REPORTABLE

IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 324/2000

In the matter between:

CHRISTOFFEL JOHANNES KOK ***APPELLANT***

and

THE STATE ***RESPONDENT***

Coram: ***SCOTT, STREICHER et NAVSA JJA***
Heard: ***18 MAY 2001***
Delivered: ***30 MAY 2001***

Alleged automatism said to arise from post traumatic stress disorder – such would not be "sane" but a mental illness in terms of s 78 (6) of Act 51 of 1977 – defence rejected on the facts.

J U D G M E N T

SCOTT JA/…

***SCOTT* JA:**

[1] The appellant was charged in the Natal Provincial Division sitting on circuit at Port Shepstone with two counts of murder and one count of attempted murder. At the time of the alleged offences the appellant was a superintendent in the South African Police Service and head of the public order policing unit at Port Shepstone. He pleaded not guilty but was convicted on all three counts by Combrinck J sitting with assessors and sentenced to 10 years imprisonment on each of the murder counts and to five years imprisonment on the attempted murder charge. The sentences were ordered to run concurrently so that the effective period of imprisonment imposed was 10 years. The present appeal is against both the conviction and sentence and is with the leave of the Court *a quo.*

[2] It was common cause that shortly after 6 pm on Monday 13 January 1997 the appellant drove to the home of Mr and Mrs Botha where he

shot and killed them both. Each was shot a number of times. The ballistic evidence established that the shots were fired from a shotgun and a 9mm pistol which had been issued to the appellant. While the shooting was in progress the Bothas' son ("Marius") emerged from the bathroom where he had been drawing a bath. The appellant pointed the shotgun at him but the latter ran into his bedroom and escaped through a window after breaking the window pain. Shots were fired through the bedroom door but apart from a few cuts and abrasions Marius escaped unscathed. The Bothas' Labrador dog was also killed. It was found to have been shot twice with a 9mm pistol.

[3] The sole defence raised by the appellant was that at the relevant time he lacked the necessary criminal capacity. In this regard he denied in a statement made in terms of s 115 of the Criminal Procedure Act 51 of 1977 ("the Act") that he had "acted consciously and voluntarily" or "was capable of forming an intention to kill." In support of this defence reliance was

placed largely on the evidence of Dr Futter, a practising psychiatrist, who first saw the appellant on 21 February 1997, a little over a month after the event. He diagnosed the appellant as suffering from major depression and a condition known as post-traumatic stress disorder. The latter was described as a disorder which has its origin in the person concerned experiencing, witnessing or being confronted by an event or events involving actual or threatened death or serious injury or a threat to his or her physical integrity with a response of "intense fear, helplessness or horror". The symptoms were said to include recurrent and intrusive distressing recollections of the event, "dissociative flashback episodes", intense psychological distress upon exposure to internal and external cues that symbolize or resemble an aspect of the traumatic event or events, persistent avoidance of such stimuli and persistent symptoms of increased arousal indicated by irritability, outbursts of anger, hyper-vigilence and the like. According to Dr Futter a further feature

of the disorder were "dissociative re-enactments" of the traumatic event or events during which the person in question in effect "acted" in a state of automatism. Based largely on what the appellant had told him in the course of a number of consultations, Dr Futter concluded that the only explanation for the appellant's bizarre conduct was that it had to be seen as a "dissociative behavioural re-enactment" of what the police called "house penetrations", *viz* a procedure adopted when forcibly entering a house or building with the object of apprehending possibly dangerous occupants.

[4] This defence was rejected by the Court *a quo*. Nonetheless in view of the stress to which the appellant had been subjected, particularly in carrying out his duties as a policeman, it was found that the offences were stress-related and at the relevant time the appellant had acted in a state of "diminished responsibility". The consequences of upholding the defence of lack of criminal capacity were accordingly not considered by the Court *a quo*.

It appears, however, that the trial was conducted on the basis that in the event of the State failing to disprove the defence the appellant would be entitled to an acquittal. In evidence Dr Futter described a "dissociative re-enactment" arising from a post-traumatic stress disorder as correlating "with the legal concept of sane automatism." He pointed out that the cause of the suggested dissociative behaviour was not a psychotic disorder. He contended that as all mental disorders were not psychotic illnesses it was therefore not correct to presume that because an automatism flows from a mental disorder the automatism had to be categorized as "insane" or "psychotic". In short, what the witness appears to have put forward is that provided the automatism is not caused by a psychotic illness or disorder it must be regarded as "sane automatism". I am not persuaded that this is correct.

[5] Section 78 (6) of the Act reads as follows:

> "If the court finds that the accused committed the act in question and that he at the time of such commission was by reason of mental illness or mental defect not criminally responsible for such act –
>
> (a) The court shall find the accused not guilty; or
> (b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty,
>
> by reason of mental illness or mental defect, as the case may be, and direct that the accused be detained in a psychiatric hospital or a prison pending the signification of the decision of a judge in chambers."

The section contains no reference to "sane automatism". It is not a psychiatric term; it is no more than a useful tag to describe automatism arising from some cause other than a "mental illness" or "mental defect" within the meaning of the section. There is furthermore nothing in the section that requires the mental illness which results in an absence of criminal responsibility to be an illness of a kind which is categorized as psychotic, such as schizophrenia, before the Court is required to direct the accused to be

detained in a psychiatric hospital or prison. All that is required is a "mental illness" or "mental defect" which results in the absence of criminal responsibility. A similar approach is adopted in England. (See *R v Burgess* [1991] 2 All ER 769 CA at 774 c – f.)

[6] Dr Futter described post-traumatic stress disorder as a mental illness with a pathology that can be demonstrated. The treatment includes the use of medications called serotonin re-uptake inhibitors which happen to be antidepressants. He recommended that the appellant continue with his psychiatric treatment which includes both medication and psychotherapy. In these circumstances, it is quite clear, I think, that if the correct finding of the Court *a quo* would have been that the appellant was not criminally responsible for the shooting by reason of the condition suggested by Dr Futter, the appropriate order would not have been an acquittal but one in terms of s 78 (6) of the Act.

[7] At common law a distinction has been drawn in the past between lack of criminal capacity arising from a pathological disturbance of the mental faculties, whether temporary or permanent, on the one hand and lack of criminal capacity arising from some non-pathological cause which is of a temporary nature on the other. In accordance with the presumption of sanity the onus in the case of the former was upon the accused and was to be discharged on a balance of probabilities. In the case of the latter, the onus remained on the State to prove criminal capacity beyond reasonable doubt (see for eg *S v Cunningham* 1996 (1) SA SACR 631 (A) at 635 g – j and the authorities there cited). Whether this anomaly can be upheld in our modern law with the enactment of the new Constitution is doubtful. However, in view of the conclusion to which I have come it is unnecessary to decide the point and I shall proceed on the assumption, as did the trial Court, that the

State bore the onus of establishing criminal capacity on the part of the appellant beyond reasonable doubt.

[8] I return to the facts. Much is common cause. The appellant, a son of a policeman, joined the police force shortly after leaving school and apart from a venture into the private sector between 1976 and 1987 has been a policeman all his working life. In the course of his career he has undergone a number of specialized training courses. One of these was a special weapons and tactics course which included activities such as house penetrations. He did service in Ovamboland in the early seventies and generally over the years has repeatedly had to participate in dangerous operations involving personal danger to himself and his colleagues. Particularly since his transfer to Port Shepstone in 1993 he has witnessed much violence and the gruesome consequences of such violence. One of the examples he gave was the "massacre" at Shoboshobane on Christmas day 1995 when some 19 people

were hacked to death with pangas and the like. As head of the public order policing unit at Port Shepstone he has been constantly blamed by politicians for not providing better policing services to prevent violence between warring ANC and IFP factions, while at the same time losing staff as a result of resignations and transfers. He complained of experiencing feelings of helplessness and frustration at constantly finding himself in a "no-win" situation. On 9 and 10 January 1997 he took part in what he described as a "stake-out" at a bank in Harding. This involved policemen being concealed in and around the bank in anticipation of an attempted armed robbery. In the event the attempt was not made On Sunday 12 January 1997, the day preceding the shooting, he was called out to do an aerial reconnaissance at Shoboshobane to monitor the massing of people in an area where it was feared there may be an outbreak of violence. On top of all this he complained

that he found it increasingly difficult to keep his head above water with all his administrative work.

[9] Somewhile previously the appellant's wife, who was employed in the appellant's unit, borrowed a tea set and two table cloths from Mrs Botha, a fellow employee in the police service. Mrs Botha subsequently complained that only the tea set had been returned and not the table cloths. This was denied and in due course Mrs Botha proceeded against the appellant's wife in the Small Claims Court for the recovery of the table cloths or their monetary equivalent. The presiding officer was an attorney, Mr Larry Seethal, who awarded Mrs Botha R600 in damages. According to the appellant, Seethal directed the parties to make arrangements between themselves for the payment of the amount in question.

[10] On Monday, 13 January 1997, at about 3.15 pm Captain Basson and Captain Gordon came to visit the appellant in order to discuss certain

matters of concern to the committee of the police deep sea angling club. All three were committee members. The appellant suggested they continue their discussion in the more relaxed atmosphere of the "Pepper Pots", a nearby bar. On the way there they called at the appellant's house where he changed out of his uniform. He also locked away his 9mm service pistol. They were accompanied by sergeant Burger who appeared to be on friendly terms with the appellant. There is some uncertainty as to how much the appellant consumed at the Pepper Pots but it would seem to be of the order of two beers and a double brandy. While they were there the appellant's wife telephoned to say that the messenger of the court was at their house, apparently making an inventory of attachable items. She was in tears and extremely upset; she asked the appellant to come home immediately. According to those present, the appellant, too, became extremely upset. Basson offered to lend him the money but the appellant insisted that it was not the money but the principle

of the thing that annoyed him. He said there had to be an arrangement for payment and Mrs Botha had no right to send the messenger of the court to his house. He tried to phone Larry Seethal but by that time it was past 5 pm and Seethal had gone home

[11] The four policemen drove back to the appellant's house. On their arrival they found Mrs Kok still in a very distressed state. The Koks have a grown-up son who has cerebral palsy and is confined to a wheel chair. He and the appellant are very close and although the former is unable to speak he is able to communicate "with his eyes". According to the appellant he could see that his son was also upset by the whole affair. This in turn upset the appellant even more. Basson testified that at one stage the appellant, after comforting his wife, said that he would have to go and "sort out" a few people. Burger thought he had said he would have to sort out "the story".

[12] Basson and Gordon left and shortly thereafter the appellant offered to drive Burger back home. Before leaving, however, he retrieved his pistol from the cupboard where he had left it. Burger lives close to the police station. Instead of going to Burger's house the appellant drove straight to the police station. There, he opened the safe in which the weapons and ammunition were kept and removed an R1 rifle, a number of rounds of ammunition including 9 mm ammunition and shotgun cartridges as well as such items as a hand-grenade and a combat jacket. All of this he loaded into the boot of his motor car. At that stage there already was a shotgun, which had a pistol grip, in the vehicle. It was kept on the floor in the front of the vehicle where it was available for use in emergencies. The appellant also kept his cheque book in the safe. Although he did not recall removing it he probably did as it was later discovered by Burger in the appellant's motor car.

[13] Burger suggested to the appellant that they have a drink together in the police canteen. The appellant agreed. He drove his motor car to a parking bay outside the canteen but then suddenly reversed out of the bay and drove off. Burger thought of phoning Mrs Botha to warn her that the appellant was possibly on his way to see her, but then decided against it.

[14] The appellant had not been to the Bothas' house before, but he knew where it was. He appears to have driven straight there. He parked in the driveway. It was then about 6:30 pm.

[15] The appellant's recollection of the earlier events of 13 January coincided in broad terms with the evidence of others, as set out above. However, he said he had no recollection of certain events or his reason for doing certain things. He said, for example, that he could not remember why he had driven back to his office. He recalled going to the safe but not why he did so or what he took out of it. He said he recalled being invited for a drink

at the canteen but not why he suddenly drove off or why he had decided to go to the Bothas' house. His version of what he could remember having taken place at the house, which he gave in evidence and earlier to Dr Futter, was in short the following. He recalled arriving at the house and standing on the left side of the motor car in the driveway with the front door open. Mrs Botha was there with a smirk on her face. He asked her what she was doing to his wife. She responded by asking him what he was doing there and telling him that he had no business to be there. She then pushed him away with her hand on his chest. He said he recalled going through the door into the house and hearing running water. He saw a person in front of him but in silhouette form. He recalled firing shots and while doing so seeing someone on his left, also in silhouette form, moving first towards him and then away from him. He then heard a very loud bang which he did not think was a shot being fired. Next he remembered being back at his vehicle where he saw sergeant Beetge

whom he greeted. Thereafter he found himself in an area near Gamalakhe which is a township to the south-west of Port Shepstone. (This account of what the appellant remembered differed in material respects from the account he gave Dr Dunn, the State psychiatrist, who saw him a few days after the event.)

[16] Sergeant Beetge and his wife lived next door to the Bothas. At about 6.30 pm on the night in question they heard what sounded like shots. They went outside to investigate and saw the appellant emerging from the Bothas' house with his shotgun at the ready. Sergeant Beetge greeted the appellant who responded by pointing the shotgun in his direction and asking him what the problem was. Beetge replied, perhaps wisely, that there was no problem and retreated into his house with his hands above his head. Once the appellant had gone, Beetge went next door to investigate. On seeing the bodies he immediately notified the police at Port Shepstone.

[17] What then followed was something of a cat and mouse game between the appellant and the police seeking to take him into custody. It lasted most of the night. Shortly after the shooting police officers in the radio control room at Port Shepstone made contact with the appellant over the police radio. By this time the appellant had, he said, heard of the shooting on the police radio. Several attempts were made to persuade the appellant to give himself up but without success. Eventually the appellant's superior, Director Hunter who had come down from Durban, arranged to meet him at Umtentweni beach. There were various delays and Hunter was late. The appellant did not wait for Hunter but drove to the house of a friend whose telephone he used to speak to Hunter. Another appointment was made for Hunter to meet the appellant alone at Umtentweni beach. Eventually they met. The two spoke for a while. The appellant used Hunter's mobile phone to speak to his wife. He acknowledged to Hunter that he was in trouble and

asked after the "laaitie". It was common cause that this was a reference to Marius who had escaped through the window. Significantly he made no attempt to find out from Hunter what had happened at the Bothas' house. Nor did he make any such inquiry from the friend he had seen earlier. Eventually the appellant agreed to go with Hunter to the Newport police station. However, he insisted on a last drink at the Pepper Pots. The appellant was still armed with his shotgun and Hunter agreed. By this time it was well after midnight and the proprietor had to be woken up. He agreed to serve them and they were joined by Burger who had been waiting in Hunter's vehicle. After about half an hour they drove to the Newport police station. On arrival there the appellant suddenly threatened the others with his shotgun and disappeared into the night. At about 4 am he arrived at the house of a colleague and friend, Captain Hills. The latter, who knew what had happened, invited him in and spent somewhile talking to him. Eventually the appellant fell asleep

and Hills removed his shotgun and pistol and locked them away. When he woke up he agreed to go to the police station with Hills.

[18] In his evidence the appellant sought to explain that he had heard on the police radio that the Special Task Force had become involved and because he feared they may shoot him he wished to hand himself over in such a manner as to prevent this from happening. He conceded however that he had never heard of the Special Task Force shooting people voluntarily giving themselves up. The more likely explanation is the one he gave to Hills, i e that he did not wish to spend that night in the police cells. It is also likely that he wished to see his family again before being taken into custody.

[19] On 14 January 1997 the appellant was sent for observation in terms of s 77 of the Act. He was seen by Dr Dunn, who is the principal psychiatrist at the Midlands Hospital, Pietermaritzburg, and his team during the period 14 January to 27 January 1997.

[20] As previously indicated Dr Futter diagnosed the appellant as suffering from both major depression and post-traumatic stress disorder. His hypothesis was that from the time Mrs Botha pushed the appellant on the chest until the time he subsequently found himself in his vehicle near Gamalakhe he was in a "dissociative state" and that his behaviour in the Bothas' house was explicable in terms of what Dr Futter described as a "dissociative behavioural re-enactment episode" during which there would have been an absence of appropriate cognitive control. The appellant's conduct, he said, would have been modelled on a previous behavioural memory which Dr Futter in turn identified as a house penetration. In support of this hypothesis Dr Futter pointed in particular to certain obvious inaccuracies in the appellant's recollection of what had occurred such as the nature and colour of the door and the length of the grass outside. These, he said, were typical features of a re-enactment episode. He also thought it

significant that the appellant should describe the figures he saw in such a way as to suggest they took the form of silhouettes. This was because silhouette figures were used in simulated house penetrations in the course of training.

[21] Dr Dunn rejected this hypothesis in its entirety. When he examined the appellant shortly after the event he observed obvious symptoms of stress which he categorized as "situational, occupational and social". However, he found no indication of major depression or post-traumatic stress disorder. As far as the latter is concerned, he rejected the notion that it could arise from what he described as a "loose and diffuse series of unhappy experiences". What gave rise to the disorder, he said, was some specific core incident particularly traumatic for the person concerned and beyond that person's day to day experience. He agreed that the incident could comprise a series of sub events but stressed that they had to be closely related. As far as the behaviour of the appellant at the relevant time was concerned, Dr Dunn

emphasized its goal-oriented nature and pointed to the account of the incident which the appellant had given him shortly after the event and which not only differed from that given to Dr Futter but was inconsistent with the latter's hypothesis. The account given to Dr Dunn was shortly the following. The appellant said he had gone to the Bothas' house to resolve matters relating to payment of the outstanding amount; he considered that his wife had been unfairly treated at the hearing and that what triggered his visit to the Bothas' house was the emotional state of his wife and son. He said he went to the front door with his shotgun; he knocked and was let in by Mrs Botha. An altercation ensued during which she pulled a face or made some sarcastic comment. He said that he lost his temper and fired at Mrs Botha. Her husband intervened and he also fired at him. He then left the house. Outside he saw the next door neighbour to whom he spoke briefly. He drove off and thereafter spoke to various members of the police service who attempted to

persuade him to give himself up. After several hours he agreed to do so. In Dr Dunn's opinion the appellant was not re-enacting (he preferred the word "reliving") some previous event at the time of the shooting. He accepted that the appellant was under a great deal of stress and was suffering from what is colloquially called "burn-out", *viz* emotional and physical tiredness. Furthermore, the appellant had consumed alcohol shortly before the fatal event which would have caused a degree of disinhibition. All this, said Dr Dunn, would have resulted in the appellant having less control over his emotional reactions. Dr Dunn accordingly rejected the hypothesis that the appellant lacked cognitive control at the relevant time or that he was unable to distinguish right from wrong and act accordingly.

[22] As correctly observed by the Court *a quo* the ultimate inquiry was whether the appellant was criminally responsible for his actions. This is an issue that had to be determined, not by the psychiatrists, but by the Court

in the light of all the evidence. (See *S v Harris* 1965 (2) SA 340 (A) at 365 B – C.) What immediately strikes one is the contrast between the version given to Dr Dunn and the version given more than a month later to Dr Futter and thereafter repeated by the appellant in evidence. The former, which was the appellant's recollection shortly after the incident, makes it clear that his mood upon arrival at the Bothas' house was both belligerent and confrontational. Indeed, he recalled going to the front door armed with his shotgun. There can be no doubt he was upset by the emotional state of his wife and his son. He said he lost his temper as a result of something Mrs Botha did or said and then fired first at Mrs Botha and then at her husband. 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 (A) 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.

[23] It may be that the appellant, whether consciously or subconsciously, subsequently repressed his memory of the events he described to Dr Dunn. It is unnecessary to decide whether this is the reason for the two versions. Quite apart from the evidence of what the appellant told Dr Dunn the former's subsequent conduct that night strongly suggests that he knew not only what he had done but also that it was wrong. It is admittedly so that he said that by the time he met and spoke to his friend whose telephone he used he had already heard over the police radio that the Bothas had been shot and their son taken to hospital. But if in truth he had no recollection of what had happened it is highly improbable that he would not have asked his friend, or Hunter whom he saw later, for details of what had happened or at least told them that he could not remember what had

happened. Instead, he volunteered to Hunter that he was in trouble and asked after Marius who had escaped through the window. This is not the conduct of someone who has no recollection of what had happened.

[24] There are furthermore aspects of the hypothesis advanced by Dr Futter which are far from satisfactory. House penetrations were not one of the events which constituted so-called "stressors" giving rise to the disorder diagnosed by Dr Futter. That being so, it seems strange that the appellant should suddenly "re-enact" a house penetration in a dissociative state. Moreover, he had never killed anyone in the course of a house penetration nor was the procedure aimed at killing unarmed people on sight. Neither Mr nor Mrs Botha was armed and the gunshot wounds sustained by the latter indicate that she was shot from behind and presumably while attempting to flee. It was common cause that the appellant must have known what he was doing when he drove to the Bothas' house. He was then, as I have said, in a

belligerent and confrontational mood. This much is apparent even from the version he gave in evidence. He volunteered that his first words to Mrs Botha were something like, “what have you done to my wife?” The suggestion is that for a reason that can only be described as trivial, he then suddenly experienced for the first time in his life a dissociative episode during which he re-enacted some past memory but in reality just happened to shoot, and do so accurately and repeatedly, the very person who had upset his wife and caused him to become angry. Such a coincidence strikes me as wholly improbable. Furthermore, when the appellant emerged from the house he observed and spoke to sergeant Beetge. Dr Futter suggested that because Beetge was a colleague of the appellant, he might somehow have been accommodated in the appellant’s re-enactment of a house penetration. But the appellant threatened Beetge by pointing his shotgun at him and asking

him if there was a problem. Such conduct was consistent with what in reality had just occurred rather than the reliving of some past experience.

[25] In all the circumstances I can see no reason for interfering with the finding of the Court *a quo* that at the relevant time the appellant had the necessary criminal capacity and that the defence of so-called "sane automatism" had to be rejected.

[26] In this Court counsel for the appellant submitted that the appellant in any event ought to have been acquitted on the count of attempted murder. He argued that had the appellant intended to kill Marius he could easily have done so when the former first emerged from the bathroom and before running into the bedroom. Instead, the appellant fired through the bedroom door only after Marius had already succeeded in escaping through the window. It is true that the appellant hesitated before firing, but Marius shut the bedroom door after him and when the appellant fired at the door he

would not have known that by then Marius had already escaped through the window. His use of the shotgun, rather than the pistol, would have made it all the more likely that anyone in the bedroom would have been hit. It follows that in my view the appellant was correctly convicted on the count of attempted murder.

[27] I turn to the appeal against sentence. In the course of his judgment on the merits Combrinck J accepted the evidence of Dr Dunn that the appellant's criminal conduct was "stress-related". The Court made no finding as to whether the appellant was suffering from post-traumatic stress disorder. For the purpose of sentence, however, the judge accepted that at the time of the commission of the offences the appellant's capacity to appreciate the wrongfulness of his conduct and to act accordingly "was diminished by reason of mental illness or mental defect" within the meaning of s 78 (7) of the Act. There was of course no suggestion that a person suffering from what

is commonly referred to as "burn-out" or stress can be said to have a mental illness. Counsel were agreed, however, that whatever the correct diagnosis may have been, it was clear that the stress and frustrations experienced by the appellant at work had materially contributed to his lack of self control resulting in the commission of the offence. Counsel for the appellant pointed to the obvious mitigating features in the case and contended that the sentence was plainly excessive. Counsel for the State, on the other hand, referred to the aggravating features and sought to persuade us to increase the sentence. Neither could point to a misdirection. I can see no reason for interfering with the sentence. It follows that the appeal against sentence must likewise fail.

[28] The appeal is dismissed.

D G SCOTT
JUDGE OF APPEAL

CONCUR:
STREICHER JA
NAVSA JA