THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 266/10

In the matter between:

M VAN DER WESTHUIZEN Appellant

and

THE STATE Respondent

Neutral citation: *Van der Westhuizen v S* (266/10) [2011] ZASCA 36 (28 March 2011).

Coram: CLOETE, SNYDERS and THERON JJA

Heard: **23 FEBRUARY 2011**

Delivered: **28 MARCH 2011**

Summary: Criminal Procedure: the requirement (in s 32 of the National Prosecuting Authority Act) that a prosecutor must act impartially, explained; held that an accused can waive the prohibition (contained in s 105A(10) of the Criminal Procedure Act, 51 of 1977) on disclosure of plea-bargain negotiations where no agreement is reached; held that where a special entry in terms of s 317(1) of the Criminal Procedure Act is sought on the basis that cross-examination of a State witness was unjustifiably curtailed, the court can avoid making a special entry by recalling the witness for further cross-examination; the effect of a formal admission made under s 220 of the Criminal Procedure Act decided and the circumstances when such an admission may be withdrawn, discussed. Sentence: Deterrence and retribution do not recede into the background as purposes of sentencing where an accused has not acted with substantial diminished responsibility.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Louw J sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

CLOETE JA (SNYDERS and THERON JJA concurring):

Introduction

[1] On 28 July 2006 the appellant shot and killed his three children. He was found guilty of three counts of murder by the Western Cape High Court (Louw J) and sentenced to 14 years' imprisonment on each count. Nine years of each of the sentences on the second and third counts was ordered to run concurrently with the sentence on the first count. The effective term of imprisonment was therefore 24 years. The appellant has appealed, with the leave of the court a quo, against both his conviction and the sentence imposed. This judgment addresses two questions:

(1) whether the appellant had a fair trial; and

(2) whether, having consented to admissions being recorded formally in terms of s 220 of the Criminal Procedure Act (the CPA),[1] the appellant was entitled, without more, to lead evidence and advance argument in contradiction of such admissions.

Fair trial

[2] The submission that the appellant had not been accorded a fair trial was based on an argument that the prosecutor had not been impartial, and on specific instances of alleged misconduct on the part of the prosecutor and the court.

[1] 51 of 1977.

Impartiality of the prosecutor

[3] I shall deal first with the impartiality of the prosecutor. The appellant's attorney submitted:

(a) that the prosecutor had called Inspector Koekemoer, a sniper and part of the special task force deployed at the appellant's house after he had shot his children, to give evidence prejudicial to the appellant when the prosecutor could have called the hostage negotiators, especially the senior negotiator Superintendent Herman Bosman, whose evidence, it was submitted, would have been less prejudicial to the appellant and important for the court to appreciate the appellant's mental state; and

(b) that the prosecutor had not called:

(i) Ronel Arendse, the psychologist to whom Mrs van der Westhuizen had been referred on the date of the shootings, who was still treating her when she gave evidence and whose summary of what was told to her allegedly differed from Mrs van der Westhuizen's evidence as to what had happened on the night of the shootings;

(ii) Tanya Swart (a psychologist at Valkenberg and part of the team that observed the appellant when he was referred there for an inquiry into his mental state and a report as contemplated in chapter 13 of the CPA) whose notes contained material which the defence considered to be of assistance to the appellant, which were used to cross-examine State witnesses and which were handed in as an exhibit by the defence;

(iii) Ronel Kemp (née Ollewagen), a psychologist consulted by the appellant and Mrs van der Westhuizen in 2004; and

(vi) Captain Marinda van Zyl, a social worker from the Employee Assistance Services of the police, whom both the appellant and Mrs van der Westhuizen consulted during the year in which the shootings took place.

[4] The appellant's attorney asked this court to draw the inference that witnesses that could support the appellant's case, were not called; and that the State had gone out of its way to obtain and place before the court evidence that showed the appellant in a bad light. At the heart of this argument is a fundamental misconception of the duties and function of a prosecutor in a criminal case.

[5] Section 179(4) of the Constitution[2] provides that:

'National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.'

The national legislation concerned, is the National Prosecuting Authority Act.[3] Two sections of that Act are relevant for present purposes, namely s 32 and s 22(6). The former section provides:

'(1)(a) A member of the *prosecuting authority* shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the *Constitution* and the law.'

The oath and affirmation prescribed in subsec (2)(a) of the same section also contain the words 'enforce the Law of the Republic without fear, favour or prejudice'. Section 22(6) of the National Prosecuting Authority Act requires the National Director of Public Prosecutions (in consultation with the Minister and after consultation with Deputy National Directors and Directors) to frame a code of conduct, and provides that such code shall be complied with by the prosecuting authority.[4]

[6] The Code of Conduct for Members of the National Prosecuting Authority was recently published by GN R1257 in *GG* 33907 of 29 December 2010. It contains the following provisions relevant for present purposes:

'**B. INDEPENDENCE**

The prosecutorial discretion to institute and to stop criminal proceedings should be exercised independently, in accordance with the Prosecution Policy and the Policy Directives, and be free from political, public and judicial interference.

C. IMPARTIALITY

Prosecutors should perform their duties without fear, favour or prejudice. In particular, they should ─

(a) carry out their functions impartially and not become personally, as opposed to professionally, involved in any matter;

(b) avoid taking decisions or involving themselves in matters where a conflict of interest exists or might possibly exist;

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[2] Constitution of the Republic of South Africa, 1996.
[3] 32 of 1998.
[4] Which, in terms of s 4 of the Act, comprises the National Director, Deputy National Directors, Directors, Deputy Directors and prosecutors.

(c) take into consideration the public interest as distinct from media or partisan interests and concerns, however vociferously these may be presented;

(d) avoid participation in political or other activities which may prejudice or be perceived to prejudice their independence and impartiality;

(e) not seek or receive gifts, donations, favours or sponsorships that may compromise, or may be perceived to compromise, their professional integrity;

(f) act with objectivity and pay due attention to the constitutional right to equality;

(g) take into account all relevant circumstances and ensure that reasonable enquiries are made about evidence, irrespective of whether these enquiries are to the advantage or disadvantage of the alleged offender;

(h) be sensitive to the needs of victims and do justice between the victim, the accused and the community, according to the law and the dictates of fairness and equity; and

(i) assist the court to arrive at a just verdict and, in the event of a conviction, an appropriate sentence based on the evidence presented.'

[7] The Code was not in operation at the time of the appellant's prosecution but it is consistent with the United Nations Guidelines on the Role of Prosecutors[5] as well as the Standards of Professional Responsibility and Statements of the Essential Duties and Rights of Prosecutors of the International Association of Prosecutors.[6] Clause 13 of the UN Guidelines provides:

'In the performance of their duties, prosecutors shall:

(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage of the suspect.'

[8] The International Association of Prosecutors' Standards contains the following provisions relevant for present purposes:

'**3.** ***Impartiality***

Prosecutors shall perform their duties without fear, favour or prejudice.

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[5] Adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Havana, 27 August to 7 September 1990.

[6] Adopted in Amsterdam in April 1999.

In particular they shall:
carry out their functions impartially;
remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest; act with objectivity;
have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;
always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

4. ***Role in criminal proceedings***

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

. . .

(d) in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence; throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence.'

[9] I pause to emphasise that the concept of impartiality in the South African code, the UN Guidelines and the Standards of the International Association of Prosecutors is not used in the sense of not acting adverserially, but in the sense of acting even-handedly, ie avoiding discrimination; and the duty to act impartially is therefore part of the more general duty to act without fear, favour or prejudice.

[10] Against this local and international background, it would be apposite to quote from the judgment of Rand J of the Supreme Court of Canada in *Boucher v The Queen*:[7]

'It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that

[7] *Boucher v The Queen* [1955] SCR 16 at 23-4.

all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion "of winning or losing"; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.'

The passage has been repeatedly referred to by that court in subsequent decisions, see eg *Nelles v Ontario*,[8] *CanadianOxy Chemicals Ltd v Canada (Attorney General),*[9] *R v Stinchcombe*,[10] *Proulx v The Queen*;[11] and it has been quoted with approval by our Constitutional Court in *S v Shaik & others*,[12] by the House of Lords and the Judicial Committee of the Privy Council in *R v H*,[13] *Randall v The Queen*,[14] *Benedetto v The Queen; Labrador v The Queen*,[15] by the High Court of Australia in *Libke v R*[16] and by the Supreme Court of Ireland in *D O v DPP*.[17]

[11] The initial remarks of Rand J in *Boucher* in the passage quoted above must not, however, be misunderstood. In our practice it is not the function of a prosecutor disinterestedly to place a hotchpotch of contradictory evidence before a court and then leave the court to make of it what it wills. On the contrary, it is the obligation of a prosecutor firmly but fairly and dispassionately to construct and present a case from what appears to be credible evidence, and to challenge the evidence of the accused and other defence witnesses with a view to discrediting such evidence, for the very purpose of obtaining a conviction.[18] That is the essence of a prosecutor's function in an adversarial system and it is not peculiar to South Africa:

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[8] *Nelles v Ontario* [1989] 2 SCR 170.
[9] *CanadianOxy Chemicals Ltd v Canada (Attorney General)* [1999] 1 SCR 743 para 25.
[10] *R v Stinchcombe* [1991] 3 SCR 326 p 10.
[11] *Proulx v The Queen* 2001 SCC 66, [2001] 3 SCR 9 para 41.
[12] *S v Shaik & others* [2007] ZACC 19, 2008 (1) SA 1 (CC) para 67.
[13] *R v H* [2004] UKHL 3, [2004] 2 AC 134, [2004] 1 All ER 1269 (HL) para 13.
[14] *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237 (PC) para 10.
[15] *Benedetto v The Queen; Labrador v The Queen* [2003] UKPC 27, [2003] 1 WLR 1545 (PC) para 54.
[16] *Libke v R* [2007] HCA 30; (2007) 235 ALR 517 para 71.
[17] *D O v DPP* [2006] IESC 12.
[18] The South African Code for Members of the National Prosecuting Authority makes it clear in para D1(e) that 'throughout the course of the proceedings the case should be firmly but fairly and objectively prosecuted'.

(a) Lord Bingham said in *Randall*:[19]

'*Fairness*

A contested criminal trial on indictment is adversarial in character. The prosecution seeks to satisfy the jury of the guilt of the accused beyond reasonable doubt. The defence seeks to resist and rebut such proof. The objects of the parties are fundamentally opposed. . . .

. . . The adversarial format of the criminal trial is indeed directed to ensuring a fair opportunity for the prosecution to establish guilt and a fair opportunity for the defendant to advance his defence. . . .

(I) The duty of prosecuting counsel is not to obtain a conviction at all costs but to act as a minister of justice: *R v Puddick* (1865) 4 F & F 497, 499; *R v Banks* [1916] 2 KB 621, 623. The prosecutor's role was very clearly described by Rand J in the Supreme Court of Canada. . . .'

and the learned Law Lord then went on to quote the remarks of Rand J in *Boucher* set out above.

(b) Justice Sutherland said in *Berger v US*:[20]

'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigour ─ indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'

(c) Madame Justice L'Heurex-Dubé said in *R v Cook*:[21]

'Nevertheless, while it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence (*Boucher v The Queen*, [1955] SCR 16; *Power*, *supra*, at p 616), it is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth: see, for example *R v Gruenke*, [1991] 3 SCR 263, at p 295, *per* L'Heureux-Dubé J. Nor should it be assumed that

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[19] Above, n 14 paras 9 and 10.
[20] *Berger v US* (1935) 295 US 78 at 88.
[21] *R v Cook* [1997] 1 SCR 113, (1997) 114 CCC (3d) 481 (SCC) para 21.

the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism: *R v Bain*, [1992] 1 SCR 91; *R v Jones*, [1994] 2 SCR 229; *Boucher*, *supra*. In this sense, within the boundaries outlined above, the Crown must be allowed to perform the function with which it has been entrusted; discretion in pursuing justice remains an important part of that function.' (Underlining in the original judgment.)

[12] Where an accused is represented, it is not the function of a prosecutor, as suggested by the appellant's attorney, to call evidence which is destructive of the State case or which advances the case of the accused.[22] The prosecutor is not obliged to play chess against him – or herself. In England, the Privy Council in the case of *Seneviratne v R*[23] allowed the accused's appeal on a narrow ground not relevant for present purposes, but rejected the accused's more general submission that the Crown had an obligation to call every eyewitness to the crime by saying:[24]

'Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.' (Emphasis added.)

Madame Justice L'Heurex-Dubé in *R v Cook*,[25] having quoted this passage, with the emphasis added, continued:

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[22] It has been held in Zimbabwe that the converse is the case where an accused is not represented: *Smith v Ushewokunze & another* 1998 (3) SA 1125 (ZSC) at 1130J-1131H; 1997 (2) ZLR 544; 1998 (2) BCLR 170.
[23] *Seneviratne v R* [1936] 3 All ER 36.
[24] At pp 48-49.
[25] Above, n 21 para 25.

'This *obiter* ruling, apparently intended to clarify the existing law in this area, did not quite accomplish its desired task. Instead, it would seem to have heightened the level of confusion. It was primarily the combined effect of the two portions highlighted above which has given rise to the most concern. At first, the Privy Council appears to be approving of a broad discretion and a reluctance to impose a need for the Crown to call witnesses for both sides. In the second portion, however, it would seem that the Court is indicating that certain witnesses, those "essential to the … narrative", must be called in every case. On the surface at least, these opposing comments are not easily reconcilable.'

The learned justice then referred to the Privy Council case of *Adel Muhammed El Dabbah v Attorney-General for Palestine*[26] and Canadian cases including *Lemay v The King*[27] and *R v Yebes.*[28] In the *Yebes* matter McIntire J said:[29]

'The Crown has a discretion as to which witnesses it will call in presenting its case to the court. This discretion will not be interfered with unless the Crown has exercised it for some oblique or improper reason: see *Lemay v The King*, *supra*. No such improper motive is alleged here. While the Crown may not be required to call a given witness, the failure of the Crown to call a witness may leave a gap in the Crown's case which will leave the Crown's burden of proof undischarged and entitle the accused to an acquittal. It is in this sense that the Crown may be expected to call all witnesses essential to the unfolding of the narrative of events upon which the Crown's case is based.'

In *Cook*[30] Madam Justice L'Heureux-Dubé said of this passage, referring back to the second passage emphasised in *Seneviratne*:

'"[E]ssential to the . . . narrative" does not mean, as many have attempted to suggest, that all witnesses with relevant testimony have to be called by the prosecution. On the contrary, it refers solely to the Crown's burden of proof in a criminal proceeding. Where the "narrative" of a given criminal act is not adequately set forth, elements of the offence might not be properly proven, and the Crown risks losing its case.'

[13] It is therefore within the discretion of the prosecutor to decide which witnesses to call as part of the State case. The duty of the prosecutor 'to see

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[26] *Adel Muhammed El Dabbah v Attorney-General for Palestine* [1944] AC 156.
[27] *Lemay v The King* [1952] 1 SCR 232.
[28] *R v Yebes* [1987] 2 SCR 168.
[29] Para 28.
[30] Above, n 21 para 31.

that all available legal proof of the facts is presented', in the words of Rand J in *Boucher*, is discharged by making the evidence (and not only the witnesses subpoenaed by the State) available to the accused's legal representatives. The South African Code of Conduct for Members of the National Prosecuting Authority provides in chapter D, which deals with 'Role in Administration of Justice':

'2. Prosecutors should, furthermore ─

. . .

(g) as soon as is reasonably possible, disclose to the accused person relevant prejudicial and beneficial information, in accordance with the law or the requirements of a fair trial.'

I respectfully agree in this regard with the remarks of Justice Sopinka who delivered the judgment of the Supreme Court of Canada in *Stinchcombe*:[31]

'As long ago as 1951, Cartwright J stated in *Lemay v The King,* [1952] 1 SCR 232, at p 257:

"I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise. . . ."

This statement may have been in reference to the obligation resting on counsel for the Crown to call evidence rather than to disclose the material to the defence, but I see no reason why this obligation should not be discharged by disclosing the material to the defence rather than obliging the Crown to make it part of the Crown's case.' (Emphasis by Sopinka J.)[32]

I would emphasise, however, that it is not necessarily sufficient for the prosecutor to tender State witnesses to the defence at the end of the State case, nor does the prosecutor necessarily discharge the duty of disclosure by making available the contents of the dossier: if there is evidence which the prosecutor knows or ought reasonably to suspect is or may be destructive of the State case, or which tends or might tend to support the defence case, and which the prosecutor knows or ought reasonably to suspect is not known to the defence, it is the prosecutor's duty to bring this evidence specifically to the attention of the accused's legal representatives. It would therefore, for

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[31] Above, n 10 p 15.

[32] This passage was approved in *Cook* above, n 21 para 36.

example, not be necessary for a prosecutor to draw attention to a specific witness's statement favourable to the accused in the dossier made available to the defence, for he who runs may read; but the prosecutor would be obliged to inform the defence that a particular witness, who has not given a statement, might to the defence's advantage be consulted and why, and also to assist, where necessary, in making such a witness available; and the prosecutor would also be obliged to furnish the defence with a document which is not in the dossier, which favours the accused's case or which is destructive of the State case, which the prosecutor believes or ought reasonably to believe is not in the possession of the defence. But the prosecutor's obligation is not to put the information before the court.

[14] I therefore conclude that there is no substance in the argument that the appellant did not receive a fair trial because the State called some witnesses, and not others. Nor did the prosecutor simply make State witnesses not called by the State available to the defence: the prosecutor placed on record that he would assist the defence in locating and consulting with such witnesses. And if the appellant's attorney did not insist that subpoenas issued at the suit of the defence were enforced, that cannot be laid at the door of the prosecution.

[15] I turn to consider the specific complaints made by the appellant's attorney in support of the argument that the appellant did not receive a fair trial. For reasons which will become apparent, it is not necessary to deal with all of them.

Section 105A of the CPA

[16] Plea negotiations as contemplated in s 105A of the CPA took place between the State and the appellant's legal representatives. Nothing came of these negotiations but in the course of them the appellant's legal representatives furnished the prosecution with reports on the appellant authored by a psychiatrist, Dr Neil Fouché, and a psychologist, Mrs Charlotte Hoffman. Those reports were sent by the prosecution to Dr Killisky (a member of the team at Valkenberg Hospital which inquired into, and reported on, the appellant's mental state in terms of chapter 13 of the CPA) and were seen by

Dr Panieri-Peter (a member of the same team) about two days before she was due to give evidence. She had regard to them and intended referring to them in her evidence. The appellant's attorney submitted that this constituted an irregularity inasmuch as s 105A(10)(a)(i) provides:

'Where a trial starts *de novo* as contemplated in subsec (6)(c)[33] or (9)(d)[34] ─

(a) the agreement shall be null and void and no regard shall be had or reference made to ─

(i) any negotiations which preceded the entering into the agreement.'

The section contains no reference to a situation such as the present where there was no agreement, but it must apply equally in such a case. Normally, an accused cannot consent to an incorrect procedure being followed: *S v Lapping*;[35] but the section contains a proviso in the following terms:

'Unless the accused consents to the recording of all or certain admissions made by him or her in the agreement or during any proceedings relating thereto and any admissions so recorded shall stand as proof of such admission.'

The effect of the proviso is that an accused may waive the protection afforded by the section and agree to the recording of admissions. *A fortiori*, then, can an accused agree to the use of documents brought into existence for the purposes of s 105A proceedings which do not contain admissions, but which are unfavourable or, for that matter, favourable to the accused. And that is exactly what happened here.

[17] After Dr Panieri-Peter had read her report into the record, the appellant's attorney pointed out that the reports of the appellant's experts sent to the prosecution as part of the s 105A proceedings, had come into her hands. The court then adjourned for the day. The following morning at the commencement of proceedings the appellant's attorney said:

'Edele, dit is nog steeds my submissie dat die verslae was ingehandig in Artikel 105A verrigtinge, en dat dit bespreek was in daardie omstandighede. Ek gaan egter, of ek was gister geskok gewees dat hierdie getuie dit genoem het, dat hierdie verslae

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[33] 'If the court has recorded a plea of not guilty, the trial shall start *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.'

[34] 'If the prosecutor or the accused withdraws from the agreement as contemplated in paragraph (*b*)(ii), the trial shall start *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.'

[35] *S v Lapping* 1998 (1) SACR 409 (W) and cases cited at 411g-412h.

oorhandig aan haar was. Ek het dit egter met die Staat bespreek, die Staat het my 'n verduideliking daaroor gegee. Ek gaan nie beswaar maak dat sy dan getuienis daaroor gee nie. Indien daar enige aspekte is wat ek voel wat verkeerdelik genoem word, of 'n verkeerde afleiding uit daardie verslae, dan sal ek dit laat uitblyk in kruisondervraging.'

After further discussions the court, addressing the prosecutor, said that the appellant's attorney did not object to Dr Panieri-Peter continuing with her evidence, obviously by dealing with the appellant's expert reports, but that he (the appellant's attorney) would deal with that evidence in cross-examination. The prosecutor confirmed that that was so. The learned judge then asked the appellant's attorney whether the position as had just been explained, was correct, and the appellant's attorney confirmed that it was. Dr Panieri-Peter continued with her evidence but before dealing with the reports from the defence, said:

'I have deliberately left out the inconsistencies in this Psychologist and the Psychiatrist reports about memory. I don't know, can I comment on those, because that is also relevant to the inconsistency of memory, but I just want to be clear, because there was a dispute about documents. I want to be clear on that information first.'

The judge then addressed the appellant's attorney and enquired: 'Ek wil net seker maak wat u houding is daaromtrent.' The appellant's attorney asked for an opportunity to take instructions, to which the judge responded:

'Ja, maar u moet nou besluit, meneer, watter kant toe u wil gaan daarmee, want ek verstaan u het dit oorweeg om te sê u het nie 'n beswaar as daar na verwys word nie, want u gaan in elk geval daarmee handel in kruisverhoor. Nou kom dit nou by die punt, en volgens die getuie is daar belangrike inligting daarin, feitlike weergawes wat vir haar van belang is om 'n mening uit te spreek.'

The court then adjourned at the request of the appellant's attorney and on resumption, the latter said:

'Dit is my instruksies om nie beswaar te maak teen die getuienis wat gelei word nie, maar versoek spesifiek dat daar spesifieke verwysing gemaak sal word na 'n persoon se verslag . . . . dat die verslae nie in een bespreek word, hetsy van Charlotte Hoffman of van Niel Fouché nie, maar indien sy dan net 'n verwysing sal maak van 'n spesifieke verslag, na wat verwys word.'

[18] In the circumstances, the proposition that the appellant did not have a fair trial because reports handed to the State in the course of s 105A proceedings had come into the hands of a State witness and were commented on by the State witness, is untenable. The attitude of the appellant's attorney as reflected in the exchanges summarised above was eminently sensible if the defence intended to call the witnesses whose reports had been handed to the prosecution. It would have been the duty of the appellant's attorney to put the contents of the reports to State witnesses who could comment thereon and that included Dr Panieri-Peter. Allowing the State to lead such comments in her evidence in chief had the advantage that the defence could consult its expert witnesses after her comments were known, and then put the reply of the defence witnesses to her criticism of their reports in cross-examination, so obviating the necessity for an adjournment during cross-examination to enable the defence to take instructions.

Special entries

[19] The next complaint advanced by the appellant's attorney was that his cross-examination of Mrs van der Westhuizen had been unjustifiably limited by the court a quo, and that the court had refused to make a special entry in terms of s 317[36] of the CPA in this regard. It is convenient to consider this point together with the further complaint by the appellant's attorney that a statement by Ms Ronel Arendse was not timeously disclosed to the defence and that the court refused to make a special entry in this regard as well.

[20] As I have said, Ms Ronel Arendse is a psychologist, to whom Mrs van der Westhuizen was referred on the date of the incident and who was still

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[36] Section 317(1) of the CPA provides:
'If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application (in this section referred to as an application for condonation) on good cause be allowed, apply for a special entry to be made on the record (in this section referred to as an application for a special entry) stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made *bona fide* or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.'

treating her when Mrs van der Westhuizen gave evidence. These facts emerged during cross-examination of Mrs van der Westhuizen on Thursday 6 November 2008. After the court had adjourned, the prosecutor looked at a report from Ms Arendse, saw that it referred to other reports, obtained those reports from her and forwarded same to the appellant's attorney because they contained references to what had happened during the night of the shootings. The reports were received by the appellant's attorney during the afternoon of Friday 7 November 2008. The following Monday, 10 November 2008, the appellant's attorney asked for a special entry to be made in terms of s 317 because the defence had not had an opportunity to cross-examine Mrs van der Westhuizen on the alleged differences between the report and Mrs van der Westhuizen's evidence on the events of the night in question. The prosecutor suggested that Mrs van der Westhuizen be recalled for such cross-examination.

[21] The appellant's attorney had by then indicated to the court that he would apply for a special entry also on the basis that he had been prevented from properly cross-examining Mrs van der Westhuizen. The court indicated that Mrs van der Westhuizen would be recalled for further cross-examination and instructed the appellant's attorney to cover both aspects ─ the alleged differences between Ms Arendse's report and Mrs van der Westhuizen's evidence, as well as any other aspects he wished to canvass with Mrs van der Westhuizen which would have given rise to a special entry. The further cross-examination of Mrs van der Westhuizen stood over for three days at the request of the appellant's attorney to enable him to prepare and other witnesses were called by the State in the meantime. Before the cross-examination commenced, the presiding judge again instructed the appellant's attorney to cross-examine Mrs van der Westhuizen on aspects that the latter claimed he had been prevented from putting to her, in order to avoid a special entry and it is clear from the record that the appellant's attorney understood the court's attitude.

[22] The appellant's attorney then cross-examined Mrs van der Westhuizen until after the tea adjournment and said to the court:

'U Edele, dit sluit my kruisondervraging af.'

The learned judge then said:

'Nou soos ek vroeër gesê het u het aangedui dat u wil aansoek doen vir spesiale inskrywing dat wat die kruisverhoor van hierdie getuie betref daar onreëlmatigheid was of dat die prosedure in stryd met die reg is. Nou die getuie is nou hier in die getuiebank. Is daar enige ander aspekte wat u met die getuie wil opvat? Wat u vroeër oënskynlik onder die indruk was dat u nie toegelaat is om behoorlik te kruisverhoor nie. Onreëlmatig nie toegelaat is nie. Of in stryd met die reg nie toegelaat is om volledig te kruisverhoor.'

The appellant's attorney began replying, and was interrupted by the court who said:

'Ja, maar nou wat is nou die posisie? Is daar nog aspekte wat u meen u nie op 'n onreëlmatige wyse of strydig met die reg nie toegelaat is om te kruisverhoor nie?'

The appellant's attorney replied:

'U Edele ek sal dit daar laat. My instruksies [is] om dit nie verder te kruisondervra.'

The court then said:

'Verstaan ek u dan dat u het die geleentheid gehad om ten volle, soos u dit sien, te kruisverhoor?'

A further discussion ensued and the court then said:

'Kyk, ek verstaan u het instruksies, maar u is die regsverteenwoordiger. U moet 'n besluit neem.'

Again, the court made its attitude clear:

'Want ek wil nie later laat ons sit met 'n situasie dat daar 'n aansoek vir 'n spesiale aantekening is dat daar nie behoorlik gekruisverhoor is nie of dat die kruisverhoor onreëlmatig of in stryd met die reg gekortwiek is nie. So as daar is dan moet u dit vir my noem dat ek ─ dan kan u vir my toespreek oor die relevansie daarvan en dan kan daar 'n besluit geneem word. Maar ek kan dit nie in die lug laat hang nie meneer. Verstaan u?'

It appears from the record that the appellant's attorney then had discussions with the prosecutor and Mrs van der Westhuizen was cross-examined further, in camera. Thereafter the appellant's attorney again said that his cross-examination was concluded.

[23] It is unnecessary to consider whether, initially, the court unjustifiably limited cross-examination of Mrs van der Westhuizen. Any irregularity that

there may have been in that regard was cured by the court allowing further cross-examination. The same applies to the complaint that the report of Ms Arendse was made available only after Mrs van der Westhuizen had already given evidence. The submission on appeal that the procedure followed by the court was irregular and that the court was obliged to make the special entries, is devoid of authority, logic and merit.

Bias of the judge

[24] The appellant's attorney accused the trial judge of bias towards the appellant. He did not wish to answer the question from the bench whether he relied on actual bias or on facts that could reasonably give rise to an inference of bias but, when pressed, he alleged actual bias. I do not propose dignifying this allegation by analyzing the submissions made in support of it. It is entirely without merit and the best proof of this is the fact that, as the appellant's attorney confirmed, no application was made at any time, in court or in chambers, for the judge a quo to recuse himself.

[25] Further arguments by the appellant's attorney in support of the submission that the appellant did not receive a fair trial that were contained in the heads of argument, were either abandoned in argument before us[37] or require no serious consideration.

[26] I therefore conclude that there is no substance in the submission that the appellant did not receive a fair trial. I turn to consider the effect of the formal admissions made by the appellant.

Section 220 admissions

[27] At the commencement of the trial, the appellant pleaded guilty to each of the three murder charges. He was then represented by an advocate and his present attorney. A written statement setting out the facts on which he pleaded guilty and signed by himself, his advocate and his attorney was read out in full by his advocate and handed in as exhibit A. The appellant, in

[37] Those in regard to the calling of Koekemoer and Joubert and the non-production or late production of documents by the State.

response to a question by the court, thereupon confirmed that exhibit A contained his plea and explanation of his plea. The following paragraphs of that document are relevant for present purposes:

'Ad Aanklag 1

4.1 Ek erken dat ek op 28 Julie 2006 en naby Kingstraat 8, Brackenfell vir Bianca van der Westhuizen, 'n vroulike persoon, gedood het deur haar een maal met 'n vuurwapen, te wete 'n Z88 pistool, in die kop te skiet.

Ek erken dat ek geweet het toe ek so opgetree het dat ek verkeerd optree en dat ek daarvoor gestraf kan word.

4.2 Ek erken voorts dat die oorsaak van dood "'n skoot aan die kop is" soos vervat in die regsgeneeskundige lykskouingsverslag van Jacob Johannes Dempers.

4.3 Ek erken voorts dat die oorledene geen verdere beserings opgedoen het na die toedien van die noodlottige skoot tot die uitvoering van die regsgeneeskundige lykskouing.

4.4 Vir doeleindes van volledigheid erken ek ook dat die identiteit van die oorledene Bianca van der Westhuizen was.

5. Ad Aanklag 2

5.1 Ek erken dat ek op 28 Julie 2006 en naby Kingstraat 8, Brackenfell vir Marius Eben van der Westhuizen, 'n manlike persoon, gedood het deur hom een maal met 'n vuurwapen, te wete 'n Z88 pistool, in die kop te skiet.

Ek erken dat ek geweet het toe ek so opgetree het dat ek verkeerd optree en dat ek daarvoor gestraf kan word.

5.2 Ek erken voorts dat die oorsaak van dood "'n skoot aan die kop is" soos vervat in die regsgeneeskundige lykskouingsverslag van Jacob Johannes Dempers.

5.3 Ek erken voorts dat die oorledene geen verdere beserings opgedoen het na die toedien van die noodlottige skoot tot die uitvoering van die regsgeneeskundige lykskouing.

5.4 Vir doeleindes van volledigheid erken ek ook dat die identiteit van die oorledene Marius Eben van der Westhuizen was.

6. Ad Aanklag 6

6.1 Ek erken dat ek op 28 Julie 2006 en naby Kingstraat 8, Brackenfell vir Antoinette van der Westhuizen, 'n vroulike persoon, gedood het deur haar een maal met 'n vuurwapen, te wete 'n Z88 pistool, in die kop te skiet.

Ek erken dat ek geweet het toe ek so opgetree het dat ek verkeerd optree en dat ek daarvoor gestraf kan word.

6.2 Ek erken voorts dat die oorsaak van dood "'n skoot aan die kop is" soos vervat in die regsgeneeskundige lykskouingsverslag van Jacob Johannes Dempers.

6.3 Ek erken voorts dat die oorledene geen verdere beserings opgedoen het na die toedien van die noodlottige skoot tot die uitvoering van die regsgeneeskundige lykskouing.

6.4 Vir doeleindes van volledigheid erken ek ook dat die identiteit van die oorledene Antoinette van der Westhuizen was.

7. Nieteenstaande die feit dat ek voor en ten tye van die voorval aan erge depressie gely het en nieteenstaande die feit dat ek geen geheue het oor die betrokke voorval, welke geheueverlies toegeskryf word aan post traumatiese spanning (stress) disfunksie:

7.1 Erken ek die feite soos uiteengesit in die klagstaat;

7.2 Erken ek dat alhoewel my insig beperk was deur die depressie, ek nieteenstaande die beperkte insig, die verkeerdheid van my handelinge besef het;

7.3 Erken ek spesifiek dat die depressie en/of geheueverlies geen regverdigingsgrond daarstel nie maar slegs verminderde toerekeningsvatbaarheid daar mag stel;

7.4 Erken dat die geheueverlies toegeskryf word aan post traumatiese spannings disfunksie en dat dit nie 'n verweer daarstel soos uiteengesit in Artikel 77 en 78 van die Strafproseswet;

7.5 Ek erken dat my depressie en geheueverlies vanweë post traumatiese spannings disfunksie volledig met my bespreek is deur my regsverteenwoordigers, sielkundige en psigiater, dat ek die omvang daarvan begryp en weereens erken ek onomwonde dat dit nie 'n verweer daarstel en dat ek erken dat my optrede verkeerd was en dat ek die nodige insig gehad het.

8. Gevolglik erken ek dat ek die nodige vermoë gehad het om tussen reg en verkeerd te onderskei en voorts dat ek die vermoë gehad het om ooreenkomstig daardie onderskeidingsvermoë te handel.'

[28] The prosecutor placed on record that the State did not accept the allegations in para 7 of exhibit A. For the rest, the admissions were accepted. The learned judge a quo noted that there was no admission that the appellant's conduct was accompanied by an intention to kill, but merely that the shots the appellant fired had caused death and that there was criminal responsibility. The court then entered a plea of not guilty on all three counts. In doing so, it acted in terms of s 113(1) of the CPA which provides:

'If the court at any stage of the proceedings under section 112(1)(a) or (b) or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.'

In accordance with the proviso, once the plea of not guilty had been entered, the admissions in exhibit A stood 'as proof' of the allegations admitted.

[29] After the prosecutor had placed on record further admissions made by the appellant and handed in exhibits to which they related, he asked that, despite the fact that the court had recorded a plea of not guilty, the admissions made in exhibit A should stand as formal admissions in the trial. The appellant's advocate indicated that there was no objection to this being done. The court nevertheless explained the position to the appellant and asked him, twice, whether he made the admissions; and twice, the appellant said that he did. It is quite clear from the record that the admissions were sought and made in terms of s 220 of the CPA. That section provides:

'An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact.'

[30] The distinction between ss 113(1) and 220 is this. When the plea of guilty was tendered, there was no dispute between the State and the defence and hence (to use the words of s 220) there was no 'fact placed in issue'. Once the plea of not guilty had been entered, all the allegations in the indictment were placed in issue (save that in terms of the proviso to s 113(1), the admissions stood 'as proof' of the allegations admitted) and admissions in terms of s 220 could be made. The difference in effect between the two sections is that whilst an allegation, admitted by an accused up to the stage at

which the court records a plea of not guilty, stands 'as proof' of such allegation, and therefore forms part of the probative material before the court, an admission of a fact in terms of s 220 is 'sufficient proof' of such fact and no further evidence is necessary.

[31] The significance of the admissions made in terms of s 220 is this: The appellant admitted in respect of each count, and therefore three times, that when he shot each deceased he knew that he was acting wrongfully and that he could be punished therefor; and the appellant recorded that he had the capacity to distinguish between right and wrong and that he further had the capacity to act in accordance with such appreciation. The effect of the admissions is that the appellant acknowledged criminal responsibility because the admissions are inconsistent with a defence of criminal incapacity, whether non-pathological or caused by mental illness or mental defect ─ although the admissions are not inconsistent with diminished responsibility, which is relevant to mitigation of sentence. The distinction is explained by Prof Snyman[38] in comparing s 78(1)[39] of the Criminal Procedure Act, which excludes criminal responsibility caused by mental illness or mental defect, with s 78(7),[40] 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 capacity and criminal non-capacity 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,

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[38] *Criminal Law* 5 ed (2008) para 12 at 176-7.

[39] 'A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable─

(a) of appreciating the wrongfulness of his or her act or omission; or

(b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.'

[40] 'If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.'

despite his criminal capacity, 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 mental illness is not present, as appears from a number of judgments of this court eg *S v Smith*,[41] *S v Shapiro*,[42] and *S v Ingram*.[43] According to these cases, 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 as 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 because the criminal act was performed when the accused did not fully appreciate the wrongfulness of the act or was not fully able to act in accordance with an appreciation of such wrongfulness.

[32] The consequence of the admissions was to put the appellant's criminal capacity beyond issue. Cameron JA said in *S v Groenewald*:[44]

'An admission is an acknowledgment of a fact. When proved or made formally during judicial proceedings, it dispenses with the need for proof in regard to that fact. *Wigmore on Evidence* calls it "a method of escaping from the necessity of offering any evidence at all": a "waiver relieving the opposite party from the need of any evidence".[45] Section 220 of the Act, accordingly, makes it possible for a contested fact to be put beyond issue since, once made, the admission constitutes "sufficient proof" of it.'

Therefore, as pointed out by Rumpff CJ in *S v Seleke & 'n ander*:[46]

'Wanneer 'n erkenning kragtens art 220 gemaak word, beteken dit dat 'n beskuldigde nie later kan beweer dat wat erken is, nog deur die Staat bewys moet word nie. Die woorde "voldoende bewys" onthef dus die Staat van die las om die betrokke feit wat

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[41] *S v Smith* 1990 (1) SACR 130 (A) at 135b-e.
[42] *S v Shapiro* 1994 (1) SACR 112 (A) at 123c-f.
[43] *S v Ingram* 1995 (1) SACR 1 (A) at 8d-i.
[44] *S v Groenewald* 2005 (2) SACR 597 (SCA) para 33.
[45] John Henry Wigmore *Evidence in Trials at Common Law*, revised by James Chadbourn (1972) vol 4 para 1058.
[46] *S v Seleke & 'n ander* 1980 (3) SA 745 (A) at 754F-H.

erken is, op enige ander manier te bewys, tensy die Staat, om spesiale redes, nog ander getuienis omtrent die feit aan die Verhoorhof wil voorlê.'

[33] The appellant, having made the admissions formally, was not entitled to require the State to cross the hurdle the admissions were intended to eliminate. And much less was it open to the appellant, having made the admissions, himself to create a hurdle by leading evidence inconsistent with the admissions, for the same reason. But that is precisely what the appellant's attorney, once the appellant's counsel had been relieved of his mandate, sought to do. When the prosecutor put paragraph 7.3 of exhibit A to Dr Panieri-Peter, the psychiatrist called by the State, and the witness had replied 'it is a question of diminished responsibility', the judge intervened, rehearsed the facts leading to the State's non-acceptance of the plea explanation and pointed out that the appellant's attorney had previously indicated in cross-examination of State witnesses that he would argue that a verdict of not guilty should be returned; and the judge at the end of the case permitted argument to this effect. The admissions made formally in terms of s 220 were simply ignored. None of this should have been allowed.

[34] For so long as a formal admission stands, it cannot be contradicted by an accused whether by way of evidence or in argument. To hold otherwise would defeat the purpose of s 220, eliminate the distinction between a formal admission in terms of that section and an informal admission which may be qualified or explained away, and thereby lead to confusion in criminal trials. As Viljoen JA said in *S* v *Mjoli*[47] in a concurring judgment:

'By reason of the fact that an admission formally made by or on behalf of the accused is "sufficient evidence", the effect is that such fact virtually becomes conclusive proof against him because the accused himself or his legal representative on his behalf has made the admission and any effort by him or on his behalf to adduce evidence countervailing such fact would be inconsistent with his having made the admission.'

[47] *S v Mjoli* 1981 (3) SA 1233 (A) at 1247B-C.

[35] There is no authoritative pronouncement as to how an accused may escape the consequences of a formal admission, once made. Rumpff CJ said in *Seleke* after the passage quoted above:

'Voldoende bewys is natuurlik nie afdoende bewys (conclusive evidence) nie en kan later deur die beskuldigde, bv, weens dwang of dwaling of deur ander regtens aanneemlike feite, weerlê word.'

In *S v Daniëls & 'n ander*[48] Nicholas AJA and Botha JA adopted different approaches. Nicholas AJA (having quoted the provisions of s 220) continued:[49]

'The words "sufficient proof" relieve the State of the onus of proving the admitted fact in any other way (*S v Seleke en 'n Ander* (*supra* at 754G-H)).

In a civil case the Court has a discretion to relieve a party from the consequences of an admission made in error in a pleading (see *Gordon v Tarnow* 1947 (3) SA 525 (A)). So too in a criminal case the Court has a discretion to relieve an accused from the consequences of a formal admission on a ground recognised by law. Examples are where an admission was made as a result of compulsion or mistake (see *S v Seleke en 'n Ander* (*supra* at 754H)), or where the making of it has been attended by an irregularity.'

Botha JA said:[50]

'Ter wille van duidelikheid moet ek ook verwys na die analogie wat my Kollega Nicholas vind tussen die terugtrekking van 'n erkenning in 'n siviele saak, soos bespreek in *Gordon v Tarnow* 1947 (3) SA 525 (A) op 531-2, en die moontlikheid om 'n beskuldigde te verlos van die gevolge van 'n erkenning in 'n strafsaak, soos bespreek in *S v Seleke en 'n Ander* 1980 (3) SA 745 (A) op 754G. Ek is met eerbied nie oortuig daarvan dat die analogie volkome suiwer is nie. In 'n siviele saak word die party wat 'n erkenning gedoen het nie toegelaat om getuienis in stryd met die erkenning voor te lê nie, tensy hy eers verlof kry om die erkenning terug te trek. 'n Soortgelyke standpunt kan op die gebied van die strafreg in verband met die toepassing van art 220 gehuldig word (vgl bv, Schmidt *Bewysreg* 2de uitg op 217-8), maar na my mening is daar veel te sê vir 'n ander benadring, ten minste in die geval waar art 220 ter sprake kom as gevolg van die toepassing van art 115 uit hoofde van arts 119 en 122. Om 'n uiterste voorbeeld te neem: 'n beskuldigde op 'n aanklag van moord erken, ingevolge die genoemde artikels, dat hy die oorledene doodgemaak

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[48] *S v Daniëls & 'n ander* 1983 (3) SA 275 (A)
[49] At 298G-H.
[50] At 318C-319A.

het; by sy verhoor kom daar getuienis vorendag (hoe ook al) wat bewys dat hy op die betrokke dag in die gevangenis was en dat dit onmoontlik is dat hy die oorledene kon gedood het; maar die beskuldigde bied geen verklaring aan waarom hy die erkenning gedoen het nie. Ek kan my dit nie indink dat enige Hof die weerleggende getuienis van oorweging sal uitsluit nie, selfs al voer die beskuldigde nie aan dat hy sy erkenning gedoen het as gevolg van dwang, dwaling, onbehoorlike beïnvloeding of dies meer nie. Artikel 220 se verwysing na "voldoende bewys" kan nie beteken dat die Wetgewer beoog het of dat 'n hof sy oë of ore vir die waarheid moet sluit nie. In die geval van buite-geregtelike bekentenisse is dit nog altyd aanvaar dat 'n hof aan die einde van die saak, selfs waar die toelaatbaarheid van die bekentenis buite twyfel is en daar aan die vereistes van art 209 voldoen is, bo redelike twyfel seker moet wees dat die bekentenis die waarheid is alvorens 'n skuldigbevinding geregverdig is (*S v Mlambo* 1975 (2) SA 549 (A) op 554C en *S v Kumalo*, 31 Augustus 1982 (A), ongerapporteer). Volgens my mening is dit goed argumenteerbaar dat dieselfde benadering toepaslik is waar daar in die samehang van arts 115, 119, 122 en 220 rede ontstaan, op watter wyse ook al, om die juistheid te betwyfel van 'n erkenning wat 'n beskuldigde gemaak het. . . . . As dit so is, sal dit op die feite van die huidige saak geen verskil maak of beskuldigde 2 se uitlatings voor die landdros beskou word as erkennings of slegs as bewysmateriaal nie.'

[36] It may be noted that there is a fundamental difference between s 220 of the CPA, and s 15 of the Civil Proceedings and Evidence Act[51] which provides:

'It shall not be necessary for any party in any civil proceedings to prove, nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings.' (Emphasis supplied.)

[37] In my view, the minimum that an accused who wishes to lead evidence or advance argument inconsistent with a formal admission in terms of s 220 would first have to show, before being allowed to do so, is that there is an explanation consistent with bona fides why the admission was made in the first place and why he or she now wishes to resile from it. No doubt, as pointed out by Botha JA in the passage quoted above from the *Daniëls* case, a court will not in a criminal matter close its eyes and ears to the truth and

[51] 25 of 1965.

convict an accused based on an admission where the admission is clearly wrong – as Hiemstra puts it:[52]

'The purpose of the process is and remains to get to the truth, namely what happened, and not to determine what was said about it';

but that is a far cry from allowing the accused himself or herself without more to lead evidence or advance argument contrary to an admission he or she has formally made.

[38] In the present matter the appellant's attorney delivered further heads of argument, in response to a request by the court, on whether, in view of the admissions contained in the appellant's plea explanation formally recorded in terms of s 220, he was entitled to argue that the appellant was not criminally responsible for his actions in shooting the three deceased. The appellant's attorney submitted that the appellant had made the admissions in circumstances where:

(i) he had loss of memory in respect of the shooting incidents;

(ii) he had a defence available when he pleaded;

(iii) he is a lay person in psychiatry and psychology;

(iv) he pleaded on the advice of his legal representatives, who are not experts in the fields of psychiatry and psychology;

(v) he acted bona fide on the strength of incorrect findings in expert reports and was guided by the findings therein contained; and

(vi) there was prima facie an evidential burden on him to prove his lack of criminal responsibility.

First, this explanation is irreconcilable with the admission by the appellant in para 7.5 of his plea explanation that his mental state had been fully discussed with him by both of his legal representatives and his psychiatrist and his psychologist, and that he fully appreciated its ambit. Second, there is no factual foundation for the submission that at the time he pleaded, the appellant had a defence. The appellant's attorney relied for this submission on the report of the psychiatrist consulted by the appellant, Dr Neil Fouché. In that report Dr Fouché wrote:

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[52] Kruger *Hiemstra's Criminal Procedure* sv s 220.

'It would, therefore, be fair to conclude that this gentleman, for the period preceding the incident on 28 July 2006, was mentally ill and that his mental state certainly impaired his functioning and judgment.'

The word 'impaired' connotes 'rendered worse', 'damaged' or 'weakened'[53] or, to use the word in s 78(7), 'diminished'. It does not mean 'excluded' or 'prevented' and the report cannot be read as meaning that the appellant was, by reason of his mental state and as required by s 78(1) of the CPA or the defence of temporary non-pathological incapacity,[54] rendered 'incapable' of appreciating the wrongfulness of his acts or acting in accordance with such appreciation at the time he shot the three deceased.

[39] It is unfortunately necessary, although the law is clear, to deal with the submission by the appellant's attorney that impairment sufficed to bring his client within the provisions of s 78(1)(b). For that submission, reliance was placed on the following passage in Burchell *Principles of Criminal Law*[55] in the section headed 'Capacity to act in accordance with such appreciation (self-control)':

'The test was originally described melodramatically as the "irresistible impulse" test. However, the description was misleading since the illnesses concerned did not necessarily manifest themselves in impulsive actions. Further, the notion of "irresistible" suggested that the victim had to have been subjected to an overpowering force, while the true issue is whether his normal capacity for self-control has been substantially impaired.'

But the paragraph immediately following the paragraph just quoted begins:

'The formulation of this test of insanity in South African law requires that the mental illness or defect should have caused the accused to be incapable of acting "in accordance with an appreciation of the wrongfulness of his act". The general effect of s 78(1)(b) of the Criminal Procedure Act is thus that although the accused was capable of appreciating (and even if he did appreciate) the wrongfulness of his act, he is still not criminally responsible if at the time of its commission he suffered from mental illness or mental defect which made him "incapable of acting in accordance with" such appreciation.'

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[53] *OED* 2 ed vol VII.
[54] See the authorities quoted in the next para below.
[55] 3 ed (2005) p 382 and see also p 378.

Section 78(1) is clear in its terms: for it to be applicable, the accused must have been 'incapable' of either appreciating the wrongfulness of his or her act or omission or of acting in accordance with an appreciation of such wrongfulness. That is the very distinction between s 78(1), and s 78(7) which provides for the situation where the accused's capacity to appreciate the wrongfulness of his or her act or omission or of acting in accordance with such appreciation, was 'diminished' by reason of mental illness or mental defect. A similar distinction exists in regard to the defence of temporary non-pathological criminal incapacity. Smallberger JA said in *Ingram*:[56]

'The guilt or innocence of the appellant depends upon whether, as put forward in his defence, he was suffering from a temporary non-pathological incapacity when he shot the deceased and was therefore criminally unaccountable for his conduct. Accountability in this context depends upon a person's ability to (1) distinguish between right and wrong and (2) exercise restraint or control over his or her actions which are unlawful. If either of these psychological characteristics is absent the person concerned would not be criminally responsible for his conduct (S v Laubscher 1988 (1) SA 163 (A) at 166F-J).' (Emphasis supplied.)

And Kumleben JA said in *S v Smith*:[57]

'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. The conviction of murder was, in my view, fully justified.'[58]

[40] The appellant on his own version as recorded in his plea explanation exercised a fully informed choice. And he made no mistake. He knew exactly what he was doing. He also knew what the consequence was ─ this was spelt

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[56] Above, n 43 at 4E-G.
[57] Above, n 41 at 135E-G.
[58] See also *S v Kalogoropoulos* 1993 (1) SACR 12 (A) at 24b-c and 25i and the dissenting judgment in *DPP, Transvaal v Venter* 2009 (1) SACR 165 (SCA) para 51.

out in his plea explanation over and over again: he had no defence based on his alleged mental state.

[41] The position is therefore that the appellant has advanced no acceptable explanation consistent with bona fides as to why he should be relieved of the consequences of his formal admission. I accordingly conclude that the trial should have been conducted, and that the appeal should be approached, on the basis that the appellant was able to appreciate the wrongfulness of his acts and act in accordance with such appreciation; and that the only issue, which is relevant solely to sentence, is the extent to which he acted with diminished responsibility. In any event, however, as my colleague Snyders has demonstrated, the defence raised by the appellant is without merit. I concur in her judgment.

Order

[42] The appeal is dismissed.

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T D CLOETE
JUDGE OF APPEAL

SNYDERS JA (CLOETE and THERON JJA concurring):

[43] Despite the appellant's admission of criminal capacity at the commencement of the trial, full ventilation of that issue was allowed by the trial court. The appellant persisted in that defence during the trial and on appeal by contending that the evidence entitles him to an acquittal in terms of

s 78(6) of the Criminal Procedure Act 51 of 1977 (the Act).[59] In order to avoid any possible prejudice to the appellant I will now explore whether the evidence shows that it is reasonably possibly true that the appellant had no criminal capacity at the time that he committed the crimes in question.[60]

[44] On Friday evening of 28 July 2006 the appellant, a superintendent in the South African Police Service, shot and killed his three children with his service pistol. All three children, Bianca, a nearly 17 year old cerebral palsied girl, Marius Eben, an almost six year old boy, and Antoinette, a 19 month old toddler, were asleep in their beds when they were shot in their heads by their father. Bianca was a child from the appellant's previous marriage of whom he enjoyed custody. The two younger children were of the appellant's marriage to police captain Charlotte van der Westhuizen to whom he was still married and with whom he was still living at the time of the incident.

[45] The appellant claims amnesia in relation to the critical events of that evening.[61] As a result of this claim his wife was the only witness that gave a version of the shooting. Insofar as the appellant does remember certain facts, his version does not present a materially different scenario. Mrs van der Westhuizen's version is reconcilable with all the objective facts and contains no inherent improbabilities. She was a good witness that testified

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[59] An acquittal in terms of s 78(6) presupposes a finding of a lack of criminal responsibility in terms of s 78(1).
Section 78(1) is quoted in footnote 39 above.
Section 78(6) reads: 'If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or intellectual disability 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,. . . .'. The rest of the ss deals with the directions a court would be capable of making regarding the detention of such an accused in a hospital, institution or conditions of release.

[60] The trial court applied the usual standard of proof in criminal cases to avoid the appellant's objections to the provisions of s 78(1A) insofar as those could potentially have been applicable.

[61] Whether the appellant actually has amnesia is not an issue on which the trial court had to make a finding as it does not constitute a defence. At worst for the appellant it may reflect on his credibility and at best it may be a mitigating factor. The psychiatrist that testified on behalf of the State, Dr Panieri-Peter, questioned the claim of amnesia, primarily due to the patchiness and inconsistency of the appellant's recollection being irreconcilable with amnesia. The psychiatrist, Dr Fouché, and clinical psychologist, Mr Scholtz, that testified on behalf of the appellant, accepted his claim without question.

spontaneously, realistically, maturely and to the point. She withstood prolonged and harrowing cross-examination. Criticism of her evidence as untruthful and overly dramatic is without any merit. The trial court was correct in accepting her version of the events as satisfactory in all material respects.

[46] The Van der Westhuizen couple had a long standing history of marital discord. It manifested yet again that Friday evening. The appellant was discontent because Mrs van der Westhuizen arrived later than he expected her to, from work. Their differences did not develop into a full argument, but rather silence filled with portent. She and the children went to bed early whilst he continued with a do-it-yourself project. During the course of the evening he discovered that she had given him a dishonest explanation for her lateness. She told him that on her way home she had had to turn back because she had forgotten Antoinette's milk that she had bought earlier that day, at her office. He discovered this to have been a dishonest explanation because he checked the vehicle's odometer reading and knew that she had only travelled a sufficient number of kilometres that day to have travelled to work and back home. According to him, this made him very angry, sad, frustrated and disappointed. In truth she had volunteered to work late, but because her relationship with her work and colleagues had become such a hugely contentious issue in their marriage, she did not feel free to tell him the truth.

[47] Shortly before 10 o'clock that evening the appellant went to the main bedroom where his wife was sleeping. He woke her and insisted that she make a choice between him and her job. She responded irritably that it was not a matter of choice and that she wanted to go back to sleep. He insisted that she make a choice and she refused. He then jumped to the conclusion that her lack of response amounted to her choosing her job and he verbalised that conclusion. He got off the bed, switched on the light and went to the gun safe with keys in hand. He unlocked the safe and took out his service pistol. Still in bed, she asked him what he was going to do. He repeated that she had chosen her job. He took her mobile telephone from the bedside table next to her, walked out of the bedroom and shut the door. She jumped up and

followed him. When she opened the door he was in the passage next to the door of the two girls' bedroom. He switched on the passage light, repeated to her that she had made her choice and said that she was going to have to bear the consequences of her choice. He lifted the firearm, cocked it, turned and entered the girls' bedroom. He switched on the light and walked inside. He first walked to Bianca's bed, and aimed the firearm at her head. Mrs van der Westhuizen entered the bedroom. The appellant looked at her and shot his eldest daughter in her head. He turned, lifted his hand over the railing that prevented Antoinette from falling out of bed and shot her in her head, after again repeating to Mrs van der Westhuizen that she had made her choice and that she was going to bear the consequences of her choice. He did all of this despite her screams of protestation.

[48] The appellant walked calmly past Mrs van der Westhuizen, went down the passage, switched on a further light in the passage, and also the light of their son's bedroom. She followed him, screaming at him to stop. He waited for her to enter Marius Eben's bedroom, and when she did, he shot their son in his head. He looked at her and shouted: 'You see, now your children are dead'.[62]

[49] The appellant handed Mrs van der Westhuizen's telephone back to her and said she would probably now telephone her superior officer, Senior-Superintendent Brand, for help. She went back to her bedroom and dialled Brand's number. The appellant came to the bedroom door with both of his mobile telephones in his one hand and the firearm still in the other. He told her not to fear as he was not going to shoot her. He then left. Moments later when Mrs van der Westhuizen tried to leave the house she discovered that he had locked her inside the house with the dead children.

[50] Hours after the appellant had shot his children and whilst hiding in the garden, he shot himself. He put the pistol under his chin and pulled the trigger, but missed all vital organs.

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[62] Direct translation of Mrs van der Westhuizen's evidence: 'Sien jy, jou kinders is nou dood'.

[51] The appellant was referred to Valkenburg psychiatric hospital in terms of s 78(2) for enquiry and report in terms of s 79 of the Act.[63] Dr Panieri-Peter, the specialist psychiatrist appointed by the Medical Superintendent of Valkenburg on the panel that was to enquire into the mental condition of the appellant, presented the unanimous findings of the panel in court. The experts made the following findings in terms of s 79 of the Act:

'79(4)(b) 1. Clinical Diagnosis: not mentally ill

2. He is NOT certifiable in term of the Mental Health Act.

79(4)(c) He is fit to stand trial in terms of Section 77(1).

79(4)(d) He was able to appreciate the wrongfulness of the alleged offence, and act accordingly.'[64]

[52] Dr Panieri-Peter did not hesitate to express her professional opinion on the facts available to her during the enquiry and as supplemented during her evidence. She held the view that the appellant, at the time of the commission of the murders, was able to appreciate the wrongfulness of his actions and was able to act in accordance with that appreciation. The trial court accepted those findings.

[53] In this court the appellant repeated a gratuitous attack on the integrity of Dr Panieri-Peter. As the trial court did, I find no foundation whatsoever for such an attack. It is regrettable that professionals in conducting a trial should perceive the need for gratuitous attacks on the integrity of a professional expert witness who properly performs a vital function in the interests of the

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[63] Section 78(2) reads: 'If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.'
Section 79 is a lengthy section that deals, inter alia, with the composition of the panel for the purpose of the enquiry, the committal of the accused to a psychiatric hospital for that purpose, the furnishing of information to the panel and the nature of the report.

[64] Section 79(4) reads: 'The report shall – (a) include a description of the nature of the enquiry; and (b) include a diagnosis of the mental condition of the accused; and (c) if the enquiry is under section 77(1), include a finding as to whether the accused is capable of understanding the proceedings in question so as to make a proper defence; or (d) if the enquiry is in terms of section 78(2), include a finding as to the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with an appreciation of the wrongfulness of that act was, at the time of the commission thereof, affected by mental illness or mental defect or by any other cause.'

administration of justice. Dr Panieri-Peter expressed her opinions in a firm, clear, well motivated and reasoned manner. By doing so she fulfilled the function of an expert witness to the letter.[65]

[54] The expert witnesses that testified for the appellant did not challenge her conclusion that the appellant had criminal capacity when he murdered his children. Dr Fouché, a psychiatrist, testified on behalf of the appellant. The appellant was referred to Dr Fouché for treatment at the end of August 2006 by the physician who treated him after he shot himself. Dr Fouché entered into a therapeutic relationship with the appellant for a period of approximately two years. A therapeutic role is substantially different to the forensic role Dr Panieri-Peter and her colleagues were called upon to perform. The inherent difference between the two functions is obvious. As therapist Dr Fouché was expected to accept information furnished by the appellant to him and provide therapy on the strength thereof, whereas Dr Panieri-Peter was meant to investigate, question and enquire with a view to objectively and factually ascertain the appellant's mental health at the time of the incident. This distinction serves to illustrate why there is a substantial difference in objectivity when the views of the two psychiatrists are compared.

[55] Despite that distinction Dr Fouché did not come to a conclusion that the appellant did not have criminal capacity when he committed the murders. In his report, compiled during November 2008, he addressed a substantially different issue to that contained in s 78(2) of the Act, as his conclusion reflects:

'79(4)(b) 1. He has a Recurrent Depressive Disorder current episode mild
Post Traumatic Stress Disorder of moderate severity
Abnormal Bereavement Process.
2. He is not certifiable in terms of the Mental Health Act.

79(4)(c) He is fit to stand trial according Section 77(1).

[65] Insofar as it is necessary to refer to the purpose of opinion evidence by an expert witness and the approach a court is to adopt regarding such evidence, I draw attention to the following authorities: *S v Adams* 1983 (2) SA 577 (A) at 586C; *S v Kleynhans* 2005 (2) SACR 582 (W) at 585a-g; *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung Mbh* 1976 (3) SA 352 (A) at 371G-H.

79(4)(d) He has the ability to appreciate the wrongfulness of the alleged offence and act accordingly.'

[56] Dr Fouché in his report addressed the appellant's mental condition prior and subsequent to the incident. The latter is not particularly helpful when criminal capacity at the time the murders were committed, is considered. In relation to the former he accepted that the appellant suffered from depression and anxiety prior to the incident and stated that the appellant's ability to act in accordance with his appreciation of wrongfulness was impaired. He repeated this view during cross examination, but then explained it to mean that the appellant had the ability to distinguish between right and wrong, but was unable to act in accordance with that distinction. He formed this view because the appellant, after he shot his children, tried to commit suicide. Dr Fouché felt that an attempt to commit suicide is indicative of the absence of the ability to act in accordance with insight into right and wrong. The difficulty with this view is that it again relates to the period after the appellant shot the children whereas the true investigation should focus on the time prior to and at which he did so. Dr Fouché's attempt to typecast the events surrounding the murders as an extended suicide is not supported by any evidence, not even that of the appellant.[66] He conceded that his evidence in this regard was a mere theory to try and understand why the appellant did what he did.

[57] Dr Fouché's evidence reveals that he was not fully comfortable in dealing with the concept of criminal capacity and the distinctions drawn in s 78(1) of the Act. He struggled to express a consistent and clear opinion on the appellant's ability or inability to have acted in accordance with his appreciation of right and wrong. Towards the end of his cross examination, Dr Fouché reverted to the position that the appellant's ability to have acted in accordance with his appreciation of right and wrong was seriously diminished, not absent. It is fair to say that Dr Fouché spoke rather loosely and was not qualified to venture a forensic view from his therapeutic perspective, but even

[66] Crudely described as a parent wanting to take his own life and killing his children because he does not want to leave them behind in a helpless state.

so, he did not advance the view that the appellant did not have the ability to act in accordance with his appreciation of right and wrong. Dr Fouché's evidence, with all its shortcomings, was the highwater mark of the appellant's defence.

[58] Mr Scholtz, a clinical psychologist, was consulted by the appellant during November 2008 on an ad hoc basis to make a clinical assessment of him. His report does not address the appellant's criminal capacity. It states that the appellant suffered from clinical depression and post traumatic stress disorder prior to the incident. His report is based on information from the appellant obtained during one three-hour consultation. During that consultation Mr Scholtz explained that he had deliberately refrained from enquiring from the appellant about the events of the evening, for fear of losing his objectivity. In his report he states:

'Clinical Depression and Post Traumatic Stress Disorder can significantly effect a person's personal, social and occupational functioning. It could also lead to a degree of distorted thinking and impaired judgment.'

[59] Mr Scholtz also testified. Understandably he was hesitant to express a firm view on the appellant's criminal capacity on the strength of his consultation. His strongest evidence for the appellant was that the appellant's ability to act in accordance with acceptable norms was probably diminished because he suffered from depression and post traumatic stress at the time of the incident.

[60] All the expert witnesses were confronted with the facts that the appellant relies on for his persistent contention that he had no criminal capacity. None of the expert witnesses changed their opinions to support the appellant's contention. At best for the appellant their evidence supports a view that his ability to act in accordance with an appreciation of wrongfulness was impaired or diminished. In para 39 of my colleague Cloete's judgment it is made clear that the argument that impairment is sufficient for a finding in terms of s 78(1)(b) is without any substance. The trial court's finding of

diminished criminal capacity was not challenged by the State on appeal. It is therefore not necessary to consider the contrary opinion of Dr Panieri-Peter.

[61] The next enquiry is to ascertain whether the trial court should have rejected the unanimous s 79 finding and the unanimous view of the expert witnesses in favour of a finding that the appellant did not have the ability to act in accordance with his appreciation that what he was doing was wrong.

[62] The attorney for the appellant argued that the appellant suffered from a pathological incapacity that negated his ability to act in accordance with his appreciation of the wrongfulness of his actions. He argued that the depression, anxiety and post traumatic stress disorder that he suffered from each constituted a pathology. The submission was further that the existence of a pathology taken together with the fact that the murders were irrational and contrary to the appellant's loving, kind and soft hearted personality, compels the conclusion that the appellant had no ability to control himself. The argument went so far as to state that once it is accepted that the appellant suffered from a pathology it becomes irrelevant whether his actions in committing the murders appeared deliberate and goal directed.

[63] The latter contention is to be rejected because of the wording of s 78(1). The section prescribes that two questions be answered irrespective of whether the appellant suffered from a pathological or non-pathological condition at the time of the commission of the murders. That the appellant appreciated the wrongfulness of his actions was never disputed. His actions before, during and after the murders need to be scrutinised to determine whether he was able to act in accordance with his appreciation of wrongfulness.

[64] The attorney on behalf of the appellant strongly relied on *S v Kavin* 1978 (2) SA 731 (W) and *S v McBride* 1979 (4) SA 313 (W) as analogous to this matter. This reliance is unfounded. In both those cases the panel of psychiatrists made a unanimous report in terms of s 79(4) that the accused, at

the time that the crime that was committed, was unable to act in accordance with an appreciation of wrongfulness. In *Kavin* it was reported that the accused suffered from '[s]evere reactive depression super-imposed in a type of personality disorder displaying immature and unreflective behaviour . . . [which] produced a state of dissociation'. In *McBride* the unanimous report was that the accused suffered from endogenous depression.

[65] The appellant introduced evidence of all the stress factors that operated in his life leading up to the incident. Much of this evidence was common cause or undisputed and even insofar as disputed, was taken into account in the appellant's favour by the trial court. The appellant occupied a stressful position of leadership in the SAPS. He held the rank of superintendant and was stationed at a large and very busy police station, Claremont, in the Western Cape. Due to duties that frequently took his commanding officer away from the station the appellant was in effect the commander of the station. He was described by many witnesses as a perfectionist in his work. Dr Fouché and Mr Scholtz supported that evidence in that they found him to have obsessive-compulsive personality traits which caused him to expect a very high level of performance from himself. The extensive duties he was expected to perform and his own requirement to do so to perfection placed a great deal of stress on him. As his workload increased he reached the stage that he simply could no longer perform all his duties or could not perform at the level he wanted to. This state of affairs caused him to feel out of control which in turn caused him a measure of depression and anxiety. He was no longer the calm, kind, strict perfectionist that tried to be everything to everybody in his workplace. From about December 2005 he was seen to behave uncharacteristically at work by hitting his head against the wall, being abrupt with colleagues, being forgetful, rushing around, gripping his chest in pain, looking worn out and stressed, locking himself in his office, being withdrawn and being irritable and impatient.

[66] The appellant's experiences as a policeman during his entire career contributed to his emotional condition and depression. Throughout his career,

in the day to day execution of his duties he encountered very traumatic events. Some of those involved colleagues, to whom he was emotionally close, being killed virtually next to him. He was shot at on numerous occasions and on several occasions his life was endangered in other ways.

[67] The appellant's marriage was another source of depression and anxiety. There existed long standing marital discord between him and his wife. She was stationed at the Kuils River police station. He had enormous difficulties with the way she managed her working hours and they had constant arguments about that. The appellant resented his wife working any form of overtime without insisting on either payment or time off as compensation as he believed she should have. However, not only did she regard her situation as an administrative officer as being different to his, she was reluctant to do what he wanted. She enjoyed her career and walked the extra mile voluntarily and with good results. She progressed to the rank of captain in a short period of time and had an excellent relationship with her colleagues and commanding officer. These relationships were a source of resentment for the appellant who perceived that she obtained more joy and satisfaction from those relationships than from her marital relationship. The evening that he shot the children it was her relationship with her work that figured prominently in his decision to kill them.

[68] The appellant started suspecting his wife of having an extra-marital relationship. Although he never confronted her with this and it objectively appeared that he was wrong, he subjectively believed it and silently gathered many pieces of information in support of his belief. He testified that she was verbally and physically abusive towards him and the children and recounted many examples of her behaviour.

[69] Taken with his obsessive-compulsive personality traits the appellant experienced his disintegrating marriage more keenly than would objectively be expected. It motivated him to do irrational things to her in an attempt to dissuade her from following her own head but rather succumb to his wishes.

He took away the keys of their only vehicle, her means of transport to work, or removed the rotor from the engine after she had come home late from work. He did this under the pretext of needing the car to be available at home in the event of an emergency arising with Bianca, his cerebral palsied daughter who regularly developed emergency health issues. He hid the battery of her work laptop computer when he felt that she had spent too much time working over the weekend, depriving the family of her time. He also did so after she charged the battery of the computer at home, using the electricity that he was paying for. He locked sweets in the safe when he decided that she ate too many of them. He took away her credit and bank cards when she spent her own money, even her bonus, contrary to their agreed financial planning.

[70] The trial court accepted the evidence by and on behalf of the appellant about all of the stresses, strains and anxieties that affected him in the period preceding the killing of his children. In a benevolent approach to the appellant the trial court did not pay any attention to the dramatic development of the appellant's version during the course of the proceedings. This development took place in two respects. First, the allegations of violent and abusive behaviour of his wife increased and became more serious as the trial progressed. Second, the seriousness and extent of the stresses and strains that influenced him escalated during the proceedings. I will similarly ignore those inconsistencies. The trial court accepted that these factors caused the appellant to have been depressed, anxious and suffering from post traumatic stress disorder. The evidence of Dr Panieri-Peter and Dr Fouché was that it is recognised in their field of discipline that post traumatic stress disorder only arises for victims of traumatically fearful and threatening events and it was unlikely that the appellant suffered from post traumatic stress disorder prior to the incident. The trial court ignored this evidence and found that the appellant suffered from post traumatic stress disorder prior to the event. There was, however, no cross-appeal.

[71] The facts that provide a clear picture contrary to that of a man that behaved uncharacteristically and out of control, and therefore without criminal

capacity, were also taken into account by the trial court. As mentioned earlier in this judgment, the appellant consistently and persistently over a period of years took action to punish his wife and try and manipulate her into doing as he wished her to do. He felt justified in his behaviour because of what he perceived to be her errant behaviour. His manipulative behaviour became increasingly serious. During March 2006 an incident occurred that motivated Mrs van der Westhuizen to obtain an interim interdict against the appellant in terms of the Family Violence Act 116 of 1998. She was late from work because she had taken Antoinette to the doctor after fetching the children from crèche. The appellant was furious when she came home later than expected. She noticed that he had been drinking. He refused her the use of the car to go to a chemist to buy the medicine that the doctor prescribed. His verbal aggression scared her. She asked a neighbour to take her to a friend. She telephoned her parents to fetch her from her friend and take her to the chemist. After the medicine had been collected her parents took her home, where an altercation occurred between the appellant and her father. The appellant was aggressive and she described him as drunk. He locked his wife, her parents and the sick child out of the house whilst the other two children were with him inside the house. When she begged him to open the door he told her to choose between her work and her parents on the one hand and him on the other. Ultimately one of the appellant's superiors, Director Roberts, spent hours reasoning with him to calm him down and only in the early hours of the morning did he allow his wife and the sick child back into the house. The appellant was persuaded to leave with Roberts for the rest of the night. The interim interdict that Mrs van der Westhuizen obtained after this incident was withdrawn by her during May 2006 after the appellant apologised for his behaviour.

[72] On the evening of 20 July 2006 whilst in bed with his wife the appellant told her that he had been contemplating burning the house down with him inside, but only after informing the fire brigade and the insurance that he had started the fire. Such action would obviously have left her and the children without a home and without any financial recompense.

[73] On occasion the appellant telephoned and had a meeting with Mrs van der Westhuizen's commanding officer, Brand, a superior officer to him, and sought to interfere in his wife's working conditions. His interaction with Brand resulted in her demanding, via his superiors, an apology from him for his disrespectful treatment of her. The appellant apologised.

[74] The evening of the murders was no different to many others. The long-standing disagreement between the appellant and his wife about her working hours re-surfaced. They both seemed to have resolved rather to keep quiet than fight about it. He was having a few drinks, as was his habit. He continued working on a do-it-yourself project after she and the children had gone to bed. He was looking forward to the celebration of his birthday in two days' time and the company of guests whom they had invited for the occasion. He was also looking forward to receiving his bonus and was pleased that his dream of purchasing a double cab bakkie, the fruit of years of financial planning and discipline, was within his grasp. According to him his wife's lie about having had to return to work to fetch the milk she had forgotten only became apparent to him after she had gone to bed. This, he said, provided the trigger that made him very angry, to the extent that he felt a glowing sensation over his whole body. It also made him feel despondent and hurt. Whether this so-called trigger event occurred later rather than earlier in the evening as told by his wife is immaterial. The appellant at no stage claimed to have acted in a state of sane automatism induced by this trigger. Quite the contrary, he still remembers going back into the house, putting his glass in the kitchen, going to the bedroom and removing the firearm from the safe and the fact that his firearm jumped in his hand when he shot Bianca.

[75] He also remembers asking his wife to make a choice between him and her work. They put this at different times in relation to the first shot that he fired, but for reasons already mentioned, that is irrelevant. According to him her answer, which he interpreted as a choice for her work, again brought the warm glow all over his body. The appellant acted in a manner that illustrates

deliberate, reasoned and complex behaviour. He put a choice to her and when her answer was not what he wanted to hear he commenced behaviour that resulted in the ultimate punishment for her. He took her mobile telephone, preventing her from telephoning for help. He opened and closed doors and switched on lights as he went. He waited for her to arrive in the bedrooms of the children before he pulled the trigger. He ignored her screams and pleas to stop. The horror of his first, nor for that matter his second, shot did not throw him off course. He kept on repeating to her that his actions were the consequences of her choice. He told her that she should not fear as he was not going to shoot her. He only handed her mobile telephone back to her after all three children were killed and then, in line with his resentment about her work and good working relationship with Brand, he remarked that she was probably going to telephone her commanding officer for help. This remark, given the context, was an ironical taunt. The appellant then locked his wife in the house with the dead children and went and hid in the back garden.

[76] From his position of hiding he telephoned several people and told them that he had shot his children. He telephoned a friend and colleague that was invited for his birthday celebrations and told him that the event had been cancelled because he had shot his children. He told his commanding officer that he was not prepared to go to jail. He misled the police as to his position and ultimately, when they found him, and the task force moved in, ready to shoot him if necessary, the appellant shot himself under the chin, more than three hours after he killed his children. At no stage after the murders and before he shot himself did the appellant act in a surprised, shocked, bewildered or distraught state as would have been expected had the realisation of what he had done only dawned on him after his actions were complete.

[77] The manner in which the appellant executed his children, his behaviour and communication during and after the incident and the ordinariness of the events earlier that evening all indicate that the appellant acted in a controlled, deliberate and reasoned manner in perfect keeping with his usual pattern of

behaviour viz-a-viz his wife. The trial court's finding that the appellant was criminally capable when he murdered his children is consistent with all the evidence and cannot be faulted.

[78] The trial court accepted in the appellant's favour that he acted with diminished responsibility. A finding as to the degree of diminution was not expressly made. A finding that the degree of diminution was substantial or severe, is not possible. At best, it is borderline and the appellant received the benefit of any doubt. The appellant did not find himself in a position, as in all reported cases of diminished responsibility, where he faced a choice – to continue suffering emotional pressures or act against the person creating that pressure. His situation is in reality no different to that of an accused that relies on many mitigating factors.

[79] The fact of diminished responsibility was accepted by the trial court as a substantial and compelling circumstance within the meaning of s 51(3) of the Criminal Law Amendment Act 105 of 1997. That is why the prescribed minimum sentence of 15 years' imprisonment for each of the murders was not imposed.

[80] The appellant's attack on the sentence was that it is shockingly inappropriate in the circumstances. In support of this contention the appellant's attorney specifically referred to the following circumstances: he had already suffered enough and will continue to suffer because he killed his own children, he was not to blame for the state of diminished responsibility that he was in, his remorse was not adequately taken into account, he is a suitable candidate for correctional supervision and private treatment for his depression and related issues would be more effective outside of prison in a more supportive and conducive environment.

[81] The trial court dealt with each and every mitigating factor, including the circumstances emphasized on appeal. A repetition of all those facts is

unnecessary and I will confine this judgment to mentioning the ones that give the balanced picture.

[82] The appellant was a 44 year old police superintendant at the time of the incident. He has had a very successful career. He was respected by all his colleagues. He was known as a disciplined, dedicated, astute police officer. He insisted on discipline at his police station from all his subordinates, but always acted fairly, reasonably and even-handedly. He had the community's interests at heart and showed that by dedication beyond the call of duty. He devoted himself to the community policing trauma centre attached to the Claremont police station. He was always ready and prepared to assist colleagues with personal issues.

[83] The substantial support that he has received since the incident from friends, former colleagues and members of the community bears testimony to the high regard in which he is held. Many witnesses testified to what a good man he is and what a dedicated, loving father he was.

[84] In the performance of his police duties over his years of service he had encountered many situations that left him with distressing emotional impressions. He had lost colleagues in the line of duty and encountered several life threatening situations.

[85] The demands of his job became inordinate and overbearing. What he used to do with dedication and care became a source of stress. He felt he could no longer perform his functions in the manner he wanted to. The deterioration of his marriage relationship also caused him distress. The problems between him and his wife were of long standing. No prospect of improvement was evident. As a result of his obsessive-compulsive personality traits these circumstances caused him depression, anxiety and post traumatic stress disorder.

[86] Since the incident the appellant has lost the life he knew previously. He resigned from the police force, he lost his wife and children, his home, hopes, dreams and ambitions. There is no doubt that the appellant has been experiencing a great deal of sorrow. He will no doubt continue to suffer for he has to live with the knowledge that he murdered his children.

[87] Whatever level of depression he experienced before the incident, it has been deepened by the consequences of the incident. He suffered a serious head injury, albeit by his own hand. He has been receiving psychiatric treatment since shortly after the incident and continues to be in need of such treatment. It was argued that he would be unable to receive appropriate treatment in prison and that the prison environment is not conducive to his full recovery. To succumb to such an argument would place the emphasis of the sentence exclusively on the appellant's interests. Requiring psychiatric treatment is hardly a reason not to be imprisoned. The prison authorities are statutorily obliged to provide the necessary health care to inmates.[67] Mr Joseph, the regional coordinator of health services within the Department of Correctional Services in the Western Cape, testified that psychiatric and psychological services are available to inmates. His evidence in this regard was uncontroverted and confirms the practical implementation of the statutory duty.

[88] The evidence before the trial court was that the appellant is an appropriate candidate for correctional supervision. That does not mean for a moment that correctional supervision would be an appropriate sentence in the circumstances. The appellant's attorney relied on *S v Marx*[68] for the submission that correctional supervision would be an appropriate sentence. The attempted analogy is completely inappropriate. In *Marx* it was found that the accused acted with severely diminished responsibility when he shot his wife after she had been unfaithful to him, humiliated, belittled and emotionally taunted him over an extensive period of time.

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[67] Section 12 of the Correctional Services Act 111 of 1998.
[68] *S v Marx* 2009 (2) SACR 562 (ECG).

[89] I accept, as the trial court did, that the appellant deeply regrets the death of his children. It is however alarming that he has persistently tried to put some blame for the incident on his wife. He also continues to claim that he was not to blame for the depression, anxiety and post traumatic stress disorder that influenced his actions, firstly, because factors and events external to him put stresses and strain on him and secondly, that because of his particular personality traits he responded to those stresses and strains in a way that caused the diminished responsibility.

[90] During her cross examination it was put to Mrs van der Westhuizen that she contributed to the incident and could have avoided it. During the hearing of this appeal the appellant's attorney again argued that not only was the appellant not to blame for the condition that motivated him to commit the murders, but that his wife and the SAPS could have avoided the incident. This attitude resonates with the reason why the appellant killed his children – to punish his wife for a choice she seemingly made.

[91] Despite years of reflection and treatment, the appellant does not realise that the way he handles life needs to change to avoid a similar incident. Everyday life for the average individual presents stresses and strains. The appellant is never going to escape that reality. If he continues to blame others and to handle those stresses and strains inappropriately he continues to present a potential danger to those closest to him and a similar situation could present itself in the future. In view of his lack of insight and relatively minor degree of diminished responsibility, deterrence and retribution as purposes of sentencing do not recede into the background as in cases of substantial diminished responsibility.[69]

[92] Although we are not necessarily to blame for our personality traits, we are expected to live appropriately despite them. If we do not, the consequences of our aberrant behaviour are punished. The appellant knew best how the stresses and strains of his reality were impacting on him and

[69] *S v Shapiro* 1994 (1) SACR 112 (A).

made him feel. He was the only one who could have known how necessary it was to take appropriate action to help him in the circumstances. He was no stranger to seeking professional help to cope with emotional issues. He did so shortly after his first divorce when he took time off work and consulted a psychologist for depression. He had been to consult psychologists with Mrs van der Westhuizen for problems they experienced during the course of their marriage. He was devoted to the trauma centre attached to his police station where the main focus was the provision of emotional and psychological assistance to victims of crime. The SAPS had and still has a dedicated emotional and social services unit available to its members. His evidence that he sought help form various professionals prior to the incident but was either turned away or ignored rings hollow in the circumstances.

[93] I am satisfied that the trial court took all possible mitigating factors into account and explored all the relevant facts in arriving at the sentence it imposed. If only the mitigating factors and the interests of the appellant are taken into account one could conceivably arrive at a sentence that does not amount to long term imprisonment. However, if only the aggravating circumstances are considered it is evident that a sentence of life imprisonment would potentially have been appropriate.

[94] The crime that the appellant committed is abhorrent and the enormity of it can hardly be over-emphasized. His three defenceless children were executed in their sleep by their own father, a policeman, despite the screams of protestation by their mother. Unlike any other reported case of diminished responsibility they, the victims, did not contribute in any way whatsoever to any of the stressors that the appellant said caused him to take their lives. The only explanation for their murders came from the appellant's own mouth as he was murdering them. He punished his wife. The appellant has never tried to explain his actions. During his evidence in the trial he said he wanted to shoot himself and only went to the children's rooms to say goodbye to them. How, why and when his intention changed so that he took his ire out on his innocent children, he has never even tried to explain.

[95] The appellant has in fact achieved what he set out to achieve. He has caused his wife the ultimate agony, as her evidence revealed. For the rest of her life she will have to contend with the horrific images of what occurred. Not surprisingly she, too, has been under continued psychological treatment since the incident.

[96] There is no question that the nature of the appellant's crimes requires the imposition of long term imprisonment. By imposing a sentence of one year less than the prescribed minimum of 15 years' imprisonment on each of the murders and ordering nine years of the sentence on two of the convictions to run concurrently with the other, the trial court adequately provided for all of the mitigating factors and the diminished responsibility it found proved. There is no basis upon which this court is entitled to interfere.

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S SNYDERS
JUDGE OF APPEAL

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