THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1304/2021

In the matter between:

PINDILE JOSEPH JUNIOR NTSHONGWANA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Ntshongwana v The State* (1304/2021) [2023] ZASCA 156 (21 November 2023)

Coram: MOLEMELA P and PONNAN, MOCUMIE and MBATHA JJA and WINDELL AJA

Heard: 23 August 2023

Delivered: 21 November 2023

Summary: Criminal law – defence of pathological incapacity – ss 78(1A) and 78(1B) of the Criminal Procedure Act 51 of 1977 – onus on accused to prove lack of criminal responsibility on a balance of probabilities – onus not discharged.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Nkosi AJ with Steyn and Vahed JJ concurring, sitting as a court of appeal):
The appeal is dismissed.

JUDGMENT

Windell AJA (Molemela P and Mocumie and Mbatha JJA concurring):

Introduction

[1] During March 2011, an axe-wielding man brutally killed four people in the greater Durban area. He hacked them to death, decapitating three of them in the process. He also attempted to kill two more people. The victims were all men, walking alone at night. Both the injuries inflicted and cause of death were similar, namely chop wounds to the head and neck. On further investigation, the perpetrator of these crimes was linked to two more incidents, four months earlier: an assault with intent to do grievous bodily harm of a man on 26 November 2010; and the kidnapping and rape of a woman on multiple occasions over a period of three days during 28 November to 1 December 2010.

[2] On 28 March 2011, Mr Pindile Joseph Junior Ntshongwana, the appellant, was arrested at his home, which he shares with his mother, in Yellowwood Park, Durban. The appellant was arraigned before the KwaZulu-Natal Division of the High Court, Durban on nine counts: four in respect of murder (counts 4, 7, 8 and 9); two in respect of attempted murder (counts 5 and 6); and one each in respect of assault with intent to do grievous bodily harm, kidnapping, and rape (counts 1, 2 and 3, respectively). In respect of each count of murder and the rape, the provisions of s 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 applied, in terms of which, in the absence of

substantial and compelling circumstances, each count attracted a sentence of life imprisonment.

[3] The appellant pleaded not guilty. His defence was not entirely clear. As best as one could discern, it was that he suffered from a mental illness, and that by reason of such mental illness, he lacked criminal capacity (also referred to as criminal responsibility), which is a prerequisite for criminal liability.

[4] The type of defence sought to be raised is commonly referred to as a defence of pathological incapacity. Section 78(1) of the Criminal Procedure Act 51 of 1977 (the CPA) in that regard provides:

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

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

(b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission.'[1]

[5] Section 78(1A) states that: 'Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of s 78(1), until the contrary is proved on a balance of probabilities'. Section 78(1B) provides that the burden of proof with reference to the criminal responsibility of the accused shall be on the party that raises it. The onus in the present matter thus rested on the appellant. To discharge the onus, he had to prove that he suffered from a mental illness or mental defect during the commission of the offences and that the mental illness or mental defect resulted in a lack of criminal capacity.

[6] The appellant elected not to testify in his defence, but called three witnesses: Professor A E Gangat, a specialist psychiatrist; his sister; and his mother. Their testimony related to his odd behaviour and mood swings, which they believed to be indicative of his

[1] Sections 77, 78 and 79 of the Criminal Procedure Act 51 of 1977 were amended by the Criminal Procedure Amendment Act 4 of 2017. The words 'mental defect' were replaced with 'intellectual disability'.

mental illness. He was convicted by Khalil AJ (sitting with an assessor) in the KwaZulu-Natal Division of the High Court, Durban (the trial court) on all nine counts. The trial court found that on a conspectus of all the evidence, the appellant failed to discharge the onus resting on him in terms of s 78(1B) and that, notwithstanding the fact that he suffered from a mental illness at the time of the commission of the offences, he was criminally responsible for his actions. On 19 December 2014, the appellant was sentenced to, *inter alia*, five life terms – for the four murders and rape.

[7] The convictions and sentences imposed by the trial court were subsequently confirmed on appeal by the KwaZulu-Natal Division of the High Court, Pietermaritzburg per Nkosi AJ with Vahed and Steyn JJ concurring (the full court) on 4 June 2021. During November 2021, the appellant was granted special leave to appeal against both the convictions and sentences to this Court.

[8] In this Court, the appellant argued that the trial court committed a material misdirection, which was perpetuated by the full court, by focusing solely on s 78(1)*(a)* in relying on evidence that the appellant committed the offences in a 'well planned, calculated and purposed driven manner' and that he 'took steps to avoid detection after the commission of the offences,' all of which indicated that he was aware of what he was doing at the relevant times. Counsel for the appellant submitted that none of that was in issue. It was not disputed that the appellant was able to appreciate the wrongfulness of his conduct. The real issue was whether the appellant had the capacity to act in accordance with such appreciation when he committed the offences (s 78(1)*(b)*), an issue which was not addressed by the trial court or the full court.

[9] In this regard, counsel for the appellant contended that although the appellant elected not to testify and claimed that he had no recollection of any of the events, it mattered not. This is because the objective evidence of the survivors in the attempted murder charges and the complainant in the rape charge, coupled with the evidence of the appellant's expert witness, Professor Gangat, was sufficient to discharge the onus upon him in terms of s 78(1B).

[10] In the alternative, it is contended that both courts erred in their finding that the appellant's capacity to act in accordance with his appreciation of the wrongfulness of his actions was not *diminished* by reason of his mental illness as contemplated in s 78(7) of the CPA, thereby constituting substantial and compelling circumstances which justified a departure from the prescribed minimum sentences.[2]

[11] As the trial progressed the appellant came to accept that he had committed the offences in question. Therefore, in respect of conviction, the sole issue for determination before this Court is whether the appellant had discharged the onus in proving that he did not have the capacity to act in accordance with an appreciation of the wrongfulness of his conduct. In relation to sentence, the issue is whether his capacity to act in accordance with his appreciation of the wrongfulness of his actions, was diminished by reason of his mental illness.

Background facts

[12] The appellant committed the first offence on 26 November 2010. He attacked Mr Mhleli Tholo, who was walking alongside the road in Yellowwood Park in Durban with a baton (count 1). Mr Tholo shouted for help and one of the residents nearby switched on a light, whereafter the appellant released him and fled the scene. Prior to the attack, the appellant had tried to get the attention of the victim by enquiring from him if he knew a girl by the name of Zama. Mr Tholo reported the incident to the South African Police Service (SAPS) and was able to give them a description of the appellant as well as the registration number of the silver-grey car that the appellant was travelling in.

[13] A few days later, on 28 November 2010, the appellant kidnapped Ms M, who was walking in Park Street in Durban Central. What followed was a three-day ordeal during which she was kept against her will at the appellant's home and raped on three consecutive days (counts 2 and 3). She testified that during the period of her kidnapping the appellant's mood changed several times and that he at times, acted and made utterances that made no sense. He sometimes behaved as if she was his girlfriend and

---

[2] *Director of Public Prosecutions, Transvaal v Venter* [2008] ZASCA 76; [2008] 4 All SA 132 (SCA); 2009 (1) SACR 165 (SCA).

accused her, amongst other things, of having other boyfriends, aborting his baby, killing his child by infecting the child with AIDS, and causing problems between their respective families. At other times, however, he was apparently aware that she was not his girlfriend. When the complainant, for instance, first got into his car, he placed her hand on his crotch and asked her if she ever had sex with a Xhosa boy. When she said no, he said she would experience it that night. Later, he threatened the complainant to keep quiet when someone knocked on his locked bedroom door. He also dictated a message that she sent to her sister from her cell phone to the effect that 'she was with a wonderful man and was fine'. At one time when he raped her, she asked him to use a condom. He reassured her that 'he had nothing'. On a separate occasion, he forced her to travel with him to fetch a firearm, chased after her when she tried to escape and then assaulted her. On the fourth day, she managed to escape after she convinced the appellant that she wanted to move in with him, whereafter he took her to her flat to collect her belongings. After the escape, the complainant reported the kidnapping and rape to the SAPS. She provided them with a copy of the appellant's Identity Document (which she took from the appellant's room) and was able to give the SAPS the registration number of the car used by the appellant during the kidnapping.

[14] Approximately four months later, on 20 March 2011, the appellant killed and beheaded Mr Thembinkosi Cebekhulu in Montclair, Durban (count 4). Two days later, on 22 March 2011, he killed and beheaded Mr Paulos Hlongwa (count 7) in Lamontville, Durban. The murder in count 7 was witnessed by two people who saw the appellant picking up something reddish and placing it into a plastic packet after the attack. The head of the deceased was found later that same night, about a kilometre away in a bin. The following day, on 23 March 2011, the appellant killed Mr Simon Ngidi (count 8) in Umbilo, Durban. Mr Ngidi was not beheaded, but the injuries were clearly indicative of an attempt to do so. An eyewitness to this murder testified that the appellant continued chopping the deceased for some time, and it was only after he opened the front door and shouted at the appellant to stop, that he looked up and thereafter ran away. The appellant also killed and beheaded an unidentified man sometime between 20 March and 28 March 2011 (count 9). His body was found in Yellowwood Park, Durban, approximately 500 metres

from the appellant's home. A toe cap from a Nike shoe (later identified as belonging to the appellant) was found next to the decapitated body.

[15] In between the murders, the appellant attacked and attempted to kill two other men, Mr Siyanda Khumalo on 21 March 2011 in Umlazi and Mr Khangelani Mdluli in Lamontville on 22 March 2011 (on the same night the murder was committed in count 7). Both survivors testified. The complainant in count 5, Mr Khumalo, only had a fleeting encounter with the appellant from which he managed to escape. During this encounter there were no utterances from the appellant save from saying 'come here', after which he attacked him. Mr Mdluli (the complainant in count 6), however, had a brief interaction with the appellant before he was attacked. The appellant asked him why he had infected his child with AIDS. When the complainant denied the accusation, the appellant grabbed the complainant and attacked him with an axe. The complainant was able to break free and bolted to safety. The appellant chased after him but failed to catch him.

[16] Eyewitnesses to counts 4, 7 and 8 gave the SAPS a unique physique description of the appellant and of the car he was driving. This in turn led the SAPS to the assault charge committed against Mr Tholo in November 2010, which ultimately led them to the appellant's mother, as it turned out that the silver-grey car used in the assault on Mr Tholo was registered in her name.

[17] When the SAPS arrived at the appellant's home on 28 March 2011, a foul scent directed them to a dog kennel in the backyard. Bloodied clothes and shoes (including a Nike shoe with a toe cap missing) as well as a sharpened axe were found hidden inside the dog kennel. The appellant was arrested on suspicion of murder. Later, on further forensic examination, the SAPS found signs of latent blood in various places in the appellant's *en suite* bathroom.

[18] At the time of the appellant's arrest, his mother's car, a silver-grey Chevrolet Aveo (the Aveo), was not at the premises. The SAPS were told that the Aveo had been taken in for repairs and a courtesy car that was used by the appellant, a silver-grey Opel Corsa,

from Avis Rent a Car (the Avis car), had been returned to Avis four days earlier, on 24 March 2011.

[19] It then transpired that the Avis car had not been returned timeously to Avis car rental and Warrant Officer Mathe (Mathe) had been dispatched to collect the Avis car on behalf of the rental company. He was interviewed by the SAPS. He later testified that he spoke to the appellant on 24 March 2011 (less than a day after the killing of Mr Ngidi in count 8) and on inspection of the Avis car, confronted him about blood stains inside the car and damage at the boot area. He also noticed an attempt to remove a portion of the blood stains. The appellant explained to him that the Avis car had been involved in an accident with a bus, and that the blood stains were from injuries sustained by some of the bus passengers. The appellant voluntarily consented to surrender the car and followed Mathe in the Avis car to the Avis premises in Prospecton, Durban. Mathe then drove the appellant back to his residence.

[20] Two days after his arrest, on 30 March 2011, the SAPS interviewed the appellant in the presence of his attorney. He was asked a series of questions by Lieutenant-Colonel McGray. An analysis of the questions put at the interview reveals a total of 77 questions asked, of which the accused declined to comment on, or elected to remain silent in respect of 34 questions.

[21] Sometime later the SAPS linked the appellant to the rape and kidnapping case that was committed during 28 November 2010. DNA samples taken from the Avis car, and the toe cap of the Nike shoe found next to the unidentified body, also connected the appellant to the murder charges in counts 7, 8 and 9.

The appellant's medical history

[22] When the appellant first appeared in court on the charges, he was referred by the magistrate, in terms of s 77(1) and 78(2) of the CPA, to undergo psychiatric observation. The purpose was to enquire into and report on whether, by reason of mental illness or mental defect, the appellant was capable of understanding the court proceedings so as to make a proper defence, and whether the mental illness or mental defect, if any,

rendered him incapable of appreciating the wrongfulness of his acts or of acting in accordance with an appreciation of the wrongfulness of his acts (ie not criminally responsible).

[23] Three psychiatrists presented reports in terms of s 79(1)*(b)* of the CPA: Dr Dunn, Dr Moodley and Dr Brayshaw (the panel psychiatrists). A formal enquiry was held to determine whether the appellant was fit to stand trial as provided for in s 77(3) of the CPA. The KwaZulu-Natal Division of the High Court, Durban, per Pillay J, found the appellant capable of understanding the proceedings to make a proper defence. The proceedings then continued in the 'ordinary way' as prescribed in s 77(5) of the CPA.

[24] In his s 115 plea explanation, the appellant stated that he suffered from a delusional disorder, which resulted in 'loss of control'. A report from the appellant's expert witness, Professor Gangat, who later testified on behalf of the appellant, was annexed to his plea explanation. Two further details of the appellant's defence, which were not included in his plea explanation, later emerged through Professor Gangat's evidence and the cross-examination of the state witnesses: first, the appellant had amnesia during the period that the offences were committed and was unable to remember anything concerning it; and second, although the appellant was able to appreciate the wrongfulness of his actions during the commission of the offences, he lacked the criminal capacity to act in accordance with such appreciation.

[25] It is common cause that the appellant's early life and adolescence did not reveal any 'conduct disorder features'. At a young age he was introduced to sports and excelled at rugby. He was a prefect at school and by all accounts led by example, especially during those formative years. As a young adult he undertook a professional rugby career.

[26] The appellant's mother and sister testified that they first noticed peculiarities in his behaviour during August to December 2009, when the appellant was in his early thirties. This was about a year before the commission of the offences in counts 1, 2 and 3. According to his mother, he became a 'totally different person'. He refused to eat the food his sister had prepared for fear of being poisoned and accused her of stealing his personal

belongings. There were times when the appellant would not sleep in his room because of 'strange smells'. Both the appellant's mother and sister noticed the appellant increasingly isolating himself in his room. He had mood swings and would become excessively angry. He however never engaged in physical threats or violence.

[27] The appellant was first admitted for treatment on 15 December 2009 at RK Khan Hospital. According to the psychiatric report prepared by Dr Singh dated 19 January 2012 (the Singh report), which was handed in by consent, the appellant presented psychotic and manic symptoms evidenced by paranoid, religiose and grandiose delusions, tangentiality, pressured speech, irritable mood, decreased need for sleep and aggressive behaviour. The appellant was diagnosed with schizoaffective disorder, bipolar type. This included persecutory delusions, including, *inter alia*, that he was being followed, that his food was being poisoned, that people wanted to kill him and that his personal belongings were being stolen. He was put on medication and was discharged on 28 December 2009.

[28] Six months later, on 14 July 2010, the appellant was readmitted to RK Khan Hospital with a relapse of manic and psychotic symptoms following non-compliance with his treatment. The Singh report noted that the appellant refused hospital treatment, and a transfer to King George V Hospital was arranged. En-route to King George V Hospital, the appellant escaped from the ambulance. On 13 August 2010, he was admitted to the Valkenberg Hospital, Cape Town and stayed there for nearly four weeks. Dr Temmingh, the treating psychiatrist, filed a report, which was also handed in by consent. It was noted that on this occasion he presented symptoms of being preoccupied with religious and spiritual matters. He was talkative and his thoughts were described as circumstantial and over-inclusive. He appeared suspicious of the food in the ward and expressed over-valued ideas about his abilities to continue his rugby career. He also came across as intrusive and sexually flirtatious in interviews with female staff. The diagnosis of schizoaffective disorder, bipolar type was confirmed, and he was put on medication and discharged on 17 September 2010.

[29] On 23 December 2010, the appellant was admitted to the psychiatric ward in King George V Hospital. As it later turned out, at the time of his admission, he had already

committed the assault with intent to do grievous bodily harm (count 1), and the kidnapping and rape in counts 2 and 3. A report from Dr Moola was admitted with consent. It was reported that the appellant presented with persecutory delusions, auditory hallucinations and poor sleep on admission. The 'working diagnosis' was 'schizoaffective disorder, bipolar type most recent episode mania with psychotic features'. Dr Moola noted that he responded well to medication and his psychosis had improved, although his insight remained partial and he continued to have treatment-resistant negative symptoms of schizophrenia. His medication was increased to therapeutic doses and he was discharged on 3 January 2011.

[30] On 17 January 2011, at King George V Hospital, the appellant had a follow-up visit with Dr Moola and was found to be stable. There were no reports of aggressive or other inappropriate behaviour, although his mother still expressed concerns about the appellant isolating himself. His medication was increased. On 14 February 2011, during an interview with Dr Moola, the rape allegation was discussed, which the appellant denied. He, however, conceded locking his girlfriend in his room for a few minutes whilst he went to the kitchen as he feared someone may steal his belongings. (His mother confirmed this conversation when she testified for the defence.) According to Dr Moola, there were no reports of aggression and the appellant reported that he had been compliant with his medication, which was overseen by his mother. He recorded the appellant's 'persisting persecutory overvalued ideations', and the presence of 'residual positive psychotic features' as well as 'negative symptoms of schizophrenia'.

The evidence of the psychiatrists

[31] During the trial the defence relied on the evidence of Professor Gangat, whilst the State relied on the evidence of the panel psychiatrists. Professor Gangat has more than 33 years' experience in psychiatry. He is also a lecturer and examiner at the University of KwaZulu-Natal, Nelson Mandela School of Medicine in psychiatry. He previously served as a professor and head of department of psychiatry at the Medical University of South Africa (MEDUNSA).

[32] He first saw the appellant in July 2012, more than a year after his arrest. He testified that during his first visit, which was at the request of the appellant's mother, the appellant refused to be interviewed or examined by him and he appeared to be suspicious of him. Professor Gangat was however given a brief history by the appellant's mother of what she observed when she visited the appellant on 9 July 2012. On that occasion, she found the appellant behaving in a 'bizarre manner in that he was carrying a broom and preaching'. The appellant refused, in addition, to accept the food that she had brought. Professor Gangat also studied the hospital ward notes which revealed that on one occasion the appellant was found kneeling and reading the Bible and spoke to himself in an unintelligible and incoherent language. Professor Gangat also interviewed a nursing sister, Ms Luthuli at Westville Correctional Centre, who informed him that the appellant's behaviour was fine, and he was not verbally aggressive. With this limited information and ignoring sister Luthuli's observations, Professor Gangat concluded that the appellant 'is clearly suffering from a severe mental illness with delusions and hallucinations accompanied by bizarre behaviour. He lacks insight and has impaired judgment. He has lost touch with reality and is unable to give a coherent account of himself'.

[33] Three months later, on 18 October 2012, Professor Gangat consulted with the appellant. He prepared a second report dated 14 November 2012. He concluded that it was clear that the appellant has a delusional disorder, and was beset by delusions of being harmed, poisoned and killed. He stated that:

'When the delusions come thick and fast, the person loses control and can become hostile, aggressive, homicidal and extremely violent in this highly charged emotional state where the world of his delusions and hallucinations become one with the real world. He then loses touch with reality. His actions during this psychotic breakdown may not be able to be recalled.'

[34] He stated that delusional disordered persons have impaired impulse control and may not remember their actions during a psychotic breakdown. He added that the delusions may vary in degree, and are fixed, firm, false beliefs not amenable to reason or logic. He further explained that delusions involve situations that occur in real life, such as being followed, poisoned, infected, loved, deceived or cheated. He testified that, in his

opinion, the appellant acted in accordance with such delusions when he committed the offences because he feared being harmed, poisoned or killed.

[35] Notably, he could not, however, explain how the appellant, who did not know or meet the victims before the incidents, would have felt threatened by the said victims. Professor Gangat suggested, in general terms, that the only logical conclusion was that the appellant was acting in a psychotic state when he committed the offences and that although he was capable of distinguishing between right and wrong, he would have acted involuntarily, irrationally and not in a goal-directed or purposeful way.

[36] Professor Gangat did not fare well under cross-examination. When he interviewed the appellant in 2012, and when he testified in court a year later, he was not aware of the allegations against the appellant. He merely knew that the appellant was incarcerated for murder. He also did not know anything about the details of the offences and the appellant's conduct during the commission of the offences. He contradicted himself on the appellant's diagnosis of delusional disorder and the symptoms thereof and when referred to an academic article dealing with delusional disorder, he agreed with the views expressed therein that, in delusional disorders, mood symptoms tend to be brief or absent and, unlike schizophrenia, delusions are non-bizarre, and hallucinations are minimal or absent. When confronted with the undisputed evidence of the witnesses at the time of the commission of the offences, namely that the appellant drove a car on various occasions; had the axe in a plastic packet which he removed and used to attack the victims; committed the offences over a four month period; asked the rape victim if she ever had sex with 'a Xhosa boy'; and threatened the complainant to keep quiet when somebody knocked on his bedroom door, he was evasive and merely stated: 'Anything is possible'.

[37] Confronted with the fact that the appellant tendered an explanation, namely that the complainant was his girlfriend when asked about the rape allegation during his follow-up visit with Dr Moola on 14 February 2011, his response was: 'They sometimes remember facets of what occurred, not everything, and sometimes they have no recollection of it'. He could not explain how, if the appellant was in a psychotic state and acted irrationally, he would have been able to drive to various places and seek out his

victims to attack; wipe the blood in the bathroom and Avis car; and conceal the axe and clothing in the dog kennel. Pressed for an answer, Professor Gangat stated that the appellant would have acted involuntarily and 'could have done a better job in concealing the axe'. He later proposed that the appellant acted 'in a state of automatism' when committing the offences and described the act of driving a car as automatic. He later changed his testimony by conceding that the appellant's conduct in driving to various places to commit the offences was not automatic because, when driving, a person had to be aware of one's action and be possessed of one's faculties.

[38] Before the panel psychiatrists testified in court, they confirmed that, unlike Professor Gangat, they had read the transcript of the evidence and that they were au fait with the appellant's conduct at the time of the commission of the various offences. Following their observation of the appellant at Fort Napier Hospital, the panel psychiatrists described the appellant as coherent and cooperative, with his cognitive functions fully intact. Drs Moodley and Brayshaw both testified that they had changed their initial opinion expressed during the s 77 of the CPA enquiry and were of the view that the appellant's behaviour at the relevant times, was consistent with making conscious decisions, and his mental illness had no impact on his mental abilities of appreciating the wrongfulness of his actions and acting accordingly at the time of the commission of the offences. Dr Dunn confirmed his initial opinion and testified that he was more convinced that the appellant had criminal capacity at the time of the commission of the offences.

[39] The panel psychiatrists referred to examples in the undisputed evidence of the witnesses in the various counts indicative of the appellant having criminal capacity. In count 7, for example, they described the appellant's behaviour in leaving the scene and returning to continue the attack on the deceased, picking things up, placing them into a plastic packet, as being goal-directed and purposeful. According to them, a person in a confused state of mind, would be incapable of acting as such. Furthermore, the actions of the appellant in sharpening the axe, concealing it in the dog kennel, wiping off blood in the bathroom and in the Avis car, in their opinion, showed that the appellant was not only fully appreciative of what he did, but was aware of the consequences if caught. They

opined that the steps taken by the appellant to evade detection, are signs of clear thinking and can hardly be described as involuntary or automatic.

[40] The panel psychiatrists also disagreed with Professor Gangat's diagnosis of delusional disorder. They believed that Professor Gangat ignored all other symptoms which led, not only them, but also the psychiatrists at Valkenberg, RK Khan and King George V Hospitals to the diagnosis of schizoaffective disorder. There was also, according to them, no nexus between the offences committed, and the fears of the appellant of being poisoned, harmed, or killed. They testified that if the appellant feared that his sister was poisoning his food and harming him, it would have been more likely that he would have attacked her instead of the strangers walking along the road, posing absolutely no threat to him.

[41] The trial court remarked that the panel psychiatrists stood up well to cross-examination and impressed the court as being, not only reliable witnesses, but also unbiased in their opinions. The trial court noted that '[t]hey provided motivated reasons in coming to the conclusions they did' and where necessary, in support of their opinions, referred to the undisputed facts relating to the conduct of the appellant at the time of the commission of the various offences.

The criminal capacity defence

[42] There is a presumption in terms of s 78(1A) of the CPA that the appellant was not suffering from a mental illness at the time of the commission of the offence '*so as not to be criminally responsible in terms of s 78(1)*'. The appellant bears the onus to prove the contrary on a balance of probabilities.[3] According to Burchell et al,[4] with reference to *S v Kavin*,[5] and *S v McBride*,[6] the determining factor under s 78(1)*(b)* is the question of capacity for self-control, namely, whether, 'in all the circumstances of the case, the effect of the insanity was that the accused "could not resist or refrain from" committing the act

[3] Section 78(1B) of the CPA.
[4] E M Burchell, P M A Hunt, J Milton, J M Burchell *South African Criminal Law and Procedure*: *General Principles of Criminal Law* (2011) Vol 1, 4 ed at 299.
[5] *S v Kavin* 1978 (2) SA 731 (W) at 741A.
[6] *S v McBride* 1979 (4) SA 313 (W) at 319B-C.

or was “unable to control himself to the extent of refraining from” committing the act’. Burchell states that ‘it does not have to be shown that the accused’s conduct was involuntary in the sense that it was automatic or purely reflexive, for then the accused would be exempt from criminal liability on the ground that his or her act was not one of which the criminal law takes cognisance, and the question of criminal capacity does not arise’.

[43] The trial court arrived at its conclusion on mainly three grounds. First, the appellant’s decision not to testify. The trial court held that although the appellant was under no constitutional obligation to testify, it did not mean that there were no consequences attached to his election to remain silent. The onus remained on the appellant to prove that he had no mental capacity. Second, the appellant’s conduct during the period of the commission of the crimes. The trial court relied on evidence that the appellant not only committed the offences in a goal-directed manner, but he also took steps to avoid detection after the commission of the offences. This evidence supported the conclusion that he had the mental capacity to act in accordance with his appreciation of wrongfulness. Third, the trial court rejected the evidence of Professor Gangat and accepted that of the panel psychiatrists. The trial court found that Professor Gangat was biased, contradicted himself, disregarded certain information and that his evidence was ‘unreliable and of very little, if any, cogent value’.

[44] The conclusion by the trial court cannot be faulted. It was correct in rejecting the evidence of Professor Gangat and accepting that of the panel psychiatrists. There was therefore no misdirection on the facts. The evidence of the panel psychiatrists supported the trial court’s conclusion that the conduct of the appellant during and after the commission of the crimes was indicative of a person that had criminal capacity. In evaluating the evidence in counts, 4 to 9, the trial court found that his actions were those of someone who had a purpose in mind. The appellant drove around late at night looking for victims who were generally alone on the streets. He would then exit his car and follow the victims on foot. To attract their attention, he would pretend to enquire from them about someone before he attacked. He left his home on each occasion carrying the axe, concealed in a plastic packet, and exercised conscious decision-making in deciding when

to attack. In my view, the trial court justifiably concluded that the only reasonable inference to be drawn, consistent with the proven facts, was that the murders were pre-meditated and that the appellant was criminally responsible.

[45] As far as the kidnapping and rape of the complainant in counts 2 and 3 were concerned, the trial court meticulously dealt with the events from the time of the complainant's abduction on 28 November, until her escape on 1 December 2010. It considered that the appellant had frequent mood swings throughout this episode but was able to control his anger. It found that his actions were clearly indicative of conscious and goal-directed behaviour. The appellant prepared breakfast, ordered pizza, threatened the complainant not to make a sound when someone knocked at the door calling out his name and even dictated a cell phone message to the complainant's sister to inform her that all was fine. These were all signs of clear and rational thinking. The trial court was therefore correct in its finding that the actions of the appellant were clearly not of a person who acted involuntary or in a state of automatism. As the trial court found: ‘If anything, the conduct of the appellant may be described as manipulative and purposeful in inspiring fear into the heart of a defenceless young woman whom he intended all along to kidnap and rape’.

[46] The question that then arises in the present matter is the following. If Professor Gangat’s evidence did not withstand the scrutiny of cross-examination, and there was no reason to reject the panel psychiatrists’ evidence, and the appellant opted not to testify, where does it leave the appellant who bears the onus to prove on a balance of probabilities that he lacked criminal capacity at the crucial moments when he committed the offences? This brings me to the high-water mark of the appellant’s argument. Counsel for the appellant argued that the undisputed psychiatric history of the appellant and the ‘bizarre conduct’ of the appellant during the commission of the crimes were sufficient to discharge the onus on the appellant, as it clearly showed that he acted ‘in a severely deluded state when committing the offences and that this compromised his ability to regulate his conduct in accordance with his appreciation of [the] wrongfulness [of his conduct]’. The full court, so it is argued, therefore misdirected itself when it remarked that

the appellant was the only person who could attest to his state of mind. In support of his argument, counsel for the appellant relied on two cases: *Kavin* and *McBride*.

[47] Firstly, these two cases are of little assistance to the appellant. Although they both emphasize the importance of expert testimony in a defence of pathological incapacity in evaluating the particular facts of a case, the crucial issue of the appellant's criminal responsibility for his actions at the relevant time is ultimately a matter for the Court to decide, not the psychiatrist.[7] In both matters the court *and* the panel psychiatrists had an explanation from the accused as to what happened on the day of the commission of the offences, and the psychiatrists also considered the accused's conduct during and before the commission of the offences before they unanimously found that the accused had no criminal capacity. The respective trial courts could therefore find no compelling grounds to reject the findings of the experts.

[48] Secondly, as far as the appellant's decision to not testify is concerned, it is important to emphasize two aspects. First, the appellant cannot shy away from the fact that he is the only person that can testify about his state of mind during the commission of his offences and explain his behaviour. There are significant gaps in the events as they unfolded that could only have been filled by the appellant. His election not to testify was voluntarily made.[8] There are consequences for the appellant, particularly in relation to the issue on which he bore the onus. Dr Brayshaw mentioned in his report and early in his testimony that the appellant, in his view, is 'highly intelligent, understands the nature and seriousness of the charges against him, is able to follow procedure' and would be able to communicate with his legal representative if he so chooses. He added that, if he refused to communicate or to be cooperative, it would not be because of mental illness but would be deliberate. This evidence was unrefuted.

[49] Closely linked to the appellant's decision not to testify is his allegation that he had amnesia for the whole period during which he committed the offences (26 November 2010 until at least 28 March 2011). Amnesia is not a defence and such a claim should be

---

[7] *S v Harris* 1965 (2) SA 340 (A) at 365B-C; *S v Cunningham* 1996 (1) SACR 631 (A).
[8] *R v Von Zell* 1953 (3) SA 303 (A).

carefully scrutinised.[9] During the formal enquiry in terms of s 77(3) of the CPA, it was found that the appellant was able to understand the proceedings and give instructions to his counsel to make out a defence. The panel psychiatrists' testimony (that was accepted by the trial court) was that the appellant's conduct after the commission of the offences cast serious doubts on the appellant's claim of amnesia. According to the panel psychiatrists, that the amnesia claimed by the appellant extending over four months, covering the period when the offences were committed, is unknown in psychiatry. According to Dr Brayshaw, delusional disordered patients usually have sharp memories and in all his years of practice, it was the first time he had heard of a person diagnosed with delusional disorder having memory problems.

[50] I agree with the trial court's finding that the appellant's claim of amnesia appears to be an afterthought. It must be treated with scepticism for three reasons: he was able to give an explanation to Dr Moola on 14 February 2011 when he was confronted about the kidnapping and rape of the complainant in counts 2 and 3; he was able to give an account to Mathe who met with the appellant and engaged with him less than a day after the murder of the deceased in count 8; and he gave clear answers to Lieutenant-Colonel McGray who conducted the interview with the appellant on 28 March 2011. The undisputed evidence of these witnesses was that the appellant appeared to be cognitively intact and answered questions appropriately. Absent the appellant's evidence, there was no evidence on record as to his state of mind at the time of the offence and nothing to gainsay the evidence of the panel psychiatrists that his claims of memory loss were likely contrived.

[51] Thirdly, contrary to what counsel for the appellant submitted, the trial court did not ignore the appellant's medical history. In fact, it dealt with the appellant's medical history at length and was alive to the fact that the appellant had been in and out of psychiatric hospitals before the commission of the offences. Although the earlier psychological reports objectively showed that the appellant was suffering from a mental illness at the time of the commission of the offences, they were of little assistance in establishing

[9] *S v Majola* 2001 (1) SACR 337 (N); *S v Kensley* 1995 (1) SACR 646 (A).

whether the appellant had criminal capacity at the time of the commission of the offences. No evidence was led to give context to the medical reports,[10] and they were simply insufficient to gainsay the conclusions reached by the panel psychiatrists. Snyman[11] correctly points out that 'a person may at a certain time have capacity and at another time lack capacity. A mentally disturbed person may for a reasonably short period be mentally perfectly normal and therefore have capacity (this is the so-called *lucidum intervallum* [lucid interval]) and thereafter again lapse into a state of mental abnormality. For the purposes of determining liability, a court needs to know only 'whether X had capacity *at the moment* he committed the unlawful Act'.[12]

[52] Lastly, it is so that the appellant made certain unusual utterances to the complainant in counts 2 and 3. As much as some of his behaviour seemed odd, there were other facts which pointed to clear, rational and goal-directed behaviour. As stated by the trial court, these charges provided the trial court with the greatest insight over the period of some three days to examine the conduct of the appellant in light of the defence raised, the expert psychiatric evidence, medical reports and surrounding facts relating to the commission of these offences. The trial court noted that '[h]is behaviour showed a train of conduct that required a conscious awareness of what was going on and an ability to respond to the differen[t] circumstances he found himself in'.

[53] On a conspectus of all the evidence, the appellant failed to show any misdirection by the full court on the facts or the law. In addition, no circumstances have been shown which would entitle this Court to interfere with the finding of either the trial court or the full court that the appellant was able to appreciate the wrongfulness of his actions and that he was able to act in accordance with his appreciation of the wrongfulness of his actions during the commission of the offences. It follows that the appeal on conviction must be dismissed.

---

[10] *MM v S* [2012] ZASCA 5; 2012 (2) SACR 18 (SCA); [2012] 2 All SA 401 (SCA).
[11] K Snyman & S Vaughn Hoctor *Snyman's Criminal Law* 7 ed (2020).
[12] Ibid at 138.

Diminished responsibility

[54] Section 78(7) of the CPA states:

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

[55] The trial court found that that there were no facts in support of the appellant's contention that his actions were influenced or diminished by his mental illness. Counsel for the appellant contended that this was a misdirection, as the appellant's 'severe mental illness at the relevant times, coupled with his consistently abnormal conduct proved "overwhelmingly" that his criminal responsibility was diminished by reason of mental illness'. In *S v Mnisi*,[13] in dealing with diminished responsibility, this Court observed:

'Whether an accused acted with diminished responsibility must be determined in the light of all the evidence, expert or otherwise. There is no obligation upon an accused to adduce expert evidence. His *ipse dixit* may suffice provided that a proper factual foundation is laid which gives rise to the reasonable possibility that he so acted. Such evidence must be carefully scrutinised and considered in the light of all the circumstances and the alleged criminal conduct viewed objectively.'

[56] For the same reasons set out above, the finding of the trial court cannot be faulted. In respect of the murder counts (counts 4, 7, 8 and 9) an inference was drawn, which was consistent with the proven facts, that the murders were planned and not impulsive acts committed on the spur-of-the-moment. As far as the rape conviction is concerned, the appellant's behaviour showed a conscious awareness of what he was doing and an ability to control his actions and to act accordingly. As remarked in *Mnis*i, had the appellant testified, his testimony could have provided the factual foundation to give rise to the reasonable possibility that he acted with diminished responsibility. Yet, he chose not to give evidence.

---

[13] *S v Mnisi* [2009] ZASCA 17; 2009 (2) SACR 227 (SCA); [2009] 3 All SA 159 (SCA); 2009 (2) SACR 227 (SCA) para 5.

Sentence

[57] The appellant was sentenced to life imprisonment on each of the four counts of murder and on the count of rape. On count 1, assault with intent to do grievous bodily harm, he was sentenced to 2 years' imprisonment. On counts 2, 5 and 6 (the attempted murder and kidnapping charges), he was sentenced to six years' imprisonment on each of the counts.

[58] The appellant is a dangerous criminal who acted with flagrant disregard for the sanctity of human life and individual physical integrity. Counsel for the appellant accepted that in the absence of a finding of diminished responsibility there are no substantial and compelling circumstances justifying a departure from the prescribed minimum sentences imposed by the trial court. This concession was rightly made.

[59] In the result, the following order is made:

The appeal is dismissed.

_____

L WINDELL
ACTING JUDGE OF APPEAL

PONNAN JA (concurring)

[60] In *S v Hadebe*, Marais JA observed:

'The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'[14]

[61] In dismissing the appeal, my colleague, Windell AJA, has subjected the various components of the body of evidence to a detailed and critical examination. In stepping back a pace, to consider the mosaic as a whole in this matter, I will seek to demonstrate that the broad hypothesis sought to be advanced on behalf of the appellant is equally unsustainable.

[62] A useful starting point is the finding, after an enquiry by the high court (per Pillay J), that the appellant was capable of understanding the proceedings and of mounting a proper defence to the charges. The appellant has never sought to assail that finding. Early in the appellant's criminal trial, which had commenced thereafter in the ordinary course, there was an attempt to cross examine some of the prosecution witnesses as to credit, but that was quickly abandoned. Consequently, the prosecution evidence establishing the commission of each of the offences, as also the appellant's involvement in them, went unchallenged. The appellant was thus driven to the only defence that arguably could avail him in the circumstances, namely, his lack of criminal capacity. This had been

[14] S *v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426 E-H, Marais JA citing with approval from his own earlier judgment in *Moshephi and Others v R* (1980-1984) LAC 57 at 59F-H.

foreshadowed in his s 115 plea explanation and evidently had its genesis in a report that had been prepared by Professor Gangat.

[63] To succeed in his defence, the appellant had to prove on a balance of probabilities that the view of Professor Gangat was correct. However, when viewed in isolation, there were several disquieting aspects about the conclusion reached by Professor Gangat, the most notable of which were: He appears to have rushed to an opinion. Approximately one year after the commission of the offences, after no more than fleeting contact with the appellant, and when the appellant was far from co-operative, he was evidently willing to express a view. Professor Gangat saw the appellant on the first occasion for no more than five minutes (when the appellant refused to talk to him), on the second for half an hour and on the third for less than that. His view was expressed in a vacuum so to speak, without him having familiarised himself with the details of the offences, the manner in which they were committed or the version of the prosecution witnesses.

[64] Further, when juxtaposed against the evidence of the other expert witnesses, the acceptance of Professor Gangat's opinion had to be predicated on the rejection of some seven other opinions. This, because the opinion of Professor Gangat was irreconcilable with those opinions. The difference between Professor Gangat, on the one hand, and the other experts, on the other, also illustrates a substantial difference in objectivity, when the respective views are compared. Little wonder then, when the various instances of the appellant's purposeful, goal-directed behaviour was pointed out to Professor Gangat, he was willing to revise his opinion under cross examination. He then came to accept that the appellant was capable of appreciating the wrongfulness of his actions, but suggested he may well have been incapable of acting in accordance such appreciation.

[65] This alternative hypothesis formed a key plank of the appeal to this Court. The difficulty for the appellant is that this hypothesis rests as well on the acceptance of Professor Gangat's evidence. It must follow from the rejection of his evidence that it lacks a proper factual foundation. And, absent a proper factual foundation, it is open to rejection as no more than a rather speculative hypothesis. But, goes the argument, even on a rejection of Professor Gangat's evidence, by stitching together from various disparate

pieces of objective evidence, a proper factual substratum can be discerned for the contention that although the appellant had the ability to distinguish between right and wrong, he lacked the capacity of acting in accordance with his appreciation of the wrongfulness of his conduct. However, to cherry pick from the evidence, by disregarding those aspects that are less favourable demonstrates a misconception as to how evidence is to be evaluated. As it was put in *S v Trainor*:

'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence must of course be evaluated against the onus on any particular issue or in respect of the case in its entirety. [A] compartmentalised and fragmented approach . . . is illogical and wrong.'[15]

[66] That aside, the alternative hypothesis sought to be advanced hardly seems compatible with an acceptance that the appellant was capable of appreciating the wrongfulness of his actions. The key enquiry must focus on the time when the appellant committed each of the offences. It would have been far easier to accept that the appellant had suffered a complete loss of self-control had we been concerned with an isolated incident. But, here we are dealing with someone who has committed a series of offences on diverse occasions over a protracted period. That he could appreciate right from wrong, but was incapable of acting in accordance with such appreciation when he committed each offence, merely has to be stated to be rejected. The appellant had the wherewithal to go about his daily life, drive to unfamiliar places to seek out his victims, perpetrate the offences and avoid detection. On at least two of those occasions, he stopped when disturbed, demonstrated an awareness of his surroundings, before fleeing the scene. It thus seems inconceivable that over a period of many months the appellant suffered a complete loss of control only at the crucial time when committing each offence. I thus cannot subscribe to the view that the appellant did not have the capacity of self-control necessary to restrain himself from committing the acts that he knew to be unlawful.

---

[15] *S v Trainor* [2002] ZASCA 125; 2003 (1) SACR 35 (SCA); [2003] 1 All SA 435 (SCA) para 9.

[67] In the result, like Windell AJA, I would also dismiss the appeal, albeit on this narrower footing.

_____

V M PONNAN
JUDGE OF APPEAL

Appearances

For the appellant:	J E Howse SC
Instructed by:	Mdledle Incorporated, Durban
	Webbers Attorneys, Bloemfontein
For the respondent:	N Moosa
Instructed by:	National Prosecuting Authority, Durban
	Director of Public Prosecutions, Bloemfontein