word nie maar in die manier waarop die beginsel toegepas word. ***Indien 'n hof geredelik of maklik aanvaar dat 'n besope persoon wat bv 'n vrou verkrag of probeer verkrag nie bewus is van wat hy doen nie en dus nie***

> ***toerekeningsvatbaar is nie, en vry behoort uit te gaan, sou die regspraak baie gou in diskrediet gebring word.*** Verminderde toerekeningsvatbaarheid en 'n minder straf is natuurlik iets anders."
> (emphasis added)

[27] Since ***Chretien's*** case the Legislature has intervened statutorily to deal with intoxication as a defence by way of the Criminal Law Amendment Act 1 of 1988. It is beyond the scope of this judgment to examine the changes brought about by statutory intervention. I consider the following quotation from ***South African Law and Procedure*** Vol 1 (**3rd ed)** by JM Burchell at **188** to be important to bear in mind:

> "While *Chretien* cannot be faulted on grounds of logic or conformity with general principles, the judgment might well have miscalculated the community's attitude to intoxication."

[28] It was but a short jump from the acceptance that intoxication could result in an individual losing the ability to distinguish between right and wrong and to act in accordance with that distinction, to an acceptance that emotional stress combined with provocation or intoxication or both could excuse criminal liability on the same basis. Severe emotional stress, in combination with factors such as provocation and/or intoxication resulting in non-pathological criminal incapacity, has become a very popular defence as a perusal of the law reports on the subject

and a further reading of this judgment will confirm.

[29] I now proceed to deal chronologically and in some detail with decisions of this Court in which the defence of non-pathological criminal incapacity was considered. It is necessary, in the quest for greater clarity and precision, to distill the common threads in these judgments.

[30] In ***S v van Vuuren*** **1983 (1) SA12 (A)** Diemont AJA referred to ***Chretien's*** case, and said the following at **17 G - H**:

> "I am prepared to accept that an accused person should not be held criminally responsible for an unlawful act where his failure to comprehend what he is doing is attributable not to drink alone, but to a combination of drink and other facts such as provocation and severe mental or emotional stress. In principle there is no reason for limiting the enquiry to the case of the man too drunk to know what he is doing."

The appellant in that case shot his ex-wife and her friend, injuring the former and killing the latter. The shooting took place after growing tensions between the appellant and the persons shot by him. Diemont AJA noted that the appellant's actions, after he shot two people were rational and responsible: he conveyed his daughter to his parents' house; he telephoned the police and the ambulance; he reported to a policeman that he had shot two women and accompanied his father back to the house where the shooting took place. Diemont AJA took into account that, even though the appellant stated that he had no knowledge of the actual shooting, he gave the court a detailed account of his activities during the evening; before and after the event. It was held that the trial court was correct in its conclusion that the appellant did not lack criminal capacity. Dealing specifically

with the effect of emotional stress coupled with provocation and intoxication Diemont AJA said the following at **D - E**:

> "These factors, the drink, the provocation and the emotional stress all serve to mitigate his moral turpitude, but I am not persuaded that they caused such mental turmoil that the appellant had no understanding or knowledge of what he was doing. There is evidence, persuasive evidence, which supports the State's contention that the appellant not only was fully aware of his actions but that there was a measure of premeditation."

[31] In ***S v Campher*** **1987 (1) SA 940 (A)** the appellant shot and killed her husband who had repeatedly subjected her to physical and psychological abuse. In the time immediately preceding the shooting he had subjected her to further humiliation and physical abuse. On appeal, the question whether she lacked criminal capacity at the relevant time was addressed. Viljoen JA accepting that at the critical moment the appellant was aware of the difference between right and wrong said the following (at **956 B**):

> "Die vraag is egter of sy die vermoë gehad het om ooreenkomstig daardie besef op te tree, met ander woorde die nodige ***weerstandskrag*** gehad het. In die huidige geval word die ondersoek gereduseer tot die vraag of sy onder die geweldige emosionele druk wat sy op daardie oomblik beleef het die vermoë gehad het om weerstand te bied teen die drang om hierdie 'monster' te vernietig."
> (emphasis added)

The learned judge of appeal stated the following (at **958 C**):

> "Haar getuienis noop my tot die gevolgtrekking dat haar gees op die kritieke

> oomblik erg versteurd was en dat haar weergawe van haar gemoedbewegings bestaanbaar is met 'n ***drang*** waarteen sy nie kon weerstand bied nie."
> (emphasis added)

In the view of Viljoen JA the appellant was entitled to an acquittal. Boshoff AJA was of the view that the appellant had the capacity to distinguish between right and wrong and to act accordingly. At **967 C** Boshoff AJA states:

> "Trouens, uit haar getuienis is af te lei dat sy deurgaans die vermoë gehad het om die ongeoorloofdheid van haar handeling te besef en dat sy versuim het om haar wilsbeheer, 'n vermoë waaroor sy subjektief beskik het, uit te oefen."

Jacobs JA was of the view that where an accused had the ability to distinguish between right and wrong, the defence of irresistible impulse (which he considered to be the basis of the appellant's defence) would only be available where a mental illness or defect was present. On the facts of the case Jacobs JA and Boshoff AJA constituted the majority, dismissing the appeal. On the law Boshoff JA and Viljoen JA formed the majority holding that in principle emotional stress could lead to an absence of criminal capacity and an acquittal.

[32] ***S v Laubscher*** **1988 (1) SA 163 (A)** is an oft-cited case on the test for non-pathological criminal capacity based on a psychological breakdown. In that case a 23-year-old medical student whose intelligence level was that of a genius, discharged 21 rounds of ammunition into various rooms of a house in which his

wife and parents-in-law resided. In consequence, his father-in-law was killed. At his trial on charges, *inter alia*, of murder and attempted murder, it was contended that at the relevant time he had suffered a total psychological breakdown or disintegration of his personality, of a temporary nature, with the effect that he acted involuntarily. The incident in question was preceded by verbal exchanges and a protracted struggle by the appellant to have his wife and child return to him from her parental home. Joubert JA states the following (at **166 G – 167 A**):

> "Om toerekeningsvatbaar te wees, moet 'n dader se geestesvermoëns of psigiese gesteldheid sodanig wees dat hy regtens vir sy gedrag geblameer kan word. Die erkende psigologiese kenmerke van *toerekeningsvatbaarheid* is:
>
> 1. Die vermoë om tussen reg en verkeerd te onderskei. Die dader het die *onderskeidingsvermoë* om die regmatigheid of onregmatigheid van sy handeling in te sien. Met ander woorde, hy het die vermoë om te besef dat hy wederregtelik optree.
>
> 2. Die vermoë om ooreenkomstig daardie onderskeidingsvermoë te handel deurdat hy die *weerstandskrag* (wilsbeheervermoë) het om die versoeking om wederregtelik te handel, te weerstaan. Met ander woorde, hy het die vermoë tot vrye keuse om regmatig of onregmatig te handel, onderworpe aan sy wil.
>
> Ontbreek een van hierdie twee psigologiese kenmerke dan is die dader *ontoerekeningsvatbaar*, bv waar hy nie die onderskeidingsvermoë het om die ongeoorloofheid van sy handeling te besef nie. Insgelyks is die dader ten spyte daarvan dat hy wel die onderskeidingsvermoë het tog ontoerekeningsvatbaar waar sy geestesvermoë sodanig is dat hy nie die weerstandskrag het nie."

For reasons that will be discussed later in this judgment, it is perhaps unfortunate that the word “weerstandskrag” was used. This follows on the use of the same word by Viljoen JA in ***Campher's*** case, *supra*. Considering the appellant's

conduct against the aforementioned test, Joubert JA found that although the appellant's actions had been irrational and not in keeping with his normal personality, he had acted voluntarily as he had powers of discernment and restraint, so that he was criminally accountable. Joubert JA held that the trial court was correct to take into account the goal-directed and purposeful acts by the appellant, before and during the shooting incident, as well as the fact that he managed to drive away from the house in his motor vehicle afterwards. The following is stated at **173 B**:

> "Ofskoon die appellant se optrede irrasioneel was en nie in ooreenstemming met sy gewone persoonlikheid was nie, het hy wel ***willekeurig*** opgetree omdat hy onderskeidingsvermoë en ***weerstandskrag (wilsbeheervermoë)*** gehad het sodat hy nie ontoerekeningsvatbaar was nie maar wel verminderd toerekeningsvatbaar. Na my oordeel het die Verhoorhof tereg tot hierdie bevinding op die bewese feite bo redelike
> twyfel geraak."
> (emphasis added)

[33] In ***S v Calitz*** **1990 (1) SACR 119 (A)** the accused, a sergeant in a counter-insurgency unit in the army, assaulted and beat a villager in Ovamboland to death. He raised the defence of non-pathological criminal incapacity, due to a raging anger that was said to have arisen because the deceased had exchanged words with him after he drove an army vehicle over a pole that had a ritual significance for the village. The appellant in that case recalled details of the event in question. After

he killed the deceased he involved his men in a cover-up operation. He planted a Libyan uniform and arms and ammunition in the vicinity of the deceased's house. He radioed his base and informed them that he had killed one of the enemy. After the deceased's family laid a charge of murder the appellant admitted killing the deceased and resorted to the defence of non-pathological criminal incapacity, due to his anger. After considering the psychiatric evidence for the State and on behalf of the appellant, Botha JA concluded as follows (at **127 g**):

> "Volgens die getuienis van die psigiaters sou 'n mens nie van iemand wat in so 'n toestand verkeer het, verwag om 'n deurlopende gedetailleerde relaas van die gebeure tydens so 'n episode te kan verstrek nie. In die getuienis van die appellant, is daar egter 'n aansienlike mate van redelike fyn detail van die verloop van die aanval. Dit is verder voor die hand liggend, soos dr Fourie ook getuig het, dat waar iemand normaalweg baie kwaad is sonder dat hy in sy onbeheerstheid in 'n verstandelike beneweling verkeer, hy nie elke fyne besonderheid van die gebeure sal kan onthou nie. Met dié mate van bewustheid van wat om hom aangegaan het, en van sy handeling tydens die aanval, wat die appellant in sy getuienis kon weergee, was die Verhoorhof, na my mening, geregtig gewees om tot die gevolgtrekking te kom dat die appellant nie in 'n tydelike verstandelike beneweling verkeer het nie, en dat hy wel toerekeningsvatbaar was."

[34] ***S v Wiid*** **1990 (A)** is the only case in this Court in which the defence of non-pathological criminal incapacity due, *inter alia*, to emotional stress was upheld on the facts. In that case the appellant shot and killed her husband. The deceased

had been unfaithful throughout their marriage. He had assaulted the appellant on two occasions before the shooting incident. Shortly before the incident the appellant discovered that the deceased was conducting yet another affair. On the day of the incident when the deceased returned home she confronted him. He denied the accusation and shortly thereafter attempted to record their conversation on a tape recording machine. She attempted to stop him from doing so and in the result the machine fell to the ground. The deceased assaulted the appellant quite severely, breaking her nose and a tooth, and splintering other teeth in the process. Her spectacles were broken and her mouth was bleeding. After the assault the deceased chased the appellant out of their bedroom, threatening her with a further assault. Shortly thereafter she shot him. After the shooting she was heard to ask: "Wat het ek gedoen?" A policeman testified that when he arrived at the scene she appeared bewildered and disoriented. The appellant's recollection of the day on which the incident occurred was vague and she was unable to recall the shooting itself. She recalled that the deceased had said he was going to kill her. She saw his pistol nearby but could not recall that she picked it up. She remembered hearing shots. In the time leading up to the incident the appellant was in a state of anxiety and was highly emotional. The psychiatric evidence was to the effect that given the intake of sedatives and alcohol and lack of eating, combined with the severe assault and the threat of death, the appellant may well have lacked criminal

capacity altogether and that she may well not have been able to distinguish between right and wrong. The trial court held that it was reasonably possible that the appellant may have been concussed after the assault and during the time that she fired the fatal shot. Goldstone JA said the following at **569 c – e**:

> "Na my mening, indien al die feite in ag geneem word, bestaan daar redelike twyfel oor die vraag of die appellante ***willekeurig*** opgetree het. Dat sy bewustelik en opsetlik die oorledene wou doodskiet is nie met appellante se persoonlikheid en karaktertrekke te versoen nie. Dit is die effek van haar eie getuienis en word deur Gillmer en Plunkett gestaaf. Haar oorblywende en steeds sterk liefde vir die oorledene rym nie met die doelbewuste doodmaak van die oorledene nie. Die feit dat sy sewe skote geskiet het, is aanduidend van onbeheersde optrede."
> (emphasis added)

The appeal was upheld and the appellant acquitted.

[35] In ***S v Kalogoropoulos*** **1993 (1) SACR 12 (A)** the appellant was a jealous husband who shot and killed his domestic servant and his business partner. He also shot and wounded his wife and his partner's wife. He was convicted by the trial court, *inter alia*, on charges of murder and attempted murder. The appellant suspected that his wife was having an affair with his business partner. After consuming a quantity of alcohol he armed himself with a revolver and confronted his wife and partner with an accusation that they had been intimate that afternoon. They denied it and a heated altercation ensued. The appellant fired a shot that

struck and wounded his wife. Thereafter he fired a number of shots in quick succession, killing his business partner and wounding his partner's wife. He then drove home where he opened his safe, armed himself with a pistol and proceeded to the domestic servant's quarters. On his way there he shot and killed a dog. On his arrival at the room where the servant lived he shot and killed her, saying that he could not trust her anymore. The appellant's defence to the charges was that owing to the vast quantity of alcohol consumed by him and the provocation to which he had been subjected he lacked the necessary criminal capacity. The appellant's defence was rejected and the appeal dismissed. Botha AJ in rejecting the appeal reasoned as follows (at **25 h – 26 a**):

> "The shooting in the office could not have lasted for more than a couple of seconds. Immediately before that short space of time the appellant was in control of himself; that is not in doubt. Immediately after it he was again in control of himself; so Dr Vorster says herself (as I have indicated, for good and compelling reasons). He then replaces the emptied revolver with a loaded pistol and, having just shot three people, proceeds to shoot a fourth. On the face of his conduct before and after, it seems to me almost inconceivable that in the brief interval in between he was deprived of self-control... The appellant shot Dora (and the dog) because he was angry and emotionally upset, but while in a frame of mind where he could exert self-control."

[36] In ***S v Potgieter*** **1994 (1) SACR 61 (A)** the appellant, a 36 year-old woman, admitted that she shot and killed her lover who had abused her physically and emotionally over a number of years. In the trial court she raised a defence of

sane automatism" and in the alternative, that she was impelled by an irresistible impulse and that she therefore lacked the legal capacity to commit a criminal act. The trial court rejected her defence and she was found guilty of murder. On appeal, Kumleben JA equated the defence raised by the appellant with the defence dealt with in the ***Laubscher***, ***Calitz*** and ***Wiid*** cases. At **73 g – i**, Kumleben JA cited the following passage from Hiemstra's ***Suid Afrikaanse Strafproses*** **(4de uit)** at **189** with approval:

> "Daar moet getuienis van die kant van die beskuldigde wees wat sterk genoeg is om twyfel te laat ontstaan oor die ***vrywilligheid*** van die beweerde daad of versuim. Dit moet gerugsteun word deur geneeskundige of ander deskundige getuienis wat aantoon dat die ***onwillekeurige*** gedraging heel moontlik te wyte was aan oorsake anders as geestesongesteldheid of geestesgebrek. As aan die einde van die verhoor daar twyfel bestaan of die gedraging ***willekeurig*** was of nie, moet die beskuldigde die voordeel van die twyfel geniet."
> (emphasis added)

The learned judge of appeal also cited Prof CWH Schmidt's article ***Laying the Foundation for a Defence of Sane Automatism*** in the **90 (1973) SALJ 329** at **333** where the learned author states:

> "…the accused has to adduce evidence from which a reasonable alternative inference can be drawn' that he acted unconsciously."

Kumleben JA states the following at **73 j – 74 b**:

> "The need for careful scrutiny of such evidence is rightly stressed. Facts which

> can be relied upon as indicating that a person was acting in a state of ***automatism*** are often consistent with, in fact the reason for, the commission of a deliberate, unlawful act. Thus – as one knows – stress, frustration, fatigue and provocation, for instance, may diminish self-control to the extent that, colloquially put, a person 'snaps' and a *conscious* act amounting to a crime results. Similarly, subsequent manifestations of certain emotions, such as fear, panic, guilt and shame, may be present after either a deliberate or an *involuntary* act has been committed."
> (emphasis added)

The Court held that the appellant was an untruthful witness in many respects and concluded that the factual foundation for the defence was absent. The court took into account that the appellant's actions were complex and goal-directed and had difficulty in accepting that it could all have been executed automatically. The appellant's defence was rejected and the appeal against her conviction dismissed.

[37] In ***S v Kensley*** **1995 (1) SACR 646 (A)** the appellant shot and killed two people, after he discovered that the objects of his affections were female impersonators. His defence was that he lacked criminal capacity attributable to non-pathological factors, namely, a combination of severe emotional stress and intoxication. Van den Heever JA in dealing with the *onus* resting on the state, to prove beyond a reasonable doubt not only that an accused could distinguish between right and wrong but that he was capable of acting in accordance with that distinction, after reference to the decisions in the ***Calitz, Campher*** and ***Wiid*** cases,

said the following at **658 g – j**:

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

The court held that the state had discharged the *onus* and that the appellant had been rightly convicted.

[38] In ***S v Henry*** **1999 (1) SACR 13 (SCA)** the appellant shot his ex-wife and her mother after an argument at her home. He was charged with two counts of murder and a contravention of the Arms and Ammunition Act 75 of 1969. He raised a defence of sane automatism and testified that he was in a rage, heard loud noises zinging in his ear and heard shouting. The trial court rejected his defence and convicted him on all three counts. In dealing with his appeal Scott JA said the

following (at **20 c – e**):

> "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 this 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, i e ***psychogenic automatism***, is most uncommon. The two must not be confused."
>
> (emphasis added)

The court considered the absence of a trigger mechanism and concluded that the appellant's conduct at the time of and after the shooting was indicative of conscious behaviour and inconsistent with automatism. His appeal was dismissed.

[39] In ***S v Cunningham*** **1996 (1) SACR 631 (A)** the appellant was an accountant in his late thirties. After a collision between a motor vehicle driven by the appellant and two cyclists he was charged in the trial court with murder, attempted murder and three contraventions of the Road Traffic Act 29 of 1989. The appellant was driving on the wrong side of the road and went through a red

traffic light before colliding with the cyclists. One of the cyclists was killed and another was left paralysed. The statutory offences related to the appellant's failure to stop immediately after the collision and ascertain the nature and extent of the damage and injury sustained in the collision. At his trial the appellant raised a defence of "sane automatism". The trail court rejected this defence and held that he had been negligent. On the count of murder he was convicted of culpable homicide. He was acquitted on the charge of attempted murder. The impact of the collision had been severe and the appellant had been in a confused state thereafter. He was consequently acquitted on the statutory charges. On appeal to the Cape Provincial Division the appellant's conviction of culpable homicide was confirmed. The appellant appealed to this court against his conviction of culpable homicide. In the trial court a psychiatrist who testified in support of the appellant's case held the view that the most plausible explanation for the appellant's behaviour was automatism. A psychiatrist who testified on behalf of the state held the view that an inference of automatism was not justified. The magistrate in the trial court preferred the view of the psychiatrist who testified in support of the state's case. Scott JA who delivered the judgment of this Court stated the following at **635 g – h**:

> "Criminal responsibility presupposes a ***voluntary act*** (or omission) on the part of the
> wrongdoer. ***Automatism*** therefore necessarily precludes criminal responsibility."

(emphasis added)

The learned judge of appeal, in dealing with the natural inference that assists the state,

said the following at **635 j**:

> "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."
> (emphasis added)

Scott JA accepted that before the collision the appellant was emotionally upset and was preoccupied with problems to the extent that he was not concentrating on what was happening around him. He considered the lack of an event that would serve as a trigger for automatism. The learned judge of appeal had regard to the manner of the appellant's driving before the collision and held that no factual foundation was established to displace the inference of voluntariness. The defence was rejected.

[40] In ***S v Francis*** **1999 (1) SACR 650 (SCA)** the appellant shot and killed a

woman with whom he had a relationship. Before killing her he shot her father in the elbow. In the trial court the appellant was convicted of murder and assault with intent to do grievous bodily harm. His defence that he acted in a state of non-pathological criminal incapacity was rejected. Schutz JA in discussing the appellant's defence states the following at **651 h**:

> "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."

As can be seen, the learned judge equated sane automatism with non-pathological criminal incapacity. A psychiatrist who was called by the state pointed to various actions of the appellant which he said showed an awareness of what he was doing, were purposeful and some of them of some complexity. Schutz JA agreed that there was a series of deliberate actions by the appellant before, during and after the acts in question and he was able to distinguish his victims. The appellant was also found to have lacked credibility. His defence was rejected.

[41] In ***S v Kok*** **2001 (2) SACR 106 (SCA)** this Court accepted that the appellant, a policeman who shot and killed a colleague and her husband, was subjected to stress at work and was in a depressed state at the time of the shooting. It concluded that when he arrived at the deceaseds' home he was in a confrontational and belligerent mood. He recalled going to the front door. He

testified that he lost his temper as a result of something one of the deceased had said to him. Scott JA said the following at **115 j –**

116 a:

> "Loss of temper, that is to say a failure to control one's emotional reactions, is not to be confused with a loss of cognitive control (see *S v Henry* 1999 (1) SACR 13 (SCA) at 20 *d – f*). The fact that he could recall these events some days later indicates that he knew what he was doing and is inconsistent with the hypothesis that he was re-enacting some memory in a dissociative state."

The court rejected the appellant's assertion that he had no recollection of the shooting, concluding that his behaviour after the shooting was not what one would have expected of someone who had no recollection of the crucial event. The court rejected his defence.

[42] From the judgments of this Court referred to in the preceding paragraphs it is clear that in order for an accused to escape liability on the basis of non-pathological criminal incapacity he has to adduce evidence, in relation to the second leg of the test in ***Laubscher's*** case, from which an inference can be drawn that the act in question was not consciously directed, or put differently, that it was an involuntary act. It is clear from the decisions in the ***Potgieter***, ***Henry***, ***Cunningham*** and ***Francis*** cases that the defence has been equated with the defence of automatism.

[43] The decisions in the preceding paragraphs show that this Court has approached defences of non-pathological criminal incapacity with caution. In the ***Henry*** case the phenomenon is said to be "most uncommon". In dealing with a natural inference that people act consciously and voluntarily this court has

repeatedly stated that the inference is disturbed in "exceptional cases". In the ***Wiid*** case, *supra,* the only case in this Court in which the defence was upheld, there was doubt whether the appellant had the ability to distinguish between right and wrong and to act in accordance with that distinction. In that case not only were the stressors severe and aggravated by the intake of a sedative, but also the immediate circumstances and the concussion suffered by the appellant were so extreme so as to persuade the psychiatrists and the Court that there was a reasonable doubt about her criminal capacity. It is perhaps because of his repeated exposure to the asserted defence that Dr Kaliski is so sceptical. His call for a set of compelling facts before he concedes the validity of the defence in a given case is in line with the *dicta* referred to above. Dr Kaliski equated automatism with the defence asserted by the appellant in the present case and his explanation makes it clear that in his view the only circumstance in which one could "lose control" is where one's cognitive functions are absent and consequently one's actions are unplanned and undirected. His view is in line with the decisions of this Court.

[44] The approach of this Court in the decisions discussed in this judgment, has been to carefully consider the accused's actions before, during and after the event. It took into account whether there was planned, goal-directed and focused behaviour. In the decisions referred to, a determination was made about whether an accused was truly disorientated - an indicator of temporary loss of cognitive control over one's actions and consequent involuntary behaviour. This Court has repeatedly stated that a detailed recollection of events militates against a claim of loss of control over one s actions.

[45] In the ***Henry, Kensley*** and ***Kok*** cases, this Court warned against confusing loss of temper with loss of control. In the ***Henry*** and ***Kensley*** cases, as can be seen from the *dicta* referred to earlier in this judgment, this Court, in assessing an accused person's evidence about his state of mind, weighed it against his actions and the surrounding circumstances and considered it against human experience, societal interaction and societal norms. Griesel J at **183 h – i** of his judgment did the same, when he considered the appellant's behaviour against the behaviour of hundreds of thousands of people who on a daily basis find themselves in the appellant's position and who do not respond as he did. I will in due course deal with criticisms of this approach.

[46] I turn to consider decisions of the High Court on which the appellant relies. In ***S v Arnold*** **1985 (3) SA 256 (C)** a case decided a year after the decision in ***S v van Vuuren*** **1983 (1) SA 12 (A)** the accused, a 41 year-old man, shot and killed his 21 year-old wife. The accused claimed that at the time the fatal shot was fired, because of emotional stress he did not have criminal capacity. He claimed that he could not remember aiming the firearm and pulling the trigger. His description of

events prior to and after the shooting was detailed and precise. After the shooting he was shocked and remorseful but showed presence of mind, attempting to summon the police and an ambulance. He had entered his home with a firearm in his hand. He was emotionally distraught and angry about earlier events and was subjected to a number of stressors such as financial problems and his deteriorating relationship with his mother-in-law. His wife enjoyed flaunting her natural assets and taunting him. Shortly before the shooting she had leant over while talking to him, provocatively revealing her breasts while stating her intention to take up a career as a stripper. It is clear from a reading of the judgment that the court saw the accused in a sympathetic light. The psychiatric evidence on behalf of the appellant was to the effect that his conscious mind was so "flooded" by emotions that it interfered with his capacity to appreciate what was right or wrong, and because of his emotional state he may have lost the capacity to exercise control over his actions. The state did not call any psychiatrist nor contest the opinions expressed by the psychiatrist who testified in support of the appellant. Burger J concluded that there was reasonable doubt that when the accused killed the deceased that he was acting unconsciously. The learned judge then stated (at **263 H – I**):

> "Assuming, however, that the accused was acting consciously, the further question arises as to whether he had criminal capacity ('toerekeningsvatbaarheid'). A person is said to be criminally responsible or to have criminal capacity when he is able to appreciate the wrongfulness of his act and act accordingly."

By putting it in these terms the learned judge created the impression that one can act consciously but at the same time not be able to act in accordance with one's appreciation of what is right and wrong. The accused's *ipse dixit* about his state of mind was readily accepted by Burger J. His focused and goal-directed behaviour before, during and after the event was not given adequate weight. The test for criminal incapacity as laid down in the decisions of this Court was misapplied.

[47] In ***S v Nursingh*** **1995 (2) SACR 331 (D)** the accused, a university student, shot and killed his mother, grandfather and grandmother. He raised the defence of

non-pathological criminal incapacity. The accused had a predisposition to emotional outbursts. His evidence shed very little light on events immediately before the shooting. The evidence of a young friend, Soni, who was elsewhere in the house assisted the Court to piece together the events that led to the death of the deceased. There was evidence that the accused s mother abused him sexually and it was possible that he may have rejected overtures from her immediately before the shooting took place. Soni heard an argument take place and heard the accused's mother's voice raised to a screaming pitch. Soni arrived at the scene after the shooting had occurred. He found the accused in a bewildered state, at times babbling incoherently. They both fled the scene. According to Soni when they realised the enormity of what had occurred they formed a plan to avoid implication. It is clear that the abuse, sexual and otherwise that the accused suffered at the hands of his mother over a long period weighed heavily with the Court. The evidence of a psychiatrist and a psychologist was that having regard to the appellant's predisposition to emotional outbursts and the sudden and immediate threat to him by his mother, in the context of the prior abuse, he might have undergone a state of altered consciousness with a temporary destruction of his intellect. The state did not call an expert in rebuttal. The court saw the firing of the pistol as a mere motor function. The accused and Soni were believed in their version of events and the appellant was acquitted.

[48] The ***Nursingh*** case does leave one with a sense of disquiet at an acquittal in the face of the enormity of the deed. The case however does not provide support for the appellant. In that case there was evidence that the accused's intellect had been destroyed. The goal-directed actions by the accused were limited to the multiple shooting. Subsequent to the event he was babbling incoherently and was crying. The trigger was one that apparently had built up from years of physical, emotional and sexual abuse. The combination of factors was extreme and unusual.

[49] Less easy to explain is the case of ***S v Moses*** **1996 (1) SACR 701 (C)**. The accused and the deceased developed a homosexual relationship. On the night in question, immediately after unprotected anal intercourse, the deceased announced that he had AIDS. This angered the accused and a flood of thoughts entered his mind. He thought about his own death and about breaking the news to his family. In his fury he attacked the deceased with an ornament. Thereafter he ran to the kitchen and obtained a small knife with which stabbed the deceased. He returned to the kitchen to fetch a bigger knife with which he cut the deceased's throat and wrists. The accused testified that when he cut the deceased's throat and wrists he saw what he was doing and could not stop himself. After the event he was shocked and sat in the passage realising that he had committed what he thought

was a crime. He tried to remove his fingerprints from objects he had touched and attempted to clean blood stains. He drove off in a motor vehicle and gave a hitchhiker a lift, unsuccessfully attempting to seduce him to create an alibi. After his arrest he made a false statement to a magistrate, later deciding to tell the truth. The hitchhiker testified and stated that the accused looked relaxed and normal. A post-mortem examination confirmed that the deceased was HIV positive. The accused testified that his father had sexually abused him. A clinical psychologist who testified in support of the accused's case stated that the accused was prone to rage reactions and had poor impulse control. When provoked he would know what he was doing but would have been unable to stop himself. The clinical psychologist did not contend that the accused had acted in a state of automatism. A psychiatrist who testified in support of the accused's case agreed with the psychologist. He saw the pronouncement by the deceased of his HIV condition as a trigger to the accused's conduct, which in his view, the accused related to the abuse at the hands of his father. The psychiatrist testified that in a state of rage one's capacity to "retain control" is "definitely impaired". Against this evidence the state led the evidence of Dr Jedaar, who at that time was still employed at Valkenberg Hospital. He postulated the view that one can never lose control except in a state of automatism. He stated that even in a state of extreme rage one still has cognitive ability. Following upon a state of automatism one is usually bewildered. Jedaar held the view that the accused's conduct was not uncontrolled or involuntary and that the killing was not committed in a state of automatism. Each act was planned, goal-directed and controlled. The court in the ***Moses*** case, dismissed Jedaar's view, stating that it flies in the face of South African law. The mistake that Jedaar is accused of making is that the bulk of his evidence was directed at showing that the accused had not acted in a state of sane automatism. The court in the ***Moses*** case referred to the ***Wiid***, ***Laubscher***, ***Campher***, ***Potgieter*** cases as support for its view that the defence of non-pathological criminal incapacity is distinct from the defence of automatism. Jedaar, as we can see, has undergone a conversion since he testified in that case.

[50] Another case that is difficult to explain is ***S v Gesualdo*** **1997 (2) SACR 68 (W)**. In that case the accused shot and killed his friend. Their relationship deteriorated when the deceased attempted to cut the accused out of a business venture, which was the latter's idea in the first place. They had engaged in public arguments and the deceased resorted to foul language. There were stormy conversations on the telephone. The deceased had threatened the accused, which resulted in the accused visiting the police for assistance. Two days before the shooting the accused was involved in a discussion with the deceased and became very angry. In the presence of a witness he said he would visit the deceased at his

factory and that the witness should not get involved. The witness, a Mr Molina, testified that the accused's anger had been building up progressively as a result of the deceased's behaviour. The accused testified that on the morning of the shooting he drove around aimlessly. He had his firearm on him. From the time he arrived at work he recalled breaking a machine but recalls nothing of the shooting incident. Mr Molina testified that the accused entered the deceased's premises carrying a packet in his hand. He pulled a firearm from it and pointed it at the deceased. The deceased taunted the accused and challenged him to discharge the firearm. The accused shot and killed the deceased and pointed the firearm at Mr Molina before running away. He was found several hours later wandering around and did not appear to comprehend why he was being arrested. The accused was taken to his flat where he pointed out the firearm. The court accepted that he was disoriented after the event. The two psychiatrists who testified did not doubt the genuineness of the accused's amnesia. The psychiatrist who testified in support of the accused's case stated that he was to some extent aware of what he was doing and able to distinguish between right and wrong but was unable to act in accordance with that distinction because he had lost control of himself. He did not contend that the accused acted in a state of automatism. Dr Vorster, who was called by the State, testified that the accused had not acted in a state of automatism as he was capable of taking complex decisions and actions were goal-directed. Like the court in the ***Moses*** case, the court in the ***Gesualdo*** case rejected the view of the state psychiatrist on the basis that it flew in the face of decisions of this Court, which in its view held that persons who could distinguish between right and wrong and who had not acted automatically may nevertheless, because of emotional stress, have lost control of their actions to such an extent that they would escape criminal liability.

[51] In ***South African Criminal Law and Procedure*** **(Vol 1)** by JM Burchell, *supra*, the learned author, in dealing with provocation and emotional stress expresses disquiet at the growing trend in court decisions, excusing acts committed by people driven to them by emotions such as jealousy and anger. The following appears at **202**:

> "The general approach in most legal systems is that provocation does not excuse from criminal liability. People are expected to control their emotions. Furthermore, in many cases the response to the provocation is in the nature of a revenge for harm suffered. Since it is a fundamental principle of modern systems of criminal justice that vengeance for harm suffered must be sought through the public criminal process and not by personal self-help, the criminal law is

> precluded from admitting the provocation should be a justification for unlawful conduct."

In the ***Moses*** and ***Gesualdo*** cases we appear to have moved from the fundamental position that provocation is a mitigating factor to a position where it has become an exculpatory factor. The approach adopted by this court in the decisions discussed earlier was not followed in the ***Arnold***, ***Moses*** and ***Gesualdo*** cases.

[52] In an article in ***South African Journal of Criminal Justice*** **(2001) 14 pp 206 -216** entitled ***S v Eadie***: ***Road Rage, Incapacity and Legal Confusion*** Ronald Louw, of the University of Natal, takes a critical look at the judgment of the Court below and the judgments in the ***Nursingh*** and ***Moses*** cases. He is particularly critical of the decision in the ***Moses*** case, stating the following (at **216**):

> "The acquittal in *Moses* leaves us with a dangerous precedent. In future whenever a person flies into an 'annihilatory rage' and kills somebody, irrespective of the reason for the rage and the relationship between the accused and the deceased, the killing will be permissible. This subjects society to the whims of the short-tempered. This is wrong. If we follow *Moses* then, unlike in *Eadie*, those who kill in circumstances of road rage, can expect to be acquitted."

[53] This unsatisfactory state of affairs arose because of a misapplication and a misreading of decisions of this Court. Burchell and Hunt in ***South African Criminal Law and Procedure*** (**2nd ed) Vol 1**, in the passage quoted in paragraph [24] of this judgment, adopt the position that when one is dealing with a reflexive or automatic act an accused would be exempt from criminal liability on the ground

that his act was not one of which the criminal law takes cognisance. The second leg of the test in ***Laubscher's*** case is read to mean that one looks to see whether in all the circumstances of the case the accused could not resist or refrain from this act or was unable to control himself to the extent of refraining from committing the act.

[54] Likewise, Snyman in ***Criminal Law***, *supra*, at **152 - 153** states:

> "The (a) inability to act in accordance with an appreciation of the wrongfulness of the act (in other words the absence of the conative mental function) must not be confused with (b) the inability of a person to subject his bodily movements to his will or intellect. Inability (b) deals with the question of whether X has committed an act in the criminal-law sense of the word. If inability (b) is absent, it means that X has acted involuntarily and that there was no act or conduct as these terms are understood in the criminal law. An example of this is where X walks in his sleep. The crucial question is whether X is capable of controlling his physical (or motor) movements through his will. On the other hand inability (a) has nothing to do with the question of whether X has acted or not, but forms part of the test to determine capacity. ***Here X does have the power to subject his bodily movements to his will, but what he is not capable of doing, is to properly resist the temptation to commit a crime***. In short, in (*a*) the mental power of resistance which a normal person has is absent, whereas in (*b*) the power or ability physically to control one's bodily movements is lacking."
> (emphasis added)

[55] Ronald Louw, in taking a critical look at the judgment of the Court below states, (at **207**) of his article, *supra*:

> "This lack of clarity has been exacerbated by confusing decisions of our courts. This confusion is partly a result of its application in practice. This note seeks to identity some of the confusion in an attempt to chart a clearer way forward. The court in *Eadie* acknowledges this confusion and tries to clarify the problem to some extent. Unfortunately I think the court adds to the confusion in two respects, namely in the lack of a clear distinction between automatism and incapacity and, secondly, in the implied assumption of an objective test for provocation defences."

In dealing with the now vexed question of automatism *versus* non-pathological criminal incapacity the learned author states the following at **207**:

> "However, in one respect, capacity appears to be similar to conduct. This relates to the second leg of the capacity inquiry: whether the accused was able to control himself in accordance with his appreciation of right and wrong. In other words, capacity is absent where the accused lacks self-control. It is far from clear in our law when self-control is absent."

The learned author refers to the attempt by Griesel J to explain the distinction between automatism and the defence of non-pathological criminal incapacity and the learned judge s conclusion that it is a distinction without a difference. He suggests that this added to the confusion and states that we must decide whether the two defences are identical or distinct.

[56] In Ronald Louw's view the decisions in the ***Nursingh*** and ***Moses*** cases, *supra*, significantly added to the confusion. He submits that in the ***Nursing*** case the court failed to distinguish between capacity and intention and furthermore confused the capacity test itself. In this regard, at **208**, he refers to the following passage from that

judgment (at **334 b - c**):

> "Now, although the onus is on the State to show that the accused had the necessary criminal capacity to establish and found the *mens rea* necessary to commit an offence, where an accused person relies on non-pathological causes in support of a defence of criminal incapacity, then he is required to lay a factual foundation for it in evidence, sufficient at least to create a reasonable doubt on the issue as to whether he had that mental capacity."

In the ***Moses*** judgement the court drew a very clear distinction between automatism and the lack of self-control. The learned author argues that in the wake of these cases we are left with no clear understanding of what

"loss of control" means. He submits that logic dictates that we cannot draw a distinction between automatism and lack of self-control. He argues that if the two were distinct it would be possible to exercise conscious control over one's actions (the automatism test) while simultaneously lacking self-control (the incapacity test). Louw submits that if there is no distinction then the second leg of the test in the ***Laubscher*** case should fall away: capacity would then be determined solely on the basis of whether the person is able to appreciate the difference between right and wrong. It follows, so he argues, that once an accused has been shown to have capacity he may then raise involuntariness as a defence. At **211** he states:

> "We will then also have a sounder principle and body of law to rely on in assessing the defences. Such a clearer distinction will, I argue below, deal correctly with the more controversial judgments that have recently dogged the provocation defence."

[57] I agree with Ronald Louw that there is no distinction between sane automatism and non-pathological incapacity due to emotional stress and provocation. Decisions of this Court make that clear. I am, however, not persuaded that the second leg of the test expounded in ***Laubscher's*** case should

fall away. It appears logical that when it has been shown that an accused has the ability to appreciate the difference between right and wrong, in order to escape liability, he would have to successfully raise involuntariness as a defence. However, the result is the same if an accused's verified defence is that his psyche had disintegrated to such an extent that he was unable to exercise control over his movements and that he acted as an automaton - his acts would then have been unconscious ***and*** involuntary. In the present contest, the two are flip sides of the same coin. The judgments of this Court referred to earlier, as the highlighted parts of relevant *dicta* show, see it as such.

[58] It appears to me to be clear that Joubert AJ was concerned to convey, in the second leg of the test set in the ***Laubscher*** case, that the State has to prove that the acts which are the basis for the charges against an accused were consciously directed by him. Put differently, the acts must not have been involuntary. It is therefore not surprising that the defence is described as sane automatism, first in the ***Potgieter*** case and then later in the ***Cunningham, Henry*** and ***Francis*** cases. In ***South African Criminal Law and Procedure*** **(Vol 1)** ***General Principles of Criminal Law*** **(3rd ed)** JM Burchell, in discussing voluntary conduct (at **pp 41 – 42**) states the following:

> "Modern western philosophy derives the notion of individual responsibility from the doctrine of free will. This holds that all humans are born with the ability freely to choose between different courses of action. Having this freedom the individual a justifiably be held to be responsible for the consequences of his chosen actions. It follows from this that persons will only be held criminally liable if their actions are determined by their own free will. This principle is expressed by the requirement that for the purposes of the criminal law, a human act must be voluntary in the sense that it is subject to the accused's will. Where for some reason or another is deprived of the freedom of his will, his actions are

'involuntary' and he cannot be held liable for them."

Later on, at **42**, the learned author sets out terms used by South African courts to describe involuntary conduct: "mechanical activity", "unconsciousness", "automatic activity", "onwillekeurige handeling", and "involuntary lapse of consciousness". The learned author states that it is clear from these terms that voluntary conduct must be regarded as conduct controlled by the accused's conscious will. In my view the insistence that one should see an involuntary act unconnected to the mental element, in order to maintain a more scientific approach to the law, is with respect, an over-refinement.

[59] Whilst it may be difficult to visualise a situation where one retains the ability to distinguish between right and wrong yet lose the ability to control one's actions it appears notionally possible.

[60] The view espoused by Snyman and others, and reflected in some of the decisions of our courts, that the defence of non-pathological criminal incapacity is distinct from a defence of automatism, followed by an explanation that the former defence is based on a loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one's emotions, does violence to the fundamentals of any self-respecting system of law. This approach suggests that someone who gives in to temptation may be excused from criminal liability, because he may have been so overcome by the temptation that he lost self-control -

a variation on the theme: “the devil made me do it”. It is for this reason that it was suggested earlier that the use by Joubert JA in ***Laubscher's*** case, *supra*, of the word "weerstandskrag" was unfortunate. So too was the use of the word "drang" in ***Campher's*** case at **956 B**, referred to in paragraph [32] of this judgment. These words suggest a resistance to urges or temptation. No self-respecting system of law can excuse persons from criminal liability on the basis that they succumbed to temptation. Against the fundamental principles restated by JM Burchell (quoted in paragraph [58] of this judgment) it is with respect, absurd to postulate that succumbing to temptation may excuse one from criminal liability. One has free choice to succumb to or resist temptation. If one succumbs one must face the responsibility for the consequences.

[61] The time has come to face up to the fact that in some instances our courts, in dealing with accused persons with whom they have sympathy, either because of the circumstances in which an offence has been committed, or because the deceased or victim of a violent attack was a particularly vile human being, have resorted to reasoning that is not consistent with the approach of the decisions of this Court. Mitigating factors should rightly be taken into account during sentencing. When an accused acts in an aggressive goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone, that at some stage during the directed and planned manouevre he lost his ability to control his actions. Reduced to its essence it amounts to this: the accused is claiming that his uncontrolled act just happens to coincide with the demise of the person who prior to that act was the object of his anger, jealousy or hatred. As demonstrated courts have accepted such version of events from accused persons.

[62] It is necessary to deal with one further aspect raised by the appellant, namely, that in terms of our law a purely subjective test should be applied when the

question of incapacity is raised, and that Griesel J erred in resorting to objective criteria such as the behaviour of hundreds of thousands of other motorists.

[63] In his article, *supra,* Ronald Louw submits that a second aspect of confusion in the judgment of the Court below is the use of an objective test for determining criminal capacity. The learned author refers to the ***Kensley*** case, where in his view a more explicit objective test for capacity was set out at **658 h - j**. He asks the question: should our law include some objective criterion in the capacity enquiry? He refers to Burchell and Milton who, in ***Principles of Criminal Law*** **(2nd ed)** (**1997**), suggest that such a shift might be appropriate but state that legislation or a bold judicial reassessment is necessary. Ronald Louw's view is that neither development is likely, nor necessary. At 212 he states:

> "Part of the current uneasiness with the provocation defence is that it is one that seems easily to lead to an acquittal contrary to a common sense feeling of injustice..."

In the learned author's view the problem does not lie in the subjective aspect of the test but in its application.

[64] I agree that the greater part of the problem lies in the misapplication of the test. Part of the problem appears to me to be a too-ready acceptance of the accused's *ipse dixit* concerning his state of mind. It appears to me to be justified to test the accused's evidence about his state of mind, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social interaction. Critics may describe this as principle yielding to policy. In my view it is an acceptable method for testing the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence. The ***Kensley*** and ***Henry*** cases adopted this approach.

[65] To maintain the confidence of the community in our system of justice the approach of this Court, established over almost two decades and described earlier

in this judgment, should be applied consistently. Courts should bear in mind that the phenomenon of sane people temporarily losing cognitive control, due to a combination of emotional stress and provocation, resulting in automatic behaviour, is rare. It is predictable that accused persons will in numbers continue to persist that their cases meet the test for non-pathological criminal incapacity. The law, if properly and consistently applied, will determine whether that claim is justified.
[66] In the present case it is common cause that the appellant did not at the relevant time act in a state of automatism. Jedaar was emphatic about this. In any event the facts are such that the appellant should be held responsible for his actions. Griesel J may not have been completely accurate in his description of the asserted defence. However, his conclusions on the facts of the case cannot be faulted. He displayed the necessary caution in his approach to the appellant's evidence. He was right to consider the appellant's goal-directed and focused behaviour, before, during and after the incident in question, as indicating presence of mind. The appellant was angry with the deceased and intended to vent that anger. He intended to be violent and destructive. All of his actions were performed with presence of mind. How can we believe him when he says that his directed and planned behaviour was suddenly interrupted by a loss of control over his physical actions when those actions are consistent with the destructive path he set out on when he was admittedly conscious? The learned judge correctly considered the appellant's detailed account of the assault as an indicator of consciousness. Griesel J was correct to conclude that there were no signs of true disorientation subsequent to the event. The learned judge's conclusion that the appellant's deceitful behaviour immediately after the event should count against him cannot be faulted. His finding that the appellant could not be believed about his state of mind at the relevant time is wholly justified, as is the conclusion that the psychiatrists' evidence has to be viewed against that fact. In any event, Kaliski's approach to the asserted defence is to be preferred to that of Jedaar. The dismissal of Jedaar's view of non-pathological criminal incapacity by the court in the ***Moses*** case, appears to be an explanation for his more recent view. A close reading of his evidence in the present case reveals a number of inconsistencies and unsatisfactory explanations, particularly where he is attempting to justify the appellant's conduct. Jedaar sought to persuade the Court below that the event in 1990 played a part in the assault on the deceased. Even though the appellant testified about that event he did not in his evidence in the Court below state that he relived that experience as testified to by Jedaar. I agree with the conclusions reached by the Court below that the event played no part in the appellant's conduct. Jedaar testified that the appellant acted involuntarily because of the absence of a directing mind, due to disturbed cognition, but was unwilling to equate the

appellant's actions with that of someone acting in a state of automatism. I find Jedaar's evidence wholly unpersuasive. It appears to me to be clear, as found by Griesel J, that the appellant lost his temper and did not lose control over his actions. The appellant is someone who is inclined to lose his temper. Finally, I agree with Griesel J's conclusion that the appellant had the necessary intention to kill, particularly if regard were had to the viciousness of the attack. I agree with the learned judge that Hill's evidence is probable and that the attack took place as described by Hill, notwithstanding the discrepancies in his evidence concerning, *inter alia*, the number of blows he witnessed. It does however make no difference if one were to accept the appellant's version of how he perpetrated the assault. When he gave vent to his anger and engaged in the savage attack directing blows and kicks at the head of the deceased he must have foreseen the resulting death of the deceased.

[67] In sentencing the appellant Griesel J dealt with the phenomenon of road rage. His judgment on sentence is reported as ***S v Eadie (2)*** **2001 (1) SACR 185 (C)**. At **189 b – c** the learned judge refers to the intense public and media interest in the appellant's trial. At **189 c – e** he states the following:

> "Part of the reason for this interest is, no doubt, because so many people can identify with the phenomenon of so-called 'road rage'. This is not a phenomenon that is unique or limited to our society. On one of the many Internet websites dealing with the topic the following appears:
>
> > 'Road rage is ubiquitous in America today. Evidently the average commuter in our cities, towns, villages and on our highways across the country is filled with anxiety, stress, antagonism, discontent and fear that encourages such incidents. Most of the victims recognise a dramatic increase in road rage. …What causes aggressive driving and habitual road rage? And everybody points to the same factors: more cars → more traffic → more frustration → more stress → more anger → more anger → more hostility → more violence. More cars leads to more aggression on the roads, sort of like rats fighting in a crowded colony.'
>
> These symptoms sound all too familiar and similar to situations encountered on our own roads every day."

[68] Shannon Hoctor of the University of Port Elizabeth, in an article entitled

***Road rage and reasoning about responsibility SACJ* (2001) 14 195**, deals with the phenomenon of road rage. We were referred to this article by counsel for the appellant as support for the argument that the Court below improperly conflated automatism and non-pathological criminal incapacity. That argument has already been dealt with. My reference to the article is limited to the following description of the phenomenon of road rage at **195**:

> "Whilst the exact ambit of the term is rendered somewhat vague by misuse, it is clear that road rage is a product of the confluence of a number of factors – aggression, increasing frustration, the feeling of power associated with driving – which converge to create a cauldron of stressful conditions…"

[69] In ***S v Sehlako* 1999 (1) SACR 67 (W)** an accused was convicted of murder after he shot and killed the driver of a car that collided with his. In sentencing the accused Borchers J said the following at **71 i – j**:

> "As far as the offence is concerned, the murder can on the facts before me only be attributed to what has come to be called 'road rage'. It was obviously not premeditated. It arose directly from the fact that the accused believed that the deceased was responsible for the collision which occurred between their respective vehicles. It was, however, a cold-blooded and wholly unnecessary killing. This country is suffering from an epidemic of violence which cannot be tolerated."

Later, at **72 b – c**, the following appears:

> "Each and every person who drives a vehicle can expect to be involved in a collision at some or other time. It is wholly unacceptable that such a person, even if he is the cause of such collision, can be executed on the scene by the other driver. In my view even where an accused's personal circumstances are extremely favourable, as they are in this case, they must yield to society's legitimate demand that its members be entitled to drive the roads without risk of being murdered by other irate drivers."

I agree with these sentiments.

[70] There is no doubt that in the present case the appellant was provoked and that the deceased behaved badly. The deceased and the appellant had no business being on the road in their state of insobriety. The deceased's aggressive and provocative behaviour did not entitle the appellant to behave as he did. It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism. It is by its very nature a state that will be rarely encountered. In future, courts must be careful to rely on sound evidence and to apply the principles set out in the decisions of this Court. The message that must reach society is that consciously giving in to one’s anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law.

[71] For all the reasons mentioned earlier in this judgment the appeal is dismissed.

M S NAVSA

JUDGE OF APPEAL

***CONCUR*:**

OLIVIER JA

STREICHER JA