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99/84

CASE NO. 216/83
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

CARL FRANCIS XAVIER HOLSHAUSEN APPELLANT

and

THE STATE RESPONDENT

CORAM: RABIE CJ, HOEXTER JA, et ELOFF AJA

HEARD: 20 AUGUST 1984

DELIVERED: 14 SEPTEMBER 1984

J U D G M E N T

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ELOFF, AJA

The appellant was convicted in the Natal Provincial Division by Broome J and two assessors of murder with extenuating circumstances; of contravening Section 1 (1) of the General Law Amendment Act, 1956; of possessing a firearm without a licence; and of possessing ammunition in contravention of Section 36 of the Arms and Ammunitions Act, 1969. On the murder count he was sentenced to twelve years' imprisonment; on the second count the sentence was six months' imprisonment; and on the other counts three months' imprisonment was imposed. The lesser sentences were ordered to run concurrently with that imposed for the conviction of murder. Leave to appeal was refused

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but with the leave of this Court he appeals both against his conviction of murder and the sentences imposed on the lesser counts. An application for leave to appeal against the sentence imposed on the murder count was presented to this Court shortly before the hearing of the appeal, but it was abandoned.

The substance of the case against the appellant on the first count was that on the evening of Saturday 30 January 1982 he shot the deceased, Anthea May Burgess, in the head with a .38 revolver, in consequence whereof she died almost instantaneously. During his trial the appellant admitted that he was present in his flat in Durban when the deceased was

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shot, but he claimed that due to retrograde amnesia which he suffered as a result of his having been wounded in the head himself during the evening when she was shot, he had no recollection of what had happened at the time. He suggested however that the deceased herself inflicted the fatal injury, probably after she had first shot and wounded him. The inquiry at the trial was accordingly mainly directed to the issue whether the deceased had committed suicide. It seems to have been generally accepted that if it were adequately established that she had not, it must have been the appellant who shot and killed her. The trial Court found it proved beyond reasonable doubt that the fatal injury to the deceased was not self-inflicted.

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It will be convenient, before dealing with the contentions advanced before us, to set out the main features of the case. The appellant was at the time of the shooting a 24 year old employee of a shipping company in Durban. The deceased was a 22 year old professional model employed and resident in Cape Town. A close relationship between the two developed a few years before the date of the killing, and they in fact lived together in Durban for a time. In October 1981 however disagreements between them arose, so much so that they parted company and she left to take up employment and residence in Cape Town. Their relationship was not altogether terminated, for they still visited

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each other. The appellant was apparently still very much in love with the deceased, but she gave clear indications that the feeling was not reciprocal. Thus one finds him writing to her on 9 November 1981:

> "When you say you don't want to see or hear from me again, I just don't know what you mean. I can't accept you mean it, cause we love each other. Please try not to get cross when I phone, cause its love that makes me phone."

The attitude of the deceased was clearly reflected in her statement to him in January 1982 that she was being escorted by another man, whose name she afterwards gave as being Paul Gilbert. Nevertheless she occasionally used terms of endearment in her correspondence with the appellant. It was clear however that she did not

reciprocate/ .....

reciprocate the strong feeling that he had for her. As far as he was concerned matters were coming to a head, as is shown by the fact that on 16 January 1982 he recorded in his diary - "Phoned Anthea to tell her we are over", and on 19 January 1982 - "Confirmed Anthea and my relationship - over". In his evidence the appellant said that he still had prospects of regaining her affection, and that "there were not only downs but also ups" in their association. However, I agree with the view held by the trial Court that he knew that the prospects of re-establishing a steady relationship had waned considerably.

Late in January 1982 the appellant con-

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ceived of a plan designed to bring him and the deceased together. The idea was that he would take up employment with a shipping company in London. The deceased would accompany him with the expectation that she would find modelling work in Great Britain. He intended - so he said - to discuss this idea with the deceased, and to that end he arranged for her to fly to Durban for the weekend of 29 to 31 January 1982. She duly arrived at Durban on Friday 29 January 1982, where he met her at the airport. Whether he put his proposal to her on her arrival at Durban was a matter in dispute at the trial. I shall deal with it later, and I shall first continue with the narrative.

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On Saturday 30 January 1982 the appellant arranged with the deceased to take her to his flat at 6 p.m. In the meantime he spent most of the day with his friends Clifford Benn and Norman Lazarus. At about noon they were together at the house of Benn's parents, and afterwards he played backgammon with Benn and Lazarus at the flat shared by the two of them. Eventually he left to keep his appointment with the deceased.

The only direct evidence we have concerning what occurred in the flat between the deceased and the appellant is the latter's account. In addition, other evidence accepted by the trial Court established the following in regard to the actions of the appellant after the deceased arrived at his flat. At about 7:30 p.m.

the appellant returned to Benn and Lazarus' flat, stating that he thought that he might have left his keys in Lazarus' bedroom in the flat. He appeared to Benn and to Ronlynn Botha, Benn's girl friend, who was also present in the flat, to be "distracted" and somewhat confused. His statement that his keys might be in Lazarus' bedroom struck Benn as odd as the appellant had not been in Lazarus' bedroom earlier that day; none of them was ever elsewhere than in Benn's part of the flat. However, the appellant went into Lazarus' bedroom, greeted him through the door of the bathroom in which Lazarus was at the time, and also told him of his quest for his keys. Lazarus also thought that strange, but said

nothing/.....

nothing. Once inside Lazarus' bedroom the appellant went to the drawer where - to his knowledge - Lazarus kept a .38 revolver. It was loaded with 5 rounds of ammunition. Without Lazarus' knowledge the appellant took the revolver and returned with it to his flat, where the deceased sat waiting. Later during the evening a black female servant, a domestic employee of the appellant, who was in her quarters at the time, heard a sound which she described as a burst. We now know that what she heard was one of the two shots fired with Lazarus' revolver that evening in the appellant's flat. The first shot was also heard by the witness Ester Mahlaba, a domestic servant employed in the residence adjoining the building in

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which appellant's flat was situated. Subsequently, when Ester had finished some ironing and had gone to her quarters, she heard what we now know was the second shot. Ester went outside to see what was happening, and found the appellant outside his flat calling out: "Edith, Edith!" After some time a man appeared and went with the appellant to the apartment. We now know that the other person must have been Benn, and I return to his account of events.

He testified that some time after 8:45 p.m. the telephone in his flat rang; it was the appellant who, in an obvious state of excitement said: "Get here, get here, get here!" Benn enquired what was going on, and

received no clearer response than - "I'm finished, I'm finished, get here, get here!" Benn at once informed Lazarus and the two of them went hastily to the appellant's flat. After they had left the appellant telephoned to their flat once again. The telephone was answered by Dawn Chapman, Lazarus' girl friend. The appellant enquired when Benn and Lazarus were coming - "Please, you've got to come quickly, you've got to come now." Miss Chapman commented that "nothing can be that bad", whereupon the appellant said, "Its too late, I'm finished, I'm gone", and replaced the receiver. When Benn and Lazarus arrived at and entered the appellant's flat they found the deceased lying on the floor, and the appellant groping around on the floor on hands and knees. There

was blood on the deceased and she was obviously dead. She was lying on her back, with Lazarus' revolver on her chest. Her right hand was over the butt of the revolver. Lazarus immediately picked up the revolver, thinking that in the condition in which the appellant was, it might be unsafe to leave it loaded within his reach. After unloading it he placed it on a mantle-piece in the flat. Turning his attention to the appellant, he decided that he should be taken to hospital as soon as possible. The appellant, needing but little help, walked to Lazarus' motor car supporting himself only by keeping his arms around the shoulders of Benn and Lazarus. On the way to the hospital he complained that he was bleeding to death and that

he was dying. He also enquired about the condition of the deceased, and he was given some sort of assurance by Benn, remarking that as she was fine, he should not worry. At the hospital the appellant was taken in hand by the staff, and he received treatment at once. I shall later return to the subsequent history of his treatment at the hospital. It is necessary first to return to the scene of the tragedy. When the police and an ambulance arrived, investigations commenced. A subsequent medico-legal examination of the body and a ballistics investigation brought to light inter alia that the deceased had been shot with the revolver which the appellant had purloined from Lazarus earlier that evening. The bullet entered

her head behind the right ear; its line of travel was slightly downwards and such that it came to rest and lodged in the left rear part of her skull. Other matters also revealed by investigations will be discussed later in this judgment.

An outline of the evidence given by the appellant now follows. It will be convenient to take up the narrative at the point when he decided to ask the deceased to come to Durban for the last weekend in January 1982. He said that he had decided to put the proposal mentioned earlier herein of going to London at some convenient stage during the weekend. He did not think it opportune to discuss his plan when he saw the deceased the Friday evening.

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The next day, while he was at the house of Benn's parents together with Benn and some other friends, he telephonically arranged with the deceased to pick her up at 6 p.m. and take her to his flat. That arrangement was kept and the deceased was with him in his flat from 6:30 p.m. onwards. While she was at the flat she chanced upon a photographic spool of which only 5 photographs in the middle of the spool had been developed. She showed concern at what could have happened to the unexposed negatives on the spool, and put it to the appellant that these may well have been of photographs which he may surreptitiously have taken of her in compromising positions some time ago. She suggested that the appellant had wiped the negatives of these photographs off the spool; hence the fact that no developed

negatives could be seen save for those alluded to. And she suggested that the appellant might allow the photographs of her, in compromising positions, to get into the hands of the press. This accusation perturbed the appellant, and he wished to prove it to be unfounded by obtaining and showing the deceased the cover in which the spool in question had been sent to him by a firm of photographic dealers. On that cover the number of the negatives which were in fact developed and printed were marked, and the production thereof might satisfy the deceased that only those ever existed. The cover was however in his office, and he decided then and there to collect it and in the meantime to ask the deceased to wait for him at his flat.

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On arriving at his office he found that the keys thereof, which he normally kept in his motor car, were no longer in the car. He then remembered that he had earlier that day taken them out and had carried them with him. He thought he might have left them at Benn and Lazarus' flat. He accordingly went there, but did not find his keys there. At that point he decided that in any event, there was no way in which he could get the deceased to believe that he had not taken compromising photographs of her, and that he should abandon his quest. At the same time he recalled that the deceased had expressed her frustration earlier that evening - she wished to retaliate physically against his threats of exposing the fact that she had undergone an abortion in the past.

He decided "to call her bluff" by producing a firearm and placing it at her disposal so that she could show whether she really intended to hurt him. He remembered that Lazarus had on a previous occasion shown him his revolver and where it was kept; he looked for, found and took the revolver and brought it with him, back to his flat where the deceased sat waiting for him. Once in his flat he took the revolver out of the holster and started to walk towards the deceased with the intention of handing it to her "to call her bluff". He testified that he did not really think that she would do anything with the revolver, for on a previous occasion some months before when she and he had had an argument, he had handed her a shotgun

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which he happened to have with him with the comment that, should she wish to shoot him, she could use the shot-gun for that purpose. Her response was to burst into tears, and he expected a like response on this occasion. Her reaction however was strange; she remained blank, and then took him to task for jeopardising her career with his threats of reporting the fact of her abortion. He apologised for having uttered those threats, took her from where she was sitting on the bed, led her towards the lounge, and that is where his recollection ceased. All that he could still remember was a flash, like a bolt of lightning, and after that the smell of a hospital, lights and strange people. That, in brief, was the sub-stance of the appellant's account. I shall later set

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out the views of the trial Court and also my own on this evidence.

I indicated earlier that on the material before the trial Court the only possibilities were that the appellant shot the deceased or that she took her own life. On the related question of who shot the appellant and at what stage, it seems to me that the only possibilities which merit serious consideration are that the appellant inflicted the injury on himself after he had killed the deceased, or that the deceased did that before she committed suicide. I wish to add that if the evidence negates the possibility that the deceased at any stage wounded the appellant, with the implication that his wound was self-inflicted, that fact strongly indicates that it was the

appellant who, having shot the deceased, decided to use the revolver on himself.

The trial Court found it proven that the deceased had not committed suicide, and that the appellant had shot her, after which he shot and wounded himself in the rear part of his head. The conclusion was reached by reasoning by inference on a number of factors. I now proceed to outline and discuss the main components of the material relied upon by the trial Court as the basis of its deductions, as also the material which might support conclusions inconsistent with that reached by the trial Court. I shall then discuss the merits and demerits of the evidence of the appellant himself, and finally express my views on conclusions reached by the Court a quo in the

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light of all these factors.

The Thursday monologue:

After the shooting the police found a tape casette in the flat of the appellant on which he recorded a monologue delivered by him on the Thursday before the deceased flew up from Cape Town. A transcription of what the appellant recorded was placed before the trial Court. Its production was objected to but the trial Judge ruled that it was admissible and should be received. According to the transcript the appellant inter alia recorded the following:

> "I have three options. Either I love her, take her to London with me, get her to model as much as possible, make her as happy as possible, or, I get rid of her

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and myself, or a failure of both these other two and wind up on my own. Her in Cape Town, not knowing where I am going. One will find out this weekend. Destiny and fate are in motion. It is obvious for any one of these three I have to have courage. No matter the outcome I love her desperately. She has some magic about her that nobody understands but me...."

He paused and went on -

"Something she has so special. She has made many mistakes. I have made many mistakes, but regardless, we still love each other desperately. It is just such a pity that two people that love each other so can't be happy together until something serious happens. Well now it has happened and I have no alternative. This weekend will be the final weekend or the beginning of something incredible. To my family, whatever the ultimate happening, I love you too, all of you. Possibly my state of mind is not the best at the moment. I know when I love someone and I love you all, Daddy,

Mommy..." then a name that could not be picked up, "... and Nicholas. I love you all."

It is now convenient to discuss the arguments advanced by appellant's Counsel that the trial Judge erred in resolving to receive the evidence in question.

Counsel first argued that the evidence was hearsay. This contention was not seriously pressed but was not abandoned and I shall accordingly deal with it.

Of hearsay Phipson, Evidence, 12th Ed. paragraph 625 says:

> "Former statements of any person whether or not he is a witness in the proceedings, may not be given if the purpose is to tender them as evidence of the truth of the matters asserted in them, unless they were made by a party ..."

This passage, accords with a statement in the 9th Edition, p. 221, which was relied upon in R v Boardman en 'n ander, 1959(4) SA 457(T) at 460(H) - 461(A) and is quoted in Hoffmann and Zeffertt, South African Law of Evidence, 3rd Ed. p. 95. It excludes from the scope of the hearsay rule a statement such as that under discussion which was made by a party to the litigation, and which was not tendered or received to prove the truth of any of the matters stated therein, but only to prove that he had given thought to the possibility of killing the deceased. I do not think that the evidence of the monologue is hearsay.

Evidence of the sort under consideration

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admitted in a number of cases as matter relevant to the main issue. In R v Apter 1941 OPD 161 it was held to be admissible, in a prosecution in which speeding on a public road was in issue, to prove that the accused had before undertaking the journey in question stated that he would have to travel faster than the maximum speed allowed. In R v Malgas 1943 CPD 528 similar evidence was ruled to be admissible on the same ground. In R v Mpanza, 1915 AD. 348 the main issue was whether it was the accused who had murdered the deceased, and evidence of a like nature was received. At 352/3 Innes CJ said:

> "Now facts relevant to the issue may always be proved, and any facts are so relevant if

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> from their existence inferences may properly be drawn as to the existence of the fact in issue. Here the fact in issue was whether the accused had murdered a certain Indian storekeeper, and the fact that he had previously threatened to do so was clearly relevant to the issue. (See Halsbury, Vol. 13, section 621; Best Section 452, etc). And I agree with the Provincial Division that an expressed declaration of intention to kill a man of the class of the deceased in the exact way in which the deceased was subsequently dealt with, was also a relevant fact to be weighed and considered by the jury."

Counsel for the appellant drew attention to the statement at 353 -

> "No doubt it was necessary for the Crown first to prove that such a crime had been committed."

He argued that that meant that Mpanza's statement could only be used to prove intention. I do not agree. I

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think that Innes, CJ meant no more than that evidence of Mpanza's statement per se did not prove the actual killing, and for that other evidence was required.

Reference might also be made to the decision in R v Kalkiwich and Kruger, 1942 AD. 79 where Tindall JA said at 87:

> "It seems to me that, if it is proved that A and another person opened safes by means of a special apparatus not readily available to the ordinary burglar, evidence that not more than two months earlier A and B had in their control a similar apparatus, and disclosed that they held it for the purpose of breaking into premises, does tend to show that it is likely that in the offence which A admittedly committed his associate was B. If that be so, it follows that such evidence was relevant because it proved facts relevant to the issue."

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It is necessary to emphasise that the logical relevancy of facts for the most part determines their legal admissibility (Phipson (supra) para 153). In the present case, where the main issue was whether it was the appellant who shot the deceased it was clearly relevant that he had two days before the shooting stated that he might shoot her if she refused to accompany him to London (and she in fact did refuse).

In arguing to the contrary counsel for the appellant placed reliance on the following passage in Phipson (supra)paragraph 221 at 90:

> "There is a third purpose for which such evidence (i.e. of statements made concerning feelings, motives, intentions, opinions, knowledge, belief, health and the like (cf. p. 86)), is sometimes

> tendered, viz. to prove the occurrence of the act intended. Here the existence of the intent, evidenced by the declarations, is relied on as rendering it more probable than that the intent was fulfilled and the act done. In England, however, the weight of authority is against such a user, at all events in criminal cases."

It is in my opinion evident, having regard to the context of the subject matter in which this passage occurs, that the author was not dealing with evidence of statements made by accused persons themselves, but of statements of others. A reference to the authorities quoted at the end of the passage makes that plain. Of those the most important is R v Christie (1914) A.C. 545, in which the admissibility of evidence of a statement made by a boy in a case of indecent assault was considered. The

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House of Lords concluded that that statement should not be received to serve the purpose of corroborating the boy's evidence.

Mr Mostert also contended that the trial Judge should have excluded the evidence on the ground that in the light of evidence concerning the circumstances in which the statement was made its weight was minimal and its prejudice to the appellant great. Evidence of the circumstances relied on was first presented in support of an objection which led to a trial within a trial. The evidence led was that of a certain Prof. Leary, a pharmacologist, and that of the appellant himself. The substance of the evidence of the appellant was that prior

to making the tape-recorded monologue he took two or three valium tablets, a few glasses of wine and he smoked two dagga "joints". Prof Leary gave his opinion on what the effect of all that could possibly have been on appellant. The appellant also testified that he recalled having made a tape-recording, but that he could remember very little of what he said and recorded. After hearing argument the trial Judge declined to give a ruling then and there, saying that the question would be considered at the end of the trial in the light of all the evidence. Later during the trial Prof Leary was recalled to restate the substance of his evidence in the presence of the Judge and assessors as well. The Judge

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also listened to the tape recording. At the end of the trial the Judge ruled that the statement was material and could be relied on.

The evidence of Prof Leary was that if the appellant had taken the quantity of dagga, valium and wine that he stated he had, the effect might be that he would find himself in a state of disinhibition and he might act in an inappropriate manner. People in that state tend to say things or utter threats or make insults that they might afterwards regret. It is however impossible to predict how every person is liable to react, for the effect of a use such as the appellant claimed varies from person to person. It

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was accordingly necessary to consider how the appellant spoke in assessing his reaction to whatever he said he took. Prof Leary said that judging by the tape recording the appellant seemed to be under stress, and was emotional. With that the trial Judge agreed. Prof Leary remarked thereon that the appellant was speaking slowly. The Judge agreed, but added that the pace in appellant's speech was not inconsistent with that of a person dictating with pauses for thought, proper composition of words, and use of syntax. Prof Leary also observed that the appellant tended to be repetitive. The Judge agreed but found that that was not marked. Prof Leary thought that appellant seemed to slur some of his words. The Judge's impression was that one

or two words seemed slurred but not in the manner of an inebriated person. The Judge added that the appellant gave the impression of being coherent. His grammatical construction was good. Only one or two words were not properly enunciated.

The Judge concluded that even if the appellant had taken and used the quantity of wine, valium and dagga that he said he had, the content and manner of presentation of the dictated monologue established that he knew what he was about, that he had given deliberate thought to his emotions and intentions, and was adequately in control of his faculties. In regard to whether reliance could be placed on what the appellant said in his monologue, the Judge in his judgment

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quoted the following answer by Prof Leary in re-

sponse to a question from the Bench whether one

would expect a reliable account from a person having

taken that which the appellant claimed he did: "The

Romans reported this peculiarity as in vino veritas."

Prof Leary also testified that the

appellant would have recall of what he said in the

state in which he was, that he probably knew at the

time what he was saying, but that he might not at the

time appreciate the "inappropriateness of what he was

doing and saying." This evidence, in the view of the

trial Judge, materially affected the reliability of

appellant's testimony that he had very limited recall

of what he said and did that Thursday night. I agree with this conclusion, and with the learned Judge's opinion that it casts doubt on whether appellant could be believed when he said that he had taken and used the quantities of wine, valium and dagga which he said he had. I think that it is also correct that the coherence and articulation manifested by the recorded monologue belies the suggestion that the appellant was to any significant degree affected by any drugs or liquor. The weight of Prof Leary's conclusion was largely dependent on whether what he had been told by the appellant was true, and can in the circumstances not have much value.

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I consider that the trial Judge firstly exercised a proper discretion in accepting the evidence at the close of the trial within a trial, and that he at the end of the trial correctly ruled it admissible.

In regard to the weight of the evidence in question, Counsel for the appellant argued that there was nothing to show that the appellant had not discarded his expressed intention of killing the deceased should she refuse to come with him to London. I think the answer is that if the appellant - who was best equipped to speak about his own intentions - had testified that he had changed his mind, the probative value of the Thursday monologue may have been diminished. But in

the absence of such evidence the inference was rightly drawn by the Court a quo that on Saturday the appellant still harboured the thoughts expressed two days before.

The powder residue and hydroxyquinaline tests

As soon as the police arrived on the scene of the shooting they inter alia gathered material to determine whether there were any signs that the deceased ever handled the revolver in question, and whether she fired any shots. The one important aspect investigated was whether any gunpowder residue was present on that part of the index finger of the right hand which faces the thumb, between the knuckle and the first joint. I shall in this judgment for ease

of reference allude to that as the "index finger area". The importance of this investigation was demonstrated by a series of tests performed under the direction of the witness who was mainly responsible for this part of the enquiry, Genl. L P Neethling. The witness, a police officer with an impressive background in the field of chemistry and forensic science, arranged for a number of shots to be fired with the very revolver with which the deceased was shot. Eleven shots in all were fired by four persons, some with the use of the right hand and some with the use of the left. In each case gun powder residue was left in the index finger area of the hand of the persons concerned. Further experimentation led the witness to the conclusion that

if the deceased had fired a shot with the revolver, it would be expected that between 40 and 60 particles of gun powder residue would be deposited in the index finger area of her hand. These are residues resulting from the chemical reactions that take place in the explosion process of the detonation of the bullet, and are emitted - so the witness explained - from the minute aperture between the cylinder and bridge of the revolver. The gases which escape from the aperture contain residues from the primer and from the bullet. These residues are emitted in vapour form, and very rapidly, as the temperature reduces, the vapour is condensed to droplets of which several are deposited on the index finger area.

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The witness next microscopically examined material that had been taken from the webbing area of the hand of the deceased within hours after the shooting. That was done by the witness Captain Wilkinson, a man with many years of training in the field of selecting and gathering of samples for purpose of examination by the forensic laboratories of the South African Police. What he did was to use a piece of cellotape and dab the sticky side a number of times over the surface of the index finger area of the deceased. The portion of tape was that which was microscopically examined by Genl. Neethling. The instrument used was a scanning electron microscope at a magnification of 1 000 to 1 500. The

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object of the exercise was to ascertain whether in the debris picked up from the area in question there were any of the metallic and metal oxide particles, spheroidal in shape, which were found by adopting the same test on the hands of the persons who fired the experimental shots. General Neethling found no such particles on the tape examined by him.

The trial Court found that the sampling and testing in the matter was properly and efficiently done, that no gunshot residue was found in the area in question of the hand of the deceased, and that if she had fired a shot, it would have been found.

This conclusion was attacked on several grounds, each of which will be discussed seriatim.

The first point related to the detection by Prof J P Nel, the pathologist who conducted the medico-legal post mortem examination of the body of the deceased, of a small darkish mark in the palm of the right hand of the deceased, downwards from the ring finger. He thought it could have been caused by soot but he did not have it chemically analysed. It was not clear whether the mark was on the hand of the deceased when Capt. Wilkinson examined the body, for according to the evidence of Dr Nel, the body was conveyed to the mortuary in a plastic bag, and could have been contaminated in the process or after it was deposited in a holder in the mortuary. Dr Nel stated that when he

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examined the body there were also bloodstains on the hand which were not there when the body was still in the flat. Capt. Wilkinson did not, according to his evidence, see the mark, but he explained that he did not examine that part of the hand at all. It was not necessary for the purpose of what he was investigating - one would not expect to find gun powder residue on that part of the hand if the person concerned fired a shot with the revolver in question. Counsel argued that that mark could possibly have been caused by the discharge of the revolver held by the deceased in a manner other than the normal. In my view this possibility is far-fetched and does not merit serious consideration. There is no

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reason to suppose that if the deceased handled the revolver in order to fire she would have done so otherwise than in the ordinary manner. Indeed the appellant testified that the deceased "had a very good working knowledge of guns." One can only speculate on whether the spot was there while the body of the deceased was still in appellant's flat, and if so, what it was and what caused it. Whatever the answer it could not have been gun powder residue left in consequence of the firing of a shot or shots by the deceased.

In developing this argument counsel made the further point that since Capt. Wilkinson did not see the spot, the accuracy of his further observations should be questioned. I do not agree. Even if the spot was

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already there when he conducted his investigation, he was solely concerned with that area of the hand in which gunpowder residue might be found, and his failure to see the spot does not afford any indication of neglect on his part.

Mr Mostert took the State to task for not having thoroughly explored every facet of the matter and for not presenting answers to all the questions raised by defence Counsel at the trial. In this context he also, e.g. alluded to the want of evidence explaining the existence of blood under the finger nails of the deceased. I do not think it was incumbent on the State to present evidence by way of explanation of all the possibilities suggested by Counsel's ingenuity. I am satisfied that

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in general adequate steps were taken to account for all matters which could be material to the enquiry.

The second point was that on the material before the Court Genl. Neethling's findings did not apply if the deceased fired the shot which ended her own life by holding the revolver with the butt in a horizontal position. The possible places of where gunpowder residue might be found if the revolver was not fired with the butt in a vertical position were debated with Genl. Neethling in cross-examination. His evidence was that if the gun were to be fired while held in that position one might expect to find less gunpowder residue on the index finger area, but, as I interpret his evidence, one would nevertheless expect to find gun powder residue

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there. There are passages in the recorded evidence which might indicate that at one stage Genl. Neethling conceded that if the deceased were to fire the revolver in question while holding it in a horizontal position, gun powder residue might not be found in the index finger area. Unfortunately the witness did not at all times express himself precisely; quite often there were misunderstandings between him and Counsel; and more than once there was manifest confusion as to which weapon Counsel was referring to in his questioning (he put several questions by reference to a model which he handled while cross-examining). After cross-examination the trial Judge endeavoured to achieve clarity on what the witness wished to say. His explanation was recorded and commented on

by the trial Judge as follows:

> " "The catchment area now becomes this part" and he indicated the index finger, that is once again the region between the knuckle and the first index finger joint. He indicated that part of the index finger as being more affected than the webbing between the knuckle of the thumb and the knuckle of the index finger. He said: "The closest part of the hand that is in contact and the highest chance of picking up residue, will be this part, between the knuckle and the joint of the hand of the forefinger, because that stays closest in order to activate the trigger and that is - that will be very little affected by turning one position or two position." "

Like the trial judge I think that I can best determine what Genl. Neethling was endeavouring to say, and also follow the logic of what he was saying,

by grasping his reason for expecting gunpowder residue on the index finger area of the hand whether the revolver is held with the butt in a vertical or horizontal position. He said that when the revolver in question is fired the gases which contain metal residues in vapour form, and which on condensation leave the gunpowder residue, emerge in isocentric fashion, and part of it will, no matter whether the revolver is held in the one or the other position, be directed towards the nearest exposed surface of the hand, which is the area under discussion. The force of gravity may, if the revolver is fired with the butt in a horizontal position, account for the fact that less residue is propelled on to the surface area in

question/ .....

question, but the part of the revolver from which the gases are impelled will be equidistant from the index finger area whether the butt is held horizontally or vertically. I think that on Genl. Neethling's evidence even if the deceased fired a shot while holding the revolver with the butt in a horizontal position, gun powder residue would have been left.

I should add that even if some doubt exists whether gunpowder residue would have been left on the area examined by Capt. Wilkinson if the revolver had been fired with the butt in a horizontal position in order to commit suicide, there is every reason to think that if the deceased had shot at the appellant, she would

have/ .....

have held the revolver in the ordinary position. That fact and the evidence of Genl. Neethling establishes a high probability that the deceased did not fire the shot which injured the appellant. That circumstance is, as will appear later herein, of great importance in the ultimate analysis of the evidential material and the assessment of the probabilities.

That brings me to the last point raised in regard to the evidence of Genl. Neethling. He conceded the possibility that in the process of picking up debris with sticky tape, a lot of debris may be picked up which may mask the existence of gun powder residue. Counsel argued that the concession created doubt as to whether Capt. Wilkinson did not dab

the/ .....

the area of the hand under discussion so much as to conceal the existence of gunpowder residue. This contention renders it necessary to examine exactly what Genl. Neethling conceded.

I think that if one reads his evidence as a whole he conceded no more than that some of the gunpowder residue may be masked, but not all. Even if of a 1 000 possible particles only one was exposed that would be enough, "they just hit you in the eye". He stressed that it was necessary to dab as much as possible, so as to pick up all debris. This debris will have some "sandwiching" effect, but "in practice this is of no importance" -

"There/ .....

> "There might then be 500 hidden and you are looking only at 50, but these 50 are indicative enough to be able to make a conclusion ... and in this particular case, on the average in 11 firings, 50 particles could be detected with dabbing of probably 50, 60, 70 times."

Of importance in this regard is the fact that the dabbing done by Capt. Wilkinson was performed in accordance with a set procedure which was also followed by Genl. Neethling's assistants; it is accordingly reasonable to conclude that if the dabbing done by Genl. Neethling's assistants did not altogether mask tracings of gun powder residue, it would not have masked possible residue either in the case of Capt. Wilkinson's sampling. It remains to be said that Capt. Wilkinson's evidence of his sampling methods

was hardly challenged, and there was good reason to accept his evidence.

Lastly, in regard to Genl. Neethling's evidence I think that it is noteworthy that when he was cross-examined by counsel for the appellant, he was told more than once that Counsel had at his side a professor in chemistry and an expert in the use of the electron microscope. More than once Counsel assured Genl. Neethling that the knowledge and experience of these gentlemen was superior to that of the witness, and at times Genl. Neethling was told that these gentlemen would be called to counter his evidence. Neither of these persons was called. The inference can in these circumstances be

drawn that none of the challenges of Genl. Neethling's scientific evidence was persisted in.

Another test performed by the police was what was described as the hydroxyquinoline test. This involved the spraying of the chemical hydroxyquinoline on the palms of the hands of the deceased, examining them in the light and then in the dark with the aid of an ultra-violet light. It was empirically established that if the revolver in question was held for at least half a minute there was more than a 50% chance that the metal of the revolver would have left detectable signs on the palm of the hand of the holder. If it was held for at least a minute, there was more than a 70% chance of signs being

left./ .....

left. The reliability of these tests was not challenged in the Court a quo, only their value. Counsel contended that if the deceased had done all the shooting, she could have handled the revolver for seconds only. I agree with the trial Court, however, that the results of the tests have clear value - in the scenario contended for by the defence, and bearing in mind the probable time lapse between the two shots as was established by the evidence of the two maidservants, it is more than likely that the deceased would have handled the revolver for substantially more than a minute. The test results render it highly improbable that she did so.

In my view the Court a quo rightly accepted the evidence of Genl. Neethling, and also that of Capt.

Wilkinson/ .....

Wilkinson. I can find no fault with the conclusion of the Court a quo that on the basis of that evidence it is highly unlikely that it was the deceased who fired the two shots.

The nature and surrounding circumstances of the fatal injury.

The evidence given in this regard was mainly that of Prof Nel. He examined the body of the deceased on 2 February 1982. The bullet which caused the fatal injury entered the head of the deceased at a point 25 cm posterior to the right ear; it proceeded slightly downwards and backwards. That means that whoever fired the shot had to hold the revolver

with the barrel pointing slightly backwards and downwards.

. By reason of the existence of deposits of soot around and in the wound behind the right ear, deposits of unburnt gunpowder in the hair of the deceased around the entry wound, and discolouration of the skin around the wound, Prof Nel concluded that the revolver must have been held close to the head of the deceased when the shot was fired, but he disputed the suggestion that the wound had the appearance of a "contact wound". He was not prepared to and could not on the available data be more specific than I have indicated. That means, I think, that the possibility of suicide is not excluded. It also means that if the appellant fired the shot he held the revolver

close/ .....

close to the rear of the head of the deceased when he did so.

Much was made in argument of a concession made in cross-examination that a shot to the head behind the ear indicates a "typical suicide position". I do not discern anything adverse to the view taken by the Court a quo of the probabilities in this statement. The nature of the shot is also that which could be expected in a case of murder. And it should not be overlooked that the ultimate finding of the trial Court involved the conclusion that the appellant killed the deceased and positioned her hand in a manner suggesting suicide.

I think that the most significant part of Prof Nel's evidence is that which establishes that

if the deceased fired the fatal shot she did so by holding the revolver in an awkward position. It is unlikely that she would have done so. I agree with the Court a quo that that is a factor which can be taken into account.

Could the injury to the head of the appellant have been self-inflicted?

It was, understandably, an important part of the appellant's case in the Court below that it is unlikely that he shot himself in the head. For if he did not then the deceased must have done so, and if that is what she did, it makes it less difficult than might otherwise have been the case to accept that she would have

used/ .....

used the revolver on herself - possibly due to shock and horror at the thought that she might have killed or seriously hurt the appellant. It also tends to counter the idea that what happened in the appellant's flat was the fulfilment of what he was thinking about the previous Thursday, that he would first kill the deceased and then himself.

The witness mainly relied upon in this regard at the trial and again in argument before us, was Dr le Roux, who was called on behalf of the appellant. He attended to the appellant after he was taken up at the Entabeni Hospital. He found two wounds in the occipital area of the appellant's skull, one of which must have been the entrance and the other the exit

wound. He expressed conflicting views as to which of these was the entrance wound. At one stage he said that "one can say with a fair degree of accuracy" that the right-hand one was the entrance wound. That was within minutes after he had said that it is "a bit difficult to be sure" which was the entrance wound. Under cross-examination he conceded that one could not be categorical about it, and ultimately he could place it no higher than "one would possibly suggest it could have been that the left hand wound may have been an entrance wound." Part of the difficulty in taking a firm view on the matter, said Dr le Roux, was due to the fact that by the time he came to examine and treat the appellant, the doctor at the

hospital/ .....

hospital who first treated the appellant had enlarged the left-hand wound. The factors which in his estimate favoured the conclusion that the left hand wound was the entrance wound, were, as I understand his evidence, the following: It was found that once the bullet struck the head of the appellant it split into one large and some small fragments. The large fragment passed through the skull, and in fact struck the ceiling of the appellant's flat, and was eventually found on the floor. The smaller fragments were found inside the skull of the appellant nearer the right hand wound. Dr le Roux claiming to apply some laws of physics, said that if one were to propel a number of objects at the same time in the

same/ ....

same direction, the larger ones, possessing more kinetic energy, were likely to travel further. I think that in propounding this theory Dr le Roux revealed a lack of appreciation of the fact that one ventures onto dangerous ground if you try to apply laws of physics to situations such as the present where a number of additional and immeasurable factors come into play. One of these factors is that the bullet was travelling through hard and soft matter and encountered inestimable forces of resistance. I agree too with the view of the Court a quo that without knowing at what stage in the passage of the bullet it fragmented, one cannot have any assurance concerning the fundamental factors necessary to reach a conclusion along the lines propounded by Dr le Roux.

In/ .....

In my view there was no material to create any probability that the left hand wound was the entrance wound. Dr le Roux, who seemed to have accepted that the appellant was right handed, concluded, on the strength of the above reasoning that it is unlikely that the appellant would have endeavoured to shoot himself by using his left hand. I am not persuaded that the Court a quo erred in rejecting Dr le Roux's theory.

The next part of Dr le Roux's evidence which falls to be considered in the context under discussion, is to the effect that when he examined the appellant he found no indication of burning or tattooing around the right-hand wound. He said that, if the wound had been self-inflicted, such burning or tattooing, would

have/ .....

have been evident. He testified that he ran his fingers through the appellant's hair around the area of the wound and found no signs of the sort of deposits of foreign material that is usually encountered in the case of a close-up shot. When it was put to him that the nurse who attended to the appellant when he was admitted, had testified that the right hand wound was in an area heavily matted with hair, that the hair was swabbed with a substance called Savlon and cleaned, he endeavoured to brush this aside, saying that the staff at the hospital is usually busy and that one cannot expect that the cleaning would have been done thoroughly. When challenged on this view he simply

said/ .....

said that he found that the hair beyond the area around the wound was dry when he saw the appellant, and that therefore the hair could not have been cleaned properly. I share the view of the trial Court that not much value can be placed on this sort of superficial reasoning.

I also agree that the nurse concerned, the witness Ramona Irene Petersen, gave credible evidence that when she took the appellant in hand during the evening of the shooting, she first cleaned the hair around the wound areas with Savlon solution, that she then shaved the hair around the wound areas and threw it into a bin, and that she cleaned the area. She was afterwards told that "this was a police case"; she retrieved some of

the/ .....

the hair which she had thrown away, placed it in an envelope and handed it to the police. On the evidence of Nurse Petersen the trial Court was, I think, correct in concluding that Dr le Roux should not have expected to find dirt in such hair as was still left around the wound areas when he examined the appellant. If the shot had been fired from close up such tattooing and depositing of matter would have been absorbed by the hair, which was then thoroughly cleaned. That also accounts for the absence of root penetration in the skin around the area of the right-hand wound.

I leave the evidence of Dr le Roux for a moment to return to the hair which Nurse Petersen handed

the police. Genl. L P Neethling said that that bit of hair was eventually examined by him, but it represented a small and unsatisfactory sample. He did not find powder in the hair, and expressed the view that if the hair had been cleaned the chances of finding any powder particles would be insignificant. This portion of the evidence of Genl. Neethling does not appear to have been challenged in cross-examination, and was rightly accepted.

Genl. Neethling also said that he had not found evidence of burning in the portion of the appellant's hair which he examined. He said that one usually finds signs of burning of hair around the entrance wound area if the weapon was fired from close range. It was

also/ .....

also the view expressed by Dr J P Nel, who was asked for his opinion concerning the circumstances of the wounds and head of the appellant. He said that the flame emitted by the firing of a revolver might scorch the hair if the weapon is fired from close by. Dr le Roux also said that scorching is usually to be expected if the firearm is fired from close range.

However, the question whether the revolver used in the present case caused scorching when fired from close range, was determined empirically by a state witness, Lt. du Plessis. He testified that he took a quantity of human hair which he was given at a hairdresser, he glued it on to a small area on a piece of chamois leather which was in turn affixed to a piece of carton, and he fired 6

shots/ .....

shots with the revolver through the hair area with the muzzle of the revolver 5 inches from the chamois. On each shot some of the hair was blown away, and fresh hair had to be affixed for the next shot. The hair very close to where the bullet passed through the chamois leather was thereafter examined microscopically by him, and he observed no burning of the hair. He then repeated the experiment holding the revolver 2 inches away, and again found no signs of burning. The same results were found when firing from 4 inches.

In the cross-examination of this witness the point was made that his tests were valueless, since in the case of the appellant the bullet struck his head tangentially, while in the experiments conducted by

Lt. du Plessis the bullet struck the surface of the chamois leather at right angles. The witness did not think that that affected the value of his tests. In fact, said he, where the shot is fired at a right angle to the surface of the object the chances of possible burning are greater than otherwise. That seems to me to follow, and I cannot support the contention advanced by Counsel in argument before us.

Apart from gratuitously casting aspersions (all groundless) on the *bona fides* of the witness, cross-examining Counsel put to him what is found in a number of textbooks on forensic pathology. The witness did not accept the correctness of the opinions expressed in these books, but he pointed out that even some of

them/ .....

them indicate that much depends on the type of arm and ammunition used, and in particular on the speed of the projectile. That was precisely the point made by Lt. du Plessis - the modern weapon used in this case and the speed of the bullet do not cause burning of hair when fired from close range. The comment by Lt.du Plessis on what is said in the books referred to is, likewise that much depends on the type of arm and ammunition used, and in particular the speed of the projectile. He used the example of what happens when one passes one's hand very rapidly through a flame, no burning or singeing need be found.

In my opinion the Court a quo had good

reason/ .....

reason to accept the evidence of Lt. du Plessis, and that nothing turns on the fact that such evidence as there was of the condition of appellant's hair after the shooting did not reveal singeing.

It is at this point convenient to deal with an argument advanced by counsel for the appellant, viz that the Court a quo should have accepted the views of the authors of the books which were put to Lt. du Plessis. The answer is, I think, found in the following passage from the judgment in R v Mofokeng and Another 1928 AD 132 at 136 -

> "The opinion of this writer or any writer on this subject or on any subject was not and could not be evidence in this case. It is only permissible to read such opinions

> to a witness and to ask him if he agrees or disagrees with it. If he does the opinion becomes the evidence of the witness. If he does not, there is no evidence before the jury supporting the opinion."

The other witness relied upon by counsel for the appellant in support of his argument that it is improbable that the appellant's wound was self-inflicted, was Dr Terespolsky. It is correct, as was pointed out, that the witness said "... So I would say that I think this could not have been self-inflicted on that evidence." It is of course important next to see what "that evidence" was. It was a series of propositions put to him by counsel. They were the following:

"There/ .....

"There will be ballistic evidence ... that a revolver of this sort, using ammunition of this sort, will produce a flame ahead of the muzzle, in the order of two inches and that there will be further scorching ahead of the flame of approximately two to three inches, making a total of approximately six inches. ... but ahead of the flame there is still sufficient heat to burn or scorch. So that will be the first thing."

"There will be evidence that no blackening, in other words gun-powder residue was found on the hair of the accused when he was shaved in the immediate area of the wound."

"There will be further evidence that the doctor who was responsible for retrieving the hair sample and who was aware of the significance of burning, blackening and tattooing, also tested the rest of the hair with his hands for blackening or granules and found there to be none."

"There will be further evidence that the bullet shattered, that the heaviest particle

went/ .....

> went in and emerged and ricochetted in the room in question, leaving a smaller particle of approximately one third of the size embedded in the head and also leaving a number of very smaller particles also in the head. ... The evidence will be that the larger particle was closer to the right-hand wound ... and the smaller particles were closer to the left-hand wound."

It will be remembered that I dealt with these matters in discussing the evidence of Dr le Roux. It follows from the conclusions reached earlier herein that the hypotheses on which Dr Terespolsky expressed his opinion, were groundless. I believe the Court a quo was correct in the view taken that Dr Terespolsky's opinion that the appellant's wound was probably not self-inflicted, carried no weight. It is in this context also necessary to again bear in mind that Genl. Neethling's evidence renders it highly

unlikely/ .....

unlikely that the deceased fired the shot which wounded the appellant.

The position of the hand of the deceased over the revolver.

It will be remembered that when Lazarus and Benn came into the appellant's flat, they found the deceased lying on her back with the revolver on her chest, and with her right hand resting over the butt of the revolver. It is clear that if the appellant shot the deceased, he must have been the one who placed the revolver on her chest with her hand over it, probably to suggest that she had fired it. It is also clear that if that was what had happened, that must have been done after he himself was shot and injured in the head. In

the light of these circumstances the further evidence given by Dr Terespolsky falls to be considered. Dr Terespolsky said that in the light of the nature of the brain injury sustained by the appellant, and on the basis of certain hypotheses which were put to him, it is extremely unlikely that the appellant would have had sufficient cerebral function at the time to have planned such an act. Dr Terespolsky also testified that the appellant's statement that he had no recall of the important events in the flat was consistent with what might be expected if he sustained the injury to the head described by the medical witnesses. The evidence of Dr Terespolsky was supported by that of Dr le Roux. It will be convenient to deal with the latter as well while I am busy with

the evidence of Dr Terespolsky.

The view taken by the trial Court of the appellant's cognitive and reasoning ability after his own injury to the head was sustained, was that if he could after the shooting perform all the acts described by credible state evidence, he showed that he retained sufficient brain power to decide to place the revolver and the hand of the deceased in the positions in which they were found. This approach was criticised by Counsel, who contended that the trial Court was giving a preference to lay theorising as opposed to expert testimony.

Dr Terespolsky's starting point in his evidence was that the appellant undubitably sustained a

head injury which he described as moderately severe to severe. One of the most important factors to be considered in assessing the severity of the brain injury - said the witness - was whether the person concerned thereafter sustained amnesia, and if so, for what period. Another important factor is whether the person concerned lost consciousness, and if so, to what extent and for how long. He thought that it was likely, given the fact that the appellant sustained brain injury through being shot, that he would have lost consciousness for at least a few minutes after the injury. He also considered that since the bullet impaired the cortical origins of the visual functions of the appellant, it

was/ .....

was likely that the injury blinded him for a while and that it is questionable whether for at least some minutes after the shot the appellant had sufficient visual capacity to take any purposeful action. He did not however say, nor does it follow from his evidence, that it is probable that loss of consciousness and temporary blindness following on the infliction of brain injury such as the appellant sustained is likely to be of more than a few minutes duration, or that post-traumatic amnesia is likely to set in. Indeed Dr Terespolsky said that there are well documented instances of persons who sustain very severe brain injury who sustain no significant loss of consciousness or amnesia./ .....

amnesia. I should incidentally mention that it was also stated by Dr le Roux that a depressed skull fracture such as appellant sustained need not cause unconsciousness. It seems to follow that whether in the instant case the appellant suffered loss of consciousness of significant duration or amnesia has to be determined clinically, by reference to ones knowledge of what he did after the injury, and in the light of his own account of his recollections. It must accordingly be said that if Dr Terespolsky did not have full knowledge of what the appellant did or said within minutes after he sustained the head injury, and if the appellant's account of his recollections or lack of

recollection, is open to doubt, a clear opinion on whether the appellant sustained loss of consciousness or memory of significant duration can not be given.

It was put to Dr Terespolsky that within a very short space of time after the shooting the appellant performed a number of acts involving reasoning. The appellant went out of his flat and called out to his maidservant. He dialled the telephone number of the flat occupied by Lazarus and Benn, and asked them to come to his flat. When they did not come speedily enough he dialled again. When they arrived at his flat he told them that he thought he was dying. He responded to Lazarus' suggestion that he should accompany

them to the hospital. Dr Terespolsky responded that the performance of these acts is not necessarily indicative of fully conscious behaviour. He thought that what the appellant did and said was possibly indicative of automatous behaviour, but not necessarily of reasoning.

In my judgment the question whether that which we know the appellant did after the shooting is indicative of reasoning or not, is a matter on which the trial Court was entitled to state its own view. It is not a matter exclusively in the province of the expert medical witness. On being informed by the evidence of

Dr Terespolsky of the test, viz whether the appellant manifested the use of powers of reasoning, and the ability to act rationally and coherently, the trial Court was entitled to and indeed obliged on the application of that test to decide for itself whether on the known facts the appellant was sufficiently conscious to plan the act of placing the revolver and the hand of the deceased in the positions found by Lazarus and Benn.

I am not persuaded that the trial Court erred in the view which it took of the appellant's cerebral capacity. I think that the Court rightly held that the decision of the appellant to call out to Edith for help, and afterwards to telephone Lazarus and Benn, involved reasoning,

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an appreciation that he was bleeding to death, and a realisation that assistance must be sought. The decision to phone again when Benn and Lazarus did not arrive promptly, is a further indication of fully conscious behaviour. The conduct of the appellant can not be likened, I think, as Dr Terespolsky said it might, with the conduct of a man who absent-mindedly and without specifically thinking of what he is doing, drives home through traffic.

Dr le Roux also ventured the view that it is unlikely that the appellant would have had "an awareness of events after the injury to his head." When it was put to him that the appellant performed

all the acts detailed earlier in this judgment after the shooting, he explained that a person rendered unconscious by brain injury may thereafter be able to speak, but be unaware of what he is saying. When it was put to him that the appellant was sufficiently conscious to realise that Edith was on the premises, and that he called out to her, Dr le Roux suggested that the appellant may have experienced lucid intervals after the injury. The trial Court appears to have been singularly unimpressed by Dr le Roux as a witness, and found him to manifest a bias in favour of appellant. I find no reason to differ from this conclusion. In any event my remarks concerning the function of the trial Court to

assess for itself whether on the evidence before it the appellant showed himself able to think properly, are of equal application to the views expressed by Dr le Roux. In spite of Dr le Roux's opinion the state evidence supports the finding that at least from the time that the appellant called out to Edith and started to telephone Lazarus and Benn, he was sufficiently in control of his faculties to decide to place the revolver on the chest of the deceased with her hand over it.

I should add that Dr le Roux seems to have been influenced by the fact that when he attended to the appellant in the hospital some hours after the shooting, the latter appeared to be drowsy and un-

responsive. That is not the condition in which Lazarus and Benn found him. It seems likely that the appellant's condition changed after he was taken up at the hospital.

Counsel for the appellant pointed out that according to the evidence of Lazarus the hand of the deceased was not only over the butt of the revolver, but her fingers were curled over it. I do not think there is any significance in whether that was so or not, for if the correct conclusion is that the appellant placed the hand of the deceased over the revolver on her chest, it is conceivable that he may have positioned her fingers so as to create a semblance of a

gripping/ .....

gripping position. However, I should record my view that Lazarus' evidence, taken as a whole, does not indicate that he could with any certainty say more than that the hand of the deceased rested lightly on the butt of the revolver.

I think it necessary, in conclusion on the question of the position of the hand of the deceased over the revolver, to refer to the evidence of Genl. Neethling. He said that he had never in examining cases of suicide involving hand-guns (and he had investigated many) encountered a single instance where the deceased had come to rest with the weapon still in his grip. In all the cases examined by him the weapon was

flung/ .....

flung away from the body. I think it stands to reason that the recoil effect, due to the discharging of the revolver, coupled with the immediate loss of muscular control, will cause the weapon to be discarded. I think that this evidence is of considerable consequence and establishes a further factor of probability that the deceased did not commit suicide.

The appellant as witness.

The trial Court considered the evidence of the appellant to be unsatisfactory in a number of respects. The reasons given for reaching an adverse opinion concerning the credibility of the appellant, indicate that the Court a quo was largely influenced by its view that the explanations given by the appellant on a number of his statements were disproved by credible testimony. I fully

agree with these conclusions. I think it necessary to mention only a few matters which support the Court's estimate of appellant's credibility.

His explanation for going to Lazarus' flat and purloining his revolver is so very much at odds with the probabilities that it can only be described as false. It will be remembered that the explanation starts off with the story that he wished to go to his office to get the film cover. He wished to show the deceased that her fear concerning the undeveloped film she had seen, which led her to think that it may be of photographs taken by appellant of her in compromising positions, was unfounded. It is not only unlikely in the extreme that in the circumstances described by him she could have suspected that he had taken such photographs, but also improbable that

he could have thought he could allay her concern by producing the cover in which the developed spool was sent. If he really wanted to do no more than to go to his office to collect the cover, why did he not take the deceased to accompany him? Why leave her sitting alone in his flat? I cannot but think that he came up with the story of the photographs to give himself an explanation his visit to Lazarus' flat, ostensibly to search for the keys of his office which he suddenly discovered - so he said - were not in their usual place in his motor car. The appellant's evidence of his search for the keys runs counter to credible testimony. The evidence of Benn and Lazarus - which on this aspect

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was not challenged - was clear that even if appellant could have thought that he left any keys in their apartment, he could not have believed that he left them in Lazarus' part of the apartment: the appellant never entered there during that day. Again I am impelled to the conclusion that the appellant invented the story that the keys were in Lazarus' part of the apartment solely to provide an explanation for being in the room where Lazarus' revolver was kept. Then comes the explanation for taking the revolver - to call the deceased's bluff. Why would he, who on his evidence was set to win the heart of the deceased on that day, act in such a senseless inappropriate manner? The story

is far fetched, and simply cannot be true. I shall later in this judgment return to the significance of the fact that the appellant lied on these matters.

Another matter on which the appellant's evidence was by acceptable evidence shown to be unacceptable was on the rather important question of when he discussed the possibility of going to London with the deceased. It will be recalled that he said that he did not discuss that with the deceased on the Friday, as he wished to leave that for a later opportunity. He also said that on Saturday he had a firm expectation of winning the deceased over. Contrary to this there was the evidence of Ronnlynn Botha, Benn's girl friend, viz. to the effect

that on the Saturday after the Friday in question, the appellant told her that he had already tried to persuade the deceased to come with him to London, but that she did not wish to go. Benn testified that during that Saturday morning the appellant at one stage telephoned the Airways office to enquire whether the deceased had not prematurely booked a flight back to Cape Town. He explained that he feared she might leave without his knowledge. This evidence too does not appear to have been challenged in cross examination, but when giving evidence himself the appellant gave what the trial Court correctly described as deliberately evasive evidence thereon. The importance of the appellant's untruthfulness on this question will

also/ .....

also be referred to later.

A further matter regarding which the trial Court found the evidence of the appellant to be unacceptable, was in connection with his reason for not unloading the revolver when he returned to his flat. He admitted that for the purpose for which he had taken the revolver, it did not require to be loaded. He must have known that it would be very dangerous to hand her a loaded revolver "to call her bluff". His explanation that he did not realise this fact, was correctly rejected by the trial Court. This untruth too has special significance, and I will again refer to it.

I think it necessary to refer to the

appellant's/ .....

appellant's evidence that he had very little recall of the tape-recorded monologue, discussed earlier in this judgment. It will be remembered that Prof. Leary testified that even if the appellant's account of what he had consumed and taken prior to the episode was correct, he would have remembered the whole incident. The appellant's evidence on this point is likewise unacceptable.

Lastly, the appellant's reference to his relationship with the deceased at the end of January 1982, as being "up and down", was correctly rejected by the Court a quo. Counsel for the appellant contended that there was no reason to doubt this evidence. Like the Court a quo I consider that the evidential material, the letters written

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by appellant, his diary entries, the content of his monologue, and his statement to Miss Botha, to which I referred a few paragraphs earlier, strongly indicate that his evidence on this point was unacceptable.

Lastly there is the matter of the locality where the revolver holster was found - in the bathroom. When evidence to that effect was led appellant's counsel indicated that that was not disputed. The appellant testified, however, that when he re-entered his flat he placed the revolver, in its holster, on the floor of the lounge. On any version it is extremely unlikely that the deceased would have deposited the holster in the bathroom; the inference must accordingly be made

that after the appellant entered the flat he placed the holster in the bathroom. On this question too he was untruthful.

I conclude that the appellant was a most unreliable witness.

Summary and Conclusions:

Since there was no direct evidence of what happened at the vital stage of the drama, the trial Court had in the final analysis to reason by inference. According to well established principles it had to take into account all the facts and circumstances from which, either individually or collectively, logical conclusions might be drawn. It had to consider whether the inference

that/ .....

that it was the appellant who fired the fatal shot, is consistent with the facts found to have been proved beyond reasonable doubt. It then had to decide whether any conclusion save that appellant was the killer might reasonably be drawn. (R v Blom 1939 AD 188 at 202/3).

Counsel for the appellant argued that the Court a quo committed an error by taking "accused's poor showing as a witness" into account in its reasoning. I think however that the trial Court was entitled, in assessing the strength of the inferences, to bring the falsity of appellant's explanations of certain facts and circumstances into reckoning - they tended to strengthen the inferences which could be drawn. In this regard

the following passage in Wills on Circumstantial Evidence 7th Ed. at 112 seems to me to be apposite -

> "So natural and forcible is this rule of presumption, that the guilty are instinctively compelled to evade its application, by giving some explanations or interpretations of adverse facts, consistent, if true, with innocence; but its force is commonly aggravated by the improbability, or absurdity even of such explanation, or the inconsistency of them with admitted or incontrovertible facts. All such false, incredible or contradictory statements, if disproved, or disbelieved, are not simply neutralised, but become of substantive inculpatory effect."

A convenient starting point in the discussion of possible conclusions, is to take the fact that it was the appellant who, shortly before the

deceased was shot in his flat, obtained the revolver with which she was shot, and brought it, fully loaded, into the flat. These simple basic facts may, in the absence of an acceptable explanation, attract an adverse inference. The fact that appellant gave a false explanation of how he came to think of getting the revolver seems to me to strengthen the inference that he went to get it to use it, and to use it for a more sinister objective than to enable him to "call her bluff". This inference is further supported by the fact that the appellant gave an unacceptable explanation for not unloading the revolver when he brought it into the flat. The fact that the holster was found in the bathroom of the flat

indicates/ .....

indicates that appellant had taken the revolver out of its holster once he was in the flat, a fact inconsistent with appellant's suggested innocuous intention.

The conduct of the appellant must be viewed against the background of the fact that two days earlier he considered what his action might be should the deceased reject his proposal to go with him to London: he thought that he might in that event kill her and then himself. This very situation arose - she not only refused to accompany him but also to resume their relationship.

The notion that it was the deceased who shot herself is highly unlikely. That is so firstly because of the absence of gun powder residue on her right index finger. In

the/ .....

the second place there was no conceivable reason why she would have wished to take her life. She was a young, attractive person leading a fulfilling life as a successful model. She had established a new relationship with a man in Cape Town. She was not, like the appellant, in an emotional quagmire. She was not upset at the prospect of the relationship with the appellant not being revived. She was not the one who went in search of the weapon. Thirdly, if she fired the fatal shot she would have had to hold the revolver at a most awkward angle in relation to her head. In the fourth place, if she shot and killed herself it is very probable that the revolver would have come to rest away from her body.

The/ .....

The suggestion that the first shot was that which wounded the appellant, and that it was fired by the deceased, is also countered by strong probabilities. It is inconsistent with the fact that no gun powder residue was found on the index finger area of the deceased's hand. If the deceased held the revolver for more than a minute, which would have been likely if one visualises a scenario in which the deceased first shoots and wounds the appellant and after some time shoots herself, the hydroxyquinaline test would probably have shown that she had handled the revolver. The test was negative. It is furthermore unlikely in the extreme that the deceased would have wished to shoot the appellant. Although she did not

wish to resume her relationship with him, there was no suggestion that she was so angry as to wish to shoot him. His evidence that she had once expressed frustration at her inability to hurt him physically in retaliation at his threat to publicise the fact that she had in the past undergone an abortion, is improbable. And even on his own account, when on a previous occasion he had handed her a shotgun after he had threatened her with exposure, she had burst into tears.

I am in full agreement with the trial Court that the inference that the appellant shot the deceased, thereafter wounded himself, and then placed the revolver on the chest of the deceased, with her right

hand over the butt so as to suggest suicide, fits the facts in every respect. I think he was rightly convicted on the first count.

It remains to consider the sentences imposed on the lesser counts. Not much was said by appellant's Counsel on this aspect of the matter. It does not appear to me that the learned Judge misdirected himself, or that the sentences are excessive.

The appeals are dismissed.

ELOFF, AJA

RABIE, CJ)
) CONCUR
HOEXTER, JA)