

199/93

Case No 553/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE STATE

Appellant

and

G SHAPIRO

Respondent

CORAM: VAN HEERDEN, SMALBERGER, JJA, et NICHOLAS, AJA

HEARD: 1 November 1993

DELIVERED: 1 Desember 1993

J U D G M E N TNICHOLAS, AJA

At about half past five on the afternoon of Saturday 24 August 1991, the late Rodney Byron Williams was standing near the reception counter in the foyer of the Sunningdale Hotel in Corlett Drive, Birnham, Johannesburg. He was using the telephone. A man named Gideon Shapiro entered from the street and fired six shots from a revolver at Williams who fell to the floor. Shapiro went outside, reloaded the revolver, and returned to the foyer and at point blank range fired another shot at the recumbent Williams who died shortly afterwards. Shapiro left the scene.

On post mortem examination a number of gunshot wounds were found on Williams's body;

- (a) a wound which penetrated the right upper arm and exited through the inner aspect of the right upper arm;

(b) an entrance wound, in horizontal line with the exit wound in (a), of the lower right chest wall, which passed through the right hemi-diaphragm, the right lobe of the liver and the aorta; and

(c) a wound which entered the left cheek and passed into the brain. There was widespread powder tattooing around the entrance wound.

In the opinion of the state pathologist who carried out the examination either of wounds (a) and (b) independently could have caused the death of the deceased. However death from haemorrhage must have ensued within minutes of the infliction of wound (b).

Arising out of this incident Shapiro was arraigned in June 1992 in the Witwatersrand Local Division on a charge of murder before a court consisting of Schabert J and two assessors. He pleaded not guilty. He did not make a statement in terms of s. 115 of the Criminal Procedure Act 51 of 1977 but made certain formal admissions. After a trial

lasting several days he was found guilty of murder and sentenced to imprisonment for seven years, four years of which were conditionally suspended.

In terms of s. 316 B of the Criminal Procedure Act 51 of 1977 and with the leave of the trial judge the Attorney General of the Witwatersrand Local Division now appeals to this court against the sentence. At the hearing of the appeal Mr R J Chinner, who was prosecuting counsel at the trial, appeared for the Attorney General and Mr A F Marais appeared pro deo on behalf of Shapiro.

A main actor in the events which led up to Williams's death was Miss Carol Elana Bloch ("Carol"), who gave evidence for the state. At the time of the trial in June 1992 she was 30 years old. She is a qualified public relations officer registered with the Public Relations Institute of South Africa, and has studied film production and fashion design. She has been friendly with Shapiro since they were children. They became lovers and started living

together about seven years before the trial. Their relationship was interrupted in October 1989 when Shapiro moved to Durban to open a compact disc shop. Carol had a good job in Johannesburg and continued to live there. She stayed in the house of Noëlène and Jonathan Kingsley-Hall. There she met Williams, a man of 37 years, who was a frequent visitor to the house.

Williams, she learned, was a dealer in cocaine, who operated a network of drug distributors which extended to Durban, Cape Town and Botswana. He was reputed to be the biggest drug dealer in Johannesburg. He introduced her to cocaine. She found him to be a very likable person - "when sober" - and they became friendly. As will appear, however, when Williams was going through episodes of cocaine-abuse, he became a monster.

In March 1990 Carol and Shapiro became engaged, and she joined him in Durban where they again lived together. In April Williams visited Durban and he telephoned Carol and

arranged to meet her. He told her,

"I want you to deal cocaine for me in the area. I have got a lot of clients here, and I need someone here to do that."

She refused. When she reported this incident to Shapiro, he was angry and insisted that she have nothing to do with cocaine dealing. A few days later Carol and Shapiro met Williams for drinks at the Malibu Hotel. The question of drug-dealing was again raised but Shapiro and Carol said that they were not interested. Williams warned them -

"I know where to find you both and if you mention any of this to anybody I will kill you both."

Shapiro's business did not prosper. It went insolvent, and he and Carol returned to Johannesburg, where they were given a temporary refuge in a house in Eksteen Street, Observatory, occupied by Nerina Harmse and two others. Williams was a frequent visitor - he would come and go at all hours of the day and night. He supplied Nerina with cocaine for sale by her. From time to time Carol and Shapiro used cocaine provided gratis by Williams, but Shapiro

was unhappy about the set-up - "He did not like to be around these people who were coming and delivering and fetching and taking - he did not want to be involved with that."

Nevertheless a friendly relationship developed between Williams and Shapiro. During this period incidents occurred, of which it is unnecessary to give details, but which showed that Williams did not shrink from violence to enforce his will. He was ruthless towards those who crossed him, or failed to pay him what he thought his due. Carol formed the opinion that he "was not the type of man to stop [at] anything ... when he was violent and in a bad mood he was not worth interfering with, because he was not really easy to control."

In February 1991 Carol visited Israel. She returned to South Africa in March. Shapiro had by then acquired an interest in a restaurant called Arlecchino's in Rosebank which was open until late at night.

In May 1991 Carol and Shapiro moved into a flat in

Olympia Place which is adjacent to the Sunningdale Hotel in Corlett Drive. At this stage, Carol said, Shapiro and Williams were friends. Williams visited the restaurant with increasing frequency and he used also to visit the flat whenever he felt like it at any hour of the day or night. It was however "a casual friendship". Due to the nature of his business Williams did not like to get too close to anybody - he did not really trust many people - but came to trust Shapiro more and more, and he spent most of his time with the couple. "He would come at all hours of the night to sleep after like a two-day binge or whatever and he felt safe to sleep there without being disturbed by anybody".

In the time that Carol knew Williams he went through two periods when he seriously abused drugs. One was during the few months preceding his death. During this time he got worse and worse, she said. He was aggressive and making threats against all and sundry. He threatened to burn Nerina's house down if she did not pay money she owed him.

He went round saying that he was the boss of Johannesburg. He accused a number of people, whom Carol named, and also Carol herself, of stealing his drugs. She said variously: drugs made him almost schizophrenic; he had mood swings - his moods were totally unpredictable; there was no way of telling what he was going to do next; he was totally erratic; he was in a real megalomania trip at that point; he had become totally paranoid.

Carol described a number of illustrative incidents.

One occurred at the end of June. Williams arrived at the restaurant in an intoxicated condition and caused trouble. This was not good for business, and Carol offered to take him home. After they had travelled a short distance Williams suddenly sobered up. He took over the steering wheel and drove to Halfwayhouse. At a house there he dug up a container with a large quantity of cocaine, which he showed to Carol. They used cocaine together. Williams wanted to have sex with her, but she refused, and locked herself in

another room. On the following morning she telephoned Shapiro while Williams was still asleep and asked him to come and fetch her. But Williams woke up and took her home, acting as if nothing had happened. She told Shapiro what had occurred, but he decided to do nothing about it.

On several occasions during the ten days preceding 24 August 1991 Williams accused Carol of stealing his cocaine. The first was on a Thursday when he threatened to kill her if he did not get his cocaine back. On the following Tuesday, notwithstanding requests by Shapiro not to do so, she had gone to the restaurant. Williams was there and threatened to kill her. She dared him to do it. He caught hold of her shoulder and slapped her face twice with the flat of his hand. Shapiro and his partner separated them.

Shapiro and Carol then decided that she should go to Israel until the dust settled, because they feared for her life. She was due to leave on Saturday 24 August 1991.

On the next Thursday, 22 August, Williams came to the flat by arrangement with Shapiro in order to search for the cocaine which was said to be missing. Although it had been agreed that she would keep away, Carol arrived and asked if Williams had found the cocaine. When he said no, Carol, who was tired of the whole situation, lost her temper. She told Williams she found it strange that on one day he wanted to sleep with her and on the next he accused her of being a thief. Williams attacked her, slapping her in the face. He threatened to kill her, but Shapiro held his arms and spoke to him, and he left. Carol told Shapiro that she was terrified of Williams. He consoled her with the fact that she was leaving in a few days for Israel where she would be safe.

On Saturday 24 August 1991 matters reached a climax. At about 5 p m Williams arrived at Olympia Place and spoke to Carol over the intercom. He told her to release the security gate. She told him that she would come down to the

ground floor and let him in. Meanwhile she telephoned Shapiro at the restaurant and told him that Williams was at the flat building, that she was frightened and that if anything happened to her, he would know who was responsible. Shapiro told her not to open the gate, that he was on his way to her. Despite the fact that she was terrified, she went down and opened the gate with the idea of talking to Williams in the open. Williams forced his way into the building. He told her that he had just come from his wife's home where he had shot her, and his mother-in-law was going to be next; it was now Carol's turn and then he was going to Nerina. He attacked her, slapping her in the face and kicking her. He then began choking her with his hands but stopped when the building-owner arrived. When Carol asked the latter to call the police, Williams left the scene.

Shapiro arrived about 10 minutes later. Carol told him what had happened. Bystanders said in evidence that she appeared to be upset and shocked. As a result of the assault

there were red marks on her cheek, eye and neck. Shapiro satisfied himself that Carol was not in need of immediate medical assistance and returned to his car which he had double-parked on the other side of the road. He made a U-turn and stopped in front of Olympia Place. He asked Carol where Williams had gone. She replied that she did not know but begged him to do nothing, saying "Please don't - just leave it, he has got his gun with him". Shapiro, however, ignored her plea and, two men sitting nearby in a motor car having pointed in the direction of the hotel, he entered it.

I interrupt the chronological sequence in order to refer to some of the evidence given by Shapiro himself.

He said that he was 27 years old. He matriculated in 1981 and did his national service during which he was trained in the use of firearms. On returning to civilian life he got employment and at the same time studied for a B. Comm. degree for two years. He acquired the revolver with which Williams was killed (a Smith and Wesson 357 Magnum) in

1984, and for some years he kept it in a "tog-bag" which he carried around with him.

He described his relationship with Carol, his meeting with Williams in Durban, and their return to Johannesburg where he and Carol lived for a time in Observatory. There he met Williams again and his attitude towards him was a cautious one. He knew his reputation: he was a person who had grown up on the streets, he was a fighter and lived by his wits. As time went on however a mutual trust and respect developed.

I pass over most of Shapiro's evidence (which, although there were some differences, largely confirmed that of Carol) until his account of the last critical 10 days.

He said Williams had gone into "this high usage of cocaine" for about two months before this, and their relationship deteriorated. His behaviour in the restaurant changed - he made trouble, made a noise, threatened customers. On several occasions he threatened Shapiro,

saying he was going to kill him. He said, "... the fears were becoming more real every day". He took the threats very seriously. In consequence he started carrying his revolver on his person. Williams attacked Carol on the occasions she described. He told her, "I want my cocaine or I am going to get you".

On the Wednesday, however, Williams telephoned Shapiro. He was apologetic and they arranged that they would meet on the Thursday so that Williams could once more search the flat for cocaine. Shapiro fell in with this in order to placate him - he knew there was no way that Carol would have stolen cocaine. He and Carol agreed that she would keep away from the flat, but unfortunately she arrived home while Williams was still there. He went into a rage.

Dealing with the events of the last fateful Saturday, Shapiro said that when Carol telephoned him, he gave one of the waitresses a crash course on how to work the till at the restaurant, and rushed to the flat. He found

Carol standing on the pavement. It was plain that she had been assaulted. She was hysterical and showed him the marks on her neck. He ran across the road to where his car was double-parked, did a U-turn, and went back to Carol. He could see that she was not in immediate need of medical attention, and asked where her assailant was. His basic fears that Williams wanted to kill Carol and himself, were now confirmed. Carol was screaming, "No, leave it, it is not worth it, he is low life, he is carrying a gun", but he felt that if he did not make a stand then Williams would come after them and kill them both. Near the hotel entrance two men in a white car pointed towards the inside. He entered the foyer and saw Williams standing near the reception desk. He drew his firearm and, saying to Williams something like, "You cannot just do as you want," he aimed and fired shots at him. He did not know what his thoughts were at the time. He turned to walk out of the hotel and looking back over his shoulder, he saw movement which made him think Williams was

still alive. He knew that if Williams survived, "I would be shot, Carol would be shot - it would have been the start of this whole takeover of Johannesburg". So he reloaded, walked back into the foyer and fired a seventh shot at Williams's head. He felt as though a massive weight had been lifted from his shoulders. He walked out of the hotel, spoke to Carol and waited for the police for some minutes. Then he felt that he had to get back to the restaurant and he left the scene.

Some additional details of the shooting were recounted by two witnesses called by the State.

Mr Gregory Shewen said that he was having a drink in the hotel bar when he heard a series of shots. He went into the foyer where he saw a man lying on the floor. A strange gurgling noise was coming from his throat. He saw someone leaving through the entrance and went outside where he saw the accused (Shapiro) standing with a weapon in his hand. The accused turned and re-entered the hotel and walked

up to the deceased (Williams) and pointed the weapon towards him and fired one shot. The accused left the hotel again, walking normally. Shewen said to him, "Do you realise you have just killed somebody?" The accused said something like, "I know, so what?" There was no sign of astonishment or surprise or confusion. He turned and spoke to a woman standing there (this was presumably Carol) and told her that he could not wait for the police; that when they arrived she should direct them to his place of work, or ask them to telephone him. He drove off in the direction of Rosebank. To the witness the accused appeared perfectly normal. He did not seem to be disorientated in any way. There was no sign of remorse, he did not cry.

The second of the two witnesses was Mr Anton Hart, who was driving his car in the vicinity of the Sunningdale Hotel when he heard shots. He came to a stop, got out of his car and crossed the road. He saw the accused come out of the hotel, in his hand a firearm which he unloaded. The accused

turned around and went back into the hotel. Hart, following him, saw a man lying on the floor. The accused was very cool and calm and walked normally. Outside on the pavement he began to get restless, walking up and down. Then he spoke to his girl friend, telling her she must wait for the police and went to his car and pulled off normally.

In delivering the judgment of the trial court, Schabert J said that with the possible exception of one witness (whose evidence I have not referred to), all the witnesses testified with "solemn and sincere endeavour to be as frank and accurate as possible". Their demeanour was suitable and persuasive. After a survey of the evidence the learned judge dealt with a submission that the accused acted in private defence, and rejected it. Referring to "putative private defence" as a possible basis for acquitting the accused Schabert J said:

"It is our view that this was not an instance of private defence but an instance of private execution."

The trial court also rejected a defence contention that the accused "possibly acted in non-pathological criminal unaccountability by virtue of all the emotional stresses and strains operating on his mind ..." Schabert J said that the defence was not borne out by any evidence before the court, including the report and testimony of Dr Eriksson, a psychiatrist called to give evidence for the accused. The verdict of the court was that the accused was guilty of murder: he shot and killed the deceased with direct intent.

I quote in extenso from Schabert J's remarks when sentencing the accused:

"The circumstances in which a crime has been committed are of the utmost importance in determining an appropriate sentence. Murders are committed in vastly different circumstances and that must be reflected in the sentences. In this case I have in my previous judgment dwelt in great detail on the historical lead-up to the tragic event. I do not propose canvassing those facts again. Suffice is to say that they cast a very extraordinary and very significant light on the incident as a whole. It is certain beyond any doubt that the deceased by his obnoxious, villainous and violent conduct in the months and weeks and days preceding the afternoon in question and during that afternoon, created the setting for

his own ruination. It is impossible on the evidence before the court, not to form the impression that by his habits, illicit activities and conduct, the deceased was bent on a course of virtual self-destruction and calamity for many others.

It is known how you got involved in the ultimate incident between the deceased and Miss Bloch. It is known what your relationship with her was at the time. It is known how you responded. Much evidence has been adduced and you yourself have testified about the effect on your mind and conduct, of all the various stimuli to which you were subjected. There was inter alia severe provocation, intimidation and humiliation. The profile of your personality has been expertly sketched to the court. It was conceded on behalf of the State and it is accepted by me that you acted, however brutal and callous your actions may seem, with substantially diminished criminal accountability as a result of all the aforementioned factors.

Your personal circumstances have been set out in the psychiatrists' report and additional particulars appear in the evidence. You are 27 years of age, you are a partner in a restaurant business, you have a fairly stable relationship with Miss Bloch and there is a prospect that you may marry her in due course. You have no previous convictions involving violence. I have been urged on your behalf not to sentence you to unsuspended imprisonment. I have been told that you are not an ideal candidate for that kind of punishment. I have been told that you have changed your lifestyle. I have been asked to give great weight to all the

relevant facts preceding and pertaining to the fatal incident. This is clearly a case demanding great understanding for your person and your position at the time and presently and the greatest leniency permissible in the circumstances should be shown. You have expressed regret for what you have done and there is no doubt that you are remorseful.

I have no doubt further that the public interest must be accorded substantial importance in this case. You have taken the law into your own hands with grave consequences. That is something which this court may not condone and which society cannot tolerate. Persons who do that must realise that their actions will be severely censured by the courts. Not with the utmost understanding do I see my way open to keep you out of jail. There is good reason, nevertheless, to suspend a substantial part of your sentence.

You are sentenced to seven years' imprisonment, four years of which are suspended for five years on condition that you are not convicted of an offence committed during the period of suspension, involving violence and for which you are sentenced to unsuspended imprisonment.

The registrar of this court is directed to submit a copy of this judgment and of the psychiatrists' report, exhibit G, to the Department of Corrective Services for consideration and placement on your personal file."

It may well be that this court would have imposed

on the accused a heavier sentence than that imposed by the trial judge. But even if that be assumed to be the fact, that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in S v Rabie 1975(4) SA 855 (A) at 857

D-F:

- "1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -
 - (a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court'; and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.
2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

Central to the judgment on sentence is the finding that however brutal and callous Shapiro's actions may seem, he acted with substantially diminished criminal responsibility. S. 78(7) of the Criminal Procedure Act 1977 relates to cases where 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. In such a case, the court may take the fact of such diminished responsibility into account when sentencing the accused. But apart from "pathological reduced criminal responsibility", as it has been called, it has been recognised that it is possible for there to be non-pathological temporary reduced criminal responsibility, which would likewise be relevant to sentence. See S v Laubscher 1988(1) SA 163 (A) at 167 J - 168 B. It is this form of reduced criminal responsibility which was found by the trial judge to be present in this case.

In making this finding the learned judge relied on the report of the psychiatrist, Dr Eriksson, and on his oral evidence at the trial. The state's psychiatrist, Dr Vorster,

concurred in this report. At the conclusion of Dr Eriksson's evidence in answer to a question by the trial judge, Mr Chinner confirmed that he did not dispute either the factual material contained in the report or the opinions expressed therein.

Dr Eriksson expressed the opinion, based on evidence given by Carol and by Shapiro, that at the time of the incident Williams was "actively paranoid secondary to cocaine abuse". He had a fixed delusional belief that Carol had stolen his cocaine and it was in this frame of mind that he made the attack on Carol on Saturday 24 August 1991.

In regard to Shapiro, Dr Eriksson's unchallenged opinion was that -

"Numerous and significant factors detailed both in the body of this report and further evidence as given before the Court, have, in my opinion, interacted in such a way that the accused was not fully able to appreciate the wrongfulness of his act. It is my opinion that at the time of the alleged incident the accused experienced a decreased ability to appreciate the moral, ethical, social and legal consequences of his act. His ability to appreciate the wrongfulness of his act was therefore, in my opinion, diminished."

While conceding that the decision as to criminal responsibility was the function of the court, Dr Eriksson said -

"... it is my opinion, on assessing from a medical perspective, the facts at hand, as these pertain to biological, psychological and social factors of this case, the alleged murder was a summation of a number of complex and interacting factors leading to a state of extreme emotional distress, such that the accused was likely not to be fully responsible for his behaviour."

In his discussions of Shapiro's mental state at the time of the incident, Dr Eriksson said in his report:

- "1. The role of FEAR as a contributing factor to the accused's final course of action.
- (a) The accused has for a time prior to the alleged incident been living in a state of heightened tension as a result of the deceased's unpredictable behaviour and threatening attitude.
- (b) On the accused confirming the attempt made on the life of his fiancée, Carol, and on being told by Carol that he, the accused, 'must be careful as he is carrying his gun', fear for his own and his fiancée's life was brought into sharp focus. His fear was further heightened by his past experiences with the deceased and his having had experiences with the unpredictable nature of the deceased's thinking and mood.

- (c) Fear of the consequences which may result from his taking an alternative course of action to deal with the immediate crisis to hand further focused his actions at the time of his going to confront the deceased with his, the deceased's, unacceptable behaviour (attempted to murder the accused's fiancée. Thus the usual socially acceptable ways of dealing with an act of attempted murder were effectively closed to the accused. Fear thus led to his accepting the ultimate final CHOICE - 'It is either me or him'.

.....

3. The role of ANGER as a contributing factor to the accused's final course of action.
- (a) As described the accused had experienced considerable stress as a result of the deceased's behaviour and thinking concerning the accused and his fiancée Carol. Scientific texts explaining the mechanisms involved in aggression describe STRESS as the psychophysiological trigger initiating aggressive behaviour. Behaviorally aggression can be internalised or externalised. At the time of the incident, ... persons who witnessed the behaviour of the accused both prior to and following the incident confirm that no externalised expressions of anger were noted. Only the final alleged aggressive act confirms the overwhelming internalised anger experienced by the accused.
4. The role of PROVOCATION as a contributing factor to the accused's final course of action.
- (a) Evidence as presented to the Court suggests that prior to the alleged incident the accused was subjected to extreme provocation. The

accused was able to confirm the reality that the deceased had attempted to murder his fiancée, Carol, by strangulation. With confirmation of this fact his worst fears had been realised - it was no longer a case of 'all talk'. The confirmed physical act, in my opinion, acted as a source of severe provocation.

Mr Chinner told this court that Schabert J was in error in saying that the State conceded that Shapiro acted with substantially diminished criminal responsibility. If that was a mistake, I do not think that it was material. The fact is that the learned judge accepted that Shapiro's diminished criminal responsibility was substantial and although Dr Eriksson did not use the word in his report, that was its general tenor and the finding was in my view justified on the evidence.

The grounds of appeal set out in the notice of motion filed in the application for leave to appeal were these:

- "2. Die gronde waarop gesteun word ter ondersteuning van die aansoek is soos volg:
- 2.1 Sy Edele die Verhoorregter het homself wanvoorgelig deur

- 2.1.1 die persoonlike omstandighede en meer in besonder die verminderde toerekeningsvatbaarheid van die Respondent oor te beklemtoon in die lig van
- (a) die Respondent se meewerking en skuld aan die situasie waarin hy hom op die dag van die voorval bevind het deur sy 'vriendskap' met die oorledene en die afwesigheid van enige vroeëre pogings om hom aktief van die oorledene te dissosieer.
 - (b) die feit dat die oorgrote meerderheid van alle moorde en aanrandings gepaard gaan met verhoogde emosionele spanning, provokasie en woede.
- 2.1.2 die onderbeklemtoning van die gemeenskap se afkeur van die brutale wyse waarop die moord uitgevoer is deur
- (a) 'n ander mens koelbloedig af te maai.
 - (b) die gewetenlose teregstelling van 'n persoon wat hulpeloos en sterwend is, nadat die vuurwapen herlaai is.
- 2.1.3 die onderbeklemtoning of negering van die laakbaarheid van 'n moord op 'n 'vriend' wat na alle waarskynlikheid (en tot die kennis van Respondent) paranoïes was en hulp benodig het eerder as 'n gewelddadige en moordadige konfrontasie.
- 2.1.4 die onderbeklemtoning of negering van die toename van sake van hierdie aard en die gebruik van emosionele onstabiliteit as regverdiging of strafvermindering vir onaanvaarbare gedrag.
- 2.1.5 die onderbeklemtoning van die gemeenskap se afkeur daarvan dat die reg in eie hande geneem word en op die wyse die

hoogste prys vir gewraakte optrede geëis word.

2.1.6 die gevestigde oogmerke van straf naamlik vergelding en afskrikking te negeer of 'n onbelangrike rol toe te ken.

2.2 Die vonnis verwek 'n gevoel van skok en is onvanpas in die lig van die Verhoorregter se bevinding dat hier nie sprake is van noodweer nie maar wel van 'n 'private regstelling'."

In his argument in this court, Mr Chinner developed and expatiated upon these grounds. He stated repeatedly that the trial judge misdirected himself by overemphasizing this or that aspect and underemphasizing other aspects. He did not rely on specific statements in the judgment on sentence, but said that it was to be inferred that Schabert J did not give due and proper weight to the various circumstances mentioned: if he had done so he could not have imposed the sentence which he did. While these matters should be taken into account when considering whether the trial judge, in imposing the sentence, exercised his discretion properly and judicially, I do not think it helpful to consider whether separately they can be regarded as misdirections.

Mr Chinner's main argument was that although he did not dispute Dr Eriksson's opinion, this court should not lose sight of the unchallenged evidence of independent bystanders, that Shapiro's actions appeared to be cool, calm and calculated. Outwardly he gave no sign of emotional confusion. Moreover, the provocation he experienced was limited. He brutally executed a man who was helpless and dying. He acted without compunction, and thereafter showed a callous indifference to what he had done.

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

Shapiro's conduct on that Saturday at the Sunningdale Hotel was bizarre. In full public view, with no attempt at concealment, and indifferent to the presence of eyewitnesses, he entered the hotel and gunned down his victim. He went outside, reloaded his gun and returned to fire another shot to make sure that he was dead. All this time he acted with apparent coolness, calmness and deliberation. There was nothing in his behaviour to suggest that he appreciated that what he was doing was wrong. He does not appear at any time to have been aware of his awful predicament. When told he had killed a man he replied with apparent indifference, "What of it?" And outside the hotel he appeared to be quite unconcerned of the enormity of his act, or of its probable consequences for himself. He just drove away to attend to what were, in relation to what he had done, the unimportant affairs of his business.

In regard to sub para (a) of para 2.1.1 of the notice of motion it is not clear to me why what is seen to be

Shapiro's contributing fault should affect the weight to be given to the fact that at the time of the act he had diminished criminal responsibility. Nor is it clear why the fact (if it be a fact) set out in sub para (b) is relevant in this connection.

In regard to paras 2.1.3 and 2.1.5 there can be no doubt that the community must view this crime with abhorrence. I do not believe, however, that right-thinking men would demand condign punishment in a case where the accused acted with substantially diminished criminal responsibility. Nor do I think that there is substance in the point made in para 2.1.4 that the trial judge ignored or underemphasized the increase in cases of this nature, or overemphasized emotional instability as a justification for or in mitigation of unacceptable conduct. Each case must be judged on its own facts, and it would, I think, be wrong in principle to impose a heavier sentence in this case in an attempt to stem the flow of cases in which emotional

instability is relied on by the defence.

In regard to para 2.1.6 I do not agree that the learned trial judge ignored or minimized the importance of retribution and deterrence as objects of punishment. I do not think that in the light of the finding of diminished responsibility this case is one which is clamant for retribution. It does not appear from the evidence that Shapiro is likely to again commit a violent crime. He has no previous convictions relevant to show propensity for violence. It does not seem that he is a danger to society which would call for his separation from the community for a long time. In regard to the deterrence of others, it does not seem to me that in the present case a long prison sentence is called for. The concatenation of circumstances was highly unusual and is unlikely to occur again.

Finally, in regard to para 2.2, I do not agree that the sentence induces a feeling of shock. Although it may be considered to be lenient, it was not in my view "disturbingly

inappropriate" (S v Rabie (supra)); "wholly inadequate"

(S v Anderson 1964(3) SA 494 (A) at 496 H); or "so inappropriately lenient" (S v Human 1979(3) SA 331 (E) at 338 A-B) that the inference should be drawn that the trial judge did not properly and judicially exercise his discretion.

Mr Marais submitted that in the event of the appeal being dismissed, an order should be made in terms of s. 316 B (3) that the State pay the accused's costs. Since Mr Marais appeared pro deo, the accused was not put to any expense in regard to counsel's fees in this court. But there may be other costs and I think that the accused is entitled to the order sought.

The appeal is dismissed. It is ordered that the State pay the accused the whole of the costs to which the accused may have been put in opposing the appeal and the

application for leave to appeal in the court a quo, taxed according to the scale in civil cases of this court.

H C NICHOLAS, AJA

VAN HEERDEN, JA)
SMALBERGER, JA) concur