IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A259/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

11/6/14

DATE

SIGNATURE

In the matter between:

ALBERT PETRUS VAN VUUREN **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

Fabricius J,

1.

The Appellant was convicted of murdering his wife ("the deceased"), found guilty and sentenced to life imprisonment on 30 August 2011. The honourable trial Judge Kubushi J granted leave to appeal to the Full Court against the conviction and sentence.

2.

In the relevant charge sheet, no reference was made to the provisions of the ***Criminal Law Amendment Act 105 of 1997***, relating to any possible minimum sentence.

It was not specifically stated that the State would rely on the fact that the murder had been planned or premeditated. This arose during argument on sentence and in the application for leave to appeal it was contended that such a duty rested upon the State in the drawing of the particular charge sheet, and it was, one of the bases upon which the learned Judge granted leave to appeal. However, at the plea stage, the State Advocate said that he would rely on the provisions of ***s. 51 of Act 105 of***

1997 "dealing with the minimum sentences." No sub-section was referred to nor was any further detail provided of the State's reliance on ***s. 51.***

3.

Before dealing with certain parts of the evidence presented by the State, it will be convenient to specify the facts that were common cause during the trial:

3.1

The deceased died in her house of multiple stab wounds and a cervical spine injury on the evening of 11 July 2010. In fact, according to the post-mortem examination report she was stabbed 25 times with a sharp object. These stab wounds varied in depth from superficial to deep. Three of the stab wounds were on the left, back and upper arm. There were also wounds on the palm surface of each index finger, one above the right clavicle and one on the abdomen. All other stab wounds were mainly on the chest. Six of these wounds were inflicted while she must have been dead. She also suffered a fractured jaw and there was a dislocation of the neck at the c1/2 level. Dr Lombard, the State Pathologist, attributed four stab wounds as the

ones that caused death. These stab wounds penetrated her heart muscles and both the right and left lungs;

3.2

During the evening of 11 July 2010, at least four people were present in the house where the deceased was murdered, namely the deceased, the Appellant, Mr Gordon McCallum ("McCallum") and a worker of the deceased known only as Thomas. This Thomas disappeared after the murder and was not seen or heard of since;

3.3

The Appellant sustained serious injuries on his left hand and at the back of his head during the evening in question. Both of these wounds had been bleeding profusely;

3.4

No explanation for these injuries sustained by the Appellant was presented during the trial;

3.5

McCallum reported the incident to the owners of the property on which they were staying, and a Mr Strauss Junior called the police. The first police officer attending

to the crime scene at approximately 23:35 on the evening of the 11th of July 2010 was a Detective Warrant Officer Du Plessis;

3.6

When McCallum arrived at the Strauss' house, his trousers and shoes were stained with a substance resembling blood. There is however no doubt that this was in fact blood in my opinion, but for some inexplicable reason these stains on McCallum's clothing were never examined by the police;

3.7

McCallum washed these stains from his jeans and shoes after the incident;

3.8

Mr Strauss Junior accompanied the police to the crime scene on the night in question. He was at the scene for about 30 minutes, and left together with McCallum and went to sleep. The next morning when he returned to the scene, he found McCallum outside as he could not enter because the house had been locked, as he did not know that Warrant Officer Du Plessis had made an arrangement with Mr Strauss Junior that she would leave the key in a basket;

3.9

Appellant was arrested on the crime scene and detained at the Bronkhorstspruit police cells, where his clothing was changed the next morning which had been brought to the cells by McCallum. Photographs were also taken of the blood stained clothes;

3.10

The crime scene was not preserved by the police and no forensic investigation of any kind was conducted during that night on the scene. This astounding failure was not explained by the police;

3.11

Somebody partially cleaned the crime scene during the night after Appellant had been arrested. It could allegedly not have been McCallum who did not have the key of the house after Warrant Officer Du Plessis left. Whether or not he had his own separate key was not investigated. There is no explanation about this mystery at all;

3.12

Somebody also removed a blood drenched jacket from the main bedroom and placed it in the kitchen during that night, also after the Appellant had been arrested. This jacket had been given to McCallum by the Appellant prior to the night in question;

3.13

McCallum was not interviewed by the police on the night and neither was the said Thomas who, as I have said, disappeared shortly after the incident;

3.14

The jacket worn by McCallum on the night in question was never confiscated nor examined by the police;

3.15

Only one speck of the deceased's blood was discovered on the knee area of the Appellant's jeans worn during the night in question. Dr Lombard was never asked whether, having regard to the number of stab wounds and the violence involved, one

would have expected more blood to have appeared on the particular assailant's clothing, if indeed it was the Appellant;

3.16

The Appellant's jeans, shoes, shirt and jacket were stained with blood that did not originate from the deceased;

3.17

The actual murder weapon was never found nor identified, and the blood that was recovered from a knife in the kitchen did not originate from the deceased;

3.18

R13 000 was found missing from a kitchen cupboard, and it was never explained how this could have occurred;

3.19

Both McCallum and Appellant had consumed alcohol during the afternoon and evening of that night and according to Warrant Officer Du Plessis the Appellant had been clearly drunk;

3.20

McCallum had for years consumed medicine/tranquilisers for bipolar disorder which he had mixed with alcohol, and had also done so during that particular evening;

3.21

McCallum had also handed the Appellant a tranquiliser tablet during the evening in question.

4.

Looking at these common cause facts coldly one would obviously be inclined to think that the murderer must have been Appellant, or McCallum or Thomas, were it not for one other important fact that was also simply left hanging in the air by both Counsel for the State, the defence and the Court, namely that the following morning Appellant told McCallum that they had been attacked. This communication should have rung cathedral bells in everyone's mind, but these bells did not ring, they remained silent, and this topic was never raised again. Any alert Counsel ought to have immediately solicited further details.

5.

Keeping the abovementioned common cause facts in mind, it is then necessary to look at the evidence of McCallum critically. Both Warrant Officer Basson and Mr Strauss had described him as an unstable person with a long history of alcohol abuse, controlled medicine abuse and aggression. On his own version he had been drinking brandy habitually every evening and had mixed the tranquiliser prescribed to him with the alcohol. McCallum testified, as had done the Appellant, that during that particular afternoon/evening they had been watching dvds and drinking brandy and coca cola in the lounge whilst deceased was busy in the kitchen. According to McCallum he and the Appellant had consumed about three quarters of a litre brandy between about 16:00 and 20:00. He testified that at some stage he had heard the deceased and the Appellant arguing, but could not hear what they were saying, and because he thought that the Appellant had become aggressive he gave him the tranquilising pill to calm him down, as he put it. In this context he presented three different versions as to what had happened after he had handed the pill to the Appellant namely:

5.1

"He took it in his hand and he threw it down on the chair next to him";

5.2

"He did not take it when I gave it to him because he did throw it on the floor";

5.3

"He took the pills and put them in his pocket".

He then said that he himself had taken a sleeping tablet (that is after all the alcohol) and went to bed at about 20:00. He then gave the following versions as to how he was woken up by the Appellant:

5.3.1

He was woken up by his light being switched on;

5.3.2

"I heard my bedroom door opening and the light was switched on";

"No I did not [hear the bedroom door opening]. I only woke up when he switched on the light";

5.3.3

"He touched me to waken me up";

5.3.4

"He did not touch me. He sat on the bed."

5.4

It is clear from a sketch of the house that was presented to the Court that the bedroom was only a few meters from the kitchen. McCallum was not asked whether he had heard any screams emanating from the deceased when she had been so brutally and repeatedly attacked by someone. It was also clear from the record in any event that this topic was not raised by anyone.

6.

Asked as to what happened immediately after he had woken up and had been told by the Appellant that he had killed his wife (on his version) he gave the following three versions:

6.1

"I got dressed and I ran through to the kitchen";

6.2

"When I went through to the kitchen he was sitting and drinking and just staring at her while she was lying there";

6.3

"I stood up and went with him to the kitchen..."

7.

Having regard to McCallum's memory of that specific evening it is important to consider the evidence of Dr Lombard who had testified about the interaction between alcohol and a so-called hypnotic sleeping tablet. He said that this was unpredictable and one would expect that a person would pass out or sleep for an extended period. Further, even though such person may appear to be awake, it would not necessarily imply that he had the reasoning or cognitive ability of a sober person. It is clear from the record that McCallum contradicted himself in his evidence

pertaining to what the Appellant did with the sleeping tablet, what had woken him up, and what had transpired immediately after he had woken up. There is of course also no explanation how his jacket that he had worn that evening had been drenched in blood. Most importantly however it is common cause that he had lied to Constable Zwane about this. Why would he say that Appellant had worn it but admit in Court that he had worn it? So, having regard to the mentioned evidence of Warrant Officer Du Plessis, Mr Strauss and Dr Lombard, McCallum could not by any means of the imagination be described as a reliable person, let alone a reliable witness as to the events of that evening. Warrant Officer Basson also testified that McCallum was an unstable person who had abused alcohol and medication for years and was aggressive when under the influence of these substances. The learned Judge a quo found that the mentioned contradictions were not material. She found that McCallum's evidence was clear, and that the defence had not shown that McCallum had been an aggressive person despite the evidence of the State witness Basson. She was satisfied that his version could be relied upon. Of course, the essential part of McCallum's evidence in this context was that the Appellant had

woken him up and told him that he had killed the deceased. This evidence was inadmissible as against the accused she held. Quite apart from the fact that Appellant denied having made the statement it is common cause from the evidence of Warrant Officer Du Plessis and Mr Strauss, that Appellant had been heavily under the influence of alcohol and could not speak properly or coherently. Furthermore, McCallum had also testified about informing the investigating officer Constable Zwane about a knife that he had discovered on the scene after the incident. Zwane had denied this. Having regard to the evidence as a whole, and especially those facts that I have mentioned that are common cause, the state of intoxication of McCallum (alcohol mixed with hypnotic sleeping tablets), the unexplained presence of blood on McCallum's jacket, and his behaviour after the police arrived, I am unable to agree that McCallum could be regarded as a reliable witness under those circumstances. He was obviously also a single witness, and on the totality of facts I would not have accepted the evidence of McCallum without any corroboration by any other reliable extraneous or objective facts.

8.

As I have said, Detective Warrant Officer Du Plessis was the first police official attending to the crime scene that night. She deposed to an affidavit that what was commissioned at 2:07 on the morning of the 12th of July 2010. She had testified that the accused had said to her, whilst he was sitting drunk in the kitchen, that he had killed the deceased because she wanted to divorce him and she was also poisoning him. These words were not mentioned in her statement to the police. In the statement she only mentioned that the Appellant had told her that he had killed his wife. It is common cause that this confession that the State relied upon was not put in writing as required by the provisions of ***s. 217 (1) (a) of the Criminal Procedure Act***. The Court a quo quite rightly held that this confession was inadmissible, although Counsel for the State on appeal contended that it was not a confession inasmuch as reference had been made to an exculpatory motive. I do not agree with that contention at all. A confession is a statement that admits all the material elements of a particular offence.

See: ***Du Toit et al, Commentary on the Criminal Procedure Act, Juta & Co, at 24 - 51***

The fact that reference was made to a possible motive, does not make a statement of this nature admissible. Warrant Officer Du Plessis, as I have said testified that the Appellant was clearly drunk and had spoken with a slurred tongue. He was dressed in jeans, a grey shirt and a blue and maroon jacket. His left hand was bleeding and there was blood on his clothes and chair where he was sitting. He told her that he had killed the deceased and thereafter she informed him about his rights and arrested him. She did not notice the head wound. She also identified the particular jacket I have mentioned that was later found next to the safe on the floor in the main bedroom of the home. She also testified that the Appellant had told her that he had received documents that his wife had wanted to leave him and that he had killed her because she had wanted to poison him. Asked why she did not mention this in her written statement to the police, she said that in her opinion these statements were not admissible, as she was not a commissioned officer in the police. She did not consider it necessary to have contacted an officer to take down a written statement

such as envisaged by ***s. 217 (1) (a) of the Criminal Procedure Act***. Further, between 2:00 am and 3:00 am on the morning of the 12th, the Appellant was still under the influence of alcohol and she thought it would be better to wait until he was sober again before attempting to explain his rights to him. After he had sobered up to the extent that he could understand his rights being explained to him, he made no admissions or confessions. She also testified that she had requested Mr Strauss to send McCallum back to the scene during the evening in question, but Mr Strauss denied this. The Court a quo accepted the evidence of Warrant Officer Du Plessis as being reliable. It did so despite the mentioned discrepancies, but the material parts of her evidence were that Appellant was clearly drunk, that he had not worn the blue blood-stained jacket, that Appellant had bled profusely from his hand, that there was blood everywhere, and that no proper forensic tests or examinations had been conducted by the police that night.

9.

Strauss Junior testified that when McCallum entered the door at his home that evening in his father's house, he saw blood on his trousers and on his shoes. The blood smear on the jeans was not consistent with the trousers lying on the floor and blood dripping onto it, he said. He took Warrant Officer Du Plessis to the scene of the crime and waited in his bakkie. He returned to his home hardly half an hour later and found his father and McCallum asleep. He also testified that when he saw Appellant, he was clearly drunk, staggering and unable to walk properly. He returned to the crime scene at about 8:00 am on the morning of the 12th of July and found McCallum there. I must note that McCallum in turn had said that he only arrived at about 10:00 am. He also found that the blood in the kitchen had been partially mopped up. There was also no blood against the walls of the kitchen. He was asked as to who had cleaned the house and replied that McCallum had still been living there and that the farm workers had helped him clean the house. McCallum gave three versions as to when this was done and by whom. This of course could not be reconciled with the evidence of Warrant Officer Du Plessis who had said that

McCallum did not have access to the locked house that morning, but in my view it is probable that McCallum did have his own key to the house, having resided there for some months. Further, on the next day, 13 July 2010, Strauss found McCallum at the scene of the crime and the kitchen was then clean. He also testified that the said Thomas had run away two to three days after the event and had not been seen since. He denied that Warrant Officer Du Plessis sent him to call McCallum back to the scene on the evening of the murder. Warrant Officer Basson testified that he took Appellant's clothing on 12 July and that a police officer also took pictures of the Appellant dressed in those clothes. The jacket worn by the Appellant was not confiscated by him. He also testified that when Appellant changed clothes he was sober and denied killing his wife.

10.

Detective Constable Zwane arrived at the scene on 12 July 2010 looking for clues and the murder weapon. The scene had been cleaned. He testified that he found the jacket that was "soaking something presumed to be blood" at the kitchen on the

crime scene. McCallum stated to Zwane that this jacket belonged to Appellant and that he, the Appellant, had worn it prior to the murder. This statement of McCallum is untrue, but it is significant when regard must be had to his credibility and general reliability. This was found by Warrant Officer Du Plessis in the main bedroom on the floor next to the safe on the night of the murder. This was conceded by Zwane and it is not an issue on my reading of the evidence as a whole, that Appellant had lent this jacket to McCallum prior to the murder and that McCallum had been wearing that on that particular evening. As I have said, the blood on the jacket remained unexplained. On 13 July Zwane returned to the crime scene and collected the suspected murder weapon, a knife, from a certain Mr Delport who had reported finding it outside the house. The relevant knife that was produced in Court had bloodstains on it, but this did not originate from the deceased. This is a further unexplained mystery in this case.

11.

Having regard to the injuries sustained by the deceased, Dr Lombard testified that whoever had committed this murder "must have lost it". I will return to this evidence later on read together with the evidence of Warrant Officer Du Plessis and Mr Strauss Junior, regarding Appellant's state of sobriety. At the very least, in my view, this common cause evidence ought to have been an extremely weighty factor in the mind of the Court a quo when it imposed sentence. He testified that a person who is under the influence of alcohol to such an extent that his speech is slurred, that he walks with a staggering gait, is highly intoxicated, cannot talk sense, has to a large extent lost control over his motor functions and ability to speak logically and to relate events in a logical sequence. I have already mentioned his view about the effect of a hypnotic sleeping tablet combined with alcohol. On the facts of this case, as I have said, I would not have regarded McCallum as a reliable witness. I may mention at this stage that Appellant had also consumed alcohol, was found to be drunk by a number of witnesses and on his own version also took the particular tablet given to him by McCallum. In that context it was contended by his Counsel that he could also

not give a reliable version of events and that it was very likely that he could not even remember what had happened on the evening in question. Reading the judgment of the Court a quo I am of the view that the learned Judge failed to take the proper approach in this context. The Appellant, like the other witnesses, gave evidence through an interpreter. It is extremely difficult to make any reliable finding as to a person's demeanour under such circumstances. The difficulty becomes even more substantial where a person is asked to testify about facts whilst he was deeply under the influence of alcohol. In my view the Appellant's demeanour during the trial should not have been a factor at all that ought to have influenced the Court to come to a finding as to the Appellant's guilt or otherwise. Except in very clear circumstances, demeanour as a fact indicating the untruthfulness of a person, is a horse that I would not ride as a judicial officer, especially not where a person is giving evidence through an interpreter. It is not unusual at all that persons testifying are ill at ease. Some may be overwhelmed by the occasion, some may be afraid, some may be uncertain of certain facts, but certain about others.

In ***S v Kelly 1980 (3) SA 301 AD*** Diemont JA referred to this fact as "at best, a tricky horse to ride."

In ***R v Lekoata 1947 (4) SA 258 (O) at 263***, Horwitz AJ said that demeanour is "that vague and indefinable fact in estimating a witness's credibility."

Diemont JA (at 308) said that the hallmark of a truthful witness is not always a confident or courteous manner or an appearance of frankness and candour. An honest witness may be shy and nervous by nature and may show hesitation and discomfort. However, as I have said, an experienced trial officer may ride this tricky horse confidently at times, and, if alert, may observe evasions, hesitations and reactions to awkward questions. This would however not absolve the Court from examining the totality of evidence critically, keeping in mind which party bears the onus of proof.

See also: ***S v V 2000 (1) SACR 453 SCA at 455*** and ***H. C. Nicholas 'Credibility of Witnesses 32 (1985) SALJ at 36 37.***

In the present instance, given the unreliability of McCallum, and the objective facts, the Court a quo should have left this horse in the stable.

12.

Captain Mashigwana testified as a forensic expert employed by the SAPS Forensic Science Laboratory. The significant part of his evidence, as I have said, is that the only blood from the deceased could be found in one stain on the Appellant's jeans near the knee area. All the other stains on the jeans and other clothing of the Appellant, as well as the blood drenched jacket and the knife, contained blood, but that did not originate from the deceased. It has not been explained by anyone how only one blood stain, and a small one at that, could be found on an assailant's jeans in the knee area under circumstances where the victim had been stabbed at least 25 times. Mashigwana in fact agreed that one would have expected more blood, and, even as a layman, it seems highly probable. The blood stained jacket worn by McCallum was not examined, nor is there any explanation as to who had moved it from the main bedroom to the kitchen. It is in my view a serious indictment of McCallum's credibility and reliability that he had tried to convince Constable Zwane that this jacket had been worn by Appellant on the day of the murder. Also, and I have mentioned this, but it is important to repeat it in the present context, the

bloodstains on McCallum's clothing were never examined. He also admitted having washed the jeans and his shoes afterwards. Blood on the knife, to complicate issues, did not originate from the deceased. It is not in dispute that large blood deposits were found in the kitchen, hallway, bathroom basins, bedroom and spare bedroom, McCallum's room as well as on his bedding and computer. No samples were taken from the crime scene and one is forced to conclude that the police had forgotten that justice applies to all. It is often notable in Court that the police provide tremendous resources and effort for certain cases, whereas a case such as the present received scant attention. This is not what justice demands. The general public cries out for proper investigation of crimes, and for efficient prosecutions, where circumstances warrant it thereafter. In this case it is a sad reflection on the police force that they obviously dismally failed in their statutory duties. I only need to refer to the provisions of ***s. 205 (3) of the Constitution.***

13.

The learned Judge a quo put it as follows, but then thereafter did not arrive at the conclusion that ought to have followed: "If it was properly investigated it could have taken the case either way, but because of the poor investigation by the police we will never know". This was said in the context of the absence of proper physical evidence that could have been found and analysed at the crime scene. Counsel for Appellant therefore contended that none of the physical evidence presented could support the version of the State that the Appellant had stabbed the deceased 25 times with a knife. I agree with that contention. The evidence of Captain Mashigwana and common sense excludes the probability that Appellant had inflicted the injuries to the deceased. It is certainly not a conclusion that can be arrived at beyond a reasonable doubt.

14.

In the context of all of the above, it is then necessary to examine the version of the Appellant. He of course bears no onus at all. It is merely necessary that his evidence could reasonably possibly be true.

See: ***S v Van der Meyden 1999 (2) SA 79 WLD at 81*** for a number of interesting examples of this trite test.

The Court a quo, as did the State, relied on the circumstantial evidence to point to the guilt of the accused.

See: ***R v Blom 1939 AD 188 at 202 to 203.***

In this context a Court cannot convict an accused unless on the proven facts the inference of guilt is not alone a reasonable inference, but is the only reasonable inference. Obviously, all the evidence must be considered in its totality in this context.

Appellant testified that he and the deceased had been in a loveless marriage for a number of years. They had never assaulted each other and he was in fact glad when ultimately he was notified that the deceased had sought advice with the view to a divorce. He gave evidence about his drinking with McCallum that particular afternoon/evening, what clothing they had worn and the presence of the worker Thomas. He said that McCallum had told him that he suspected that the deceased was busy poisoning him. He denied that an argument had occurred between him

and the deceased that evening. He testified about McCallum's habit of mixing hypnotic sleeping pills with alcohol and added that when McCallum gave him this particular tablet he put it in his pocket. Later on, when he had another drink, he took this sleeping tablet. He remembered going to the kitchen and again leaving it. McCallum was in the lounge at that time. He could still remember clearly that McCallum had been drinking a number of pills with his brandy that evening. Thereafter he only remembered waking up in the police cells with injuries on his hand and head. McCallum had visited him at the police cells and repeatedly told him that he had murdered his wife. He denied having done that, but McCallum kept on reminding him of that fact. He said that he had denied killing the deceased to McCallum, Warrant Officer Du Plessis, Warrant Officer Basson and Mrs Hannah White, who had confirmed this. On the next morning 12 July he accompanied police to the house, found McCallum there in the house, and there was no blood in the kitchen. He had never taken the so-called psychiatric tablets before. Another disturbing aspect was his evidence about his small cupboard in the kitchen wherein the deceased had placed her money and various invoices pertaining to her small

business. This cupboard was broken and about R13 000 that had been placed therein was missing. He had asked McCallum about this cupboard who had told them that the police had broken it. This aspect was also not taken further by the State and what its possible implication could have been under the particular circumstances.

15.

It was contended by Counsel for the Appellant that he had never essentially deviated from his version. Of all the facts of the case it could reasonably possibly be true.

See: ***S v Shackell at 2011 (2) SACR 185 (SCA) at par. 30.***

The Court a quo did not accept that Appellant's version could be reasonably possibly true. There were a number of aspects in Appellant's evidence that were never put to McCallum. This related to the cupboard that was broken into, the missing money, the fact that McCallum had removed a cell phone from under the carpet and the fact that the R13 000 that was missing had not been reported to the police. The learned Judge accepted the evidence of McCallum that Appellant had not taken the particular hypnotic sleeping tablet. In the context of that finding the

Court a quo found that the State had not proven that ***s. 1 of Act 1 of 1988*** was applicable. This section provides that a person who consumes or uses any substance which impairs his or her faculties knowing that such substances have that effect, and then commits an offence whilst such faculties are impaired, shall be guilty of an offence and shall be liable on conviction to a penalty which may be imposed in respect of the commission of that act. On Appellant's own evidence he had never taken such a tablet before. Quite apart from that McCallum had three different versions and, Appellant said he took the tablet at some stage not knowing what its effect would be. As far as this aspect is concerned I am of the view that the State had not proven the applicability of the section on the present facts. There was also no evidence that the Appellant tended to be aggressive when he had consumed alcohol. Despite the fact that Warrant Officer Du Plessis and Mr Strauss Junior testified that the Accused was clearly drunk, the Court a quo held that the alcohol consumed by the Accused did not affect his faculties to such an extent that he did not appreciate the wrongfulness of his actions. I have serious doubts about this finding but on the present facts, and on my view of the matter, it is not necessary to

deal therewith any further except so far as to repeat that Appellant's state that evening was clearly a compelling mitigating factor. Having analysed the evidence the Court a quo then found Appellant guilty of murder. Nothing was said in the main judgment about premeditation or planning of the crime, but during argument on sentence counsel for the State submitted that the offence was premeditated. This had never been put to Appellant, to exacerbate this unfairness. Accordingly the minimum sentence was one of life imprisonment. In giving judgment on sentence the learned Judge accepted that premeditation had been proven on the basis that Appellant had known that his wife had wanted to divorce him. In my view there is no justification for this finding. There is certainly furthermore no justification for dealing with this topic after argument on sentence. In any event, a planned or premeditated murder being something completely different in my view.

"Premeditate" means "think about with the view to subsequent action", or "think out beforehand" or "plan in advance".

See: ***Shorter Oxford Dictionary 6th Edition p 2327.***

"Plan", in turn means, according to the same dictionary at p. 2230 "an organized and especially detailed method according to which something is to be done; a scheme of action, a design; an intention; a proposed proceeding."

A number of questions relevant to the present proceedings were dealt with by the Full Bench in ***S v Raath 2009 (2) SACR at 46 CPD***. The charge sheet in that case had not indicated whether the State viewed the particular murder charge as planned or premeditated and attracting a life sentence, or simply an unplanned murder attracting a minimum 15 year sentence. However, in Appellant's plea explanation it was obvious that he denied planning or premeditating the crime. The Court held that it was clear from this, and from the conduct of his defence, that Appellant was fully aware that the State intended to make out a case for planned or premeditated murder. As a result, any fair trial rights were in no way infringed, and it was decided that it had been open to the trial Court to impose a life sentence on conviction.

As I have said, in this case the whole question of a planned or premeditated murder only arose during argument on sentence. In the present case the charge sheet made no mention of this nor indeed referred to any applicable section of the ***Criminal***

Procedure Act or any other Act at all. A summary of substantial facts in terms of ***s. 144 (3) (a) of the Criminal Procedure Act*** was annexed and in this brief exposition of the State said only the following: "During the night of 11 July 2010 an argument ensued between the accused and the deceased. The accused attacked the deceased and assaulted her and stabbed her with a sharp object." One certainly cannot gather from this summary that the State intended to rely on a planned or premeditated murder at all. When the proceedings commenced before the Court a quo Counsel for the State said that he would rely on the provisions of ***s. 51 of Act 105 of 1997***, being the Act dealing with minimum sentences as he put it and, as I have pointed out also relied on the provisions of ***s. 1 of Act 1 1998***, being the ***Criminal Law Amendment Act*** which deals with acts being punishable if committed by persons whose mental faculties had been impaired by the consumption or use of certain substances. The Appellant thereafter pleaded not guilty and preferred not to give an explanation for his plea. In ***S v Raath supra at 53 par.16*** it was held that planning and premeditation have long been recognised as aggravating factors in the case of murder. See for instance ***S v Khiba 1993 (2) SACR 1 (A) at 4*** and ***S v***

Malgas 2001 (1) SACR 469 (SCA) at par. 34. It was held by the Full Bench however that there must be evidence that the murder was indeed premeditated or planned. The concept of a planned or premeditated murder is not statutorily defined. The Full Bench was not referred to, nor was able to find any authoritative pronouncement in our case law concerning this concept. It however held that by large it would seem that the question of whether a murder was planned or premeditated has been dealt with by a Court casuistic basis. It also made reference to the ***Concise Oxford Dictionary***, as I have done. It held that the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of a crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of 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. The author of the judgment, Bozalek J, held that 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 a murder was "planned or premeditated". I agree with this reasoning. In the present case there is in my view no evidence at all that the Appellant planned or premeditated the relevant attack. In my view therefore the learned Judge a quo erred in finding that this murder was planned or premeditated, and Counsel for the State had no basis at all for suggesting such during argument on sentence. It was opportunistic and unfair, and especially so as it had not even been put to Appellant during cross-examination. For purposes of a fair trial and for purposes of the relevant provision relating to the sentence that must be imposed under such circumstances, it is my view that an accused must be made aware of the fact that the State intends relying on such, either by stating so in the charge sheet, alternatively during the plea stage of the proceedings. In other words, an accused must in my view be made aware of such an allegation timeously so that he can consult thereon with his or her Counsel, and prepare his defence accordingly

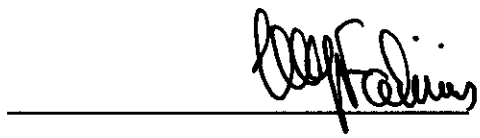
and appropriately. I find support for this conclusion in the dictum of Wallis JA in ***DPP, WP v Prins 2012 (2) SACR 183 at 198 a - b***. An accused must therefore be forewarned of the potential consequences of conviction, if that may affect the manner in which the defence is conducted. This did not occur in the present instance, but in view of my ultimate finding, it is not necessary to decide whether the proceedings were unfair as a result.

16.

In the context of all of the above, and looking at the evidence (or rather the lack thereof) holistically, I am of the view that a reasonable doubt exists whether or not the Appellant committed the murder on the night in question. The inference made by the learned Judge a quo is not the only reasonable inference in the light of the absence of a proper investigation by the police, and the absence of proper forensic investigations, which were only sought to be conducted some months later. The result is that the Appellant was wrongly convicted.

The conviction and sentence is accordingly set aside and in its place the following order is made:

The Accused is found not guilty and discharged.



JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

And

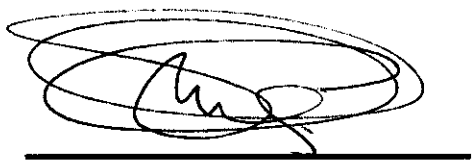
I Agree

JUDGE N. KOLLAPEN

JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

And

I Agree



ACTING JUDGE S. A. THOBANE

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION PRETORIA

Case no.: A259/2013

Counsel for the Appellant: Adv J. J. Greeff

Instructed by: Johann Scheepers Attorney

C/O Serfontein Viljoen & Swart

Counsel for the Respondent: Adv E. V. Sihlangu

Director of Public Prosecution

Heard on: 04/06/2014

Date of Judgment: 11/06/2014 at 10:00