

REPUBLIC OF SOUTH AFRICA



OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBUR

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

DATE

SIGNATURE

CASE NUMBER: SS 308/07

In the matter of

THE STATE

V

SEROBA FRANS

ACCUSED

JUDGMENT

DOSIO AJ:

INTRODUCTION

- [1] The accused is arraigned on three counts. The first two counts are of murder read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("Criminal Law Amendment Act") in that the State alleges that in respect to count one he shot and killed Refilwe Martha Seroba on the 20th of January 2007 in Buccluech in the district of

12Johannesburg, and in respect to count two that he shot and killed Mohami Sarah Makwati also on the 20th of January 2007 in Braamfontein, in the district of Johannesburg. The third count is a charge of pointing a firearm at another person to wit Nonceba Margaret Mandindi.

[2] The State is represented by Advocate Makoko and the accused is represented by Advocate van der Merwe.

[3] The assessor in this case is Norman Mtsweni.

[4] At the inception of the trial the accused was informed of the minimum prescribed sentence of life imprisonment in respect to count 1 and count 2. He understood.

[5] The accused pleaded not guilty to all three counts.

[6] The plea explanation given by the Defence Counsel was; that the accused *“would not accept the wrongfulness of his actions and as he was not criminally responsible at the time of the incidents as he suffered from a mental illness and defect which caused him to be incapable of acting in accordance with the appreciation of the rightful or wrongful nature of his actions.”* It was stated further that *“the day of the incident he and his deceased wife were on their way and were preparing to go and pay for their daughter’s school fees. He went to the shop to buy bread. Upon his return when he was back in the house he experienced a sensation that made him feel huge, as huge as a room. Around him everything was black. He felt as if he was being lifted up to the roof. The blackness earlier referred to continued and he then felt as if he was falling down to the ground. He came to his senses in the police cells.”* The accused confirmed this plea explanation.

[7] From the reports handed up marked “E”, “H” and “J”, it was the unanimous finding of all nine (9) psychiatrists, six (6) from Sterkfontein and three (3) from Weskoppies, that the accused was fit to stand trial. The court confirms this finding. It is clear to this court that the accused had the ability to understand the proceedings right through the trial and he was able to give proper instructions to his legal representative.

- [8] In the address before judgment, the Defence Counsel confirmed that the defence raised by the accused was one of pathological incapacity and that this court should proceed in terms of section 78 (6) of the Criminal Procedure Act 51 of 1977 (“The Criminal Procedure Act”) and find the accused not guilty and detain him in psychiatric hospital pending the decision of a judge in chambers.
- [9] The issue in this matter is whether the accused at the time of the offence suffered from a mental illness or defect that made him incapable of appreciating the wrongfulness of his actions, and of acting in accordance with an appreciation of the wrongfulness of his actions.
- [10] Certain formal admissions were made by the Defence Counsel on behalf of the accused in terms of section 220 of the Criminal Procedure Act. The admissions were as follows;
- i. That the deceased on count one is Refilwe Martha Seroba and the deceased on count two is Mohami Sarah Makwati and that they both died on the 20th of January 2007.
 - ii. That the bodies of both deceased did not sustain any further injuries from the time the wounds were inflicted, until the post mortem examinations were conducted.
 - iii. That Doctor AnneMarie Louise Mattheus conducted the post-mortem in respect to Refilwe Martha Seroba on the 22nd of January 2007 and that the findings in Exhibit “B” are correct.
 - iv. That Doctor Shirley Faith Angela Portia Moeng conducted the post-mortem on the deceased Mohami Sarah Makwati on the 22nd of January 2007 and that the recorded findings in Exhibit “C” are correct.
 - v. That the photographs contained in the photo album compiled by Inspector Mloi and Captain Shabalala are photographs of the crime scenes mentioned in count 1 and count 2 respectfully. These were handed in marked as exhibit “D1” and “D2” respectively.
- [11] The State Advocate informed this court that when the matter was initially placed on the court roll in 2007, the accused was sent for observation to Sterkfontein. The findings of Doctor Kalaba, Doctor Fine and Doctor Johnson who examined him 2007 were incorporated in exhibit “E”. The State informed the court that subsequent to this, the accused brought an application to go to a psychiatrist of his own choice. This

psychiatrist, who is Doctor Ulyyatt, recorded her findings in exhibit "F". The matter was then set down for hearing in June 2010. The State informed this court that Doctor Ulyyatt and Doctor Kalaba then compiled a joint minute which was marked as exhibit "G". The matter was set down for trial, however due to the fact that in this joint minute Doctor Kalaba deviated from her findings incorporated in exhibit "E", the State requested that the accused be sent again to Sterkfontein for a further evaluation. A further report was compiled in 2011 by the psychiatrists at Sterkfontein, namely, Doctor Pak, Doctor Raman and Doctor Subramaney marked as exhibit "H". The matter was once again set down for trial. Due to the fact that Doctor Ulyyatt had emigrated to Canada, the accused requested to see another psychiatrist of his own choice. This request was granted and he was evaluated by Doctor J.P Roux who recorded his findings in Exhibit "I". Subsequent to this report, Judge Bam ordered that the accused be sent again to Weskoppies for another report to be compiled. A further report was compiled in 2015 by the psychiatrists at Weskoppies, namely Professor De Wet, Professor Pretorius and Professor Roos marked as exhibit "J".

- [12] The Defence Counsel admitted the contents of the exhibits "E" to "J" as formal admissions in terms of section 220 of the Criminal Procedure Act and the State confirmed that these various exhibits would be handed in by agreement.
- [13] The State also handed in ballistic reports marked as exhibits "N", "O", "P" and "Q" respectively, which were in compliance with the provisions of section 212 of the Criminal Procedure Act. Exhibit "N" is an affidavit of Inspector Cornelius Johannes Janse Van Renseburg which states that the 9mm Makarov Calibre Norinco Model 59 Semi-automatic pistol which was handed to him in respect to Sandton CAS 710/01/2007 contained one (1) magazine. He was also handed four (4) 9 X 18 mm calibre cartridges and one (1) 9 X 18mm calibre fired cartridge which had been fired from this pistol. Exhibit "O" is an affidavit of Sergeant Colbert Eleck Siwela stating that he received two (2) 9 X 18 mm calibre fired cartridge cases and one (1) 9 mm calibre fired bullet on "Hillbrow CAS 1145/01/2007". He was unable to say whether the various fired cartridges were fired from the same firearm. Exhibit "P" is an affidavit of Cornelius Johannes Janse Van Rensburg stating that he received one (1) 9mm calibre fired bullet in respect to Sandton CAS 710/01/2007 and one (1) 9mm calibre fired test bullet. Both these bullets had been fired from the same firearm. Exhibit "Q" is an affidavit of

Zacharia Molefe Makola stating that the two 9mm calibre fired bullets that were handed to him were fired from the same firearm.

- [14] During the trial the statement of Thabiso Seroba was marked as exhibit “K”, the statement of Morwa Mary Makwati was marked as exhibit “L” and the statement of Mosethle Makwati was marked as exhibit “M”.

THE EVIDENCE

- [15] The State called the following witnesses, namely; Lethabo Seroba, Thabiso Seroba, Richard Seroba, Morwa Makwati, Mosethle Makwati, Captain Moeti Monei, and Professor Paul De Wet. The defence called Doctor Kalaba, the accused and Doctor Bramdev.
- [16] Lethabo Seroba, who is the son of the accused, testified that on the day of this incident he was playing soccer with his twin brother outside their house when he heard weird noises emanating from the house. His father’s voice was the dominant voice in the house. Whilst he and his brother were contemplating what to do, their father came out of the house and drove and dropped them off at their grandmother’s house in Soweto. That was the last time he saw his mother who is the deceased in respect to count 1.
- [17] This witness impressed this court. During cross-examination he stated that he had never observed tension between his father and his mother, yet on the 20th of January 2007 he did hear there was tension between his mother and father, however he could not hear what they were saying to each other. It was the first time he had heard his father speaking in this way. The weird noises referred to were the interactions between his father and mother.
- [18] Thabiso Seroba who is the twin brother of the previous witness, and who was also present, testified he heard a sound resembling a gun shot. Before he and his brother could run away and jump the wall, the accused came out of the house and drove them to their grandmothers house in Diepkloof, Soweto.

- [19] This witness impressed this court. Although he was initially uncertain about the statement he made and whether he in fact made it, his evidence corroborates that of his brother. Both state the accused came out of the house and told them he loved them. Although his statement marked exhibit "K" states that he could not remember what happened on this day, the court accepts his explanation that he did not tell the police anything on the day they took down the statement, as he was still under shock.
- [20] Richard Mokwati Seroba, who is the eldest brother to the accused, testified that on the 20th of January 2007, he received a call from his brother, Mike Seroba, who advised him that there was an issue at the accused's house and that he must go to Buccluech. On arrival at the accused's house he found the entrance door unlocked and the accused's car missing. He entered and in the lounge, lying on the stairs, he found the deceased on count one. She was fully clothed. He covered the deceased with a bed sheet. The accused then arrived, driving into the premises at a very high speed. The accused entered the house holding a firearm and passed him without speaking to him. The hand holding the firearm was moving from side to side and he was frenetically pacing in all directions. It appeared to this witness as if the accused's eyes were "popping out". The accused's mouth was open exposing his teeth. This witness had never seen the accused like that before. The accused opened a drawer, pulled out a plastic bag and inserted the firearm into it. This witness then ran outside and advised his other brother Mike Seroba and his mother what had happened.
- [21] The police then arrived accompanied by Moseitlhe Makwati who is the son of the deceased on count two. Moseitlhe Makwati jumped out of the car accusing Frans Seroba of killing his mother. The accused just remained silent.
- [22] Although this witness was very emotional whilst presenting his evidence and cried on several occasions, he still impressed this court. Although there were aspects of his evidence that he could not remember clearly, he still was able to chronologically place the sequence of the events on record, without there being any material contradictions. All that he added in the cross-examination is that the accused handed over the gun to the police after which he was handcuffed. By the time the accused handed his firearm over to the police he had calmed down and was no longer in a rage.

- [23] Morwa Mary Makwati testified that she is the daughter of Mohami Sarah Makwati, the deceased on count 2. In 2007 she was eighteen (18) years old. On the 20th of January 2007 she was in the reception of her mother's place of employment in Braamfontein. Together with her was her mom and another female patient waiting to see Doctor Viljoen. The accused, who is her uncle, then arrived. He was carrying a plastic bag with a brown A4 envelope in it. She was happy to see him and stood up and gave him a hug. He responded by hugging her back. It was not an affectionate hug as his posture was just "*straight*". The accused also greeted her mom who enquired how her sister was, namely the accused's wife, and the accused responded that she was fine and that she was at home doing the laundry. Her mother also asked the accused how his two boys were and he replied they were fine and were at home playing on the play station. Doctor Viljoen also greeted the accused and wished him a happy new year and they shook hands. The brother of this witness, namely, Mosele Makwati entered and said "hi" to the accused and the accused responded. After Doctor Viljoen stepped back into the consulting room the accused walked out of the reception area telling her mother that he was coming back.
- [24] A few seconds later the accused returned, walked past this witness, pulled out a firearm from a brown paper bag, pointed the gun at her mother and shot her. He did not say anything. This witness screamed and ran out followed by the other lady in the waiting room. As she went out she heard him shoot a second shot at her mom. This witness ran down to the ground floor where she later saw the accused leaving the building and he was moving his right thumb over his cell phone. The accused got into his car and drove away.
- [25] This witness impressed this court. She was consistent through her evidence and did not deviate from her evidence in chief. She stated she did not find it unusual to see the accused at her mom's work place as he would on occasion visit her mom.
- [26] Mosele Makwati who is the son of the deceased on count two, stated that on the 20th of January 2007, whilst seated in his mother's car in the parking lot of her work place, he noticed his uncle's car also parked there. He walked upstairs to his mom's office to greet him. The accused greeted him back and then this witness walked out. The accused appeared normal to him. This witness later heard two gun shots. He met the accused downstairs and he was standing at the exit holding a plastic bag which

contained a brown envelope. The accused was busy scrolling on his cell phone. This witness asked him what was going on he replied "*he doesn't know*" and shrugged his shoulders. This witness ran upstairs to his mom's workplace where he found his mother was shot. He did not know what to do, so he phoned his aunt, who is the deceased on count one, to take the kids out of the house. He could not get through to her and then he phoned the police. The police arrived quickly and he went with them to the accused's house in Buccluech.

[27] As soon as they arrived in Buccluech, the accused came out of the door of the house and the police asked this witness which one it was, and the accused without hesitation responded "it is me". The accused was remorseless. This witness used the term "*balayegile*" meaning that the accused "*knew what he was doing*". It was "*like he understood what he did, namely that he knew they are dead and he did that*". This witness stated it was as if "*he knew what he was doing, like they deserved it.*"

[28] The police asked the accused where the gun was and the accused replied it was upstairs. The police then went with him upstairs to get the gun. This witness later entered the house and he found his aunt at the bottom of the staircase covered with a blanket.

[29] This witness stated that he had a good relationship with the accused and recalled visiting his house on the 3rd of January 2007. On that day he accompanied his aunt to the shops to go and buy pap. His aunt seemed unusually sombre and on their way to the shops she advised him that she was able to go the shops because he was accompanying her. She told him she did not feel free anymore and that she was no longer happy in her marriage. She informed him that colleagues of hers had seen her being dropped off at work and then people were spying on her. The accused would on occasion randomly drop by her work at lunch time and stop his car outside her work. This witness was convinced that his aunt had discussed this state of affairs with his mother as well, as the two sisters were extremely close. The accused appeared normal on the 3rd of January 2007, however, when this witness uttered to his aunt that she looked like a 25 year old, the accused changed and was not happy to hear this.

[30] This witness did give lengthy explanations and a lot of detail which was not incorporated in his statement. However he did explain that his affidavit omitted this

detail as the policemen did not ask him to explain in detail. In addition the language difference may have attributed to the different versions. There were contradictions in his evidence in that he said initially the accused appeared normal and later he stated the accused was not acting normally. He did not impress the court as to his recollection of whether he was employed or not at the time this offence was committed, however, as regards the rest of his observations the court regards them to be honest and trustworthy observations.

[31] Captain Moeti Monei testified that in 2007 he was stationed at the Hillbrow Detective unit. On the 20th of January 2007 he attended a murder scene at a private clinic on the corner of Hospital and De Korte Street in Braamfontein where he found the deceased on count two. She had gun shot wounds. The deceased's son informed him that it was the accused who had shot his mother. Mosele Makwati directed him to Number 4A Terrilane in Buccleuch. On their arrival he introduced himself and produced his appointment certificate. Mosele Makwati pointed out the accused who responded by saying "*yes it is me*".

[32] The accused went into one of the rooms and came back with a plastic bag containing a Norinco firearm. The accused handed him the plastic bag and said "I shot my wife". This witness asked the accused for his firearm licence and the accused produced it from his wallet. The accused then directed him inside the house where the body of his wife was seen lying in the passage. She was covered with a duvet and there was a spent cartridge next to her. She had sustained a gun shot wound to her head. This witness then produced his appointment certificate for a second time and arrested the accused warning him of his rights. The accused appeared normal, he had no physical injuries.

[33] This witness impressed this court. It is clear that he was merely attending to his duties on the said day and there is no reason for this court to doubt the accuracy of his testimony.

[34] Professor De Wet, who is a registered specialist and forensic psychiatrist registered at the South African Health Council, testified that he has been practicing forensic psychiatry since 1995. He obtained a Bachelor's degree in dentistry in 1978 and a Bachelor's degree in Medicine specialising in Psychiatry in 1991. He also completed a

Masters in Medicine Psychiatry. He is currently the head of the Forensic Unit at Weskoppies Hospital in Pretoria.

- [35] He testified that he has been seeing patients referred in terms of section 77 of the Criminal Procedure Act for twenty (20) years and would examine on average between forty (40) to sixty (60) cases a year.
- [36] From the 30th of January 2015 until the 14th of March 2015 he observed the accused together with Professor Roos and Professor Pretorius. Their unanimous finding was that the accused was suffering from a major depressive disorder. They all agreed that the accused was capable of understanding the court proceedings and was able to contribute meaningfully to his defence. They all three found that at the time of the alleged offences, the psychiatric diagnosis of a major depressive disorder did not affect the accused's ability to distinguish between the rightful or wrongful nature of his deeds, however the major depressive disorder probably to a mild degree affected his ability to act in accordance with the said appreciation of the rightful or wrongful nature of his deeds. The effect would be that the accused's ability to move and think, use of memory, and reasoning would be impaired to a mild degree. However, the fact that he suffered from a major depressive disorder did not prevent him from being able to reason.
- [37] Professor De Wet and the other two psychiatrists did look into the allegations of the accused feeling huge and filling up the room and not remembering anything, however, due to the short nature of this episode, they did not find that this description fitted any known pathology. In fact the accused's ability to reason, recall and to act with memory was intact. The black-out or blackness complained of by the accused was not a term for loss of memory. This witness stated that memory is needed for daily function, and because the accused was able to answer questions posed to him on the day demonstrates there was some memory. Professor De Wet stated that memory is a symptom of a person's personal experiences and is not something that impairs a persons ability to differentiate between right and wrong. If the accused lacked memory on the day he would not have been able to find his car keys or the firearm. The fact that the accused drove from Buccluech to Diepkloof then to Braamfontein and then back to Buccluech demonstrates that his faculties were intact to complete these actions.

- [38] The fact that the accused did not remember the incident may be as a result of the accused not wanting to remember and suppressing that memory. The suppression of memory did not mean the memory did not exist. Professor De Wet stated that from a psychiatric basis, there was no indication why he could not remember. If there was subjective suppression of memory, it was psychological in nature and not an illness. Accordingly the accused should have been able to remember.
- [39] The accused at no stage informed him that he was obsessed with his wife, or that he experienced the sensation of a worm in his stomach. In fact, the accused denied ever being jealous of his wife. All that was reported to him was that when the accused was at work he would try to get back home as he would feel more comfortable being close to his wife. There were no suggestions made that he suspected infidelity.
- [40] All that came out of his sessions with the accused is that the accused was mostly depressed and did not have energy. The mood disorder was described to him as starting in 2003 and 2004 when the accused's business suffered and he started feeling progressively despondent and depressed.
- [41] Professor De Wet stated that the major depressive disorder is a mood disorder, which is a psychiatric disorder affecting a person's mood, leading to symptoms of sadness, hopelessness, loss of pleasure, impairment in daily activities, suicidal tendencies and either hypersomnia or insomnia. Such a person would also experience feelings of lack of energy and fatigue. Depending on the degree it could impair the person's social and occupational functions.
- [42] This witness impressed this court. During cross-examination this witness did not contradict himself. He was highly consistent and answered his questions continually referring back to what he had observed in respect to the accused. He stated that he had read the reports of Doctor Bramdev which indicated that the accused suffered from a delusional disorder. He stated that a person suffering from a delusional disorder would have had a fixed belief, usually a theme, that cannot be changed no matter what help the patient received. An example given was the theme of jealousy and that a partner or spouse is not faithful. This delusional belief would be a chronic on-going disorder that would impair a person's function. A person suffering from a delusion of

jealousy would start checking the partner's underwear and would follow a partner around. The symptom of the belief and the reaction normally would form the syndrome described as the delusional disorder. If a patient had feelings of grandiosity, believing that he was Jesus or a prophet, one would not easily change that belief.

- [43] Professor De Wet stated that the illness of delusional behaviour of a fixed belief would not impair an ability to differentiate between right and wrong, however, if the illness was of such a degree and depth that it did impair a person's ability to make a proper distinction, then yes, the illness could affect a person's ability to distinguish between right and wrong. However, after having considered the diagnosis of Doctor Ulliyatt and Doctor Roux, and all previous psychiatric reports, this witness stated that he and his other two colleagues, did not find any support for a diagnosis of a delusional disorder, bipolar disorder or a disassociated identity disorder. The only consistent findings they could get from all the reports was that of a mood disorder spectrum which is a known pathological psychiatric disorder of knowledge.
- [44] Professor De Wet did find that the accused was histrionic and dramatic in the way he expressed his feelings. All the other psychometry related to the dramatization and histrionicity.
- [45] Professor De Wet stated that the accused would have had diminished responsibility which would be the pathological status of the individual. Although the major depressive disorder was pathological, the illness did not take away the accused's ability to distinguish between right and wrong and the accused had the capacity and ability to act with the knowledge to differentiate between right and wrong and also had an appreciation of the wrongfulness of his act. The appreciation of the wrongfulness was however to a mild degree affected by the illness.
- [46] The State closed its case and the accused elected not to testify but rather to call a witness namely, Doctor Kalaba.
- [47] The court warned the accused in terms of the provisions of section 151 (1) of the Criminal Procedure Act that if he decided to testify after Doctor Kalaba the court could make an inference that he was tailoring his evidence. After the court explained this the accused elected to testify. Due to financial constraints in obtaining the presence of

Doctor Kalaba who was already in court, and ready to testify, Counsel for the Defence requested this court to allow the Doctor to present her evidence before that of the accused.

[48] Doctor Kalaba testified that she is a qualified doctor who specialised as a general psychiatrist, not as a forensic psychiatrist. In 2007 she, together with Doctor Fine and Doctor Johnson examined the accused at Sterkfontein. Mr Seroba did not co-operate and never informed her that he had killed his wife or sister-in-law. He didn't talk and was mute most of the time just staring at the ceiling or looking around. He was not showing his real symptoms and was attempting to fake and malingering some psychiatric symptoms to make others believe he was psychiatrically ill. He never complained about experiencing a blackness. She did not notice any delusional disorder or psychotic behaviour in 2007. She then went into private practice.

[49] In 2010 she was approached by Doctor Ulyatt, who presented her with reports from Doctor Bramdev and Doctor Theuri dated 2005. Although they differed in the diagnosis, they both agreed the accused was paranoid and suffering from a delusional disorder. She did not have these reports when she evaluated the accused at Sterkfontein in 2007. Although she never consulted with the accused in 2010, she still completed a joint minute with Doctor Ulyatt stating that the accused had an underlying psychotic condition, which was the paranoia around the infidelity of the accused's wife. She believed that she and the other two psychiatrists at Sterkfontein in 2007 had maybe missed something. Although she expressed a different opinion in the joint minute marked exhibit "G", she believed there was no mistake in her previous report marked exhibit "E".

[50] She stated that it was difficult for her to say how much the psychotic condition contributed to the accused's mind when he killed the two deceased. However, a person suffering from paranoia, would be able to differentiate between right and wrong, but would not be able to act in accordance with this appreciation due to the clouding. She informed this court that a state of psychosis is not permanent. It fluctuates. She stated she could not say whether at the time of the offence the accused had an underlying psychotic problem, she stated probably he was psychotic, but could still act with this psychotic problem.

- [51] There were some questions which the court had to ask for the purposes of clarity.
- [52] The court asked her if the accused had been suffering from a delusional disorder in 2005 when Doctor Bramdev treated him, would it have vanished between 2005 and 2007 when she examined him at Sterkfontein, to which she replied, it was unlikely it would have vanished and would still be there. This corroborates the evidence of Professor De Wet.
- [53] The court asked her whether the accused could differentiate between right and wrong, due to the evidence stating that he handed his firearm and firearm license to the police, and drove from Buccluech to Soweto then to Braamfontein and then to Buccluech. Doctor Kalaba replied that she believed that at the time of the commission of the offence all his actions were “*goal directed*”. In order to drive she stated one needs mental capacity to attend to, to recognize, to plan, and to organize. She stated that although part of his mind was clouded by a delusional belief regarding the infidelity of his wife, he could act in accordance with an appreciation between right and wrong. She stated that even if someone is paranoid, he can still function perfectly as the paranoia will not completely cloud one’s functioning or one’s ability to think.
- [54] This court asked Doctor Kalaba why the accused explained to both Doctor Ulliyatt and Doctor Roux that he was having hallucinations and later denied having hallucinations. To this Doctor Kalaba replied that the accused was obviously not consistent in his reporting of his symptoms. When asked by the court what the cause of this inconsistency could be, Doctor Kalaba replied that it could be secondary gain, in other words, “he was making up symptoms in order to make his illness more severe”. She also added that a person who suffered from a delusional disorder would not suffer from hallucinations at all, as hallucinations is not a common symptom of a delusional disorder.
- [55] The court asked Doctor Kalaba how a patient would react if he was experiencing strong feelings of paranoia but was not on medication. Doctor Kalaba answered that such a patient would have continuous thoughts of the paranoia and the symptoms would be visible. Such a patient would not be able to fake these symptoms and would not be able to malingering.

- [56] The court asked Doctor Kalaba if the accused was psychotic in 2007, to which she replied that it would be difficult to say many years later if he was psychotic at the time he committed the offence, however she was adamant that he was able to appreciate the wrongfulness of his actions at the time he committed the acts.
- [57] There were certain aspects of her evidence that corroborated the evidence of Professor De Wet, however, in respect to certain matters, she did not impress the court. These matters are;
- i. When confronted with the fact that nine (9) psychiatrists, including herself, who examined the accused at Sterkfontein or Weskoppies found no psychosis, she merely stated none of the psychiatrists said he was not psychotic. The two reports of Sterkfontein and the one report of Weskoppies clearly would have mentioned a delusional order if there was one. She could not substantiate why three (3) psychiatrists, namely, Doctor Pak, Doctor Raman, and Doctor Subramaney at Sterkfontein in 2011 and three (3) psychiatrists, namely, Professor De Wet, Professor Pretorius and Professor Roos at Weskoppies in 2015 made a mistake in misdiagnosing the accused.
 - ii. The six psychiatrists mentioned previously, observed the accused, unlike Doctor Kalaba, who merely compiled a joint minute in 2010 basing her evidence on the observations of others and not herself.
 - iii. Doctor Kalaba compiled her joint minute based on the report compiled by Doctor Ulyatt which in itself is problematic as the accused initially reported to Doctor Ulyatt that he was having hallucinations and that his wife was suspected of infidelity, and later changed his version stating that he was not having hallucinations and that his wife was not unfaithful.
- [58] The accused testified that his mental problems started in 2004 when he started experiencing the sensation of something crawling on his head. Although he did not see anything crawling on his head, it continued for days. He went to Doctor Viljoen who gave him treatment used for psychiatric patients. His condition did not improve. He started hearing voices of people talking around him and he feared these voices and even his own shadow. He would hear a train coming into the yard, followed by footsteps of people getting off the train. He would be attacked by a black spirit at night telling him he had no reason to live. He would start crying all night and would look for a rope to hang himself. He developed an urge to sit in the field and bathe in the river

believing the illness would disappear but it did not. Although he went to a witch doctor who gave him muti, his situation did not improve. He went to see Doctor Mithal who referred him to Doctor Bramdev, who in turn admitted him to the Rand Clinic for two weeks in 2005.

[59] The accused stated he never suspected his wife of being unfaithful and never restricted her movements. Instead he stated that between 2005 and 2007 his relationship with his wife was good and the marriage was perfect. He did not recall telling Doctor Ulyatt that his wife was using muti on him. However when asked by the Defence Counsel whether he ever suspected his wife was planning to harm him, the accused said he feared her like all other people, even a six month old baby he had seen in a shop. He did not fear his sister-in-law as she was not nearby.

[60] He stated that prior to the 20th of January 2007 nothing extraordinary happened between him, his wife or sister-in-law. The week prior they had discussed that Saturday morning they would pay for his daughter's tuition fees at Forbes in Randburg. The morning of the 20th of January he realised there was no bread in the house. Whilst his wife bathed he went to the Spar to buy bread. On returning he entered the kitchen and somewhere in the house he heard a strange thing coming into him as if possessing him. Within seconds he felt as huge as the house itself. Strange things were happening to him very fast. He felt a sensation of moving up and hitting the roof with his head and then the sensation of falling and then the blackness consumed him. That is all he can remember. He had no memory of what happened that morning regarding the shooting. The blackness lifted at the Sandton Police Station. He did not know what crime he had committed. His family eventually told him that he had killed his wife and sister-in-law.

[61] Sometime later he went to a Sangoma and prophets to find out why he had shot his family. He was told it was a calling from his ancestors. He then went to a Spiritual Healing Institute in 2007 for two years. During this time there, all the symptoms fell away one by one.

[62] This court was not impressed with the evidence of the accused.

[63] There were many contradictions in his evidence.

- i. In his evidence in chief he stated that he would often go to the river and bathe because the water was therapeutic with healing powers, yet when he had the opportunity to bathe at the seaside in 2006 he did not go into the sea. In fact, his family had to push him into the water.
- ii. Although the accused described in detail the auditory hallucination of the train, and being afraid of a six (6) month year old baby, both these descriptions were absent in the reports of both Doctor Ulyatt and Doctor Roux.
- iii. The version of the accused not being afraid of the people at the sea whom he did not know, but being afraid of a six (6) month year old baby, who was also unknown to him is contradictory in nature.
- iv. The accused gave a detailed account of how his hands were not closing and that he could not bath himself, yet during cross-examination he replied to the State Advocate that even during this state he went to work. This is contradictory. Surely if he was in such a state he could also not function at work.
- v. He stated he feared his wife like all other people, yet at the same time he needed to be very close to her as this would cause his pain to subside. This is contradictory.

[64] The fact that the accused says that he can't remember having a bail application this court rejects as false. When bail was refused and he took it on appeal to the High Court, clearly he must have given his legal representative instructions.

[65] The fact that he could not recall much of his first visit to Sterkfontein, the court also rejects that as false. He went to Sterkfontein many months after bail was granted. He knew what his defence was, yet he remained silent when the psychiatrists interviewed him in 2007. His election to remain silent was a deliberate attempt on the part of the accused to mangle for purposes of secondary gain.

[66] The final witness that testified for the defence was Doctor Shushika Bramdev. She is a psychiatrist who obtained a medical degree and a Masters in Psychiatry. She had eighteen (18) years experience as a psychiatrist. Doctor Mithal referred the accused to her in 2005. Doctor Mithal reported to her that the accused was presenting signs of extreme anxiety and distress. His depression was caused by a belief he had that his in-laws were out to get him. He was also extremely jealous of his wife. She saw him the first time on the 28th of November 2005 and admitted him in 2005 to the Rand Clinic. He was admitted for a psychotic episode, exhibiting signs of paranoia and jealousy

towards his wife. He was convinced his wife was cheating on him and he was aggressive towards his wife. He had even physically abused her. She saw him again on the 8th of December 2005, and the 25th of October 2006. He had stopped his medication and was showing signs of anxiety, depression, paranoia and aggression. Dr Bramdev stated that the psychosis would fluctuate and ameliorate as a result of the treatment administered. She saw him the last time on the 6th of July 2007. On this occasion he told her he was seeing things, not sleeping well and had poor concentration and was suicidal. She referred him to the Helen Josef Hospital. She believed that in 2005 and 2006 he was not in touch with reality. In 2007 when she saw him he told her he had had an out of body experience but could not recall any of his actions. This witness believed the accused was not able to act with a proper knowledge between right and wrong. Doctor Bramdev stated that although there was a term like post traumatic amnesia, she agreed that an accused could himself voluntarily suppress such a memory if he knew that his actions were wrong.

[67] This witness did not impress the court.

Firstly she stated the accused was not in touch with reality in 2005 and 2006 when she saw him, yet it is common cause that he was at work. She herself states when she saw him he was functional. Although she stated that a person who suffered from epilepsy could experience amnesia, she admitted the accused did not suffer from epilepsy

Secondly, when the court asked her if a person who was unable to act with a proper knowledge between right and wrong could differentiate between who he wanted to kill or not, Doctor Bramdev answered that such a person would experience generalised aggression, and would have been unable to exercise self-control. Such a person would probably attack anyone in front of him.

LEGAL PRINCIPLES

[68] Section 78(1) of the Criminal Procedure Act 51 of 1977 states that;

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

- (a) of appreciating the wrongfulness of his or her act or omission; or
 (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission;
 shall not be criminally responsible for such act or omission.”

Pathological Incapacity

[69] The learned author, Jonathan Burchell, in *South African Criminal Law and Procedure*, Volume 1, *General Principles of Criminal Law*, Fourth Edition, at page 284 states that;

“The test for pathological incapacity is... whether an accused at the time of the offence suffered from a mental illness or defect that deprived him or her of capacity for insight or self-control...what constitutes a mental illness or defect for purposes of the defence of pathological incapacity is essentially a question of law and evidence, not only psychiatric classification.”

[70] The learned author Jonathan Burchell at page 284 stated that even when the clinical diagnosis states that diminished control over one’s behaviour is the feature of the disorder, having the diagnosis itself does not demonstrate that a particular individual was unable to control his behaviour at a particular time.

[71] The learned author Jonathan Burchell at page 288, footnote 51 states that;

“...amnesia cannot constitute a defence of insanity, since a mere failure to recall an unlawful act is no ground for holding the actor not responsible for the act.”

And further at page 291;

“Amnesia...will not necessarily amount to pathological incapacity in the criminal law, since a mere failure to recall an unlawful act or consequence is not, on its own, sufficient to exclude criminal liability”.

[72] The learned author Jonathan Burchell at page 285 states that;

“...a mental illness that affects the cognitive or conative capacities so as to deprive the victim of insight into the wrongfulness of his conduct or of capacity to control his actions according to that insight, constitutes ‘insanity’ or ‘pathological incapacity’. Mental illness that ...does not deprive the sufferer of insight or self-control, does not come within the concept of insanity.”

[73] If an accused because of mental illness or defect does not know that his conduct is either legally or morally wrong, then the defence of insanity would be available.

[74] A mental illness may not deprive a person of the capacity to distinguish between right and wrong, but may have the effect of depriving the person of the ability to control conduct according to this appreciation. The general effect of section 78(1)(b) of the Criminal Procedure Act is thus that, even although an accused is capable of appreciating the wrongfulness of the act, that person is still not criminally responsible if at the time of its commission he suffered from mental illness or mental defect which made the person incapable of acting in accordance with such appreciation, in other words he lacked the capacity for self-control.

[75] The learned author Professor Snyman in *Criminal Law* 4 ed para 12 at page 174 states that;

“If it appears that, despite his criminal responsibility,... [an accused]...finds it more difficult than a normal person to act in accordance with his appreciation of right and wrong, because his ability to resist temptation is less than that of a normal person, he must be convicted of the crime (assuming that the other requirements for liability are also met), but these psychological factors may be taken into account and may then warrant the imposition of a less severe punishment.” [my emphasis]

[76] In deciding whether a finding of diminished responsibility is justified, the court will be guided by the specialist medical evidence, but will also take all the other evidence into account As stated by the learned Nugent JA in the case of *Director of Public Prosecution, Transvaal v Venter* 2009 (1) SACR 165 (SCA) at paragraph [67];

“While the insights of psychiatrists or psychologists might at times be helpful they are not indispensable in that enquiry. For ultimately a court must reach its own conclusion on that issue on an assessment of all the evidence.”

[77] In *S v Mnisi* 2009 (2) SACR 227 (SCA), the learned Boruchowitz AJA affirmed that diminished responsibility is not a defence but is relevant to the question of sentence.

[78] In the case of *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) the court stated that when there are differing expert reports the court must evaluate each finding in order to determine to what extent the varying opinions advanced are founded on logical reasoning.

At paragraph [39] the court stated;

“...it would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail...”

EVALUATION

[79] The proper approach in a criminal case is to consider the totality of the evidence, that is, to examine the nature of the State case, the nature of the defence case, the probabilities emerging from the case as a whole, the credibility of all the witnesses in the case, including the defence witnesses, and then to ask one self, at the end of all this, whether the guilt of the accused has been established beyond a reasonable doubt.ⁱ

[80] The accused pleaded that he did not accept the wrongfulness of his actions as he was not criminally responsible at the time, as he was suffering from a mental illness and defect which caused him to be incapable of acting in accordance with the appreciation of the rightful or wrongful nature of his actions.

[81] The court heard the evidence of three psychiatrists who testified in respect to the accused’s ability to appreciate the wrongfulness of his actions and whether he was able to act in accordance with an appreciation of the wrongfulness of his actions.

[82] Professor De Wet and Doctor Kalaba both agreed that the accused was able to appreciate the wrongfulness of his actions. Professor De Wet stated the accused was also able to act in accordance with such appreciation of the wrongfulness of his actions, whereas Doctor Kalaba stated if the accused on the day of the incident was suffering from a delusional disorder then he would not have been able to appreciate the wrongfulness of his actions. Doctor Bramdev believed that the accused was not able to act with a proper appreciation of the wrongfulness of his actions.

[83] In the light of the case of *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another, supra*, this court needs to assess whether the varying opinions advanced are founded on logical reasoning. If the expert opinion cannot logically be supported then it must fail.

[84] The court has a problem with the diagnosis of Doctor Kalaba in 2010 that the accused was probably psychotic at the time he committed these offences. As stated earlier, she never consulted with the accused in 2010 and she based her finding on the report of Doctor Ulliyatt and Doctor Roux. Due to the fact that these reports were handed in as formal admissions by agreement between the State and the Defence, the court did consider them, however, neither Doctor Ulliyatt or Doctor Roux testified. Accordingly, neither could explain the inconsistencies of the accused pertaining to the hallucinations and infidelity of his wife. It is clear from the report of Doctor Ulliyatt that on the 29th of May 2009, Doctor Theuri referred the accused to the Johannesburg Hospital and on assessment of the Johannesburg Hospital he was not deemed to be psychotic. This court would have needed some explanation from Doctor Ulliyatt in this regard. Doctor Kalaba herself agreed that the accused may also not have been psychotic in 2007. Although her joint minute in 2010 states that the accused was probably psychotic, she at the same time stated that the report she made with the other two psychiatrists at Sterkfontein in 2007 was not a mistake. She could also not answer the State Advocate what she had meant by the accused's wife's infidelity in her joint minute, as she herself had not seen the accused in 2010.

[85] In respect to Doctor Bramdev, the court has already mentioned at paragraph [67] *supra* why the court was not impressed with her evidence. Although she stated that she

diagnosed the accused as being Schizophrenic, she could not explain in detail how she reached this conclusion.

- [86] Professor De Wet on the other hand did not contradict himself and his findings of major depression are supported by Doctor Bramdev and the other psychiatrists at Sterkfontein and Weskoppies. His observations of the accused suffering from a mood disorder, causing feelings of sadness, hopelessness, impairment of daily activities, feelings of lack of energy and fatigue, are also supported in the reports of Doctor Ulyatt and Doctor Roux.
- [87] In Sterkfontein and Weskoppies the accused was kept for 30 days at a time in a controlled environment as opposed to random consultations with the other private psychiatrists that he consulted. The fact that the three (3) psychiatrists in 2011 found a major depressive disorder, currently in remission, as compared to the three (3) psychiatrists in 2015 who found that the accused was suffering from a major depressive disorder, this court does not find this difference to be a problem. Doctor Kalaba herself stated that a depressive disorder over a period of time can change.
- [88] Due to the fact that neither Professor De Wet nor the other eight psychiatrists who observed the accused, at Sterkfontein in 2007 and 2011 and in Weskoppies in 2015, detected any delusional disorder or paranoia, the court is inclined to follow the findings of Professor De Wet rather than the findings of Doctor Kalaba or Doctor Bramdev.
- [89] Professor De Wet stated that if the accused was suffering from a delusional disorder, the theme of jealousy would have been on-going. The fact that the accused never told him anything about jealousy clearly demonstrates it was not on-going. In addition if it was on-going, the accused would have confirmed it here in court, yet the accused denied he ever harboured any feelings of jealousy towards his wife. Professor De Wet stated that on the day of the incident the accused would have had an appreciation of the wrongfulness of his actions and would have been able to act in accordance with such an appreciation of wrongfulness.
- [90] This court agrees with his finding when one considers the actions of the accused on the 20th of January 2007, namely,

Prior to shooting the first deceased the evidence shows there was an argument between the accused and his wife. After shooting the deceased, the accused did not wander around aimlessly holding the firearm in his hands, instead he concealed the firearm, approached his sons and told them he loved them very much. He found his car keys and drove his sons to his mother's home in Diepkloof in Soweto and dropped them off. He then drove directly to Braamfontein to kill his sister-in-law. He remembered the address of his mother's house and also the address and the floor where his sister-in-law worked. When he entered Doctor Viljoen's consulting rooms, he was not dazed or walking around aimlessly, instead he greeted his niece, hugged her, greeted his sister-in-law and even spoke to her answering that his wife was fine and was at home doing the laundry, and that his sons were at home enjoying the "play station". He appeared fine to his niece, except for the hug being a little "straight". When his nephew entered and greeted him, he replied. When the accused walked out of the consulting rooms his sister-in-law asked him where he was going and he replied "I'm coming back". Nothing seemed strange to anyone at this stage. After the shooting his nephew asked him if he had heard gun shots and the accused responded by saying he didn't know and shrugged his shoulders. The accused was scrolling on his phone as he walked to his car. He knew exactly where he had parked his car. Someone who was deluded or confused might have wandered around aimlessly. Not this accused. He got into his car and drove off. When he arrived at his home he immediately went and put the firearm in a drawer. When the police arrived, they asked his nephew who was the man shooting and the accused responded "it is me". When the police asked him to hand over his firearm the accused did so without any resistance on his part, stating the firearm was upstairs. Captain Monei asked him for his firearm licence and the accused immediately took it out from his wallet. He was asked where the body of his wife was and the accused directed Captain Monei inside and told him he had shot his wife. The accused admitted after his arrest he did sign the warning statement.

[91] This court rejects the version of the accused that he had a blackout, and finds it not reasonably possibly true. In fact, the contrary is applicable. He knew where to find an unused firearm which he had bought in 1994 and never used. He knew how to load it. He had sufficient memory to do everything referred to in paragraph [90] *supra*. The accused's evidence of not knowing where the key to the container was, where he kept the firearm, or how much ammunition was in the firearm, is rejected by this court as false. The accused clearly had enough memory to find this gun and to load it.

- [92] Although the accused has made out to this court that he was possibly psychotic at the time of the commission of both murders, this court cannot agree. This court rejects the version of the accused of having hallucinations and an out of body experience on the 20th of January 2007 as false and not reasonably possibly true. The nine (9) psychiatrists who observed him at Sterkfontein and Weskoppies found no support to corroborate this version of the accused. Accordingly the defence of pathological incapacity is rejected by this court as false and not reasonably possibly true.
- [93] Even if the court is wrong in this respect, and the accused was suffering from a delusional disorder, the test for insanity still requires an enquiry into whether the mental illness had the effect of impairing the accused's capacity for insight into the wrongfulness of his act or the capacity to control his or her actions in accordance with this insight. From the observations of the State witnesses this court finds the accused's capacity for insight into the wrongfulness of his act or the capacity to control his actions in accordance with this insight was not impaired. He did have insight and self-control.
- [94] If he was unable to control his behaviour he would have shot his sons, his mother, his niece, his nephew, Doctor Viljoen, the lady in the waiting room, the security guard at the Braamfontein consulting room, the police and all the other family members present at his house. Yet he refrained from doing this. Captain Monei stated that it would take 45 minutes to drive from Buccluech to Diepkloof and about 15 to 20 minutes to drive from Braamfontein to Buccluech. It must have also taken the accused quite some time to drive from Diepkloof to Braamfontein. There was a considerable amount of time for the accused to control himself and to refrain from his actions. The accused must have been lucid enough to drive all these distances. Someone who was experiencing a blackout or amnesia would not know what they were doing. The time periods between each incident do not show a man who was impulsive. His actions and responses depict a man in touch with reality and who knew what he was doing. Had the accused still been suffering from the psychosis of being afraid of people, he would have shot randomly at people.
- [95] This court finds it highly probable that the accused was malingering when he was observed by the three State psychiatrists in 2007. He was not under medication in 2007 when he was admitted to Sterkfontein and if he was suffering from a delusional

disorder or a paranoia pertaining to his wife's infidelity, the psychiatrists would have noted it, as he would not have been able to control his paranoid thoughts.

- [96] It was eight months after the incident when he was referred to Sterkfontein in 2007 and the so-called "blackness" had lifted according to the accused. Therefore, by withholding the information that he had been prescribed the medication Ciprexia and Risperdal in 2006 demonstrates to this court that the accused was deliberately misleading the psychiatrists.
- [97] The court also rejects his version of fearing people as not reasonably possibly true and false. If he was afraid of people he would never have sat on a beach which was crowded.
- [98] The accused's version that his wife was having a bath prior to him killing her, is rejected by this court as false. The accused himself informed his sister-in-law that his wife was at home doing the laundry and this was confirmed by Richard Seroba who found ironing garments in the dining room. The accused's wife was also found fully clothed. She was not found in the bathroom where the accused allegedly had left her bathing prior to going to the Spar.
- [99] The accused's denial that his children were at home enjoying their play station is rejected as false. The court has borne in mind that the children said they were playing soccer outside, however, the photos marked Exhibit D 14 and 15 show there is a play station in the lounge. The accused's version that the children were asleep and not playing on the play station is rejected by this court as false. The children may have been playing on the play station when he went to the Spar. The report that the accused made to his sister-in-law that his wife was at home doing the laundry and that his children were enjoying their play station further demonstrates that the accused had sufficient memory that day. In addition, he knew which key on his bunch of many keys opened the box containing his insurances and the firearm licence. He knew where to point out the firearm and the body of his wife. The fact that he did not want to remember indicates to this court that he voluntarily suppressed a memory which was in fact intact.

- [100] The accused's version that he continually needed to be close to his wife is inconsistent with the rest of his evidence. He stated himself that on the day of the incident he was a few minutes away from his wife en route to the Spar when he experienced this overwhelming need to be close to her, yet when he returned he killed the biggest source of comfort to him. The absence of his wife after killing her, must surely have increased this sense of anxiety. Yet during cross-examination when he was asked about this separation after the death of his wife, the accused stated "I did not experience much after she was no longer around". Accordingly, this feeling that had plagued him for such a long time did not worsen. He had not yet attended the religious institute that completely healed him of his symptoms, accordingly, the accused should still have had strong feelings of needing to be close to her. When the State Advocate asked him if he did not experience the need to visit her graves site to obtain some comfort of being close to her, he answered that would be "Absurd". The court rejects this need to be close to his wife as false and as a mere fabrication to exculpate himself.
- [101] The defence has requested this court to bear in mind that the accused was not a violent man, and that his actions on the 20th of January were abnormal. This court would like to state that the actions of the accused was abnormal because he had committed two very serious offences and was aware of the consequences of his actions.
- [102] This court does not believe the accused played open cards with this court. From the evidence of his son, it is clear there was an exchange of words between himself and his wife prior to him shooting her. The accused flatly denied during his evidence in chief and during cross-examination that he was ever jealous of his wife. From the evidence of Doctor Bramdev, she confirmed the accused was jealous of his wife and that he had even physically abused her. Doctor Ulyatt's report marked exhibit "F" also confirms the accused was jealous of his wife, and suspected her of infidelity. Mosele Makwati also confirmed his aunt was no longer happy in her marriage.
- [103] The fact that the firearm was placed in a brown envelope and then inserted into a plastic bag shows that he was concealing the firearm in order to gain access into the consulting rooms in Braamfontein without being stopped by security. The hiding of the firearm after the commission of both offences and not reporting it to the police shows that he had an appreciation of the wrongfulness of the act. His admission to Captain

Monei that he had shot his wife, indicates to this court that the accused knew that his acts of shooting both his wife and sister-in law were legally and morally wrong. He had a proper insight into the nature of the acts.

[104] The evidence does not show that he lacked criminal responsibility, or that he was incapable of appreciating the wrongfulness of his acts or that he was unable to act in accordance with an appreciation of the wrongfulness of his acts.

[105] This court did consider the case of *S v Kavin* 1978 (2) (WLD) p731 which the Defence Counsel alluded to in his address. In that case an accused who suffered from depression was found not guilty of three murders due to the provisions of section 78 (1) (b) of the Criminal Procedure Act being invoked by the court. The major difference between that case and the case before this court is that the three psychiatrists from Weskoppies in the *Kavin* case *supra* unanimously found that the accused could not act in accordance with an appreciation of the wrongfulness of his act. In the case before this court the psychiatrists at Sterkfontein and Weskoppies reached a different finding stating that he could.

[106] This court accepts the evidence of Prof De Wet that the accused was able to appreciate the wrongfulness of his actions. This is corroborated by the other psychiatrists who made their findings in exhibits "E", "H" and "J".

[107] The manner in which the accused executed these killings indicates to this court that he had carefully planned his actions. The accused probably loaded the firearm with 8 (eight) bullets, because when the firearm was handed to the police for investigation it still had 4 (four) cartridges and it is common cause two bullets were fired at the scene in Buccluech and the other two were fired in Braamfontein. The accused knew very well how to load this firearm and had loaded it with enough bullets to ensure that he would kill his targets. The fact that four bullets remained in the magazine, once again shows that he was able to exercise self- control, and intended only to kill these two victims and no one else. From the accused's own version he loved his wife, sister-in-law and his sons. The fact that he did not kill any of the other family members that he also loved shows that the accused intended to kill only these two deceased.

- [108] He was still able to exercise self-control between the two incidents and had sufficient time to recollect and plan his next action. These crimes were not committed impulsively. He was calm enough to speak to his children after killing his wife. He drove calmly to his mother. He calmly greeted Dr Viljoen, his sister-in-law, his niece and nephew prior to shooting his sister-in-law and he calmly handed over the firearm to the police.
- [109] This court finds that the accused acted wilfully and with intention in the form of *dolus directus* to shoot his wife and sister-in-law. The fact that he suppressed this memory is most likely attributable to the fact that he could not come to terms with what he had done.
- [110] This court is satisfied that the State has proven beyond reasonable doubt that the accused had the intention to murder both deceased and that the accused's actions were unlawful and there were no grounds of justification for his actions.
- [111] The three psychiatrists at Weskoppies in 2015 state that due to the major depressive disorder the accused's ability to distinguish between rightful or wrongful behaviour was not affected, however, his ability to act in accordance with the said appreciation of the rightful and wrongful nature of his deeds was affected to a mild degree. This court accepts this finding.
- [112] No evidence was led in respect to count three (3).
- [113] In the result the following order is made
- i. The accused is guilty in respect to count one of murder
 - ii. The accused is guilty in respect to count two of murder.
 - iii. In respect to count three the accused is acquitted.

D DOSIO
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the State: Adv Makoko

On behalf of the Accused: Adv Van der Merwe

Date Heard: 6 July 2015

Handed down Judgment: 13 July 2015

ⁱ S v Matioda 1973 (1) PH H24 (N)