

REPUBLIC OF SOUTH AFRICA



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
HELD IN THE DELMAS CIRCUIT

28/3/2014
CASE NO: CC31/13

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

28/11/13

[Signature]

In the matter between:

THE STATE

Vs

THABISO PRINCE MONTSHO

JUDGMENT

THULARE AJ

[1] The accused, a 27 year old male, is charged with one count of murder and one count of kidnapping. He pleaded guilty to both charges.

[2] It is common cause that the accused was in an intimate relationship with the maternal aunt of the deceased and that she terminated that relationship contemporaneous with the developments leading up to the charges against the accused. The accused did not accept that the relationship has irretrievably broken down. He still harboured hopes that that relationship could be restored. The accused and the family of the deceased both lived in Wattville, in the magisterial district of Benoni. The deceased and his mother lived together with her younger sister, the accused's erstwhile girlfriend, at the same address.

[3] It is common cause that on the afternoon of 11 August 2012, at around 17H00 the accused came and removed the deceased, Tshegofatso Moraswi, at that time a 3 year old boy-child who was to turn four years old the following month, from the street in front of their home where the deceased was playing with his twin brother and a friend, pushing old tyres along the street; that he carried the child for some distance, then walked with away and took the child to Wattville Dam, also known as Dalpark Dam, where he stabbed the child several times with a knife, with the intention to kill the child, and that he killed the child and then fled the scene leaving the deceased there at the dam.

[4] The evidence shows that Albert Basi, a 16 year old youth was at the corner of Padi and Poto street, not far from where the three young infants were playing the tyre game. Whilst there, he saw the accused at that corner. He noted that the accused was keeping observation. He knew the young children from sight but did not know their names, and also knew that the accused had an intimate relationship with a relative of the deceased. He saw the children playing their tyre game. It came as no surprise to him when the accused called the young boy to him, neither was it strange to him when the accused first carried the child and later walked away with the child. In his mind, they were on their way to the shops for the accused to spoil the child with some gifts.

He reported what he saw only later that evening when he heard that the child was missing. The accused had walked with the child to the direction of Wattville Dam. The evidence suggests that it is amongst others from the reports of Basi that the community of Wattville caught the accused, and assaulted him, before he was handed over to the police.

[5] Maputle Jeffrey Tlaka is a Captain in the SAPS, stationed in Etwatwa, who was asked by the Actonville SAPS to oversee a pointing out, which was done by the accused. When explained his right to legal representation, the accused had indicated that he does not need legal representation for purposes of the pointing out, although he may require legal representation in future. When explained that what he says will be noted down and that photos will also be taken, which may be used later as evidence against him during a subsequent trial, he indicated that he understood and when asked whether he still wished to make the pointing-out, he replied in the affirmative. He indicated that he was not assaulted, threatened or influenced by any person to make the pointing-out. When Captain Tlaka observed the bruises on his back, the accused told him that the bruises were as a result of the assault by the community members when they arrested him, before the police arrived.

[6] The accused, freely and voluntarily took Captain Tlaka, the photographer and other back-up police officers to the pointing-out scene. The accused directed Captain Tlaka from Benoni SAPS station through a number of streets in Wattville, leading them out of the squatter settlement towards the dam. At the dam the accused took them into the Dalpark area where he then asked them to stop. The accused walked them for about 300m and pointed at a wet and muddy area and said that is where he killed and left the small child, which he carried away from Poto street in Wattville, whereafter he threw away the knife with which the child was stabbed, and fled the scene. Photos which were taken, were handed in as exhibits.

Captain Tlaka was not cross-examined at all.

[7] The accused version is that the maternal aunt of the deceased was his girlfriend, and that her parents did not approve of their relationship. Arising out of a dispute which arose between her and her parents, she left her parental home and came to stay with him. He and his parents accepted her for she was pregnant with his child. The first attempt of reconciliation between her and her parents, in his room which he shared with her failed, but later she reconciled with her parents and moved back home. From then on, his attempts to meet with her were thwarted by her relatives and he was prevented from seeing her. Even an attempt through her friend to get to know her well-being, or see her, failed. For a few months he went about hurting, attempting to get to see and reconcile with

her and or her parents, which attempts were always met with contemptuous disregard. Attempts by his parents to settle the issues between him and her family also failed.

[8] On 11 August 2012 he attended a traditional ceremony as he is a traditional healer. Whilst there, he shared his frustrations and hurt with other traditional healers and took a decision to join them dance as part of his emotional healing. He did not have his traditional regalia with him and decided to go home to fetch it, which he did.

[9] When he left home, he had with him a sports bag, containing his regalia as a traditional healer, which included his kangas, blanket, and beads to which a knife is attached. Carrying his sports bag, he decided to go first via his girlfriend's home in yet another attempt to reconcile with her and her family. He knocked and received no answer.

[10] As he left the yard, he noticed a group of children playing in the street in front of that yard, amongst others was the deceased whom he knew as one of the twin boy children of Jabulile, the girlfriend's elder sister. He picked up the child and does not know why he did so. He walked away with the child not knowing where he was going. He did not talk to the child, neither did the child talk to him throughout their 30 minutes walk from Poto street, through Silver Town and Tamboville, to the dam, in Wattville.

[11] He just walked aimlessly carrying the child and when he came back to his senses he was at the dam. He heard voices in his head, but could not hear what the voices were saying. However, it is not the voices that told him to kill the child. He does not know if he put the child down or whether the child dropped from his hold. He undressed the child, removing all the clothing and leaving the child naked. He opened his sports bag, searched for and took out the beads, removed the knife therefrom and started stabbing the child. He does not know how many times but he accepts it was 12 times. When he left the child, the child was still crying and it was dark. He walked away. He threw the child's clothing amongst the reeds at the dam, some distance away from the child. He also threw away the blood-stained knife away.

[12] He ran home. In his room he changed the blood-soaked clothing which he had on and placed them in a plastic bag. He moved around the structures on the yard to the backyard where he hid the plastic bag containing his blood-soaked clothing.

[13] The parents of the deceased came to his house, looking for the child. He denied any knowledge of the whereabouts of the child. He was confronted with information that he was the person last seen walking away with the child. He denied this. He was afraid of the parents and the community. He was taken away to the child's home. The Police were called to the house. They asked him about the whereabouts of the child and he denied any knowledge and denied walking away with the child. He later admitted to the Police that he took the child away but did not tell them that the child was injured. He did not tell the Police everything that happened.

[14] Upon searching his parental home, his blood-stained clothing was discovered where he had hid them inside the plastic bag behind the house. The child was searched for but was never found that Saturday. It was only the following day, the Sunday, on further searches by the community and the Police, that the body of the child was discovered at the dam. His version is that he could not take the Police or the community to the child as he did not remember where he had left the child.

[15] He did not plan what happened. He cannot explain why he did what he did. He never had any problems with the biological parents of the child. He went to school with them. He asked for forgiveness for what he did.

[16] After the testimony of the accused the State applied to re-open its case, which application was not opposed and was granted.

[17] Jacobus Cornelius Coetzee (Coetzee) is a registered Clinical Psychologist who runs an independent practice but also renders his services to Weskoppies Hospital in clinical psychology and forensic psychological assessment. He holds a Bachelor's degree in Theology and Psychology, an Honours degree in Psychology and a Master's degree in clinical psychology. He is registered with the Health Professions Council of South Africa. He is a member of the South African Medico

Legal Society as well as the International Association for Forensic Mental Health Services.

[18] He evaluated the accused at the request of the court whilst the accused was under observation at Weskoppies Hospital in Pretoria.

[19] In his psychological interview with the accused, the accused reported to him the voices that scream at him usually at night, and throw him with birds and chickens. The voices tell him to take a cable wire to hang himself and sometimes cut himself with a razor or to fight people.

[20] Coetzee conducted a psychometric test on the accused.

20.1 Under the personality assessment inventory (PAI), which test provides information relevant for clinical diagnosis, treatment planning and screening for psychopathology and covers constructs most relevant to a broad-based assessment of mental disorders, the accused answered the questions in a way to create a distorted profile. His interpretation of the marked elevation on the negative impression scale is that the accused made a deliberate attempt to create an overly negative impression of himself. Coetzee holds the view that this is indicative of an attempt to malingering psychiatric symptoms.

20.2 Under structured inventory of malingered symptomatology (SIMS), which test is a multi-axial, self-administered screening measure for detection of malingering in clinical and forensic settings, the accused scored positive for attempted malingering for all of the scales on psychosis, neurologic impairment, amnesic disorders, low intelligence and affective disorders. Coetzee interprets this as that the accused endorsed a high frequency of symptoms that are highly atypical in patients with genuine psychiatric or cognitive disorders, this may indicate an attempt to malingering these symptoms.

20.3 Under the inventory of legal knowledge (ILK), which is a test designed to assist the forensic examiner in assessing response styles of defendants undergoing evaluations of their competency to stand trial and is a measure of a defendant's approach to inquiries about his legal knowledge, the accused obtained a score of 50, which score falls in the upper end of the normal range. Coetzee interprets this as that the test results support the fact that the accused did not attempt to feign limitations in his ability to understand or participate in the legal process.

[21] Coetzee's opinion is that the accused does not currently suffer from any clinical psychiatric disorders and that at the time of the incident he did not suffer from any clinical psychiatric disorder. Coetzee's opinion is that the accused shows antisocial and narcissistic personality traits. Coetzee is also of the opinion that the accused is currently malingering some psychiatric symptoms, specifically those in the psychotic disorder spectrum.

[22] Coetzee's conclusion is that the accused is capable of understanding the court proceedings and can meaningfully contribute to his own defence, and that at the time of the commission of the offence, the accused was able to distinguish between right and wrong and was able to act in accordance with such understanding.

[23] Dr K Naidu, a State Psychiatrist and Dr PH De Wet, a Psychiatrist appointed by the Court, are both duly registered psychiatrists who compiled a joint report regarding the mental condition of the accused, which was handed in by agreement between the parties.

[24] Their examination consisted of clinical interviews with the accused and observation of his general behaviour in the ward. He was physically examined. A summary of court proceedings was made available to them, a psychosocial report was compiled and he was psychologically evaluated.

[25] The two Psychiatrists found no psychiatric diagnosis. The diagnosis they found was malingering. They both noted his previous medical and psychiatric history.

[26] Their opinion is that the accused is capable of understanding court proceedings and is able to contribute meaningfully to his defence.

[27] Their opinion is also that at the time of the alleged offences, the accused did not suffer from a mental disorder or mental defect that affected his ability to distinguish between the rightful or wrongful nature of his deeds. A mental disorder or mental defect did not affect his ability to act in accordance with the said appreciation of the rightful or wrongful nature of his deeds.

[28] The only issue between the State and the accused is whether the murder was planned or premeditated.

[29] The joint report of the two Psychiatrists, Dr Naidu and Dr De Wet, was admitted by the accused. The only criticism that the court has, of their report, is that they do not set out their training, competency, skill and/or experience, to enable the court itself to conclude that they are persons qualified to be experts in their field. Moreover, they do not indicate the nature of the clinical interviews, other observations and examinations they carried out as well as the facts they found, upon which their diagnosis is based, to enable the court to draw its own conclusions. In the light of their being qualified as experts not being in dispute, for purposes of this judgment, their titles and their declaration that they are duly registered psychiatrists will suffice to meet their qualification as experts to make a psychiatric diagnosis. In the same breath, I accept their opinion as the opinion of the court and find that no psychiatric diagnosis was made in respect of the accused, and that what was diagnosed was malingering.

[30] The court finds that the accused is capable of understanding court proceedings and is able to contribute meaningfully to his defence. The court further finds that at the time of the alleged offences the accused did not suffer from a mental disorder or mental defect that affected his ability to distinguish between the rightful or wrongful nature of his deeds. A mental disorder or mental defect did not affect his ability to act in accordance with the said appreciation of the rightful or wrongful nature of his deeds.

[31] Having regard to the evidence of Coetzee, the court finds that the version of the accused that he heard voices is beyond reasonable doubt false. With specific reference to the psychometric tests conducted on the accused and with specific reference to the personality assessment inventory, the court finds that this is part of the accused's deliberate attempt to create an overly negative impression of himself in an attempt to malingering psychiatric symptoms. The court further finds that the accused endorsed a high frequency of symptoms that are highly atypical in patients with genuine psychiatric or cognitive disorders. The court also finds that the accused falls in the upper end of the normal scale and that the accused did not attempt to feign limitations in his ability to understand or participate in the legal process.

[32] The court accepts the opinion of Coetzee, and finds that the accused has anti-social and narcissistic personality traits. The court further finds, in favour of the accused, that the murder was not planned.

[33] Section 51(1) of the *Criminal Law Amendment Act, 1997* (Act No. 105 of 1997) provides as follows:

"Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."

Part I of Schedule 2 referred to provides as follows:

"Murder, when –

(a) It was planned or premeditated; ..."

[34] The terms *"planned"* or *"premeditated"* are not defined in the Act. The Cape Provincial Division, through Bonzalek J writing for the Full Bench, pronounced itself as follows on this aspect in *S v Raath* 2009(2) SACR 46 (C) at paragraph [16] c-g:

"The concept of a planned or premeditated murder is not statutorily defined. We were not referred to, and nor was I able to find, any authoritative pronouncement in our case law concerning this concept. By and large it would seem that the question of whether a murder was planned or premeditated has been dealt with by the court on a casuistic basis. The Concise Oxford English Dictionary 10 ed, revised, gives the meaning of premeditate as 'to think out or plan beforehand' whilst 'to plan' is given as meaning 'to decide on, arrange in advance, make preparations for an anticipated event or time'. 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 a murder which may have been conceived and planned over months or even years before its execution. In my view 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 a 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'.

[35] Clearly, the Full Bench approached "*planned or premeditated*" as a concept, meaning it as one idea. It appears in my view, with respect, that the learned Judges accepted the word "*or*" between the two words as meant to introduce a synonym or explanation of a preceding word.

[36] In my view, the two words, "*planned*" and "*premeditated*" are two different concepts representing two different ideas. "*Premeditated*" refers 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. On the other hand, "*planned*" 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. Such process has general features which include:

1. The identification of the goal to be achieved.
2. The allocation of time to be spend.
3. The establishment of relationships necessary to execute.
4. The formulation of strategies to achieve the goal.
5. Arrangement or creation of the means or resources required to achieve the goal and
- 6 Directing, implementing and monitoring the process.

In my view, the word "*or*" between "*planned*" and "*premeditated*" in Part I of Schedule 2 introduces the second of the two alternative concepts. In my view, the use of the word "*or*" indicates that the Legislature did not favour a composite description of the circumstances, to meet the test.

[37] There is no evidence to suggest that the accused conceived an intention or plan to kill the deceased before that fateful afternoon, or specifically before he met the deceased in the street. From the accused's own version, it is clear that he was angered by the actions of the blood relations of his girlfriend, in particular their disapproval of his relationship with their daughter and their actions in a quest to bring that relationship to an end. His anger seems to have been fuelled by Tshepiso, girlfriend, ending their relationship on Friday the 10th August 2012, the day before he killed the deceased, on the accused's own version as related to Coetzee.

[38] The court accepts the evidence of Coetzee and finds that the accused's identity is one of ego-centrism with a self-esteem derived from personal gain, power or pleasure and that his goal-setting is based on personal gratification. He has a lack of concern for feelings, needs or suffering of others. Exploitation is his primary means of relating to others, including coercion and use of dominance. The court also accepts that the accused has a personality trait of grandiosity with feelings of entitlement, either overt or covert self-centredness, firmly holding the belief that he is better than others and is condescending towards others and is attention seeking with excessive attempts to attract and be the focus of the attention of others in admiration seeking.

The court finds that the version of the accused that his possession of the knife that afternoon in Poto street, Wattville, was simply a co-incidence, is highly improbable. So is his version that the reason for him to be in that street, where Tshepiso's parental home is situated, was an attempt to reconcile. Both are beyond reasonable doubt false, in my view.

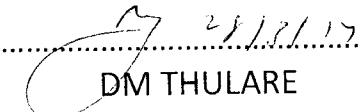
[39] When the accused saw the 3 year old boy pushing a tyre playing with his twin brother and friends, he conceived the idea of killing the infant as a sign of his power to satisfy his self-esteem. The killing was an act calculated to force Tshepiso's relatives towards benevolence and acceptance of his relationship with her, thus seeking their attention. It was also an act of revenge to Tshepiso for ending the relationship, and her family for their disapproval of him as a suitable partner for her.

[40] The deceased and his twin brother were playing without any adult supervision from a relative. The accused stood by the corner, doing an observation. The likelihood is that he had hoped to see and meet Tshepiso. He had sufficient opportunity, as he stood and observed, and as he noted the children playing, to ponder. The accused did not take any child and stab him or her, there and then in a moment of rage or impulsively in a spur of a moment. He specifically called the child of Jabulile, the elder sister of Tshepiso. When the accused carried the child away, he had rationally considered the timing and circumstances as suitable for the removal of the child to an isolated spot. The 30 minute walk to an isolated dam outside the township increased the likelihood of him succeeding to kill the child without any interference, detection or apprehension. The brutal killing of the child was an act of power, an act of dominance in the sense of having the last laugh in the whole episode, an act of

personal gratification, an act of revenge, an act of hurting Tshepiso and her family, an act to influence control and manipulate Tshepiso and her family, an act of callousness, an act of hostility in response to the discipline which Tshepiso's family tried to enforce. It was unnecessary. It was unnecessary to undress the child, with the attendant cold temperatures of the closing stages of the winter months in Gauteng, South Africa, especially the East Rand, at that time of the day, and month. Not only was it an act of lack of concern for feelings of the child and accused's lack of guilt or conscience about the harmful effects of his aggressive actions. It was also an act of humiliation not only to the child, but also to his family.

[41] The court finds that the murder was premeditated. My understanding of the decision in *Malgas supra*, as well as the decision in *S v Khiba* 1993(2) SACR 1 (A), in my view, having regard to the terminology therein employed, does not convey facile enough to me that the Supreme Court of Appeal itself interprets "*premeditated*" to be incapable of being understood as a concept on its own. I have not been referred to, nor self been able to trace any judgment where this question was specifically discussed.

[42] The accused is found guilty of the premeditated murder, as set out in count 1. He is also found guilty of kidnapping, as set out in count 2.


DM THULARE
ACTING JUDGE OF THE HIGH COURT