REPORTABLE

CASE NO: SA 29/2003

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

DAVID HANGUE **Appellant**

and

THE STATE **Respondent**

Coram: SHIVUTE CJ, MARITZ JA and CHOMBA AJA

Heard: **19 October 2004**

Delivered: **15 December 2015**

APPEAL JUDGMENT

MARITZ JA (SHIVUTE CJ and CHOMBA AJA concurring):

[1] The appellant was indicted in the High Court on four counts: the murder of Diego Huiseb; the attempted murder of Lydia Huises; the handling of a firearm whilst under the influence of liquor in contravention of s 38(1)*(m)* of the Arms and Ammunition Act 7 of 1996 and the discharge of a firearm in a public place in contravention of s 38(1)*(o)* of the same Act. He pleaded not guilty but was convicted at the conclusion of his trial on all four counts and sentenced by the court *a quo* to consecutive terms of 12 years, 6 years, 6 months and 6 months

imprisonment respectively, ie a cumulative period of 19 years imprisonment. In addition, the court ordered that the firearm used in the commission of the crimes, its magazine, the spent cartridge cases and discharged projectiles be forfeited to the State; cancelled the firearm license issued to the appellant; declared him unfit to possess a firearm during his lifetime and disqualified him from applying for a permit or license to possess a firearm in future.

[2] Immediately after the appellant had been sentenced, his counsel moved an application for leave to appeal against his convictions and for leave to adduce further evidence in terms of ss 316(1) and (3) of the Criminal Procedure Act 51 of 1977 (the Act). The Prosecution opposed the applications. The court, after hearing argument, made an *ex tempore* order declining the appellant leave to appeal but made no reference to the application to adduce further evidence by a medical expert. It may be assumed that, given the underlying purpose of further evidence (ie that, if accepted, it could reasonably lead to a different verdict or sentence on appeal), the court considered the application to have fallen by the wayside once it refused the appellant leave to appeal. It must also be noted in passing that counsel for the appellant moved the application to adduce further evidence from the Bar without the submission of a supporting affidavit that met the threshold requirements prescribed by s 316(3)[1] of the Act for the consideration of applications of that nature.

[1]'(3) When in any application under subsection (1) for leave to appeal it is shown by affidavit-
(a) that further evidence which would presumably be accepted as true, is available;
(b) that if accepted the evidence could reasonably lead to a different verdict or sentence; and
(c) save in exceptional cases, that there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial, the court hearing the application may receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court.'

[3] The appellant subsequently petitioned the Chief Justice for leave to appeal. The petition succeeded to the extent that the appellant was granted leave 'to appeal against the convictions on counts 1 and 2, namely murder and attempted murder'. The appellant thereafter prosecuted his appeal to this court within the confines of the limited leave obtained. It follows that the appellant's convictions on counts 3 and 4 are not in issue in the appeal. Neither are the sentences imposed in respect of any of his convictions in issue, unless, of course, in the event that this court interferes with or sets aside the convictions on the first two counts. In the absence of leave to adduce further evidence, the appeal falls to be decided only on the evidence presented at the appellant's trial in respect of the counts of murder and attempted murder. In what follows next, I shall give a synopsis of the evidence and, where required, elaborate on it later in the judgment.

[4] The events that resulted in the appellant's conviction on the counts of murder and attempted murder unfolded on 21 March 1999 at the J Stephanus Stadium in Keetmanshoop. It was Independence Day. The day dawned with the promise of celebrations for Namibians all over the country but, as it turned out, ended in an indescribable tragedy for the Katzao/Huises family of Keetmanshoop.

[5] Mr Katzao, his life partner, Ms Huises, and their 3-year old son, Diego, drove to the stadium at about 19h30 to attend the evening’s independence celebrations. Upon their arrival, a football match was in progress. Mr Katzao, like many others, parked his car inside the venue, close to a fence surrounding the pitch, to watch the match. As he alighted from the vehicle, Diego was already running excitedly towards the fence. His mother, concerned that the fence might

be soiled and pose a health risk to him, followed immediately behind to pick him up. As she did so, a gunshot was discharged in their vicinity. Alarmed, she returned to the car with her son and placed him on the bonnet where she sought to comfort him with cuddles and kisses. It was then that the second shot was discharged – this time with mortal consequences. The bullet struck Diego at the back of his head and, following a trajectory through his brain, exited just above his left eye. Ms Huises was kissing her son at that fatal moment. With her lips pressed against his face, the exiting projectile struck her on the forehead with just enough force to pierce the skin above her right eye and cause a hairline fracture in her skull. Fortunately, the projectile, which by then had lost much of its momentum, was deflected by her skull and followed a path underneath her skin towards her right ear where it became lodged.

[6] Both Diego and his mother were rushed to the local hospital. He was declared dead on arrival. An autopsy subsequently confirmed that the gunshot wound to his head was the cause of his death. Ms Huises, who lost consciousness when she was struck by the same bullet, received emergency treatment and later regained her consciousness. Once stabilised, she was evacuated by ambulance to the State Hospital in Windhoek for further medical treatment under the supervision of a neurosurgeon. An ear, nose and throat specialist removed the projectile from underneath her skin a few weeks into her treatment. It was forwarded to the police for forensic examination. She was discharged from hospital about a month after her admission but continued to receive medical treatment during the months that followed. Her physical injuries healed over time, but she continued to experience

severe headaches and remained at risk of suffering incidents of post-traumatic epilepsy for the rest of her life.

[7] Although the appellant denied any wrongdoing immediately after the shooting incident and, by tendering a plea of not guilty, took issue with the prosecution on all the elements of the crimes he was indicted with, there is no room for any doubt on the evidence that he was the perpetrator of this violent and tragic event: multiple witnesses, whose attention was first drawn to him when he discharged the first shot, saw that he also discharged the second shot in close proximity to the deceased and his mother. More importantly, ballistic analysis of the surgically removed projectile that had lodged itself underneath the skin of Ms Huises showed that the land and groove indentations left on its surface by the grooved barrel of the gun during its discharge, were uniquely identical to those of other projectiles discharged in a controlled environment by the pistol seized from the appellant immediately after the incident. The inevitable conclusion to be drawn from this evidence, it seems, was accepted by counsel for the appellant during argument at the conclusion of his trial and in this appeal. This much is implied in counsel's contention that the appellant should have been convicted of culpable homicide rather than the murder of Diego.

[8] The basis of the appellant's defence, disclosed by his counsel at the outset of the trial in terms of s 115 of the Act, was that the appellant had been 'too drunk to know what happened that night'; that he was a 'complete blank as to what happened there at the soccer stadium' and that he had been 'so under the influence that he didn't know what he was doing'. His counsel recorded that, aside

from a beer, which he had earlier that afternoon, the appellant and two of his friends (Mr Gallant and Mr Swartbooi) shared 3 litres of wine amongst them between 19h00 and 19h30 whereafter they returned to the stadium. On the way to the stadium they bought and consumed another bottle of wine and at the stadium they consumed beer. The last thing the appellant could remember was that he and Mr Gallant were sitting in front of the vehicle of Mr Swartbooi at the stadium. The next thing he remembered was that someone removed the pistol from him and he was arrested.

[9] The prosecution did not take issue with the allegation that the appellant was under the influence of liquor when he discharged his pistol. On the contrary, in seeking a conviction on count 3 of the indictment, the State adduced evidence that the appellant handled a firearm while he was under the influence of liquor. It, therefore, was not the appellant's mere intoxication but rather the extent thereof that was central to the appellant's defence on the counts of murder and attempted murder. The High Court had to determine, amongst others, whether or not there was a reasonable possibility that the appellant had been intoxicated to such an extent that, when he fired the fatal shot, he lacked the requisite criminal capacity or culpability to commit the crimes of murder and attempted murder; that he acted in a state of non-pathological automatism and that he was unable to form the requisite intent to commit the crimes.

[10] The trial judge addressed these issues in an extensive and well-reasoned judgment. He summarised and analysed the evidence adduced during the trial; assessed the credibility and reliability of the appellant and the State witnesses'

testimonies, amongst others, with reference to their conduct and observations before, during and after the incident; emphasised the evidence relevant to the measure of the appellant's intoxication; noted, with reference to numerous authorities, the evidential approach to defences of this nature and reminded himself of the measure of proof required for the prosecution to secure a conviction on the counts of murder and attempted murder. The judge concluded that, with the exception of one, all the prosecution’s witnesses were credible. He dismissed the evidence of the appellant that he was temporarily incapacitated as a fabrication and remarked that it was a defence of convenience seized upon after the appellant had realised the consequences of his actions. He also commented on the failure of the appellant to adduce any medical evidence to support the basis of his defence or the inferences, if any, to be drawn from the concentration of alcohol in his blood, given the regular abuse of liquor by the appellant and other relevant personal and other circumstances in the case. He concluded that, on the evidence as a whole, the State proved beyond all reasonable doubt that the appellant was guilty of the murder of Diego ‘in the form of *dolus eventualis*’ and the attempted murder of Ms Huises. He was accordingly convicted.

[11] Mr Grobler, who represented the appellant during his trial and in this appeal, contended that the trial judge should have concluded on the evidence that the appellant had been so drunk that his capacity to understand the moral quality of his conduct was severely blunted and, therefore, that he was unable to subjectively appreciate what he was doing. In addition, he submitted that although the appellant was not engaged in an unlawful act by drinking excessively, as he did, the trial judge nevertheless applied the defunct *versari in re illicita* rule to

convict him. On these grounds, he maintained that the trial court misdirected itself in law and on the facts when it convicted the appellant. He argued that, by abusing alcohol, the appellant had acted in breach of his duty of care towards the deceased and others not to infringe on their right to life and, for that reason, the court should have convicted the appellant of culpable homicide rather than of murder. The appellant's conviction on the count of attempted murder, he submitted, should be set aside without more.

[12] Mr Small, appearing for the State, argued that the trial judge did not misdirect himself and contended that there was no reason for this court to interfere with the factual findings of the trial court. He referred to a number of earlier judgments by South African courts dealing with the impact of intoxication on criminal liability and the overriding effect of the judgment in *S v Chretien* 1981 (1) SA 1097 (A) in that area of the law in South Africa. Whilst noting that this court is not bound by the decision of the Appellate Division of South Africa, he forcefully submitted that the judgment could not be faulted for its logic and application of the general principles of criminal law to the issue of criminal liability. He urged us to adopt the reasoning in that case in this jurisdiction and contended that, so applied, its *ratio* supported the approach and conclusion by the court below in the case at hand. He referred us to the numerous excerpts from the record in support of his contention that the appellant acted purposefully immediately before and after the incident. He submitted that the trial court was justified to reject the appellant's defence and correctly convicted him.

[13] It is clear that, upon a proper application of the principles of criminal liability, a person indicted of the crimes of murder and attempted murder cannot be convicted upon mere proof that he or she committed the physical acts involved in the crimes charged. Even if I were to accept, as I must in the circumstances of this case, that the appellant fired the shot that killed the deceased and injured his mother, the conviction can only be allowed to stand if the other elements of the crimes have also been proven beyond reasonable doubt. The basis of the appellant's defence disclosed by his counsel from the Bar (ie that the appellant had been 'too drunk to know what happened that night'; that he was a 'complete blank as to what happened there at the soccer stadium' and that he had been 'so under the influence that he didn't know what he was doing') takes issue with several other elements of the charges against him.

[14] It must immediately be said that, had the appellant's defence simply been that, due to his intoxication, he had no recollection of the events that gave rise to the charges (as suggested by the first two statements made from the Bar in terms of s 115 of the Act) it may well have fallen short of a defence based on a lack of criminal capacity or automatism of a non-pathological nature. The mere ‘lack of recollection, attributable to a past state of intoxication, is not necessarily indicative’ of such a state of intoxication.[2] However, the assertion of alcohol-induced amnesia does not stand by itself: by adding that the appellant was so under the influence that he did not know what he was doing at the time, the appellant's counsel brought the plea explanation squarely within the parameters of those defences.

[2] As Barwick CJ noted in *R v O’Connor* [1980] HCA 17 para 20.

The real question, as I understand it, is whether the state of the appellant's self-induced intoxication at the time that he discharged the firearm was such that he lacked criminal capacity; that it caused him to act in a state of non-pathological automatism and that it precluded the formation of the requisite legal intent for the commission of the crimes.

[15] It must be said that the ‘defence’ of temporary non-pathological criminal incapacity induced by voluntary intoxication in common law has not always been consistently applied. This is probably so because of the tension created by the need to uphold the basic principles of criminal liability[3], on the one hand, and considerations of public policy; the maintenance of social order and the protection of the public and their interests[4], on the other. Whilst persons should generally not be convicted or punished for crimes if they lack criminal capacity, society seemingly has considered the voluntary and unrestrained abuse of liquor ‘as a form of recklessness or of wickedness of mind which satisfied the requirement of *mens rea*’[5] for crimes committed in a state of severe intoxication. The tension

[3]In particular the *nulla poena sine culpa* principle: ‘In the criminal law of the Republic of South Africa *mens rea* (skuld) on the part of the perpetrator is a requirement for criminal liability. *Mens rea* here means a blameworthy state of mind with which the perpetrator acts. In Roman Law and in Roman Dutch Law the principle *nulla poena sine culpa* applies, ie no punishment without *mens rea*, and this principle is found in every civilised legal system’. Per Bertelsmann J quoting with approval in *S v Lubisi: In Re S v Lubisi & others* 2004 (3) SA 520 (T) at 529A-B from para 2.1 of the Report of the *Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters*, RP69/1967, also known as the Rumpff Report.

[4]Compare, for instance, the remarks of O’Linn J in *S v Davids* 1991 NR 255 (HC) at 259E-H: ‘It appears to me to be a travesty of justice that a person can voluntarily indulge in intoxicating liquor and/or drugs with a narcotic effect and then commit what would otherwise have been a serious crime or offence even an offence in respect of which intoxication is an element, such as driving under the influence of liquor, and then go scot-free because he was so drunk that he lacked the required criminal capacity and/or *mens rea* and/or the ability to perform a voluntary act. See *S v Chretien*. It also amounts to this - the more you drink, the better your chances of being acquitted.’ It is not necessary for purposes of this judgment to comment on these views - and I do not propose to do so.

[5]See: *R v O’Connor* para 43.

between principle and policy was acknowledged, albeit in different words, by Wessels J in *R v Bourke* 1916 TPD 303 at 306:

> 'If we admit the proposition that absolute drunkenness must be regarded as equivalent to insanity, we are logically driven to the conclusion that absolute drunkenness excuses a person from crime. Is it true that absolute drunkenness is equivalent to insanity? I submit not. The essential difference between a drunken person and one who is insane is that the former as a rule voluntarily induces his condition, whilst the latter is, as a rule, the victim of disease. It is therefore not unreasonable to consider that the person who voluntarily becomes drunk is responsible for all such acts as flow from his having taken an excess of liquor. It may conflict with our doctrine that a man who does an act when unconscious does so without *mens rea*, but, according to our law, logic has here to give way to expediency, because, in practice, to allow drunkenness to be pleaded as an excuse would lead to a state of affairs repulsive to the community. It would follow that the regular drunkard would be more immune from punishment than the sober man.'

[16] It, therefore, is necessary to briefly refer to the application and evolution of the 'defence' of temporary non-pathological criminal incapacity, automatism and inability to form the requisite criminal intent occasioned or induced by voluntary intoxication in our common law. I should perhaps also add that, unless the context indicates otherwise, I shall refer to the 'defence' in the discussion below in that sense. I do not propose to deal with instances of involuntary intoxication; with degrees of intoxication that do not 'affect' the criminal capacity, ability to wilfully act or intention of an accused to a degree which is not legally relevant or with deliberate self-induced intoxication with the intent to commit a premeditated crime whilst inebriated.

[17] A discussion of the defences' evolution in our common law will necessitate multiple references to South African authorities on point. These references are inevitable because our common law and that of South Africa are both rooted in Roman-Dutch law and, by and large, the development thereof in the two countries prior to independence was the same. The Roman-Dutch law, as it existed and was applied in the Province of the Cape of Good Hope at the time, was introduced by the provisions of s 1(1) of Proc 21 of 1919[6] as the common law of the then territory of South West Africa. By reason of the *de jure* or *de facto* powers subsequently exercised by the South African State in the Territory prior to Independence, the common law as it applied here was subject to statutory appeal and amendment by a number of legislative, executive and administrative institutions of that State. Moreover, to the extent that the common law was also subject to judicial interpretation and application by competent courts in the Territory, those courts[7] were bound to follow judgments of the Appellate Division of the Supreme Court of South Africa and the constitutional predecessors of that court. That remained to be the case, even after the establishment of the Supreme Court of South West Africa

[6]It enacted that: 'The Roman-Dutch law as existing and applied in the Province of the Cape of Good Hope at the date of coming into effect of this Proc shall, from and after the said date, be the common law of the Protectorate, and all laws within the Protectorate in conflict therewith shall, to the extent of such conflict and subject to the provision of this section, be repealed.' See also: *Estate Wege v Strauss* 1932 AD 76 and *R v Goseb* 1956 (2) SA 696 (SWA) at 700C-D where Claassen JP, writing on behalf of the Full Bench said at 700C-D that the intention of the Legislature in passing s 1(1) of the Proclamation was -
'to introduce in this Territory (ie South West Africa) the law of the Union of South Africa, as existing and applied in the Cape of Good Hope, which law has for its basic structure the principles of the Roman-Dutch law. Where those principles have been applied in the Cape of Good Hope differently from the rest of the Union, this Court must to the best of its ability endeavour to interpret and apply those principles as it considers the Appellate Division will interpret and apply them in a case coming before it on appeal from a decision of a Court in the Cape of Good Hope. Just as the Appellate Division will take into consideration changes introduced into the common law by statute law binding in that province so this Court will similarly have to take such statute law into consideration as was decided in *Tittel's* case (1921 SWA 58). See also the case of *Krueger v Hoge* 1954 (4) SA 248 (SWA).'

[7]Such as the High Court of South West Africa and, later, the South West African Division of the Supreme Court of South Africa.

by Proc 222 of 1981.[8] Barring the impact that differing statutory regimes in the then South West Africa and the Republic of South Africa had on the common law as it applied in the one international jurisdiction as opposed to the other (which do not affect the issue at hand), our common law was otherwise identical to that of South Africa immediately before Namibia's independence.[9] The common law so in force 'on the date of Independence', became the common law of Namibia in terms of Art 66(1) of the Constitution and, to the extent that it did not conflict with the Constitution or any other statutory law, continued to be of force and effect.

The most authoritative restatement of the common law on the defence of voluntary self-intoxication, as it prevailed at the time, is perhaps to be found in the judgment of Botha JA in *S v Johnson* 1969 (1) SA 201 (A). The learned judge conducted an extensive examination of the published comments of common law writers on the applicability of the defence under Roman-Dutch law. He concluded, in summary,[10] that Van der Linden,[11] Voet,[12] Moorman,[13] Matthaeus,[14] Carpzovius,[15] Damhouder[16] and J Van Leeuwen[17] all subscribed to the view that even a severe state of voluntary intoxication (ie to an extent that the perpetrator of the crime lacked

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[8] Compare: *Binga v Administrator-General, South West Africa and others* 1984 (3) SA 949 (SWA) where Strydom J remarked on this aspect as follows:
'Although our judicial structure has to a certain extent undergone a change, such change is more apparent than real. The final say in respect of appeals does not rest with us but is still in the hands of the Appellate Division of South Africa. The common law in this territory is still the Roman-Dutch law which is the common law of the Republic of South Africa. . . . A great part of our statute law originated in the Republic or was South African statute law which was made applicable to the territory. It further follows that our statute law is to be interpreted against the background of our common law which is, as stated above, the same as that of the Republic of South Africa'.

[9] Which, in effect, is also what this court found in *S v Redondo* 1992 NR 133 (SC) at 145 *in fine*.

[10] ibid, pp 210B – 211E.

[11] *Koopmans Handboek*, 2.1.5.9.

[12] *Commentarius ad Pandectas*, 47.10.1.

[13] *Misdaden*, 2.25 *et seq*.

[14] *De Criminibus* p 33.

[15] *Misdaden* (van Hoogendorp's translation) Chapter 138 paras VI and VII.

[16] *Pracktycke in Criminele Saecken* Chap 59.7 and Chap 84.12.

[17] *Romeins-Hollandse Recht* 4.32.5 and 4.34.8.

intention; was unaware that he or she was committing the crime and lacked criminal capacity) did not constitute a complete defence under Roman Dutch law. Rather, it was considered an 'extenuating' circumstance, the effect of which, when transposed and applied in the context of contemporary common law, meant that it would be a valid defence against the crime of murder but not against a conviction of culpable homicide:[18] Culpability attached to the perpetrators' conduct because, whilst still sober and being aware that their intoxication might result in the commission of crimes, they made themselves guilty of the abuse of liquor. Their culpability for the commission of the offence, from that perspective, would therefore not arise when the crimes were being perpetrated, but at the stage when they made themselves guilty of the abuse of liquor that, ultimately, resulted in the commission of the crimes.

[18] In a number of instances, however, courts[19] adopted the 'specific intent' approach known in English law to defences of that nature. That approach, restated

[18]Intoxication to any lesser degree had no such extenuating effect. It was subsequently recognised in more recent judgments that the resultant diminished culpability should also attract more lenient sentences. See: *Johnson* at 210 in fine – 211A.

[19]Compare, for instance, *Fowlie v R* 1906 TS 505; *R v Innes Grant* 1949 (1) SA 755 (A) at 765; *R v Vermeulen* 1953 (4) SA 231 (T) at 247; and, with qualification as regard the onus of proof, in *S v S* 1961 (4) SA 792 (N) at 796C-F where Caney J said: 'In *Director of Public Prosecutions v Beard* 1920 AC 479, Lord Birkenhead expressed the opinion at p. 506 that in a defence of drunkenness, where insanity was not pleaded, the question whether the prisoner knew that he was doing wrong had no place. I consider that ability to distinguish between right and wrong has no place in a case where the defence is not one of insanity, but relates to the consumption of liquor. Drunkenness is one thing and insanity caused by drinking is another and different thing'.

by the House of Lords in *Director of Public Prosecutions v Beard*,[20] was usefully summarised by the Canadian Supreme Court in *R v Daley* 2007 SCC 53 para 34 as follows:

> '(1) That intoxication could be a ground for an insanity defence if it produced a disease of the mind.
>
> (2) That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.
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> (3) That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.'

[19] This approach contemplates a distinction between 'crimes of specific intent and those of general intent, such that the defence of intoxication is traditionally only available with respect to the former. Specific intent offences require the mind to focus on an object further to the immediate one at hand, while general intent offences require only a conscious doing of the prohibited act.'[21] The immediate

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[20] [1920] AC 479 at pp 500-502. The relevant part of Lord Birkenhead's speech reads: 'I come to the conclusion that (except in cases where insanity is pleaded) these decisions establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved. This does not mean that the drunkenness in itself is an excuse for the crime but that the state of drunkenness may be incompatible with the actual crime charged and may therefore negative the commission of that crime. In a charge of murder based upon intention to kill or do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm, unlawful homicide with malice aforethought is not established and he cannot be convicted of murder.'

[21] ibid, para 35.

implication of this approach in English law is that voluntary self-induced intoxication does not constitute a defence to a crime for the commission of which only general (or basic) intent is required - not even if the degree of intoxication resulted in the involuntary perpetration of the act. This much was illustrated in *Director of Public Prosecutions v Majewski* [1977] AC 44 where the accused, charged with offences of assault, claimed that he had been taking a mixture of drugs and alcohol as a result whereof he did not know what he was doing at the time and had no recollection of the incidents to which the charges related. The trial judge instructed the jury that, if a person disabled himself from having powers of comprehension as to what was going on or of his powers of self-control by taking drink and drugs, he could not raise intoxication as a defence to any of the charges. On appeal, the point was pertinently raised whether 'a defendant may properly be convicted of assault notwithstanding that, by reason of self-induced intoxication, he did not intend to do the act of alleged to constitute the assault'. The House of Lords answered the question in the affirmative. The House, in substance, held that evidence tendered solely to raise doubt about the effect which the self-induced intoxication had on the accused's will or intent in the commission of those crimes was irrelevant and, therefore, inadmissible.

[20] Whatever the differences on point between the two systems of law may be, it seems that the premise upon which culpability attaches in English law to the conduct of a perpetrator in such circumstances is not entirely dissimilar to the policy which underpins Roman-Dutch law on the issue, as discussed earlier. In the speech of Lord Denning in *Bratty v Attorney-General (Northern Ireland)* (1963) AC at p 410 he said:

> ‘Another thing to be observed is that it is not every involuntary act which leads to a complete acquittal. Take first an involuntary act which proceeds from a state of drunkenness. If the drunken man is so drunk that he does not know what he is doing, he has a defence to any charge, such as murder or wounding with intent, in which a specific intent is essential, but he is still liable to be convicted of manslaughter or unlawful wounding for which no specific intent is necessary, see *Beard's* Case (1920) AC 479 . . . .
>
> ‘I do not for my part regard that general principle as either unethical or contrary to the principles of natural justice. If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary *mens rea* in assault cases: see *Reg v Venna* (1976) QB 421, at p 429, per James L.J. The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim. Together they add up to criminal recklessness.’

[21] The distinction in English law between crimes requiring specific and general intent for purposes of defences raised in instances of extreme self-induced intoxication has been followed and applied in a number of other Commonwealth countries, including Canada.[22] In *Leary v The Queen* [1978] 1 SCR 29 the Supreme Court of Canada endorsed the proposition that, by becoming voluntary intoxicated, culpability attached to the accused for purposes of a general intent offence. However, in *R v Daviault* [1994] 3 SCR 63 the court recognised that since *Leary’s* case, important changes have occurred in the evolution of criminal law

[22] See for example: *R v George* [1960] SCR 871, at p 877 and *R v Bernard* [1988] 2 SCR 833.

principles in that country, mainly because of the enactment of the Canadian Charter of Rights and Freedoms. It held that the strict application of the English law proposition adopted in that case (ie that the *mens rea* of a general intent offence cannot be negated by drunkenness) offended both ss 7 and 11(d) of the Charter. It reasoned that the mental element of *mens rea* has long been recognised as integral part of crimes and, to eliminate it, even in the case of general intent of offences, would be to deprive an accused of fundamental justice. More importantly, the court held that the mental element of those offences cannot be substituted by the *mens rea* of an intention to become drunk. Self-induced intoxication cannot supply the necessary link between the minimal *mens rea* required for such an offence and the *actus reus*. The majority of the court reasoned that, given the minimal nature of the mental element required for crimes of general intent, even those who are significantly drunk will be able to form the requisite *mens rea* and will be found to have acted voluntarily. Extreme intoxication akin to automatism or insanity should, like insanity, be established by the accused on a balance of probabilities. The court recognised that, while such a burden constitutes a violation of the accused's rights under s 11(d) of the Charter, the violation can be justified under s 1 thereof because only the accused can give evidence as to the amount of liquor consumed and its effect upon him. Expert evidence would be required to confirm that the accused was probably in a state akin to automatism or insanity as a result of his drinking.

[22] It must be noted that, although the English law as reflected in the *Beard* and *Majewski* cases has also been adopted in New Zealand and Australia, it was later rejected: in New Zealand by the majority of the Court of Appeal in *R v Kamipeli*

[1975] 2 NZLR 610 and in Australia by the Court of Appeal in *R v O'Connor.* In the latter case the court endorsed the conclusion in *Kamipeli's* case and concluded that evidence of the state of the accused's body and mind tendered to assist in raising a doubt as to the voluntary character of the physical act involved in the crime charged was admissible in the trial of an accused for any criminal offence, whether an offence at common law or by statute. Further, that evidence tendered to raise doubt as to the actual intention with which the physical act involved in the crime charged, if done, was done, is admissible on the trial of an accused for any offence, whether at common law or by statute, with the exception of such statutory offences that do not require the existence of an actual intent, the so-called absolute offences.

[23] The obvious dichotomy between the *nulla poena sine culpa* principle and public policy considerations for substituting the mental element of *mens rea* for specific crimes in instances of self-induced intoxication under Roman-Dutch law and, to the extent that it was followed by our courts, the differentiation between crimes of general and specific intent under influence of English law, was bound to receive closer judicial scrutiny. In *S v Chretien* the Appellate Division of the South African Supreme Court specifically dealt with defences of that nature both with regard to (a) 'specific intent' offences under English law and (b) the Roman Dutch law position as summarised in *Johnson's* case and (c) the public policy underpinning the development of the law in that regard. It dismissed the whole idea of 'specific intent' with regard to the abuse of liquor in English law as unacceptable in our common law.[23] The rest of the judgment was dedicated to deal

[23]At p 1103H–1104A.

with the position under common law and the public policies at stake. The court concluded that public policy cannot prevail over the legal principle of criminal law that accused persons should not be punished merely because, through conduct of their own volition, they became incapable to act or lacked criminal capacity.[24] The problem, the court held, was not so much with the principle that must be applied, but with the manner in which it is applied: if a court were to accept too easily that an intoxicated person had not been aware of what he was doing; lacked criminal capacity and, therefore, falls to be discharged, it would soon bring our jurisprudence in discredit. After a discussion of the various states of intoxication, the court held that persons, who are so intoxicated that their acts are merely uncontrolled muscular movements, cannot be held criminally liable, because their acts are not recognised as such for purposes of criminal liability. It also held that those who committed acts that were more than mere uncontrolled muscular movements but were so intoxicated so as not to appreciate what they were doing, or were unable to appreciate the difference between right and wrong, would lack criminal capacity and would accordingly escape criminal liability.

[24] There can be no doubt that *Chretien*'s judgment significantly altered the common law approach – and to the extent that it may still have been relevant after *Johnson*'s case, also the influence of the English law - to defences based on voluntary self-induced intoxication. This much was also acknowledged by the former Chief Justice of South Africa, M M Corbett, in a lecture delivered on *'The Role of Policy in the Evolution of our Common Law'.* [25] He stated:

[24]At p 1105F-G.
[25]The third Oliver Schreiner Memorial lecture delivered on 1 October 1986 was published in (1987) 104 SALJ 52 at 67-68.

> ‘Finally, I would refer to the case of *S v Chretien* in which the Appellate Division dealt with the position of a person accused of a crime, who at the time of the commission of the alleged offence was voluntarily so drunk that he in fact did not know what he was doing or did not appreciate the unlawfulness of his action. Twelve years prior to this, in *S v Johnson*, the Appellate Division had held that voluntary drunkenness which did not result in a mental disease was no defence in respect of an offence committed during such drunkenness. In *Chretien's* case the court decided not to follow *Johnson's* case and to hold that an accused in such a state of drunkenness was not criminally responsible. Delivering the judgment of the court, Rumpff CJ stated that in his opinion it was preferable to accept that in such a case public policy (the legal convictions of the community) did not require a person to be punished merely because he had voluntarily reached a state in which he could not act juristically or was no longer criminally responsible.’

[25] The amendment of the common law by the *Chretien* judgment is not without significance in this case. Given the binding effect of the judgments of the Appellate Division of the South African Supreme Court on the courts in the then territory of South West Africa prior to the independence of Namibia, to which I have referred above, the amending effect of that judgment also extended to the application of the common law within the Territory. It follows that the change of the common law brought about by *Chretien's* case formed part of the body of law which, by virtue of the provisions of Art 66(1) of the Constitution, continued to be the common law of Namibia after the date of independence. This proposition, however, is subject to the qualification that after independence ‘it is for the Courts of Namibia to interpret and pronounce on the content and development of such common law in Namibia, which Courts are no longer bound by the decisions of the Appellate Division of the

Supreme Court of South Africa'[26]. Under the constitutional dispensation brought about on independence, this court now bears the heavy and ultimate responsibility to determine what our common law is to the extent that it is not validly repealed or amended by an Act of Parliament.[27] In doing so, this court will carefully consider pre-independence declarations of the common law made by other courts, in particular decisions of the Appellate Division of South Africa. It would, however, fall short of the obligation entrusted to it under the Constitution if it were to accept those declarations without close and independent scrutiny: this court is the final authority to decide upon principle what our common law is and is bound to do so with due regard to the values entrenched and ideals articulated in our Constitution. It is with that in mind, that I will consider the different approaches being urged upon us by counsel for the opposing parties.

[26] Mr Grobler, who appeared for the appellant, contended that the appellant should have been convicted of culpable homicide. His reasoning is that persons who consume liquor have a duty of care towards others not to infringe on their right to life or possessions by committing crimes. If they do, their culpability for the commission of those crimes follows from the breach of that duty. This argument, it seems to me is very similar, if not entirely identical to, the public interest considerations upon which Roman-Dutch law on the issue was based as summarised in *Johnson's* case. The effect thereof will be to revert to the common law position espoused in that case. In the view I take, this contention derogates from the contemporary common law fundamentals of criminal liability and stands in conflict with the fair trial-values articulated in our Constitution.

[26]Per Ackerman AJA in *S v Redondo* at 145.
[27]See Articles 66(2) and 79 of the Constitution.

[27] Botha JA acknowledged in the *Johnson* judgment[28] that a perpetrator who committed a crime in a state of intoxication was punished, in effect, for being drunk rather than for the commission of the offence. The moral reprehension that attached to the abuse of liquor, he conceded, was actually projected onto the offender's culpability for the commission of crimes whilst being under the influence. He sought to distinguish the approach from the rejected and discredited *versari in re illicita* doctrine[29] on the basis that, although the abuse of liquor might be reprehensible, it was not an illicit activity and because the commission of the crime was a consequence of the effect of the abuse on the perpetrator rather than of the abuse itself. The latter proposition, with respect, seems to be a distinction without a real difference. As to the former, the distinction drawn only serves to illustrate that there is even less cause to base criminal accountability for offences where *mens rea* is a requirement on the moral turpitude which attaches to the abuse of liquor than on the application of the *versari* doctrine: in the latter instance criminal responsibility for unintended consequences was at least based on the perpetrator's participation in the conduct of illegal activities, whereas such responsibility in the case of intoxication is based on an otherwise legal, albeit morally reprehensible, activity. The participation in illegal activities is, from a legal point of view, clearly more serious than voluntary intoxication, which is only morally unacceptable. Why then should the former rule be rejected as being in conflict with more recent concepts of criminal liability in our common law and the latter not?

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[28] At p 212 of the judgment.

[29] In terms of the doctrine, a person who involved him or herself in illicit activities was held criminally accountable for all the consequences of those activities, even if they were not specifically intended. The doctrine was rejected in *S v Van Der Mescht* 1962 (1) SA 521 (A) because it did not fit in with more current concepts of criminal responsibility for offences in which *mens rea* was a requirement. *S v Bernardus* 1965 (3) SA 287 (A), the court held that the doctrine no longer had any place in our law.

[28] I have a fundamental difficulty with the notion that the blameworthiness (if one can call it that) attaching to the overindulgence of liquor can substitute the element of *mens rea* required for the commission of a particular crime. The element of *mens rea* is an essential part of one of the most fundamental principles[30] upon which our criminal justice system is based: absent any premeditation, how can the moral blameworthiness for occasional (or even spontaneous) overindulgence take the place of the mental aspect of *mens rea* to commit a particular offence? Does it mean that, even if a court entertains a reasonable doubt that an accused had the requisite *mens rea* to commit the crime under consideration, that the accused must nevertheless be convicted simply because his or her criminal incapacity resulted from the voluntary abuse of liquor? On this aspect, I find myself in respectful agreement with the line of reasoning adopted by the majority of the Canadian Supreme Court in the matter of *Daviault v R*. The mental element of *mens rea* must, by its very nature, bear on the *actus reus* of the crime the perpetrator is charged with. That element is an essential part of the broader basket of elements that the Prosecution must prove according to law before the presumption of innocence guaranteed in Art 12(1)*(d)* of our Constitution can be displaced and the accused may be convicted. For that reason, proof of the mental element required for the commission of a particular crime cannot be displaced by proof that the accused abused liquor prior to the commission thereof. To hold otherwise would violate the presumption of innocence. More so, because it ‘simply cannot be automatically inferred that there would be an objective foresight that the consequences of voluntary intoxication

[30] The *nulla poena sine culpa* principle.

would lead to the commission of the offence' and 'self-induced intoxication cannot supply the necessary link between the minimal mental element or *mens rea* required for the offence and the *actus reus*'.

[29] In my view, the common law position on defences of criminal incapacity based on voluntary intoxication as restated in *Johnson's* case militates against the common law fundamentals of criminal liability as currently understood and applied in law. For the reasons stated, the common law position adopted in that case would not have survived the constitutional transition on independence, given the provisions of Articles 12(1)*(d)* and 66(1) of the Constitution.

[30] Mr Small, who appeared for the respondent, strenuously argued that *Chretien*'s case cannot be faulted for its logic and for shifting the common law position on the issue to conform to the basic principles of criminal law. He requested that the case be considered on that basis.[31]

[31] One of the well-established requirements of criminal liability is that the person indicted with the offence should have the requisite criminal capacity at the time he or she committed the crime, ie, the capacity to (a) distinguish between right and wrong, *viz* to realise that he or she was acting unlawfully, and (b) to act in accordance with that realisation.[32] This much is also recognised in s 78(1) of the Act as far as the lack of criminal capacity resulting from pathological mental

[31] *Chretien*'s case has been referred to in a number of reported and unreported cases in this jurisdiction. It has not been dissented from in substance. See, for example, *S v Davids* fn 4 above.
[32] See: *S v Laubsher* 1988 SA 163 AD at 166H-J.

illnesses or aberrations are concerned.[33] It is well-recognised, as Joubert AJ pointed out in *Laubscher*'s case, that in addition to criminal capacity resulting from pathological conditions, persons may also suffer temporary lack of criminal capacity during the commission of a crime due to non-pathological conditions. There may be a number of circumstances causing non-pathological criminal incapacity, the one relevant for purposes of this case being a particular state of intoxication.

[32] The measure of a person's state of intoxication may vary greatly in degree. Depending on the degree of intoxication it may impact to a greater or lesser extent on that person's criminal accountability should he or she commit a crime whilst being under the influence of liquor. In *Chretien's* case[34] and a number of others,[35] reference is made to various degrees of intoxication and the effect thereof on criminal liability – only some of which are legally relevant to the defence. Persons who are so inebriated that their muscular movements are involuntary and they are unaware of what they are doing, will not be held criminally liable because they do not 'act' in the legal sense of the word. Perhaps more frequently occurring, is a state of intoxication, whilst not divorcing the persons' will from their bodily

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[33]Compare *S v Mahlinza* 1967 (1) SA 408 (A) at 417D-E and *S v Campher* 1987 (1) SA 940 (A) at 954C-F.

[34]At 1106C-H.

[35]Compare also: *S v Johnson* 1969 (1) SA 201 (A) at 204 and further. The same matter is also discussed by Barwick CY in *R v O'Connor* (1980) 146 CLR 64, paras 16-22 and *R v Daley* [2007] 3 SCR 523, paras 41–43: 'Our case law suggests there are three legally relevant degrees of intoxication. First, there is what we might call "mild" intoxication. This is where there is alcohol-induced relaxation of both inhibitions and socially acceptable behaviour. This has never been accepted as a factor or excuse in determining whether the accused possessed the requisite *mens rea*. See *Daviault*, at p 99. Second, there is what we might call "advanced" intoxication. This occurs where there is intoxication to the point where the accused lacks specific intent, to the extent of an impairment of the accused's foresight of the consequences of his or her act sufficient to raise a reasonable doubt about the requisite *mens rea* . . . The third and final degree of legally relevant intoxication is extreme Intoxication akin to automatism, which negates voluntariness and thus is a complete defence to criminal responsibility.'

movements, is sufficiently severe that they do not appreciate what they are doing is unlawful or that they are unable to act in accordance with that appreciation. Persons falling within this category will also not be held criminally liable for misdeeds committed in that condition.

[33] Intoxication to a lesser degree is unlikely to affect an accused person's criminal culpability but may, depending on the circumstances of each case, have a mitigating or aggravating effect on the determination of an appropriate sentence. If, due to the abuse of liquor, a person’s disposition is altered or his self-control is weakened, so that he or she commits a criminal act voluntarily and intentionally which he or she would not have done in a sober state, he or she may be held criminally accountable.

> ‘His intoxication to this degree, though conducive to and perhaps explanatory of his actions, has not destroyed his will or precluded the formation of any relevant intent. Indeed intoxication to this degree might well explain how an accused, otherwise of good character, came to commit an offence with which he is charged. . . . Intoxication to the stated degree might have rendered an accused less aware of what he was doing, or of its quality, significance or consequence. But, if voluntary, his acts remain his: and he intends to perform them. So long as will and intent are related at least to the physical act involved in the crime charged, and saving for the moment the case of a crime of so-called specific intent, the fact that the state of intoxication has prevented the accused from knowing or appreciating the nature and quality of the act which he is doing will not be relevant to the determination of guilt or innocence.’[36]

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[36] *R v O’Connor* paras 17 and 18.

[34] Inasmuch as the appellant's plea explanation of self-induced state of intoxication at the time that he discharged the firearm in effect raised the possibility that he lacked criminal capacity; that it caused him to act in a state of non-pathological automatism and precluded formation of the requisite legal intent for the commission of the crimes, the defence fall within the first two categories of intoxication discussed above and, as such, is legally permissible. However, the mere disclosure of such a defence at the outset of the trial, absent any evidence supporting it, will not be sufficient to justify the accused's discharge at the end of the trial. A proper basis for a defence of that nature must be established on the evidence as a whole for it to be considered. The court cautioned in *Chretien*'s case that, if courts were to accept defences of this nature too easily or readily, it will bring our jurisprudence in discredit. It added that a court should only uphold such a defence on the basis of evidence justifying it or creating a reasonable doubt that the accused lacked the requisite criminal intent, capacity or ability to act.

[35] I find the speech of Lord Denning in *Bratty v Attorney-General for Northern Ireland* (1961) 3 All ER 523 at 534 on this issue illuminating, although given in a another jurisdiction and a somewhat different legal context:

> 'In the present case the defence raised both automatism and insanity. And herein lies the difficulty because of the burden of proof. If the accused says he did not know what he was doing, then, so far as the defence of automatism is concerned, the Crown must prove that the act was a voluntary act; see *Woolmington's* case. But so far as the defence of insanity is concerned, the defence must prove that the act was an involuntary act due to disease of the mind; see *M'Naughten's* Case. This apparent incongruity was noticed by Sir Owen Dixon, Chief Justice of the High Court of Australia, in an address which is to be found in 31 Australian Law

Journal 255 and it needs to be resolved. The defence here say: Even though we have not proved that the act was involuntary, yet the Crown have not proved that it was a voluntary act: and that point at least should have been put to the jury. My Lords, I think that the difficulty is to be resolved by remembering that, whilst the ultimate burden rests on the Crown of proving every element essential in the crime, nevertheless in order to prove that the act was a voluntary act, the Crown is entitled to rely on the presumption that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption they must give some evidence from which the contrary may reasonably be inferred. Thus a drunken man is presumed to have the capacity to form the specific intent necessary to constitute the crime, unless evidence is given from which it can reasonably be inferred that he was incapable of forming it; see the valuable judgment of the Court by the Lord Justice-General (Lord Normand). So also it seems to me that a man's act is presumed to be a voluntary act less there is evidence from which it can reasonably be inferred that it was involuntary. To use the words of Delvin, J. the defence of automatism "ought not to be considered at all until the defence has produced at least prima facie evidence", see *Hill v Baxter*; and the words of North, J., in New Zealand "unless a proper foundation is laid," see *R v Cottle*. The necessity of laying this proper foundation is on the defence; and if it is not so laid, the defence of automatism need not be left to the jury, any more than the defences of drunkenness (*Kennedy v HM Advocate*), provocation (*R v Gauthier*) or self-defence (*R v Lobell*) need be.

What, then, is a proper foundation? The presumption of mental capacity of which I have spoken is a provisional presumption only. It does not put the legal burden on the defence in the same way as the presumption of sanity does. It leaves the legal burden on the prosecution, but nevertheless, until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. Not because the presumption is evidence itself, but because it takes the place of evidence. In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say "I had a black-out": for "black-out" as Stable J, said in *Cooper v MeKenna* "is one of the first refuges of a guilty

conscience, and a popular excuse". The words of Delvin J in *Hill v Baxter* should be remembered:

> 'I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent.'".

[36] In South Africa, the Supreme Court of Appeal had occasion some 20 years after the *Chretien* judgment to consider the requirements for the establishment of a defence of temporary non-pathological incapacity. Since *Chretien's* case the South African Legislature has intervened statutorily to deal with intoxication as a defence by way of the Criminal Law Amendment Act 1 of 1988 but the court noted in *S v Eadie* 2002 (3) SA 719 (SCA) para 28 that, relying on the ratio in *Chretien*'s case '(s)evere emotional stress, in combination with factors such as provocation and/or intoxication resulting in non-pathological criminal incapacity, has become a very popular defence'. It was obviously concerned with inconsistencies in the approach of different courts in that jurisdiction to defences of that nature, 'especially in dealing with accused persons with whom they have sympathy', by resorting to reasoning that is not consistent with the approach of the decisions of Court of Appeal.[37] Dealing with the defence of temporary non-pathological criminal incapacity, Navsa JA restated the position as follows[38]:

> 'It is well established that when an accused person raises a defence of temporary non-pathological criminal incapacity, the State bears the onus to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this Court that:

[37] Idem para 61.
[38]Idem para 2 and the line of authorities referred to therein.

(i) in discharging the onus the State is assisted by the natural inference that, in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;

(ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;

(iii) evidence in support of such a defence must be carefully scrutinised; and

(iv) it is for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period.'

[37] I agree with this approach. From my reading of the judgment *a quo* this is also the approach that the court below adopted, not in so many words, but in substance and with reference to a number of other authorities to essentially the same effect. I do not understand counsel for the appellant to suggest that the court misdirected itself on the law in that regard, that is, other than to suggest that the court applied the defunct *versari* rule in convicting the appellant. In my view, the *versari* contention has no merit and, to counsel's credit, it must be said that it was not pressed during argument at the hearing.

[38] It is with the parameters restated in *Eadie*'s case in mind that I now turn to the defence raised and conviction of the appellant in the case at bar.

[39] As I have noted earlier, it is not in issue that the appellant consumed a significant amount of liquor shortly before the incident. In the course of the

appellant's plea explanation, his counsel recorded that the appellant had a beer earlier the afternoon at the stadium; after he had left the stadium, he and two acquaintances shared a 3 liter container and a bottle of wine over a period of 30 minutes immediately before their return and, upon his return, he had some beer which they had purchased there. His evidence was somewhat different: He had two tins of beer earlier at the stadium; a 3 bottle can of old port shared with two acquaintances at a nearby dam; a bottle of port purchased for N$15 which they shared 'drinking, drinking to the stadium'; and at the stadium he purchased one or more dumpy-sized bottles of Tafel Lager beer at the 'tent' of which he drank part of. Mr Gallant, a witness called by the State confirmed that they shared a 3-bottle can of wine with the appellant at the dam, but said that it was shared amongst four persons. He could not confirm that a further bottle of wine was purchased on the way to the stadium, because he was asleep in the load-box of the vehicle.

[40] It is also not in issue that the forensic analysis of a sample of the appellant's blood, taken about one and a half hours after the incident, confirmed that his blood-alcohol concentration at the time when it was taken was 0,31 g per 100ml of blood. Unfortunately, no medical evidence was adduced about the potential impact of the blood-alcohol concentration on his conduct or, for that matter, about the expected effect that the quantity and type of alcohol consumed so shortly before the incident could possibly have had the appellant. This omission is significant in view of the fact that Dr Aldrich, a neurosurgeon, and Dr Adigwe, the district surgeon at the time of the incident, were both called as witnesses by the State and the appellant's counsel had the opportunity to cross-examine them on any matter relevant to the appellant's defence falling within the ambit of their knowledge,

expertise and experience. Given his qualifications, one would have expected Dr Aldrich to be eminently competent to give expert evidence on the effect of alcohol on the brain and the rest of the neuro-system of humans generally and on that of the appellant in particular, given his body mass, history of alcohol abuse and the effect, if any, of alcohol consumed earlier during the day, the rate at which alcohol is normally absorbed in the circulatory system or metabolised and eliminated or excreted by the body, given the timelines and quantities of consumption immediately before the incident and how that would affect the expected blood-alcohol concentration at the time of the incident as opposed to the concentration at the time the sample was taken about an hour and a half later; whether the appellant’s conduct and decisions immediately before, during and after the incident, are medically reconcilable with his claimed state of automatism or criminal incapacity, etc. Yet, these opportunities notwithstanding, not a single question on any of these matters was posed to Dr Aldrich by the defence. The appellant did not call any medical expert during the trial to substantiate the basis of his defence. Neither did he seek a postponement to facilitate the production of such evidence or to launch an application for legal aid to that effect, if necessary, with the intervention of the court.

[41] What then, is the significance that the court must attach to the forensic result of the blood sample analysis in the absence of such evidence? In the reported case of *S v Mokgethi* 1977 (2) SA 289 (O) two blood samples were taken from the accused: one 40 minutes after the incident and the other a further 30 minutes later. An analysis of the two samples concluded that the accused's blood-alcohol concentration was 0,32 and 0,31 g/100 ml of blood respectively. The

district surgeon, who examined the accused immediately after the first sample was taken, concluded that the accused appeared to be normal and capable to drive a motor vehicle with safety. The way accused spoke, walked and gestured were normal; his memory was clear, his orientation of time and place was good; nystagmus and Romberg’s sign were absent and his eyes, knee reflexes and conduct were all normal. When prompted for an explanation, the district surgeon suggested that the accused's brain had adjusted to the concentration of alcohol in his bloodstream over the period of consumption during that day. In *S v Marx* 1972 (3) SA 61 (E) at 63 a forensic analysis of the accused's blood taken about an hour after he had driven a motor vehicle, concluded that his blood-alcohol concentration was 0,29 g/100ml. The doctor’s evidence about his examination of the accused, done immediately after the sample had been taken, was summarised by the presiding judge as follows:

> ‘The accused's temperature was normal. His face was flushed. His mental state was normal. His orientation was normal and his memory was clear. His conjunctivae were moist and slightly congested but the doctor agreed that this was also the position when the accused was in court. The accused's pupils were normal and the reaction to light was brisk. His reaction to accommodation was brisk. Nystagmus was absent. There was a slight tremor of the limbs. Knee reflexes were normal. The Romberg's sign negative. His gait was normal but on a "widened base". The doctor was shown the accused's legs which have some defect which he agreed could be the cause of this "widened base". Turning was sure as was the finger to nose test. The accused's handwriting was incoordinated but this, according to the doctor, was because he did not have his spectacles with him. His diction and voice were normal and his articulation was "slightly thick but perfectly clear”. The doctor agreed that the slight thickness of articulation could be due to the fact that the accused has artificial teeth. He found that the accused suffered from hypertension. It was on these findings that Dr Schweitzer formed the

> view that the accused was mildly under the influence of liquor during his examination.'

[42] I refer to these cases, not as authority for a suggestion that the behaviour of persons with such high blood-alcohol concentrations are generally expected to be normal - there must be many more cases where persons with equally high blood-alcohol concentrations have responded much worse to overindulgence - but simply to illustrate that different people under different circumstances respond differently to such high concentrations of alcohol in the bloodstream. The correlation between different persons' blood-alcohol concentrations and their conduct do not seem to be direct, uniform or universal.

[43] Moreover, absent any medical evidence, how must the court assess the rate at which the alcohol consumed by the accused during the half hour or so before the incident had been absorbed? How much of it was absorbed before the incident and how much during the hour or more after the incident when the blood sample was taken? These are not matters of which a court may take judicial notice. The absence of medical or other expert evidence to 'individualise' the blood-alcohol analysis with reference to the physical attributes of the appellant; his history of alcohol abuse (he admitted to be a regular and 'heavy drinker'); the timelines involved for consumption, absorption, metabolism or elimination of the alcohol, etc, significantly inhibits the evidential value of the forensic result in support of the appellant's defence.

[44] There are numerous other questions concerning the appellant's conduct which, if it had been addressed by medical evidence, would either have supported

or detracted from his defence. As I shall presently illustrate, there are many aspects of the appellant's conduct immediately before, during and after the incident that appear to be purposeful, rational and structured. Can they be reconciled, from a neurological or medical point of view, with the appellant's defence of automatism and criminal incapacity? The period of claimed incapacity must have been very brief. Is it reasonably possible from a medical point of view that the 'black-out'-effect of overindulgence on the brain will extend only over such a short period of time? Medical evidence may also have assisted to resolve the appellant's conundrum of recollection: was his inability to recollect what had happened during the incident the result of alcohol-induced amnesia post the event or temporary mental and criminal incapacity at the time of the event?

[45] The appellant's failure to present evidence of a medical expert or other qualified person on these important aspects (either by means of cross-examining the neurologist and medical practitioner called by the State or by calling witnesses in his defence) impacts negatively, in my view, on the question whether he established an evidential basis for the defences advanced in his plea explanation. The duty to establish such an evidential basis was discussed by Marais J in *S v Trickett* 1973 (3) SA 526 (T) at 537D–E. The learned judge, after quoting part of Lord Denning's speech in *Bratty's* case,[39] reproduced earlier in this judgment, concluded as follows:

> 'The conclusion to which I come is that in order effectively to raise the defence of sane automatism such as is relied upon in the present appeal there must *firstly* be evidence sufficiently cogent to raise a reasonable doubt as to the voluntary nature

[39]At p 534 and further.

> of the *actus reus* alleged in the indictment, and *secondly* medical or other expert evidence to show that the involuntary or unconscious nature of the *actus reus* is quite possibly due to causes other than mental illness or disorder. If at the end of the day there is uncertainty as to whether the act was voluntary or involuntary, the doubt must redound to the benefit of the accused.'

[46] Although medical evidence may not be necessary in all instances where defences of this nature are raised,[40] evidence of that nature was clearly called for in the circumstances of this case. Absent expert evidence to support the basis of the appellant's defence and to address the many questions of a medical nature, which I have referred to earlier, the trial judge was bound to carefully assess the appellant's evidence and determine whether, in the context of the evidence as a whole, there was a reasonable possibility that he had suffered a temporary incident of non-pathological criminal incapacity; was acting in a state of sane automatism and was incapable of forming the requisite legal intention to commit the crimes that he was indicted with. It is therefore appropriate to briefly refer to the evidence about the appellant's state of intoxication immediately before, during and after the incident.

[47] Mr Gallant, who was with the appellant before and during the incident, recalled that, after the four of them had shared the 3-bottle can of wine, the appellant staggered 'a bit . . . but not that much' when he walked to the door of the car shortly before they returned to the stadium. Sometime after they had arrived at the stadium, the two of them had a conversation, standing and half-leaning against the front of Mr Swartbooi's vehicle. He was unable to recall details of the

[40] As Schmidt noted in his discussion of the case under the heading 'Laying a Foundation for the Defence of Sane Automatism', 90 (1973) SALJ 329 at 333.

conversation other than that it was about matters of a general nature. Although both of them were ‘drunk’, his impression was that the appellant understood what he was saying and he could clearly understand what the appellant was saying. When prompted by the court, he stated that the conversation was coherent. It was during the conversation that the appellant suddenly drew a firearm from the left side of his waist, cocked it and fired three shots - two in quick succession and the third after a pause. Before the incident he did not observe any ‘strange’ conduct on the part of the appellant. In assessing the reliability of his evidence, it must be kept in mind that his recollection of the events, his observations about the appellant’s appearance and conduct and his estimations of time were somewhat befuddled because of his own state of intoxication.

[48] Mr Katzao noticed for the first time that the appellant had a firearm in his hand immediately after he had discharged the first shot. He approached the appellant only after the second, fatal, shot had struck the deceased and Ms Huises a couple of minutes later. He rushed towards the appellant and asked him to come along and see what he had done. The appellant, who pointed the firearm downwards at that time said: ‘What? What? I did nothing, you are telling lies!’. The appellant nevertheless accompanied him up to a point close to where the deceased and his mother were. There, the appellant turned around and walked back repeating his denials. On his way back, the appellant discharged the third shot. The appellant was ‘drunk’ but, according to Mr Katzao’s observations, not so drunk that he did not know what he was doing. When pressed during cross-examination about the reasons for his observation about the appellant’s state of insobriety, he explained that the appellant had reacted to his request to

accompany him; had walked unassisted and that his speech was clear. Moreover, the witness asked rhetorically, if the appellant had been so drunk that he did not know what he was doing, ‘how would it be possible for him to cock the firearm to shoot’?

[49] Mr Jonker, who was engaged in a conversation with Mr Katzao at the time when the first two shots were fired, confirmed the evidence that the appellant was drunk but not staggering. His evidence about the third shot differs from that of other witnesses: according to him, the third shot was aimed by the appellant at Mr Katzao and, had the latter not bent forward to render assistance to the deceased, the shot would have struck him in the back. The conspectus of the other witnesses’ evidence was that the third shot had been discharged into the air. For this reason, the trial judge rejected Mr Jonker’s evidence as unreliable. This finding also taints the reliability of his evidence about the appellant's state of intoxication and, in the absence of any reason to interfere with the trial judge’s assessment, it will be prudent to disregard his evidence altogether for purposes of this appeal.

[50] Constable Shakuyungwa, who was on duty at the stadium, received a report of the first shot; heard the discharge of the second shot and saw the appellant firing the third shot into the air. He was a couple of metres behind the appellant when, after the third shot, the appellant walked towards Mr Katzao, who was attending to a victim lying on the ground. He heard the appellant asking something, but Mr Katzao responded by telling the appellant to wait and pushed him backwards against the fence where the appellant fell down. Constable

Shakuyungwa then noticed that the slide of the pistol was locked in an open position and that the magazine of the pistol was empty. He disarmed the appellant with the assistance of others. The appellant forcefully resisted arrest, at the same time asking what he had done and why he was being arrested – so much so that he had to be carried with the help of others to the police vehicle and had to be restrained on the way to the police station. According to him, the appellant was staggering and very drunk but not so much that he did not understand what was happening and what was being said to him. According to the officer, the appellant was strong enough to break loose and was capable of running away in his condition. He would not have been able to restrain the appellant by himself and, for that reason had to get assistance from others.

[51] Mr Appollus, who rendered assistance to Constable Shakuyungwa confirmed that the appellant resisted arrest. According to him, the appellant was under the influence but he could not say to which extent. It must be noted that the evidence of this witness is contradictory in some respects. He would, for example, say that the appellant did not understand what was happening because he did not respond to the police officer and on other occasions that the appellant responded to instructions of the officer.

[52] Mr Stephanus also assisted the police to disarm the appellant; to restrain and take him to the police vehicle and to the police station. In his opinion, the appellant was under the influence of liquor but he was able to understand what was happening to him. He did not stagger and appeared to walk properly. Mr Otto, a bystander who observed the incident and the appellant’s arrest from a distance

of about six metres stated that, in his opinion, the appellant was under the influence of liquor. He based his observation on the fact that a sober person would not discharge a handgun at an event of that nature with so many people around. When it was suggested to him under cross-examination that his opinion might also have been based on the appellant's gait, he denied it, stating that the appellant was not staggering. Ms Pomuti, who also observed the events from a short distance away, testified that when she was on her way to render assistance to the victims, she asked the appellant why he had shot the people. He did not respond. According to her, the appellant was under the influence but was not 'falling around'. The appellant did not respond to her question. She thought that the appellant discharged the shots 'for pleasure' and appeared to be aware of what was happening around him.

[53] Constable Skeyer, who saw the appellant at the police station, was of the view that the appellant was heavily under the influence of liquor at that stage because he was 'sort of unsteady on his feet, but not that he was falling around. . . . '. In cross-examination, he confirmed that the appellant was noisy and 'speaking very difficult'. Officer Xoagub, who arranged for a blood sample to be taken from the appellant about an hour and twenty minutes after the incident, observed that the appellant smelt strongly of liquor; was unsteady and stumbling; was loud and talkative and had difficulty to stand still. He denied that he had shot anyone. He was speaking with difficulty, which the witness later explained as 'slowly'. The appellant climbed the approximately ten to twelve steps of the stairs leading to the witness' office 'very fast'. As a result he stumbled and used the handrail to steady himself. He seemingly negotiated the stairs without difficulty and without the need

to be assisted by another person. In his view, the appellant knew what was going on around him. After the witness had explained to him that a blood sample would have to be taken from him and offered him a chair, the appellant sat down and said: 'If the blood must be drawn, then the blood must be drawn'. It was done without difficulty or any resistance. He agreed with the proposition put to him under cross-examination that a person with a blood-alcohol concentration of 0,31 would be heavily under the influence of liquor.

[54] Inspector Booysen, who also had the opportunity to observe the appellant at the police station from a distance of about two to three metres, got the impression that he was under the influence 'but not much' and that he understood what was going on around him. During an interview the next day, the appellant stated that he could not remember anything.

[55] I have already summarised the appellant's evidence earlier in this judgment and do not propose to repeat it but only to highlight aspects thereof.

[56] According to his evidence, the last thing he could remember (before the incident) was that he and Mr Gallant were at the vehicle inside the stadium. The first thing he could remember after the incident was that someone took his pistol away and he was arrested at the stadium. He claimed not to have any recollection of the incident or his conduct in the course thereof. On all accounts and on my understanding of the timeline of the events, the period to which his claimed amnesia and incapacity relates extended, at most, over a few minutes. For the sake of brevity, I shall refer to this period in what follows as the 'critical period'. He

does not claim that he acted in a state of automatism or criminal incapacity either before the commencement or after the expiry of the critical period. In the circumstances, he could hardly take issue with the testimony of witnesses who had observed him either before or after the critical period and testified that, although evidently under the influence of liquor, the appellant appeared to know what he was doing and what was going on around him.

[57] If one were to analyse his evidence about his conduct and recollection of events immediately before the critical period, there are two aspects that are of significance. The first is that he sought to give the impression that he only had a vague idea about the events, but when questioned more closely, his recollection revealed considerably more detail. The second is that the revealed detail strongly suggests that he acted in a purposive manner and had a good grasp of position, orientation and events.

[58] The appellant initially stated that when they arrived at the stadium, he was 'nearby' the car, Swartbooi was no longer in their company and 'what further happened . . . I do not have knowledge of'. He explained that his lack of knowledge 'can be attributed to the fact that I was intoxicated'. When asked by his counsel during evidence-in-chief, he remembered that when they got to the stadium he 'added one beer on top' of what he had before. Under cross-examination he remembered that he had purchased the beer in a tent at the stadium. Under re-examination, he said that he could not remember how many beers he had purchased and that it was possible that he had purchased more than one. When asked a few questions by the trial judge, he recalled that it was a

dumpy sized bottle of a particular beer brand, which he mentioned by name. He could not remember exactly how much he had paid for it but recalled that he had paid N$15 for the bottle of wine purchased on the way to the stadium. He also testified, contrary to the instructions he had given to his counsel, that he could have had more than the one beer at the stadium after his return.

[59] The appellant's evidence also demonstrates a fairly clear grasp of position and surrounding circumstances. He recalled that there was a soccer game in progress at the stadium upon their return. Mr Swartbooi drove the vehicle and parked it at the right hand side of the road when facing the pavilion, he explained. There were other vehicles parked in the vicinity. Some people were watching the soccer game and others were passing by or walking about. There was still some wine left in the bottle that he had purchased on the way to the stadium. He did not drink that. When he disembarked from the vehicle he noticed that Mr Gallant was lying at the back of the pickup. After a short while he went to the tent to purchase the beer. He returned to the vehicle and drank of the beer but could not recall how much he had consumed and whether he had it all.

[60] The court below, after a detailed discussion of all the evidence, concluded that the 'version of the accused that he was temporarily incapacitated or had a black-out during the shooting incident should be rejected as a fabrication and a defence of convenience after he realised the consequences of his actions'. In the absence of any misdirection of fact, Mr Small contended that we should not overlook the fact that, in coming to this conclusion, the trial judge had the advantage of seeing and hearing the witnesses; of observing their demeanour,

appearance and personality and being steeped in the atmosphere of the trial. Referring the court to the appeal guidelines enumerated by Davis AJA in *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705–706, he submitted that, where there had been no misdirection on facts by the trial judge, the presumption is that his conclusion is correct and that this court would only reverse it where it is convinced that it is wrong. This approach, cited with approval in this jurisdiction on numerous occasions,[41] was more recently restated by the South African Supreme Court of Appeal in *S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645e–f:

> 'Before considering the submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.'

[61] This approach is not intended to relieve this court from to obligation to carefully consider the evidence[42] because, as a court of appeal, it has other advantages that the trial court does not have in considering the evidence.[43] I have

[41]Compare: *Vermeulen & another v Vermeulen & others* 2014 (2) NR 528 (SC) para 17; *S v Ameb* 2014 (4) NR 1134 (HC) para 43; *S v Slinger* 1994 NR 9 (HC) at 10D–E, to name a few.

[42]As it has done, for instance in *S v Jonkers* 2006 (2) NR 432 (SC).

[43] As O'Linn J noted in *Ostriches Namibia (Pty) Ltd v African Black Ostriches (Pty) Ltd* 1996 NR 139 (HC) at 151G-152A by quoting the following from the speech of Lord Devlin in the English Court of Appeal with approval: 'Because the trial judge has the advantage of seeing the witnesses, he is accepted as the better tribunal for the determination of the primary facts; but the appellate court has a complementary advantage, which makes it the better tribunal - at any rate in a case of any length or complexity - for the determination of the secondary evidence, that is the drawing of inferences. Throughout the trial the case is alive and kicking; when it gets to the Court of Appeal it is dead. Issues change and develop as the trial proceeds and as witnesses tell their different, and sometimes unexpected stories; points that left the starting post apparent winners fall out of the race and dark horses take up the running. . . . In the Court of Appeal the material is fixed. Counsel on both sides, having now, as they had not at the trial, the advantage of knowing what evidence the judge has believed and what rejected, can sort out the material at leisure, disregarding the bad points and making the most of the good ones. Little bits of evidence that passed unnoticed at the time are seen in the light of a new definition of the issues to become greatly significant. Thus the Court of Appeal is much better than the trial judge for the ascertainment of the secondary facts; the case is, as it were, laid out flat before them and three minds consult together on the right conclusion to be drawn.'

carefully looked at and weighed the credibility of the appellant's evidence and concluded that, when considered in the context of the evidence as a whole, the trial judge was correct to reject his defence as a fabrication. I have come to this conclusion for a number of reasons.

[62] I have already referred to the appellant's sense of orientation, locality and awareness shortly before the critical period. His recollection of the type of wine purchased on the way to the stadium, the price he paid for it, the fact that not all the wine of the bottle purchased was consumed, the exact position at which the car was parked at the stadium, the type of sport being played on their arrival, the presence and movement of people and vehicles in the vicinity, the type of beer purchased by him at the stadium and the like, do not seem to be typical of a person who was so inebriated that he was about to fall into a state of automatism or criminal incapacity. Moreover, his conduct immediately before the critical period was quite purposive and structured: he alighted from the vehicle; noticed that Mr Gallant was asleep at the back thereof; observed his surrounds and the movement of other people in the vicinity; walked to the tent to purchase beer, transacted and paid for the purchase; walked back to the vehicle and positioned himself in front of it without any seeming difficulty to find its location amongst the many others parked in the area. Is it possible that a person, who is under the influence of liquor, can transcend from such a state of awareness and purposefulness into a state of automatism from the one moment to the next? In the absence of medical evidence to that effect, it does not appear to be reasonably possible.

[63] The appellant's conduct during the critical period is also quite telling about the veracity of his defence: He reached for his pistol, cocked it and discharged the shots. The fact that he reached for it implies that he must have been conscious where on his body he was keeping it. More significant is the fact that he then proceeded to cock the pistol: that is, to grasp hold of the sliding mechanism, slide it completely backwards and release it to slide forward and chamber the round before discharging it by pulling the trigger. The realisation that the pistol needs to be cocked before it can be discharged is suggestive of a state of mental awareness and logic. The cocking action requires both co-ordination and deliberate force. Can this reasoned conduct and level of dexterity be associated with that of a person acting in a state of automatism or criminal incapacity? Without medical evidence to the contrary, I think not.

[64] If one were to consider that the appellant sought to give the impression in his evidence-in-chief that, due to his state of intoxication he could only remember that they arrived at the stadium; that he was 'nearby' the car and Mr Swartbooi was no longer in their company before he had the 'blackout' and compare that with the many additional facts and events that he recalled when prompted under further examination, the inference is inescapable that he initially pretended to recall much less than he could so as to create the impression of a much more serious state of intoxication and incapacity before the claimed 'blackout'.

[65] In the analysis of the appellant's credibility thus far, I have only referred to his evidence. If regard is had to the accepted evidence of other witnesses about his conduct before and during the critical period, the truth of his defence is eroded even further. Mr Gallant testified that, although the two of them were both under the influence, they had a coherent conversation about general matters and that he could clearly understand the appellant. When the appellant was requested by Mr Katzao to follow him and observe what he had done, the appellant responded accordingly. He walked without assistance behind Mr Katzao and when he saw the victims and what he had done, he turned around and denied responsibility – a defence he shifted the next day to a denial of any recollection of the event.

[66] In my view, there is no basis to interfere with the credibility findings made by the court below. On the contrary, its conclusion is supported by an analysis of the evidence. The appellant did not lay a factual basis upon which the court could come to the conclusion that there is a reasonable possibility that, when he discharged the fatal shot, the appellant acted in a state of non-pathological automatism or criminal incapacity and was not able to form the legal intention to commit the crimes of murder and attempted murder on which he was convicted. When he recklessly discharged those shots at a public gathering with so many people about, he foresaw the possibility that he may wound or kill bystanders and, notwithstanding that knowledge, nevertheless proceeded to do so. Although he was under the influence of liquor at the time, his state of intoxication was not such that he could not appreciate the unlawfulness of his conduct and act in accordance with that appreciation. Even less was his state of intoxication such that it casts a

reasonable doubt on the voluntary character of the physical act of discharging the firearm that resulted in the wounding of Ms Huises and the death of her child.

[67] The appellant's defences of non-pathological automatism, criminal incapacity and inability to form the requisite intent to commit the crimes of murder and attempted murder resulting from his state of voluntary intoxication lack medical substantiation, merit and credibility. His guilt was established beyond reasonable doubt on the evidence as a whole and, absent any appeal against sentence and the other convictions, I make the following order:

> The appeal against the appellant's conviction on the counts of murder and attempted murder is dismissed.

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MARITZ JA

SHIVUTE CJ

CHOMBA AJA

APPEARANCES:

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	Instructed by Director: Legal Aid
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	For the State