THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 430/07

REPORTABLE

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS: TRANSVAAL
APPELLANT

v

PHILLIPUSJACOBUSVENTER
RESPONDENT

Coram: Nugent, Cloete et Mlambo JJA

Heard: 7 May 2008

Delivered: 30 May 2008

Summary: Murder and attempted murder – family members – amnesia and temporary non pathological diminished criminal responsibility – effect on sentence – effect of minimum sentencing legislation – need for standardised and consistently severe sentences for violent crime – retributive and deterrent elements outweigh personal considerations – sentence of 18 years appropriate.

Order in para [34].

Neutral citation: This judgment may be referred to as *Director of Public Prosecutions: Transvaal v Venter* (430/2007) [2008] ZASCA 76 (30 May 2008).

JUDGMENT

(Dissenting Judgment pages 18 - 38 and Concurring Judgment pages 39 - 41)

MLAMBO JA

[1] This is an appeal against sentence in terms of s 316B of the Criminal Procedure Act 51 of 1977, as amended, by the Director of Public Prosecutions of the Transvaal (the state). Leave was granted by the court *a quo* (Coetzee J sitting in Nelspruit in the Circuit local division of the Eastern Region).

[2] The respondent, then 34 years old, was convicted in the court *a quo* on one count of attempted murder and two counts of murder. (He was also convicted of other related offences but they are not material to this appeal). He was sentenced to 8 years imprisonment for the attempted murder. On one count of murder he was sentenced to 10 years' imprisonment, and on the other 15 years' imprisonment, of which five years was suspended on various conditions. The effect of an order of concurrency of the sentences was that the respondent's effective sentence is ten years. The state now appeals against those three sentences, submitting that they were shockingly light.

[3] In the court below the respondent pleaded guilty to the charges, but the plea was not acceptable to the state due to his statement, in the written plea, that he could not remember the incident in which he committed the offences. This, in turn, led the court *a quo* to change his plea to one of not guilty as the court felt that his alleged loss of memory appeared to be a defence of temporary non-pathological diminished criminal responsibility. However, after hearing evidence tendered by the state the court *a quo* concluded that the defence could not succeed and convicted the respondent.

[4] The complainant in the attempted murder count was the

respondent's wife Millie and the deceased in the murder counts were Millize, the respondent's five year old daughter and Janco, his four year old son. The incident took place on 26 April 2006 in the family home in the suburb of Drakensig in Hoedspruit, Limpopo. At that time the respondent was a member of the South African National Defence Force and stationed at Hoedspruit. His wife, though a civilian, was also employed in the army as a secretary to one of the colonels. In what follows I set out the undisputed and chilling account by the respondent's wife of the events of that fateful day when the respondent committed the offences.

[5] On the day of the incident the respondent had attended a function with members of his unit at O'Hagans, where he drank about three beers. He later accompanied his wife to another function involving members of her unit where he, amongst other things, drank three more beers. Thereafter they returned to their home in the late afternoon. On their arrival at home the respondent confronted his wife about his discomfort at her having danced with her boss, at the latter function. He told her that he did not like always seeing her dance with that colonel. This started an argument between them during which the respondent's wife apparently told him that should he be convicted, regarding certain charges he was facing, arising from the rape and murder of a 14 year old woman in Burundi, she would divorce him and take their children with her. The argument degenerated into a shouting match which unsettled the children and his wife, after failing to calm him down, decided to leave the house with the children. She asked him for the car keys telling him she was leaving to allow him to calm down but he refused to give her the keys. She then tried to use the landline telephone to phone her niece but he

pulled it from the wall. The respondent, apparently in a further attempt to prevent her from leaving the house also locked the front door but she ran out through the back entrance with the children.

[6] The respondent followed them into the street pleading with her to return and when she refused he picked up Janco who was at that stage holding on to her legs crying. He took Janco back to the house but she did not return to the house immediately and was apparently moved to doing so by Millize's pleas not to leave her 'boetie'. On their return to the house they encountered the respondent in the courtyard just outside the house talking on the phone to her mother with Janco crying. He gave his wife the phone when she demanded to talk to her mother and went inside the house. His wife told her mother amongst others, that she was through with the respondent.

[7] The respondent returned shortly thereafter having just finished smoking and said to her 'my bolla, dankie vir alles wat julle vir my beteken het' (. . . thank you for everything you have all meant to me). He again entered the house followed by Janco and the next moment she heard Janco scream and then a shot went off. She and Millize ran into the house and as they entered the kitchen the respondent emerged from the corridor carrying an R4 rifle and pointing it at her midriff. She tried to wrestle the rifle from him but he pulled the trigger hitting her in the stomach. On seeing this Millize screamed and ran away through the back entrance. The respondent, seeing her run away, took calculated aim through the wire mesh covering the door and though his wife tried to wrestle the rifle from his arms he shot the child.

[8] She ran towards the bedrooms where Janco lay next to her bedroom door curled up with blood all over the mat he was lying on. As she knelt to take a closer look at the bleeding child, the respondent pulled her upright pressing her against the wall with the rifle. She told him that he had shot their children and looking at Janco, he told her that he would kill her and then himself. As she still had the cell phone in her hand she began dialling some numbers and managed to push herself away from him, falling forward in the process. He demanded the cell phone but she refused and he pinned her hand with his foot, took the cell phone and threw it against the wall. He again pulled her upright and she used the opportunity to bite him on his neck which enabled her to run outside. As she emerged she saw Millize lying on the ground, mumbling as if asleep.

[9] She ran up the street screaming for help and one of the neighbours, Skallie, responded. She screamed at him and her other neighbours, who had started to gather there, to rush the children to hospital which they did. She was also rushed to the Hoedspruit Hospital but was transferred to 1 Military Hospital in Pretoria where she underwent an emergency operation. She was discharged a week later to attend the funeral of her children.

[10] Testifying in mitigation of sentence the respondent related his unhappy childhood due to his parents being alcoholics. He related how due to their alcoholism, he and his sister were removed from their care on several occasions and that at some stage he lived in an orphanage for two years. He also testified that he never had a stable family life as his father, a driller working for the Department of Water Affairs, was always moving from place to place resulting in him constantly changing schools. Upon

becoming a young adult he served his national service where after he held down a number of jobs culminating in his enlistment in the South African National Defence Force in the Air Force wing. He was, at some stage, posted to Burundi and on his second posting there he was arrested on charges of rape and murder involving a 14 year old woman. He was held, as an awaiting trial prisoner, in a shipping container, by the military police and was released on bail six months later with his wife's assistance.

[11] The Burundi episode and its aftermath featured prominently in his testimony. He testified that as a result thereof he was transformed in that he had weakened physically, lost some 16 kg, and that sometime after his return to South Africa, he started attending clinical psychology sessions on his wife's insistence after she had gone for help herself. The emphasis of the treatment, he testified, was aimed at helping him cope with the pressure brought about by the Burundi case. He was apparently told during these sessions that he displayed suicidal tendencies. He testified that his marriage was never the same upon his return and that he thought his wife was ashamed of being associated with him as she had started using a different bus to and from work from the one he used. He also testified that after his return from Burundi their circle of friends had changed and that he always received strange stares from other people, most of whom knew him well but who had become somewhat distanced from him.

[12] He testified that he was very emotional on the day of the incident and at some stage he had felt like crying even though his wife's niece had assured him that his wife loved him and would not leave him. He testified

that he had felt bad when his wife danced with her boss, on the day of the incident, which, he said, was a regular occurrence every time waltz music was played. He said this hurt him deeply as he had heard some unpleasant rumours about what this colonel got up to with women irrespective of their marital status. He stated that even though he did not suspect that something was going on between the colonel and his wife he did not trust him. All he could remember, he stated, about what happened further is that at some stage the argument between him and his wife had ended and he had gone to sit on a sofa as he felt tired. He remembers waking up in hospital with neck wounds but was unaware of what had happened. He was informed by the policeman guarding him that his children had died. He also had cuts on his wrists consistent with an attempted suicide. He however could not remember anything about the incident, learning about it from newspapers later.

[13] In imposing the effective sentence of 10 years the court *a quo* reasoned that it was clear from the respondent's testimony that the Burundi episode had an overwhelming negative influence on his emotional state. The court further seemed to find that the marriage of the Venters was no longer the same after Burundi. The court, however, found that it could not be disputed that the respondent had acted wilfully and with knowledge when he shot his children and his wife and that he was suppressing the memory of the incident by stating that he could not remember it. The court *a quo* further found that it was clear that the respondent was not just remorseful but was very sorry at what he had done. The court found that the effects of alcohol, his emotional instability arising from the Burundi episode, his show of remorse, that he was gainfully employed, was a mere 33 years old when he committed the

offences and was a first offender, impelled it to find that there were substantial and compelling circumstances which called for a sentence lesser than the prescribed minimum of 15 years.

[14] The state, as stated, contends that the sentences imposed in respect of each of the three offences were inordinately light. The sentence of eight years imposed for the attempted murder can be disposed of immediately. Counsel for the state submitted that an appropriate sentence would have been ten years. That submission might well be correct but I do not think that in those circumstances the sentence that was imposed can be said to be shockingly disparate, and I do not think there are proper grounds to interfere with that sentence on appeal. Most of the argument was directed instead to the sentences imposed for murder and I now turn to them.

[15] It was submitted that the court *a quo* was misdirected as it over-emphasized the respondent's personal circumstances particularly the respondent's Burundi experience and his alcohol intake on the day of the incident despite his wife's undisputed testimony that he had sobered up when the incident took place. It was also submitted that the trial court had misdirected itself by under-playing the seriousness of the offences as well as the interest of society in the imposition of appropriately deterrent sentences.

[16] As an appeal court we can interfere with the sentence imposed by the court *a quo* if we find that the court misdirected itself materially particularly in over-emphasizing some factors and underplaying others. We can also interfere even where there is no apparent misdirection but

where we find that the sentence is so light that it induces a sense of shock.

[17] It is correct, as the court *a quo* found, that the so-called minimum sentencing legislation is applicable in this matter.[1] Fifteen years is the prescribed minimum sentence on each of the murder counts, on which the respondent was convicted, as he was a first offender[2] though that may be reduced if substantial and compelling circumstances exist to do so. This court in *S v Malgas* 2001 (1) SACR 469 (SCA) spelt out how courts should approach the imposition of sentence where the legislation applies. The essence of this approach is that courts retain the discretion to determine appropriate sentences in view of the obvious injustice implicit in an obligation to impose only the prescribed sentences in any given circumstance. However, courts are required to approach sentencing conscious that the legislature has ordained that particular sentences should ordinarily be imposed regarding crimes covered by the legislation. The court reasoned that the aim of the legislature was to achieve a 'severe, standardised and consistent' response from courts in imposing sentence unless there were 'truly convincing reasons for a different response'; that when considering what sentence to impose 'emphasis was to be shifted to the objective gravity' of the crime and society's need for effective sanctions against it.

[18] As to what factors amount to 'substantial and compelling' circumstances within the contemplation of the legislation the court stated

[1] Criminal Law Amendment Act 105 of 1997, as amended.

[2] Section 51(2)(a)(i): 'Notwithstanding any other law but subject to ss (3) and (6), a regional court or a High Court shall –

(a) if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person in the case of–

(i) a first offender, to imprisonment for a period not less than 15 years; . . ..'

that all factors traditionally taken into account by courts were still relevant and that the 'cumulative impact of those circumstances may justify a departure'. The Constitutional Court in *S v Dodo* 2001 (1) SACR 594 (CC), embraced the interpretation of the legislation and the approach crafted in *Malgas* on how courts should approach sentencing.

[19] It needs to be borne in mind that the sentences provided for in the Act are minimum sentences for the prescribed offences and *Malgas* was directed to whether a lower sentence might be called for in a particular case. But an evaluation of the cumulative effect of all the circumstances, in accordance with the approach in that case, might well indicate that a higher sentence is called for. I think that is applicable in this case. For had there not been the strong mitigating circumstances that I will presently come to, I think a court might well have been justified in imposing a sentence far in excess of the minimum. It is only by applying those mitigating circumstances that I have come to the conclusion that a proper sentence would be something less.

[20] I now consider whether there is any basis justifying us, on appeal to interfere with the sentences imposed by the court *a quo*. In doing so regard must be had to all the evidence presented. The court *a quo* found that the Burundi episode had an overwhelming effect on the respondent's actions as well as feelings of jealousy and the fact that he had been drinking that day. These factors clearly influenced the court *a quo* to impose the sentence it did. Clearly the court *a quo* was of the view that the respondent had acted with temporary diminished criminal responsibility as a result of stress emanating from the Burundi episode, and to some extent, the role of alcohol.

[21] Temporary non pathological diminished criminal responsibility is recognised in our law particularly its relevance to sentence. Properly understood, this state of mind can be stated to be the diminished capacity to appreciate the wrongfulness of one's actions and/or to act in accordance with an appreciation of that wrongfulness.

[22] In a number of cases, whilst this state of mind was rejected as a defence, it was found that it had an overwhelming effect on the conduct of the accused to such an extent that very lenient sentences were imposed. In *S v Laubscher* 1988 (1) SA 163 (A) a sentence of six years for murder was reduced by suspending half of it where the appellant had been found to have acted with diminished criminal responsibility. The appellant had discharged a total of 21 rounds from his pistol in his parents-in-law's house after he was denied access to his child. One of the shots killed his father in law. A criminal psychologist and a psychiatrist had testified in the trial on behalf of the appellant supporting his claim that he had been undergoing severe stress as a result of his rejection by his parents-in-law as well as his inability to have access to his child.

[23] In *S v Smith* 1990 (1) SACR 130 (A) a sentence of six years was reduced to three years on the basis that the appellant had shot and killed the deceased as result of a prolonged period of sustained and mounting mental strain caused by the deceased. A clinical psychologist had testified at the trial supporting the overwhelming effect of psychological distress on the appellant's conduct. In *S v Kalogoropoulos* 1993 (1) SACR 12 (A) an effective eight year sentence was confirmed on appeal where a jealous husband who suspected his wife of having an affair with his business

partner, had embarked on a heavy drinking spree before shooting and killing his partner and domestic employee as well as the attempted murder of his wife and his partner's wife. He had called a psychiatrist to back his defence of temporary non-pathological diminished criminal responsibility. In that case it was also found that the appellant had suffered from genuine amnesia induced by his excessive intake of alcohol just before he embarked on the shooting spree. In *S v Shapiro* 1994 (1) SACR 112 (A) the respondent had fired six shots at point blank range at the deceased, a drug addict, who had threatened his fiancé with violence. He went outside, reloaded and returned to fire a seventh shot at the deceased. A sentence of seven years, four of which were suspended, survived on appeal. Psychiatric evidence had also featured in that case supporting a claim of diminished criminal responsibility induced by severe stress cause by the deceased.

[24] In *S v Di Blasi* 1996 (1) SACR 1 (A) the state had appealed against a four year sentence imposed on a husband who had hunted down his ex-wife and murdered her in a cold-blooded manner, simply because he had regarded her conduct of leaving and divorcing him as an affront. In that case the defence's case was that the respondent had acted with diminished criminal responsibility due to a partial emotional and psychological disintegration, amounting to non-pathological causes of a temporary nature. The respondent was on appeal found to be a self-centred man with an 'exaggerated sense of self importance and pride' who had considered it a personal insult for his wife to divorce him which he considered justified him murdering her. Vivier JA further found that the respondent's obsession was not so overwhelming that he had lost control 'of his logical and decision making facilities'. The sentence of four years imposed by

the trial court was set aside and in its stead a sentence of 15 years was substituted.

[25] It must be borne in mind in considering the aforementioned cases that they were all decided at a time when it was ‘business as usual’ and the sentencing discretion of the courts was as yet unfettered by the minimum sentencing legislation as is the case currently. In casu it is correct that the respondent had started taking alcohol as early as 11 am on the day of the incident. It is also correct that clinical psychological assessments had diagnosed him as displaying suicidal tendencies before the incident. Furthermore a forensic psychiatric report compiled four months after the commission of the offences records that the respondent was experiencing ongoing stress after the Burundi incident, which was aggravated by ‘alleged advances of a fellow officer to his wife and alcohol consumption prior to the time of the alleged offence’. The report further records that he had probably committed the offences due to impulsiveness brought about by disinhibition due to alcohol intake and that ‘the seriousness of his actions at the time of the alleged offence including the attempted suicide indicate that the distress he experienced on account of events in his life was deeper than he showed and that provocation or disinhibition would break down his defences’.

[26] Clearly, the Burundi episode had continued to plague the respondent. The references to ‘events in his life’ and ‘ongoing stress after the Burundi incident’ bear testimony to the fact that the Burundi episode had affected him personally as well as his marriage relationship. That this is so is illustrated by the fact that he mentions this extensively in his testimony in mitigation, particularly the fact that he had became a pariah

in his community upon his return from Burundi. What was constantly on his mind was that his wife had told him that should he be convicted regarding the Burundi matter she would divorce him and leave with the children. This, it appears, was a thought he could not bear. It is quite possible that he had become consumed by the threatened break up of his marriage and separation from his wife and children that he had lost some sense of objectivity.

[27] That he may have lost some objectivity should not, however, be viewed in isolation. We have uncontested testimony from his wife that she had stood by him throughout his incarceration in Burundi until he was released on bail. It was she who had raised a loan to access the funds that were employed to pay his bail. She had constantly re-assured him of her support throughout the period up to the day of the incident. She stood by him and also underwent psychological clinical help after his return, with him. A period of 18 months had elapsed from his return from Burundi when he committed the offences. In my view his loss of objectivity arising from his wife's intentions were clearly misplaced. The Burundi verdict had not materialised when the incident happened and his wife and children still lived with him. There is also undisputed evidence that he had sobered up when he committed the offences. Clearly alcohol intake played a minimal role if any on his conduct. The aforegoing analysis of the matter leads me to the conclusion that the ongoing stress about the Burundi incident cannot be viewed as wholly mitigatory. His wife had stood by him throughout and had not left him when he was charged with committing the offences. He behaved in a manner that shows a state of mind suggesting that everything revolved around him and any action by his wife and children interpreted by him to amount to them leaving him justified him murdering them.

[28] Regarding his amnesia claim it is correct that the psychiatric report filed on his behalf recorded that he was suppressing the memory of the incident because he could not come to terms with what he had done. One cannot, also, ignore his sister's evidence, called on his behalf in mitigation, that he had telephoned her shortly after he had committed the offences, telling her what he had done. In my view, the court *a quo*

clearly over-emphasized the effects of the Burundi episode on the respondent's conduct. The court *a quo* failed to consider all the facts surrounding the Burundi incident as well as the respondent's circumstances upon his return. The evidence is also clear that he was calm when he shot Janco and his wife as well as when he took careful aim at the fleeing Millize. His statement to his wife after he shot Janco, that he intended to wipe them all out and then commit suicide, shows a man who was in touch with reality and who was aware of what he was doing. That he was in control of his faculties is also illustrated by his demand for his wife's cell phone when she tried to call for help amidst the shooting. He clearly wanted to stop her calling for help as he wanted to finish them off.

[29] It is also clear from the court *a quo's* judgment that insufficient weight was given to the seriousness of the offences involving as they did the murder of two young and unsuspecting children. No doubt murder is a serious offence involving, as it does, the loss of life. In casu we have a father who shot and killed his four and five year old son and daughter respectively. He perpetrated these dastardly deeds within the confines of their home where they should be at their safest. The respondent abdicated his role as protector and provider to his wife and children and became a predator and turned their safe sanctuary into a killing field. It chills ones blood when one learns how the tearful Janco had clung to his mother in the street before the respondent picked him up and returned to the house with him and that the little boy had followed the respondent into one of the bedrooms not knowing that he was walking to his death. His wife's testimony about this aspect is undisputed and telling: the little boy screamed in the other room as if frightened by something, followed by a

rifle gunshot. He then calculatedly took careful aim at his fleeing daughter and shot her. In my view the court *a quo* underplayed the seriousness of the offences viewed within the context of the respondent as a husband and father.

[30] Clearly society views the respondent's conduct in a very serious light. The court *a quo's* judgment is glaring in its omission to deal with the interests of society and the need for deterrent sentences. It is in society's interests that persons who commit these offences in the circumstances described are appropriately sentenced. Within the context of this case the injunction to protect children from violent crime assumes a prominent role. In my view, the sentences imposed are indeed shockingly light when viewed within the context of the seriousness of the offences. Contrast the sentence imposed by the court *a quo* with a similar sentence preferred by this court in *S v Nel* 2007 (2) SACR 481 (SCA) where the appellant who was driven by a compulsive gambling habit had robbed a casino without harming any of his victims. Clearly the court *a quo* committed a misdirection in over-emphasizing the respondent's personal circumstances and underplaying in the process the seriousness of the offences he committed and society's interest in deterrent sentences.

[31] In my view this matter calls for a sentence cognisant of his personal circumstances, but which takes account of the seriousness of the offences and the need for appropriate severity and deterrence. This latter element is at the core of the community interest in how courts should deal with violent crime.

[32] This is a matter in which the respondent's personal circumstances

are outweighed by society's need for a retributive and deterrent sentence. In *Van Heerden v State* (unreported judgment of this court – case no 274/2002) this court confirmed a sentence of 25 years on a woman who was diagnosed as suffering from adjustment disorder with depression arising from overwhelming but misplaced anger, which diminished her ability to appreciate the wrongfulness of her conduct. See also *S v Martin* 1996 (1) SACR 172 (W) a full bench decision where a life sentence was reversed on a man who had been convicted, upon a guilty plea, on four counts of murder and two counts of attempted murder involving members of his family after he was denied access to his children. A cumulative sentence of 21 years was imposed instead. See also *Dikana v S* [2008] 2 All SA 182 (E) where a full bench of the Eastern Cape Division of the High Court confirmed two life sentences on a man who had murdered his ex-girlfriend and her lover, by burning them inside a shack simply because he did not accept that their relationship had ended.

[33] I have already pointed out that an evaluation of the cumulative effect of all the circumstances might in particular cases call for a sentence in excess of the minimum sentence provided for in the Act. In my view, but for the mitigating circumstances, I think that the crimes would have justified a sentence far in excess of that minimum. The mitigating circumstances I have referred to must clearly reduce the sentence that would otherwise have been appropriate, but in my view they are capable of reducing it to nothing less than eighteen years' imprisonment on each count, to be served concurrently. That is so disparate from the sentence that was imposed that I think we are justified in interfering. The two offences were committed in an ongoing course of conduct and should be taken together for purposes of sentencing.

[34] The following orders are made:

(i) The appeal against the sentences imposed on charges 3 and 4 (the charges of murder) succeeds.

(ii) The sentences imposed on those charges are set aside. On those charges taken together a sentence of eighteen (18) years' imprisonment is substituted.

(iii) The remaining sentences and directions given by the court below remain in place with the result that the effective period of imprisonment on all charges is eighteen years' imprisonment.

D MLAMBO

JUDGE OF APPEAL

CLOETE JA:

[35] I have had the advantage of reading the judgment of my colleague Mlambo. I agree with his conclusion in regard to the attempted murder charge. I am, however, with respect, unable to agree either with the reasoning or the conclusion reached in regard to the sentence he considers should be imposed for the murder charges. As I shall endeavour to demonstrate, my colleague's judgment both constitutes a radical departure from sentences hitherto considered appropriate by the courts, including

this court, for murder committed with diminished responsibility, and also emphasises aspects of sentencing which this court has ─ repeatedly ─ held do not require emphasis in such cases.

[36] In order to appreciate the respondent's state of mind when he killed his two children and attempted to kill his wife on 26 April 2006, three facts require emphasis. The first is the effect that the events in Burundi had had, and were continuing to have, on him. He had been arrested on 1 October 2005 for the rape and murder of a 14 year old girl whilst deployed with the South African Air Force in that country and the prosecution was not complete even at the time of his trial in the court *a quo* two years later. In his own words:

'[T]oe ons terugkom van Burundi af, het my vrou die nuusberigte in die koerante gesien wat haar ouma vir ons gehou het, en dit het vandat ek aangekla is tot voor die insident [on 26 April 2006] het dit my huwelik met my vrou, ons verhouding verwoes . . . ek kon aanvoel my vrou het vertroue verloor in my . . . die koerantberigte het my vrou negatief gemaak, en dit het heeltemal ons verhouding, kommunikasie, ons huwelik, alles geaffekteer. Die manier waar ons die verantwoordelikhede hanteer het verander. Dit het my werksomstandighede verander. Dit het ons vriendekring verander. Ek kon aanvoel as ek in die eenheid is, as ons wag vir die busse om ons na ons afdelings te ry, mense kyk snaaks na 'n mens, of daar is mense wat onder af skinder, of goed, en daar was op 'n stadium wat ek en my vrou nie eers meer in dieselfde bus gery het nie, omrede ek kon gevoel het, of ek het geweet sy voel beskaaf [sic; sc "skaam"]om saam met my gesien te word.'

The other two facts relevant to understanding what happened on 26 April 2006 are that the respondent had consumed alcohol; and that he considered that a colonel for whom his wife worked as a secretary had (again) made improper advances to her. I shall deal first with the events of 26 April 2006 and then return to the significance of the three facts which I have highlighted.

[37] According to the respondent, he woke up on that morning feeling exhausted, withdrawn and depressed. At about 10h00 he was transported

to a social function at O'Hagans by a female friend who, again according to him, noticed that there was something wrong with him and pressed him to discuss the problem, but he did not want to talk about it. At O'Hagans he drank three beers. By the time his wife collected him at 14h00 he was, according to her, drunk. They went to another function at about 14h30. The respondent drank a further two or three beers at that function. At one stage he felt tired and went to lie down on a cement seat. After half an hour or so he got up but did not mix with the other guests. He went to speak to his wife's niece or cousin ('niggie'). He cried during the conversation with her and said that he felt as though he was losing his wife and children and she attempted to comfort him. At a later stage music was played and when a particular tune came up, the colonel, as he had in the past, danced with his wife. That upset the respondent considerably, as usual, because the colonel had a reputation for being a ladies' man on the base where he and the respondent were stationed, and the respondent was of the view that he was continuing to make advances to his wife. The respondent's evidence on this point was as follows:

'[E]k het op 'n stadium net agtergekom nee, die man is ook besig om vlerk te sleep by my vrou. Op die spesifieke dag toe hy dans met my vrou, het dit my baie omgekrap . . .'.

[38] The respondent and his wife arrived at their home with the children at about 17h00. At that stage, according to his wife, the respondent appeared sober. Her evidence was:

'Hy was nugter. Hy het vir my nugter voorgekom.'

That is the 'undisputed evidence that he had sobered up when he committed the offences' referred to by my colleague.[3] Counsel representing the State on appeal conceded in argument in response to questions put by me that the respondent must still have been affected to some extent by the alcohol he had consumed. My contemporaneous note

[3] Para 26.

reads that counsel 'gee toe dat alkohol rol gespeel by vermindering van toerekeningsvatbaarheid'. That concession was in my view fairly and correctly made in view of the fact that the three beers consumed by the respondent at O'Hagans had made him drunk and he had consumed a further two or three beers that afternoon in a lesser period of time and before recovering from his previous alcohol intake that morning. I therefore cannot agree with my colleague Mlambo that 'clearly alcohol intake played a minimal role if any on his conduct'.[4] The significance of the fact that the respondent had drunk alcohol on the day in question appears from the psychiatric report from which I shall quote later in this judgment.

[39] After the respondent and his wife had returned home, he started an argument with her. According to the respondent's wife, the argument was prompted by his remark 'en daar gebeur dit alweer', her question 'daar gebeur wat alweer', his response 'jy en 'n sekere kolonel, wat op 'n sekere liedjie elke keer moet dans, al staan ek langs jou' and his refusal to accept her explanation by replying 'maar die kolonel neuk so rond op hierdie basis, nou neuk hy seker met jou ook rond'. According to his wife, the respondent then began talking more and more loudly and said that he did not know whether she still had feelings for him and whether she would continue to support him in the Burundi case. She attempted to reassure him by saying that she had stood by him for the last eighteen months. He then asked what would happen if he were to be locked up, and her reply was:

'As hulle nie fisiese bewyse kan gee nie, sal ek jou bystaan en jy weet dit, so het ek gesê van die begin af, maar as hulle fisiese bewyse kan gee dat jy skuldig is, dan weet jy sal ons nie meer getroud kan wees nie.'

According to her, he was at this stage almost screaming at her despite her repeated entreaties that he speak more softly and calm down. She then left the room because he would not talk quietly or see reason. On her return to the room he refused her request to hand over the keys to their

[4] Ibid.

vehicle and wanted to know where she was going. She said she did not know but wanted to leave so he could calm down. She attempted to use the telephone but he pulled it out of the wall. She indicated that she was leaving with the children and he jumped up and locked the front door. She ran out of the back door with the children. He pursued her into the street and stood directly in front of her. Then, according to her, 'Hy het vir my geskree, gaan net terug in daardie huis in'. She refused and said "As jy so gaan aanhou, gaan ek polisie toe gaan'. With that he lifted up their son Janco and ran home. She followed shortly with their daughter Millize.

[40] When the respondent's wife arrived back at their home, the respondent was talking on her cellular telephone to her mother. She took the telephone and told her mother that she could not take it any more. She typed 'help' into the telephone and sent the message to a friend of the respondent's, her cousin/niece and to a female friend. The respondent finished smoking and said 'my bolla, dankie vir alles wat julle vir my beteken het'. The respondent then went into the house and Janco followed. She heard Janco shout in fright and then she heard a shot. She ran into the house with Millize. The respondent came into the passage with a rifle at hip height aimed at her. She attempted to seize the rifle, he then pulled the trigger and she felt her stomach grow warm. Millize shouted 'nee' and ran out of the back door. The wife's evidence was then:

'Hy het aangelê na haar toe, wat sy uitgehardloop het. Hy het bietjie gekorrel met die loop tussen die kosyn en die gaasdeur. Ek het nog steeds aan die geweer probeer wegruk dat hy nie my kind moet skiet nie, maar daar het een skoot afgegaan.'

I pause to remark that the weapon was a combat rifle which had been issued by the Air Force to the respondent to enable him to participate in a competition on behalf of his unit, and that he had in the past participated in the South African combat rifle championships and other competitions. He was therefore well used to firing such a weapon.

[41] The respondent's wife ran and knelt next to Janco. The respondent pulled her upright from behind. Her evidence continued:

'Hy het my teen die gangmuur vasgedruk met die R4, en ek het vir hom gesê, besef jy dat jy ons kinders doodgeskiet het? Hy het vir Janco gekyk en gesê, dit is reg. Hy het vir my gekyk en gesê, ek gaan jou nou doodmaak, en ek gaan myself ook doodmaak . . . ek het vir hom gevra asseblief, los my net, laat ek vir hulle kan hulp kry, maar hy wou nie los nie, en ek het besef ek het nog steeds die selfoon in my hand, en net knoppies begin druk. Ek het losgeruk, en vooroor geval, halflyf in Millize se kamer in, en aanhou die knoppies druk op die selfoon. Hy het baie koel en kalm vir my gesê, "Gee vir my daardie selfoon", maar ek het nie. Toe trap hy my hand, my arm vas, en hy vat hom uit my hand uit, en gooi hom teen die muur . . . Hy het my weer regop gepluk en al wat ek op daardie stadium kon doen is byt hom in sy nek, want hy wou my nie los nie. Hy het losgeruk en my gelos, en ek het begin hardloop. Ek is by die agterdeur uit, en ek het gesien Millize lê daar.'

The respondent then attempted to commit suicide.

[42] The respondent said that he had no recollection of what had happened after the argument about the colonel had started and that his first recollection thereafter was when he came to in hospital. This evidence was not challenged by the State and is in any event irrelevant for present purposes. The reason I mention it is to explain that the respondent was unable to dispute the evidence of his wife as to what had transpired after the argument had begun.

[43] There is evidence *aliunde* which supports the evidence of the respondent as to his state of mind on the day in question. The State formally admitted during argument before the court *a quo* that a psychiatrist had found that the respondent was depressed after his return from Burundi; that he showed tendencies to commit suicide; and that he used alcohol as an escape mechanism. Furthermore the State did not seek to attack his evidence as to the conversation he had had with the female friend who had conveyed him to O'Hagans, or the conversation he had had with his wife's cousin/niece that afternoon, either by cross-examining

him on these aspects or by calling those persons to refute his evidence.

[44] The explanation for the respondent's behaviour in shooting his wife and children is to be found in the unanimous report of the panel of three psychiatrists appointed in terms of ss 78 and 79 of the Criminal Procedure Act to evaluate his capacity to stand trial. The factual basis for the psychiatrists' opinion as expressed in the report and in particular, the three facts I emphasised at the beginning of this judgment, namely, the effect of the Burundi incident; the respondent's consumption of alcohol; and the effect the conduct of the colonel had had on him, was confirmed in the evidence before the court *a quo*. The contents of the report are admissible in terms of the provisions of s 79(6) of the Criminal Procedure Act. The relevant part of the report reads:

'*He has been experiencing ongoing stress after the Burundi incident. This was aggravated by alleged advances of a fellow officer to his wife, and alcohol consumption prior to the time of the alleged offence.*
The nature of the alleged offence indicates impulsiveness, which was probably due to disinhibition on account of the alcohol consumption. However, the seriousness of his actions at the time of the alleged offence including the attempted suicide indicate that the distress he experienced on account of events in his life was deeper than he showed, and that provocation or disinhibition would break down his defences.

The alleged amnesia is in keeping with the psychogenic suppression of events which a person's mind cannot accept and which are out of character with his personality.

The accused has shown signs of depression during his time of observation and he has received treatment. It is likely that the depression was present but hidden at the time of the alleged offence, and that it became clinically significant after the alleged offence. He is deeply distressed by his actions and about the loss of his family.
The accused will have to be considered a suicide risk for a long time to come, and will need regular psychological and medical attention.' (Emphasis supplied.)

The significance of the report may be summarised as follows. There was 'provocation' consisting in the perceived advances made by the colonel to the respondent's wife, and his alcohol intake would have caused 'disinhibition'. Both of these factors aggravated his ongoing stress after the Burundi incident and would 'break down his defences' ─ resulting in

diminished responsibility and the commission of a crime which 'indicates impulsiveness'. The Burundi incident is relevant to an understanding of the respondent's state of mind when he committed the offences on the day in question and in my respectful view my colleague's conclusion[5] that 'the ongoing stress about the Burundi incident cannot be viewed as wholly mitigatory' loses sight of this fact.

[45] In view of what I have set out above, there can to my mind be no doubt whatever that the respondent was acting with substantial diminished responsibility when he committed the offences which are the subject matter of this appeal and not merely, as my colleague says,[6] 'that he may have lost some objectivity'. If I had any doubt, I would propose that the sentences be set aside and the matter be remitted to the court *a quo* for expert evidence to be led on this issue, for to do otherwise could result in the imposition of a sentence not in accordance with justice: *S v Rasengani*.[7]

[46] I cannot, with respect, agree with the emphasis placed[8] by my colleague on the following evidence:

'The evidence is also clear that he was cool and calm when he shot Janco and his wife as well as when he took careful aim at the fleeing Millize. His statement to his wife after he shot Janco, that he intended to wipe them all out and then commit suicide, shows a man who was in touch with reality and who was aware of what he was doing. That he was in control of his faculties is also illustrated by his demand of his wife's cell phone when she tried to call for help amidst the shooting. He clearly wanted to stop her calling for help as he wanted to finish them off.'

These findings in my respectful view accord no weight to the fact that the respondent was acting with diminished responsibility, which probably continued at least until the time when he attempted to commit suicide. I would add that the mere fact that the respondent shot his wife and children on the spur of the moment to my mind raises at least a reasonable possibility that he was not acting completely rationally; and the onus was on the State to negative this possibility which, it cannot be

[5] Para 26.
[6] Paras 25 and 26.
[7] 2006 (2) SACR 431 (SCA) paras 21 and 22.
[8] Para 27.

gainsaid, it did not do.

[47] It is important to distinguish between temporary non-pathological criminal incapacity, which is a defence because it excludes culpability, and diminished responsibility, which is not a defence but is relevant to sentence because it reduces culpability. The distinction is explained by Prof Snyman[9] in comparing s 78(1) of the Criminal Procedure Act, which excludes criminal responsibility caused by mental illness or mental defect, with s 78(7), which allows a court to take into account diminished responsibility resulting from either cause in sentencing the accused. The learned author, with reference to s 78(7), says:

'This subsection confirms that the borderline between criminal responsibility and criminal non-responsibility is not an absolute one, but a question of degree. A person may suffer from a mental illness yet nevertheless be able to appreciate the wrongfulness of his conduct and act in accordance with that appreciation. He will then, of course, not succeed in a defence of mental illness in terms of section 78(1). If it appears that, despite his criminal responsibility, he finds it more difficult than a normal person to act in accordance with his appreciation of right and wrong, because his ability to resist temptation is less than that of a normal person, he must be convicted of the crime (assuming that the other requirements for liability are also met), but these psychological factors may be taken into account and may then warrant the imposition of a less severe punishment.'

The same distinction applies where (as here) mental illness is not present, as appears from a number of judgments of this court. I shall refer to three. These cases also serve as illustrations of the approach taken by this court where criminal responsibility is not negatived but diminished responsibility is established.

[48] In *S v Smith*[10] this court said:

'Dr Berman was at the time the principal psychiatrist at Sterkfontein Mental Hospital and had since 1979 been involved in numerous Court cases of this nature. He has a wealth of experience in the field of mental illness and instability. He advanced a number of persuasive reasons for his opinion that the appellant was criminally responsible. It suffices to refer to the main ones.

[9] *Criminal Law*, 4th ed para 12 p 174.
[10] 1990 (1) SACR 130 (A) at 135b-e.

Her comments before the occurrence were rightly taken into account. I refer to her statement that if she could not have the deceased nobody would, and, on the day before the shooting, that she had previously contemplated dispatching him in the very manner in which she subsequently did. In the circumstances it is reasonable to infer that such actions were contemplated by her at times when she was frustrated and distraught at his behaviour. Dr Berman pointed out that the shooting involved unzipping her handbag, aiming the revolver at him and firing the three shots, one of which found its mark. These were deliberate acts, and according to Dr Berman, could not have been executed in a state of automatism or unconsciousness, particularly since she had never before used a firearm. Though she was obviously under great emotional stress, Dr Berman also considered that there were no grounds for concluding that she was unable to appreciate the wrongfulness of her conduct or to exercise self-control. These views are confirmed by what took place after the shooting. According to the two eye-witnesses, she appeared calm. After the shooting she did not realise that the deceased had been injured. Her instruction to Mrs Van der Merwe at that stage to "go and fetch him etc" indicates determination and persistence on her part to carry out a settled intention. In the light of this evidence it cannot be said that at the critical time the appellant was bereft of her senses or was not on any other ground criminally responsible for her actions.

Having said this, it is nevertheless clear that her shooting of the deceased was the final result of a prolonged period of sustained and mounting mental strain, of which the deceased was the cause. Whether it was the result of anger, frustration or humiliation, or more than one of these emotions, is immaterial. What is plain is that they must have substantially reduced her power of restraint and self-control. This fact, though highly relevant to the question of sentence, cannot affect her criminal liability.'

[49] In view of the approach taken by my colleague I would emphasise the following passage in *S v Shapiro*[11] (the facts of which are set out below in para 53):

'[Counsel for the State's] main argument was that although he did not dispute [the psychologist called for the defence's] opinion, this Court should not lose sight of the unchallenged evidence of independent by-standers, that Shapiro's actions appeared to be cool, calm and calculated. Outwardly he gave no sign of emotional confusion. Moreover, the provocation he experienced was limited. He brutally executed a man who was helpless and dying. He acted without compunction, and thereafter showed a callous indifference to what he had done.

The assumption underlying this argument is that the conduct of a person who has been found to have diminished criminal responsibility is to be measured by the same yardstick as the conduct of a person with undiminished criminal responsibility. Such an assumption is fallacious, for a person who has diminished criminal responsibility is by definition a person with a diminished capacity to appreciate the wrongfulness of his act, or to act in accordance with an appreciation of its wrongfulness.'

[11] 1994 (1) SACR 112 (A) at 123C-F.

[50] In *S v Ingram*[12] (the facts of which are set out in para 56 below) this court said:

'The learned trial Judge correctly held that the appellant had acted under circumstances of diminished responsibility. He appreciated the need to give full effect thereto in arriving at a proper sentence. He sought guidance in relation to the vexed question of sentence in certain past decisions of this Court. He no doubt bore in mind that a sentence must be individualised and each matter dealt with according to its own peculiar facts. He then went on to say:
"What distinguishes this case from the cases quoted is the behaviour of the accused after the shooting. His conduct, his emotions indicated an awareness of his acts. In my view there was a refusal to come to the assistance of this woman whose suffering at the time must have been extreme. This is an important factor that [must] be borne in mind."
There would appear to be implicit in this statement a finding that the appellant acted in callous and wilful disregard of the plight of the deceased. The evidence does not, in my view, justify such finding beyond all reasonable doubt. From what the appellant said and did immediately after the shooting it may be inferred that he genuinely believed at the time that the deceased was dead. True, later events must have made him realise that she was not. But he may well still have thought that she was beyond human assistance. When he stopped Dagny from going to the deceased he was probably acting in Dagny's interests by preventing her from being exposed to the traumatic sight of her dying mother rather than restraining her from going to the deceased's assistance. *His state of intoxication and emotional stress at the time was not conducive to totally rational thought and behaviour.* His primary concern at that stage appears to have been the immediate welfare of the children. In the circumstances it is not the only reasonable inference that he callously refused to go to her assistance, or deliberately stopped anyone else from doing so. There was accordingly a material misdirection by the trial Judge which leaves this Court at large to consider the question of sentence afresh.' (Emphasis supplied.)

[51] The law is clear: the fact that the defence of temporary non-pathological criminal incapacity fails, or is not raised, does not have the consequence that the accused must be sentenced if he/she was acting normally. The contrary is the case. A person who acted with diminished responsibility is guilty, but his/her conduct is morally less reprehensible for the very reason that the criminal act was performed when the accused was not fully in control and therefore acting with impaired judgment.

[52] There is accordingly in my view a choice in this matter: either one

[12] 1995 (1) SACR 1 (A) at 8d-i.

should accept that the respondent acted with substantial diminished responsibility and accord proper weight to that fact; or the matter should be sent back to the court *a quo* to enable expert evidence to be led on the extent to which the respondent acted with diminished responsibility, based on the evidence led at the trial. That evidence was not available to the panel of psychiatrists who gave the report and it seems improbable that they would have known the details of how the crimes were committed as the respondent was suffering from amnesia. I would follow the former course. I do not consider that sentencing the respondent on the basis that there was no, or little, diminished responsibility is an option in the absence of such evidence.

[53] The representative of the State on appeal was unable to produce a single case where an accused acting with diminished responsibility when committing murder was sentenced to more than ten years' imprisonment. I have found none and nor, apparently, has my colleague. Of course every case depends on its own facts, but the sentence considered appropriate by my colleague in this case would in my respectful view be so out of step with the decisions of this court to which I am about to refer, even making allowance for the factual differences with this case, as to be unjustifiable. Nor do I consider that the effect of the minimum sentence legislation[13] requires the imposition of the sentence he considers appropriate on the murder charges. That legislation does not require a 'severe, standardised and consistent'[14] response from courts, in the imposition of sentences for crimes it specifies, where substantial and compelling circumstances are present. And although the sentence to be imposed in lieu of the prescribed

[13] Criminal Law Amendment Act 105 of 1977.
[14] *S v Malgas* 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA); [2001] 3 All SA 220 (A); para 8.

sentence must be assessed paying due regard to the bench mark which the Legislature has provided,[15] the bar has not in my judgment been raised to the extent that 18 years' imprisonment can be justified when not more than 10 years was previously imposed, especially when the prescribed sentence for murder, which is not premeditated, is 15 years' imprisonment.

[54] I turn to consider the cases. The facts in *S v Shapiro*[16] are adequately set out in the headnote, which reads as follows:

'The respondent, who was 27 years of age and a partner in a restaurant business, had shot the deceased, who was a drug addict and a drug dealer, in cold blood in the foyer of a hotel. The evidence revealed that the respondent and the deceased had become friends through the respondent's fiancé. From time to time the deceased provided the respondent and his fiancé with cocaine free of charge and regularly visited the couple and stayed over with them. The deceased's abuse of drugs escalated seriously during the few months prior to his death and his behaviour deteriorated accordingly ─ he became aggressive and made threats against a number of people. He became unpredictable and paranoic. At a certain stage he began accusing the respondent's fiancé of stealing his cocaine and thereafter assaulted her and made a number of threats to kill her. The respondent took these threats seriously and arranged for her to go to Israel until the dust had settled. On the day of the murder the deceased arrived at the respondent's flat, threatened his fiancé and attacked her. The respondent arrived 10 minutes later and after having ascertained what had happened, went to a nearby hotel where he found the deceased. He drew his firearm, aimed and fired six shots at him. He turned to walk out of the hotel but then reloaded the firearm, walked back into the foyer and fired a seventh shot.'

The sentence imposed was seven years' imprisonment of which four years was conditionally suspended. The Attorney-General appealed against the sentence on the basis that it was shockingly inappropriate. This court pointed out[17] that 'central to the judgment [of the court *a quo*] on sentence is the finding that however brutal and callous *Shapiro's* actions may seem, he acted with substantial diminished criminal responsibility'. After considering the arguments for the State, this court concluded[18] that although the sentence might be considered to be lenient, it did not satisfy that test.

[15] Ibid para 25J.
[16] Above, n 11.
[17] At 120c-d.
[18] At 124d-e.

[55] A more recent case in which the State cross-appealed against the sentence imposed is *S v Kok*.[19] The facts are set out in the headnote as follows:

'The appellant was a superintendent in the South African Police Service at the time of the alleged offence. It appeared that a dispute had arisen between the appellant's wife and one of the deceased (Mrs B, who was a colleague of the appellant) over the return of two table cloths. Mrs B had instituted proceedings in the small claims court against the appellant's wife for the return of the table cloths and was awarded R600 in damages. After work one afternoon whilst the appellant was discussing angling club matters with two colleagues over a few drinks, he got a call from his wife to the effect that the sheriff was at their house making an inventory. The appellant returned home and found his wife and disabled son in a very distressed state. He collected his pistol and then proceeded to the police station where he removed an R1 rifle, ammunition, hand grenade and a combat jacket from a safe and loaded the[m] into the boot of his car where there was already a shotgun with a pistol grip. The appellant then proceeded to the home of Mr and Mrs B, entered their house and shot them both. Their son emerged from the bathroom and the appellant pointed the shotgun at him but he ran into his bedroom and escaped through a window after breaking the window pane. The appellant fired the shotgun through the bedroom door but the deceaseds' son escaped unscathed.'

The appellant was sentenced to ten years' imprisonment on each of the murder counts and to five years' imprisonment on the attempted murder charge, and the sentences were ordered to run concurrently so that the effective period of imprisonment imposed was ten years. This court refused to interfere either at the suit of the appellant or the State.[20]

[56] There are also several cases in this court where the accused was found to have acted with diminished responsibility and appealed against the sentence imposed for murder.[21] In *S v Laubscher*[22] the facts as summarised in the English version of the headnote were the following:

'The appellant was a 23-year-old medical student whose intelligence, according to the evidence, was that of a genius, he was courteous, an introvert and emotionally very sensitive with a very low threshold for enduring tension. He embarked on a relationship with one C who later became pregnant, whereafter they married. Appellant's parents-in-law did not accept him and were cold and aloof towards him. After the birth of their child, C's parents came and fetched C and took her and the

[19] 2001 (2) SACR 106 (SCA).

[20] Para 27.

[21] In addition to those which I shall deal with in some detail, they include *S v Calitz* 1990 (1) SACR 119 (A), *S v Kalogoropoulos* 1993 (1) SACR 12 (A), *S v Potgieter* 1994 (1) SACR 61 (A) and *S v Kensley* 1995 (1) SACR 646 (A).

[22] 1988 (1) SA 163 (A).

child back to their farm. C thereupon instituted a divorce action against the appellant. On a certain weekend the appellant arranged with C that he would collect her and the child and take them to his parents for the weekend. When he went to fetch C, however, C had changed her mind and no longer wished to accompany him. On the subsequent Monday the appellant again arranged with C that he would fetch her and the child and when he kept the appointment he was told by C in the presence of her parents that she was not willing to go with him and he was told by C's father to leave the house. The appellant then left but returned later, demanding that he be given the child. He began to shoot into various rooms of the house with his pistol and altogether discharged 21 rounds, one of which hit and killed C's father.'

The appellant was sentenced to six years' imprisonment for the murder. Joubert JA said at the conclusion of his judgment:[23]

'Wat vonnisoplegging betref, is een van die uitstaande faktore dat die appellant gewis aan geweldige stres blootgestel is, wat hoofsaaklik aan die optrede van sy skoonouers en sy vrou Cecilia toe te skryf is, toe hy die misdade gepleeg het. Wat die kumulatiewe effek van die opgelegde vonnisse betref, is ek oortuig dat 'n gepaste vonnis op aanklag 1 ses jaar gevangenisstraf is waarvan die helfte voorwaardelik vir vyf jaar opgeskort word terwyl die vonnisse van een jaar gevangenisstraf elk op aanklagte 2, 3 en 4 daarmee saamlopend is. Sodanige vonnis verskil aanmerklik van die opgelegde vonnisse sodat hierdie Hof bevoeg en verplig is om in te gryp.'

[57] In the earlier case of *S v Ingram*[24] the appellant shot and fatally wounded his wife at their home. The headnote summarises the facts as follows:

'The evidence showed that the appellant and the deceased were married in 1972 and that they had two teenage children. They were in the throes of protracted divorce proceedings, and it was shown that their marriage was "unhappy and tempestuous". The deceased had an alcohol problem and had relationships with other men. She was frequently abusive towards the appellant and the children. On the day of the shooting both appellant and deceased were intoxicated and became involved in a heated argument. Later that evening the children helped their mother to her bedroom; the appellant followed them to the room and shot the deceased, causing her death.'

The appellant was sentenced to eight years' imprisonment. This court held that the trial court had misdirected itself on sentence,[25] set the sentence aside and remitted the matter to the trial court to consider correctional supervision in terms of s 276 (1)(h) of the Criminal Procedure Act which, as the court pointed out,[26] could not be imposed for a period exceeding three years.

[23] 173F-G.

[24] Above, n 12.

[25] The misdirection is quoted in para 49 above.

[26] At 9F.

[58] My colleague has referred to a number of other cases, namely *S v Di Blasi*,[27] *S v Nel*, [28] *S v Martin*,[29] *Dikana v S*[30] and the unreported case *Van Heerden v S*. In none of those cases was the accused found to have acted with diminished responsibility ─ indeed, in some the accused was expressly found not to have so acted[31] ─ and there is in my respectful view no justification whatever in any of them to increase the sentence in the present case. I should perhaps deal in particular with *Van Heerden v S*. This court commented that the trial court had found that the first appellant's 'mental and emotional condition was a mitigating factor', but pointed out that 'the murders were carefully planned and viciously executed. They were not carried out on the spur of the moment. Nor were they the product of an unstoppable rage'.

[59] It was submitted by the representative of the State on appeal that the respondent had shown regret, not remorse. I cannot agree. The following passage in the respondent's evidence is particularly poignant:

'Ek voel baie seer, en ek soek my vrou en my kinders terug, en ek wil by skoonfamilie wees, daar met my vrou, en net huil tot daar niks meer oor is in my nie. Ek wil by my kinders se graf staan en met hulle gesels, en vir hulle sê ek is jammer wat ek gedoen het, maar ek weet nie wat ek gedoen het nie.'

The trial court had the opportunity of observing the respondent whilst he testified and, as appears from the remarks made by the court during argument and in the judgment, it had no hesitation in concluding when sentencing the respondent that:

'Dit is dus duidelik dat hy nie net bloot berou het oor sy optrede nie, maar dat hy bitter, bitter spyt is oor wat hy gedoen het.'

[27] 1996 (1) SACR 1 (A), see pp 7g to 8c.
[28] 2007 (2) SACR 481 (SCA).
[29] 1996 (1) SACR 172 (W), see p 178g.
[30] 2008 [2] All SA 182 (E), see para 7.
[31] See the passages referred to in footnotes 27, 29 and 30 above.

[60] There are undoubtedly aggravating features present in this case. The respondent's wife has been left bereft of her children ─ as she said:

'Hy het altwee my kinders weggeneem. Nie net een nie. Ek is nie meer 'n ma nie.'

At the time of the trial she was receiving psychiatric treatment, medication to enable her to sleep and antidepressants. She said: 'Elke dag is hel'. Yet no matter how successful the treatment might be, her life can never be the same again. Nor can her parents', with whom she lives. They have been deprived of their grandchildren and her father was not able to attend the trial because his heart condition had noticeably weakened in consequence of the murders. In addition murder of one's children has through the centuries been regarded by society with particular abhorrence. Yet I do not consider that these facts, nor the advent of the minimum sentence legislation, renders the sentences imposed by the court *a quo* shockingly (and I emphasise the word 'shockingly') inappropriate, much less that they justify almost doubling the highest sentence previously considered appropriate by this court where the accused acted with diminished responsibility. To my mind substantial and compelling circumstances are clearly present in this matter and the State's representative conceded as much in argument before this court.

[61] My colleague emphasises the elements of retribution and deterrence in his judgment as justification for increasing the sentences imposed by the court *a quo*. So far as retribution is concerned, I respectfully agree with the following views expressed by this court in *S v Shapiro*:[32]

'[T]here can be no doubt that the community must view this crime with abhorrence. I do not believe, however, that right-thinking men would demand condign punishment in a case where the accused acted with substantially diminished criminal responsibility . . . I do not think that in the light of the finding of diminished responsibility this case is one which is clamant for retribution.'

So far as the deterrence is concerned, the respondent is a first offender; there is no suggestion that he is a violent person ─ indeed the panel of psychiatrists found that his amnesia was in keeping with a suppression of events which were 'out of character with his personality'; and it does not seem that the respondent is a danger to society at large, so his removal from the community for a long time is not necessary for that reason. In such circumstances, this court has repeatedly held that deterrence of a

[32] Above, n 11, at 123i-j and 124b-c.

person who commits murder acting with diminished responsibility, is not an important factor when it comes to punishment: see for example *S v Campher*,[33] *S v Smith*,[34] *S v Ingram* [35] and *S v Shapiro*.[36] Deterrence of others is also not important in a case such as the present. This court held in *S v Shapiro*:[37]

'In regard to the deterrence of others, it does not seem to me that in the present case a long prison sentence is called for. The concatenation of circumstances was highly unusual and is unlikely to occur again.'

The same applies here. I would merely add that to my mind there would seem to be little purpose in attempting to deter a person not in full control of his or her faculties.

[62] I therefore conclude that although the sentences imposed by the trial court may have been less than the sentences I might have imposed, they are not shockingly inappropriate in view of the fact that the respondent acted with substantial diminished responsibility; and that there is no justification, bearing in mind previous sentences imposed by the courts, and despite the minimum sentence legislation, almost to double the effective period of imprisonment imposed by the trial court ─ and particularly not for the reasons suggested by my colleague. I would therefore dismiss the appeals by the State against the sentences imposed on the murder charges.

T D CLOETE
JUDGE OF APPEAL

NUGENT JA

[33] 1987 (1) SA 940 (A) at 964C-H and 967D-E.
[34] Above, n 10, at 136b.
[35] Above, n 12, at 9b.
[36] Above, n 11, at 124c-d.
[37] Ibid.

[63] I have read the judgments of my colleagues and agree with the order that is proposed by Mlambo JA but regrettably I have found it necessary to add some observations of my own.

[64] I do not understand Mlambo JA to suggest that the criminal responsibility of the respondent was undiminished at the time he committed the crimes. I think it is perfectly clear that the respondent was in a state of distress that contributed to his conduct. Had that not been the case I would have sentenced him to life imprisonment.

[65] The difference between my colleagues seems to me to lie rather in the degree to which each considers the respondent's powers of restraint and self-control to have been diminished. For what has come to be referred to as diminished criminal responsibility is not a definite condition. It is a state of mind varying in degree that might be brought about by a variety of circumstances. The circumstances that produce that state of mind – the effects of alcohol, jealousy, distress, provocation, and the like – have always been matters to be taken account of in mitigation and I do not think anything is altered when they are brought together under a label. My colleague Cloete views those circumstances in this case as having substantially reduced the respondent's powers of restraint and self-control – my colleague Mlambo views them as being considerably less than substantial – and it seems to me that that is where the difference between them lies.

[66] My colleague Cloete is of the view that we have a choice of only two courses in this case. Either we must accept his view of the matter or

the matter must be referred back to the court below for further evidence. But of course my colleague is not correct. There is a third option that is always available to a court, which is for members of the court to each proceed in the ordinary way to reach their independent conclusions notwithstanding that they differ, and in that way the process of justice will take its ordinary course.

[67] My colleague Cloete finds the evidence sufficient to enable him to reach a proper conclusion and I find myself in the same fortunate position. We are not dealing in this case with a pathological condition that requires expert medical opinion to guide a court in reaching its conclusion. We are dealing with the weight to be attached to a set of factors that might have operated on the respondent's mind to diminish his culpability. While the insights of psychiatrists or psychologists might at times be helpful they are not indispensable in that enquiry. For ultimately a court must reach its own conclusion on that issue on an assessment of all the evidence.[38] The problem in this case is not the sufficiency of the evidence but rather the divergent views that we take of its meaning.

[68] With his customary lucidity and clarity my colleague Cloete has set out everything that might be said for the respondent. But like my colleague Mlambo I regret that I do not attach the weight that he does to the mitigatory effect of the evidence.

[69] There is no doubt that the respondent's capacity for sound judgment and rational thought were diminished at the time he committed the crimes – the very nature of the crimes are testimony to that. But this

[38] *S v Laubscher* 1988 (1) SA 163 (A) 172A-G.

was not a man who committed his crimes in an uncontrollable rage – his distress manifested itself rather in a morbid resignation to suicide but determined that he should be accompanied by his unwilling family. After snatching Janco from his wife and returning to the house the respondent was quite able to telephone her mother and conduct a conversation, telling her that 'nee ma, alles is oraait, Millie is net 'n bietjie ontsteld'. He was quite calm enough to then smoke a cigarette. He was calm enough to thank his wife affectionately for what she had meant to him. He walked into the house exhibiting no sign that anything was to occur. After shooting Janco he exhibited no rage as he then shot his wife. He was sufficiently in control to calculatedly aim the rifle at his fleeing daughter and shoot her as well. No doubt he was brought to the morbid state that enabled him to commit those acts by severe distress but they did not occur in a spurt of uncontrollable rage.

[70] It is tragic whenever a man reaches a state of despair that resigns him to suicide but the law would fail if it did not make it absolutely clear that his wife and children are not his property to take with him to eternity. I said earlier that but for the respondent's considerable despair the proper sentence would have been life imprisonment. It seems to me that a reduction of that sentence to eighteen years' imprisonment as proposed by my colleague Mlambo takes full account of his diminished responsibility.

R W NUGENT
JUDGE OF APPEAL