IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

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

....

Case number: A140/2015

28/9/2016

In the matter between:

VICTOR VIKI SEABELA TAUNYANE **APPELLANT**

and

THE STATE **RESPONDENT**

SUMMARY

The appellant appealed his conviction on the charge of Murder read with the provisions of section 51(1) of Act 105 of 1997 and sentence of life imprisonment. The issue on appeal was whether the murder was planned or premeditated. The court a quo only made a finding that the murder was premeditated in the judgment on sentence.

On appeal the court remarked that the court a quo's finding on planning or premeditation in the course only of sentencing may create a number of difficulties. The most relevant difficulty in the present instance is that the sentencing stage was not the time when the matter should have been considered or argued or adjudicated for the first time. Planning or pre-meditation is decided having

regard to the onus of proof and should have been dealt with before conviction to serve as a basis for the determination of an appropriate sentence.

In the result, the court a quo was found to have misdirected itself in convicting the appellant of premeditated murder when it had not dealt with this issue before conviction. This misdirection prejudiced the appellant as he could not have known what standard of proof was applied and how such standard was discharged when the court made a finding of premeditation at the sentencing stage of the proceedings.

Consequently, the appeal court set aside the conviction of premeditated murder which was substituted by a conviction of murder with *dolus directus*. No compelling and substantial circumstances justifying deviation from the minimum sentence of 15 years' imprisonment were found to exist. However, the court made allowance for the two years spent by the appellant in prison awaiting trial and imposed a sentence of 18 years' imprisonment.

J U D G M E N T

SATCHWELL J:

Introduction

1. By leave of the Supreme Court of Appeal, appellant appeals his conviction of the murder of Johannes Tshitemba, on 18th June 2006 and in respect of which conviction he was sentenced to serve a term of life imprisonment.[1]

Failure by the court *a quo* to convict of an offence referred to in Part 1 of Schedule 2

2. Appellant was charged with three counts – "Murder read with the provisions of section 51(1) of Act 105 of 1997" as well as unlawful possession of a firearm and unlawful possession of ammunition. It is complained that the learned acting judge in the trial court made no mention of planning or premeditation in his judgment on conviction and that it was only when passing sentence that the learned acting judge first raised the issue of premeditation.

3. I note that the court stated in the judgment on sentence that the prescribed sentence is life imprisonment "if the court finds that it was premeditated", and then

[11] Appellant obtained leave to appeal from the court *a quo* against the sentence of life imprisonment imposed on him by reason of a finding at the sentencing stage that he was guilty of 'planned or premeditated murder'. at the first hearing of this appeal, the learned judges required that leave to appeal the conviction of murder be obtained by way of petition from the Supreme Court of Appeal which petition was granted.

went on to examine the evidence and concluded that "it is clear that the killing in this case by you was premeditated". It was on that finding and on that basis, that the learned acting judge sentenced the appellant to life imprisonment.

4. The state has argued that the indictment makes it clear that the appellant was charged with "murder read with section 51(1) of Act 105 of 1997" to which he pleaded not guilty and that the trial court found the appellant guilty of "murder read with section 51(1) of Act 105 of 1997".

5. Section 51(1) of the Statute provides that a court shall sentence a person to imprisonment for life where a court has convicted such person "of an offence referred to in Part I of Schedule 2". Part 1 of Schedule 2 refers to "Murder" as committed in no less than eight different circumstances. These range from murder where the victim was killed "in order to unlawfully remove any body part of the victim" through to murder where the death of the victim was "a law enforcement officer performing his or her functions". Murder which was "planned or premeditated" is merely one of these various scenarios in Part 1 of Schedule 2.

6. In the present matter, the state seeks to rely on Part 1 of Schedule 2 but the summary of substantial facts gives no indication as to which portion of Part 1 is alleged to be of application. The defence was entitled to request further particulars which does not appear to have been done in this case.

7. Certainly, by way of inference, both the represented accused and the court are in a position to exclude all other types of 'murder' save one which is 'planned or premeditated' from being of application to the present indictment. Although, I am somewhat concerned that an accused person and his legal representative should be expected (in the absence of a request for further particulars) to infer which portion of Part 1 of Schedule 2 and, therefore, of subsection 51(1), is the subject matter of a prosecution, I cannot see that the appellant has been prejudiced as to his defence: the appellant was informed of the charge "with sufficient detail to answer it"[2], the facts were known to him, he was legally represented and none of the other circumstances of murder set out in Part 1 of Schedule 2, could ever have been under consideration.[3]

8. The difficulty which, to my mind, arises in the present appeal is that there is no reference by the trial judge in the judgment on conviction to planning or

[2] *S v Legoa* 2003 (1) SACR 13 (SCA).

[3] This situation is not akin to that which was considered by an appeal court in *S v Raath* 2009 (2) SACR 46 (CPD), where the indictment made reference only to s 51 and did not specify ss (1) or (2) which the court found to be an 'ambiguous' notification of the application of Act 105 of 1997.

premeditation, which silence suggests that this important issue may not have been argued before the court.

9. For the trial judge to make a finding on planning or premeditation in the course only of a sentencing judgment may create a number of difficulties. To my mind the most relevant difficulty in the present instance is that the sentencing stage was not the time when the matter should have been considered or argued or adjudicated for the first time.[4]

10. Section 51(1) requires the court to have "convicted of an offence referred to in Part 1 of Schedule 1". It is prior to the conviction stage that the matter must have been fully ventilated, argued and considered. Only then can the necessary finding be made. It is only when such a conviction is determined and full reasons given in respect of an identified offence 'referred to in Part 1 of Schedule 1', that an appropriate sentence can be handed down.

11. That a conviction of murder must be identified as being 'planned or premeditated' at the conviction stage indicates the standard of the burden of proof which applies to the description of or the circumstances of the murder of which an accused is convicted.

12. I do not suggest that a new class of 'murder' (other than those identified as murder committed with '*dolus directus'*, '*dolus indirectus'*, or, *'dolus eventualis'*) has been created in Act 105 of 1997. I understand that the court has always been required to indicate at the time of conviction the class of intention with which an accused acted and is also now required to indicate whether or not such murder was committed within any one of the circumstances set out in Part 1 of Schedule 2.

13. For this particular appeal, the relevance of this consideration is the nature of the burden of proof which applies to a finding of the circumstances set out in Part 1 of Schedule 2. For a court to convict of murder which was 'planned or premeditated' it certainly seems that the usual standard of 'proof beyond reasonable doubt' must be applied at the conviction stage as to the existence or otherwise of planning or premeditation.

14. In the result, I am of the view that the acting judge in the court *a quo* misdirected himself in setting out a conviction of a planned or premeditated murder in in his judgment on sentence when he had not dealt with this issue in his judgment on conviction.

[4] The record on appeal gives no indication of any argument on 'planning or premeditation' prior to conviction.

15. Of course, the question is whether or not the appellant was prejudiced in any way by the finding of 'premeditation' only being made at sentencing stage. I am of the view that there was such prejudice which lies in the absence of any indication, as indeed there could not be in the judgment on sentencing, what standard of proof was applied and how such standard was discharged when the court made a finding of 'premeditation'.

The facts

16. The undisputed background to the events of the day in question is that appellant was married to a lady by whom he had children. He was imprisoned at one time during which his wife entered into a relationship with the deceased. On his acquittal on appeal and release from imprisonment, appellant had contact with his wife, children and the deceased. He was not pleased with the relationship between his wife and the deceased. On occasion, appellant visited his children where they lived with their mother. His arrival at this house was known, even by the deceased's own daughter, Thato Mohapelo,[5] to be "visiting his children".

17. It is common cause that the day when the deceased was killed was "Father's Day". Appellant arrived at the house, he made certain statements, a neighbour attempted to escort him away and he then fired a total of six shots at the deceased who died on the scene.

18. The two witnesses whose evidence is relevant as to the events which took place on the day in question are Ms Maria Nobandla and Mr Shadrack Alam. They were both present with the deceased at the entrance to the home of appellant's children. They were called as state witnesses and they were obviously friendly with both the appellant and deceased which suggests that they had no longstanding hostility against appellant prior to the killing to which they were witness.

19. Ms Nobandla and Mr Alam both testified that appellant arrived, was on the other side of the deceased's motor vehicle, called to and insulted the deceased and showed the deceased his firearm to which he also made verbal reference. Ms Nobandla physically intervened with appellant and pulled him aside whereafter the appellant appeared to commence walking away from the scene. Thereafter, appellant aimed his gun at the deceased, shot at him and missed, shot again and hit the deceased and then, as the deceased attempted to escape, appellant followed him and shot him at least four more times whilst the deceased was lying on the ground. Ms Nobandla believes that she heard a total of six shots fired whereas Mr Alam heard at least two shots fired.

[5] Who identified the appellant as "my father's girlfriend husband" at page 22 of the Record.

20. Appellant's version was that he had come to visit his children, the deceased assaulted him, Ms Nobandla separated them, the deceased then pulled out a gun and then he "…realised that my life was in danger". It was when appellant and the deceased "wrestled for possession of the firearm that is where the shot ran". They continued fighting for possession of the gun and "it also continued shooting" and then "the firearm ended in my hands". According to appellant he also fell down, "the firearm fell to the other side" and he then made his getaway.

21. Although cartridges found at the scene were admitted into evidence, there is no evidence if or where a firearm was ever found.

22. The post-mortem report records that the cause of death was "multiple gunshot wounds" of which six appear to be gunshot wounds with both entry and exit noted.

23. I am in agreement with the learned trial judge that the version of the appellant should be rejected. There is no indication that the deceased was ever in possession of a firearm; no firearm was found at the scene; the evidence of both Nobandla and Alam is sufficiently corroborative of each other to confirm the overall scenario and to eliminate collusion.

24. In the result, I would not disturb the finding that appellant is guilty of murder committed with a direct intention to kill the deceased.

Planning or pre-meditation

25. The concept of a planned or premeditated murder is not statutorily defined. As was pointed out in *Raath supra* our courts have tended to approach this question on a casuistic basis.

26. However, in *Raath supra* planned or premeditated murder was described as follows (p 53 para [16]):

> 'Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and one which had been conceived and planned over months or even years before its execution... Only an examination of all the circumstances surrounding any particular murder, including

> not least the accused's state of mind, will allow one to arrive at the conclusion as to whether a particular murder is 'planned or premeditated'. In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was 'planned or premeditated'.'

Raath was quoted with approval by the Supreme Court of Appeal in *Kekana v The State* (629/2013) [2014] ZASCA 158 (1 October 2014).

27. The distinction between 'planning' and 'premeditation' was made on the basis of dictionary definitions in *Raath supra* but has subsequently been examined in some detail in *S v PM* 2014 (2) SACR 481 (GP) where it was found that the concepts were distinct from each other – premeditation referring " to something done deliberately after rationally considering the timing or method of so doing, calculated to increase the likelihood of success, or to evade detection or apprehension" while planning refers to "a scheme, design or method of acting, doing, proceeding or making which is developed in advance as a process, calculated to optimally achieve a goal" (at para [36]).

28. The period of time which may elapse between a perpetrator forming an intention to commit the murder and carrying out such murder is of importance but does not, as was said in *Raath supra* "prove a ready-made answer to the question of whether the murder was 'planned or premeditated' or, as was said in *Kekana supra, "*time is not the only consideration".

<u>The Evidence of Planning or Premeditation</u>

29. Having found that the appellant did wrongly, unlawfully and intentionally kill the deceased, it was appropriate for the trial court to convict him of murder. That he pursued the deceased after the first shot and then fired four further shots into the body of the deceased as he lay on the ground, proves that this was murder committed with direct intention.

30. In deciding whether or not appellant killed the deceased in circumstances where such killing was planned or premeditated, the test is not whether there was an intention to kill. That had already been dealt with in finding that the killing was an act of murder. The question now is whether or not appellant "weighed – up" his proposed conduct either on a thought-out basis or an arranged-in-advance basis (as set out in *Raath supra* at [16]), or, whether or not appellant "rationally considered the timing or method" of the killing, or, prepared a "scheme or design in advance" for achieving his goal of killing the deceased (as set out in *PM supra* at [36]).

31. The following facts must, to my mind, be taken into account:

    a. Appellant had endured a period of incarceration during which his family life disintegrated. It is not a question of fault on the part of any of the adults involved but it must be acknowledged that appellant was distressed and disturbed and sought help from social workers. Understandably, his feelings towards the deceased were not friendly as evidenced in their previous interactions. It may be thought that this background suggests a motive for wanting to eliminate the deceased but motive or suggestions alone are insufficient to found a finding of premeditation.

    b. Appellant went to the home of his children. It seems to be agreed by everyone that he had previously visited his children and that this particular visit was understood to be taking place because it was Father's Day.

    c. Appellant carried a loaded gun on this visit to his children. Whilst it may be thought coming armed to the scene is suggestive of advance preparation for a killing, there is no evidence in support thereof. Ms Nobandla gave evidence that appellant told them all, including the deceased, that he carried his firearm 24 hours each day and night. It must be accepted that, regrettably, appellant was always illegally armed and that carrying a loaded firearm is

insufficient to find, beyond reasonable doubt that the appellant planned to kill the deceased.

d. Upon his arrival at the gate of the home where his daughters lived, appellant called upon the deceased to come closer and the deceased responded “you must come closer because you are the one who is looking for me”. At this time appellant opened his jacket and showed all three persons at the gate that he was carrying the firearm. Appellant then swore at the deceased. Nobandla grabbed appellant by the arm, pulled him aside and told him to leave the deceased alone as he was creating a scene in front of other people in the street. On the evidence of both Nobandla and Alam, all the aggression came from appellant and the deceased was silent and unresponsive. Appellant’s behaviour was certainly provocative. But I find it difficult to accept that it clearly indicates that appellant was acting in accordance with any pre-conceived design or process. It would be somewhat surprising if he had come to the house with the plan to kill the deceased in an open street with passers-by able to observe what he was doing. Before his arrival he could see that Nobandla and Alam were at the house. Yet he carried on. He did not immediately carry out any murderous action upon which he may have earlier decided. Instead, he focussed on the deceased and taunted and swore at him. He did not say to the deceased, Nobandla or Alam that he had come to kill the deceased. He was provocative but not violent. He showed his firearm but did not immediately use it. Nobandla was not so scared or terrified by his mien or behaviour that she felt unable to usher him away. Indeed the reason she gave for so doing was that he was attracting attention from others in the street and not that she feared that he might do something violent. In short, the scene at the entrance to the house where Nobandla and Alam watched appellant approach and then verbally insulting the deceased gives no indication of any action to carry out or implement a pre-planned objective such as killing the deceased.

e. Once Nobandla has ushered appellant away he seemed to walk away. It is Nobandla who puts a gloss on his walking-off as being a 'pretence'. That is her interpretation of his apparent departure because of what came next, which is that he did not actually depart. But there is nothing to suggest that this walking-off was a ruse on the part of appellant. There is no evidence to suggest that it was part of any deception or for what other purpose. Appellant could have shot the deceased then and there. He could have shrugged Nobandla off. He did not have to pretend to leave and then turn round and turn towards the deceased. The deceased was not more vulnerable because appellant had moved away.

f. Appellant did return. He fired a first shot at the deceased which missed him. He fired a second shot which did hit the deceased, who called out "Are you aware son that you have stroked (sic) me. You have got me". The deceased then ran off towards his vehicle parked at the gate. Appellant fired a third shot, then a fourth shot, whilst both he and the deceased were at the vehicle, then two further shots at the deceased who was on the ground. He then walked off and left the scene. There can be no doubt that appellant intended to kill and did in fact kill the deceased. The last four shots which he fired make this quite clear – he did not intend to wound but to kill. The period of the shooting must have been very quick – there was insufficient time for the deceased to get into his motor car at the gate between the second and the fourth shot. This is the point at which one has to enquire whether or not these events were planned or premeditated.

32. When one evaluates all the evidence against the comments in both *Raath supra* and *PM supra ,* I am unable to find that there is a deliberate course of action which was so planned as to increase the likelihood of success or enable evasion of apprehension thereafter. I cannot see any evidence of rational consideration or arrangement. I have great difficulty in finding facts which unequivocally reveal anticipation.

33. It is not required in our law that there be a trigger point which provokes the killing in the heat of the moment. As was pointed out in *Raath supra* there is indeed a continuum between two poles, the one being a murder committed in the heat of the moment and another conceived and planned over months or years.

34. Timing is of importance. In the present case, there is no evidence which, beyond all reasonable doubt, indicates that appellant arrived on the scene determined upon a murder or, that he walked along the street eyeing the deceased and then decided to kill him.

35. At the hearing of this appeal we were reminded of the dicta in *R v Blom* 1939 AD 188 at 202 and, when one has regard thereto, I find myself unable to exclude every other reasonable inference which could be drawn in the present case. Appellant may indeed have snapped once he realised he was allowing himself to be escorted away by Nobandla because he was drawing attention to himself and the deceased. Appellant may have snapped because of his experience of alienation whilst in prison, his shame in front of everyone known to him, his failure to control his temper meant he was being removed from his children's home because he was creating an embarrassment in front of others. Appellant may have decided as he was leaving, that he had had enough and that he would end the charade that he was married and the father or three daughters when, in fact, his ability to meet with his daughters on Father's Day was frustrated by the presence of his wife's boyfriend at the entrance to the house. These are some amongst many possible inferences. I do not suggest that one or all are correct. I merely attempt to illustrate that the evidence before us does not exclude all other inferences save that of premeditation and the evidence before us does not lead only to an inference of premeditation.

36. The evidence of the wife of appellant is that he phoned her later that evening and informed her that he had killed the deceased (which she must have already known) and that he had intended to burn his body after killing him. Appellant confirms the phone call but denies this aspect of the conversation. In view of the credibility

finding against appellant in the court *a quo* and the inherent improbability of his version, I would be inclined to accept that he did make such a statement. But this is after the event and may or may not be indicative of premeditation or of machismo or braggadocio. It is hardly conclusive of planning or premeditation.

37. I am not satisfied that the State has proven beyond a reasonable doubt that appellant is guilty of murder committed in circumstances of planning or premeditation.

38. In the result I would uphold the appeal against the conviction of murder as contemplated in Section 51(1), ie murder committed with planning or premeditation, as set out in Part 1 of Schedule 2 of Act 105 of 1997. I would qualify the conviction of 'murder' and with a finding of "murder with *dolus directus*". I would set aside the finding in the judgment on sentence of a murder which was premeditated.

Sentence

39. Act 105 of 1997 prescribes a minimum sentence of 15 years' imprisonment to be imposed upon a person who is convicted of the offence of murder. The court may only deviate therefrom in the event that substantial and compelling circumstances are found.

40. To the extent that mitigating or aggravating circumstances are argued to exist to cumulatively amount to substantial and compelling circumstances, they have already been discussed in this judgment.

41. On the one hand, there is the pain and aggravation of incarceration resulting in release on appeal, the separation from his wife and children only to find on release that there is to be no reconciliation and reunification and their marriage eventually ending in divorce in August 2006. The Appellant was confronted with the existence of and the involvement of the deceased in the life of his own family. He was

obviously a grown man and shamed or embarrassed in the presence of neighbours, both adults and children.

42. However, he brought this tragedy upon himself. He chose to carry a loaded firearm. He enabled the shooting and killing of the deceased. Whatever his distress at his family situation, neither adultery nor intrusion into family life could possibly justify the killing of any party to any of the relationships. It is not a question of stating that the deceased did not deserve to be killed but that appellant had no lawful justification for killing anyone at all. The deliberation with which he hounded down the deceased and fired a total of at least seven shots at him – four whilst the deceased was lying on the ground - is a most aggravating circumstance.

43. I cannot find substantial and compelling circumstances which would justify a lesser sentence of imprisonment than the minimum prescribed sentence of fifteen years imprisonment.

44. The learned acting judge in the court *a quo* did no more than state "It would seem you have spent some time in custody because of these offences" but unfortunately the only indication one can glean from the record of the period of incarceration whilst awaiting trial is that the murder was committed on 18th June 2006 and that sentence was imposed on 26th June 2008. On the assumption that appellant has spent almost two years in custody as an awaiting trial prisoner, I would impose a sentence of eighteen years' imprisonment with effect from 26th June 2006.

Order

1. The appeal against conviction is upheld only to the extent that, in regard to the appellant's conviction of murder by the court a quo, the following is added "with *dolus directus* but absent meditation or pre-planning".
2. The appeal against sentence is upheld to the extent that the sentence imposed by the trial court is substituted with the following:

   "The accused is sentenced to 18 (eighteen) years' imprisonment.
   The commencement of the sentence is backdated to 26 June 2008".

DATED AT JOHANNESBURG ON THE 28th SEPTEMBER 2016

SATCHWELL J

I agree

VAN OOSTEN J

I agree

MASIPA J

Counsel for appellant: Adv E Guarneri
Attorneys for appellant: Johannesburg Justice Centre

Counsel for respondent: Adv JM Serepo
Office of the DPP

Date of hearing: 9 September 2016
Date of judgment: 28 September 2016