IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 459/2014

In the matter between:

THOKOZANI LUNGISANI DLOMO **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Ngwenya AJ sitting as court of first instance):

1. The appeal against sentence succeeds.

2. The sentence of life imprisonment is set aside and is replaced with a sentence of 22 years' imprisonment, which is antedated in terms of section 282 of Act 51 of 1977 to the date of sentence, namely 17 May 2012.

JUDGMENT

MOSSOP J: (POYO-DLWATI ADJP and MLOTSHWA AJ concurring)

[1] Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act) provides that a high court sentencing a person convicted of an offence mentioned in Part 1 of the second schedule to that Act shall impose a sentence of life imprisonment. The appellant in this matter was alleged to have committed an act of planned or premeditated murder, and after a trial before Ngwenya AJ, was convicted of that murder. Planned or premeditated murder is an act identified in Part 1 of the second schedule to the Act, and the appellant was consequently sentenced to life imprisonment, the court a quo not being satisfied that there were any substantial or compelling circumstances as contemplated in section 51(3)*(a)* of the Act to justify a departure from the minimum sentence prescribed.

[2] Subsequent to his conviction and sentence, the appellant applied for leave to appeal and was granted the right to appeal only against his sentence to a full bench of this division. When the appeal was argued, Ms Gates appeared for the appellant and Mr Mthembu appeared for the State. Both are thanked for their helpful submissions.

[3] In a supplemented notice of appeal, the appellant sought leave to reopen his case and adduce further evidence. However, when the appeal was called, Ms Gates informed the court that such application had been abandoned for reasons that need not be dealt with.

[4] The basis upon which it was alleged that the murder was premeditated is simply stated. The deceased in this matter, Mr Phumanezwi Mathe (the deceased), was apparently believed by the appellant to have been the person responsible for murdering the appellant's brother in 2006, some five years before the deceased ultimately met his fate at the hands of the appellant. The State's case was that this prior act by the deceased led the appellant to avenge the death of his brother. The murder was accordingly premeditated and fell within the purview of Part 1 of the second schedule to the Act, and the appellant was consequently subject to the

prescribed minimum sentence of life imprisonment. The appellant denied that he was guilty of the murder.

[5] The act of murder for which the appellant was convicted occurred at a bottle store, in the rural setting of Makhabeni, in the district of Kranskop. The evidence revealed that the deceased was outside the bottle store with another person, a Mr Hlongwane (Mr Hlongwane), on the afternoon of 8 April 2011 when the appellant drove up in his white Volkswagen Jetta motor vehicle. The deceased and Mr Hlongwane walked towards the motor vehicle, from which the appellant alighted. The appellant called the deceased by his clan name, 'Mkhabela', pointed a firearm at him and fired a shot. The deceased turned and fled but was pursued by the appellant who ruthlessly and mercilessly cut him down in a fusillade of shots. The post mortem examination revealed that there were five shots to the deceased's head, and at least six shots to other parts of his body, some to the deceased's back.

[6] Other than Mr Hlongwane, who unfortunately passed away before the appellant's trial commenced, there were two other witnesses to the shooting: a Mr Mathe and a Mr Mzolo, the latter being the proprietor of the bottle store. Both of them had known the appellant for a number of years, with Mr Mathe having known the appellant since childhood. Both of them also knew the appellant's motor vehicle. There can accordingly be no doubt regarding the identity of the person who shot the deceased.

[7] This appeal turns on the meaning of the words 'planned' or 'premeditated'. If the murder was planned or premeditated, the appeal must perish. The cold-blooded brutality of the deceased's death would demand the most severe sentence. If it was not planned or premeditated, then section 51(1) of the Act would not apply. Section 51(2)*(a)* of the Act would then apply with a minimum sentence of 15 years' imprisonment being prescribed.

[8] A finding of premeditation requires the employment of inferential reasoning. The court has to consider the facts of the case and then deduce from those facts

whether the commission of the offence was premeditated or not. This is partly as a consequence, as was noted in *S v Raath*,[1] of the legislature not having defined the meaning of 'planned' or 'premeditated'.

[9] The precise wording of Part 1 of the second schedule to the Act relevant to this matter reads as follows:

'Murder, when-

(a) it was planned or premeditated;'

It is upon this meaning that the State relies. The wording is brief, and would appear to be clear in its meaning, yet it has generated some dissensus when it has previously been considered.

[10] In *S v PM*,[2] the court considered the meaning of the words 'planned' and 'premeditated' and came to the conclusion that they mean different things. 'Premeditated' was found to mean:

'… 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.'

'Planned' was found to mean a reference 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.'

[11] In *S v Jordaan*,[3] the court found the reasoning in *PM* to be unconvincing regarding these two words, and found that the element of 'rational consideration' referred to by the court in *PM* in its definition of 'premeditation' was equally inherent in any exercise of planning. In an appeal from the judgment in *PM*,[4] the Supreme Court of Appeal found it unnecessary to determine whether the phrase 'planned or premeditated' denotes a single concept or course of action. The position adopted by the Supreme Court of Appeal was that the circumstances under which a particular crime was committed, and the facts peculiar to that case, would determine whether

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[1] *S v Raath* 2009 (2) SACR 46 (C) para 16.
[2] *S v PM* 2014 (2) SACR 481 (GP) para 36.
[3] *S v Jordaan and others* 2018 (1) SACR 522 (WCC) para 127.
[4] *Montsho v S* [2015] ZASCA 187.

the offence was planned or premeditated. That would seem to indicate that the Supreme Court of Appeal did not find a difference in meaning between the two words.

[12] In *Raath*,[5] a matter decided before *PM*, no distinction in meaning was drawn between these two words and they were considered to describe the same type of conduct. A planned or premeditated murder was found to be a concept that embraced a deliberate weighing-up of the proposed criminal conduct, as opposed to committing the crime on the spur of the moment.

[13] The ordinary dictionary meaning of the word 'premeditated' is:
'to think out and plan an action, especially a crime, beforehand.'[6]
It will readily be discerned that the word 'plan' appears in the definition.

[14] In my view, the distinction drawn by the court in *PM* between these two words is artificial and is strained, and I consequently favour the approach in *Raath* and in *Jordaan* to the approach in *PM*.

[15] The only factor that could have indicated that there was a premeditated course of conduct embarked upon by the appellant is the alleged murder of the appellant's brother. It provides the motive for his subsequent conduct. The State indicated in its summary of substantial facts that accompanied the indictment that:
'2. During March 2006 the accused's brother was assaulted and passed away. The deceased was arrested for the murder of the accused's brother but later released.
3. The accused believed that the deceased had killed his brother. He decided to kill the
deceased in order to avenge the death of his brother.'

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[5] *S v Raath* 2009 (2) SAC 46 (C) para 16.
[6] *Oxford South African Concise Dictionary* 2 ed (2016).

[16] The State witness, Mr Mathe, referred to the death of the appellant's brother in his evidence in chief, and stated the following when questioned by the State advocate:
'Can you think of any incident that occurred that you know of that could have led the accused to act as he did? --- Before there was an incident that occurred but we thought about it as something that was water under the bridge, M'Lord.
In relation to the shooting of your father's brother how long before did it happen? --- It was for more than some years, M'Lord, since that incident had occurred.'

[17] Mr Mathe was indeed correct that the incident to which he referred had occurred a number of years prior to the shooting of the deceased. Approximately five years had passed and it is perhaps understandable that the incident was regarded by some members of the community as ancient history. The other direct witness to the events, Mr Mzolo, also mentioned the death of the appellant's brother and mentioned that it had occurred 'a couple of years ago'.

[18] That was the sum total of the evidence led by the State on the issue of premeditation.

[19] In *Raath*, the court 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 the murder was "planned or premeditated".'[7]

[20] There was no evidence in the court a quo at all about the appellant's state of mind. This is, perhaps, not surprising in the light of his plea of not guilty. The appellant testified in his defence. Under cross-examination, he was asked whether

[7] *S v Raath supra* para 16.

he was angry that the deceased had killed his brother but was subsequently released. He replied, phlegmatically, that
'M'Lord, I would say nothing angered me that much because I trusted in God and said that God gave and God took, so what I thought about fixing, was the matter of children that were left behind.'

[21] The appellant further testified that he had left Durban at 09h00 on the day that the deceased was murdered. He was returning to his family home, briefly, to deliver some money which was to be utilised to rent a truck that was to transport some cows which formed part of an ilobolo dowry. He went on to state that:
'… I am also a person that does not usually go home, I go home when there is a reason, like for instance when I bring pesticides for cows and goats and stuff.'

[22] When he was briefly cross-examined by the State, he answered in the following fashion:
'Yes, I put it to you that you wanted revenge for the death of your brother. --- M'Lord, no, I was not going to leave a person that stays in Durban, with me and go and hurt somebody who lives in my ancestral home, while I live in Durban, when they both did the same thing, that was to murder my brother, M'Lord.'

[23] The appellant called the evidence of his mother who confirmed that he returned home occasionally. He also called the evidence of Mr Mthobisi Mtolo, who confirmed that the appellant worked, as did he, as a vendor in Berea in Durban.

[24] None of this evidence was seriously challenged by the State. It must accordingly be accepted that the appellant was ordinarily resident in Durban but that from time to time he returned home, often briefly. There was no direct evidence of planning or premeditation or evidence of when the appellant decided to kill the deceased. It is by no means certain, in the absence of any evidence to that effect, that on 8 April 2011 the appellant had planned to return home and kill the deceased. There was no evidence to establish that the appellant knew that the deceased was at that rural area, and, more specifically, that the deceased was to be found at the

bottle store. No evidence was led as to why, after a period of five years, the appellant had decided that 8 April 2011 was the day on which he would kill the deceased. There was also no evidence of the circumstances under which the appellant acquired the firearm that he used to kill the deceased.

[25] Ultimately, the court a quo determined that the appellant had falsely denied that he was the gunman. That decision cannot be faulted. The lengthy period between the death of his brother and the murder of the deceased provided ample time for the appellant to have formulated a plan to kill the deceased. But there is no evidence that he actually did so. It is possible that he may have constructed such a plan and bided his time for five years until the correct moment presented itself to give effect to his intention. On the other hand, there may have been no such plan, but he may have held a grudge that festered within him until it finally exploded in a paroxysm of violence on 8 April 2011. If the latter is what occurred, then Mr Mthembu contended that this also demonstrated premeditation. During argument he referred the court to *Kekana v S*[8] where the court stated:

'In my view it is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.'

It was argued that the period of time between the appellant arriving at the bottle store, and him seeing the deceased, was sufficient time for him to formulate a plan and put it in to action. He thus acted in a premeditated fashion, so the argument went.

[26] There are some indications that the murder of the deceased was a targeted murder, which invites the inference that it was premeditated. The deceased was in the presence of Mr Hlongwane at the time that he was murdered. A volley of shots was fired that day, but Mr Hlongwane was not struck by any of them: all appear to have been directed at the deceased.

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[8] *Kekana v S* [2014] ZASCA 158 para 13.

[27] However, on a conspectus of all the evidence, it seems more probable to me that the appellant returned home and had a chance encounter with the deceased at the bottle store. The invitation by the State to conclude that the death of the appellant's brother five years before inevitably made the murder of the deceased a premeditated murder, is an invitation that I regret I must, in all the circumstances of the matter, decline. There is, in my view, insufficient evidence to establish that the murder of the deceased was a planned or premeditated. There are too many variables that would need to align to make it a premeditated murder. I do not accept that the time between the appellant seeing the deceased at the bottle store and the moment that he shot him constitutes evidence of premeditation. If that were the case, virtually all murders would be premeditated. The mere fact that the appellant had a firearm in itself does not establish premeditation. I conclude therefore that the State did not establish beyond reasonable doubt that the murder was planned or premeditated.

[28] It follows that the question of sentence must be considered afresh. At trial, all that could be said for the appellant was said. At the end of the day, the deceased met a cruel death at the hands of a remorseless killer. In the circumstances, a sentence of 22 years' imprisonment would meet the needs of the matter.

[29] I accordingly grant the following order:

1. The appeal against sentence succeeds.
2. The sentence of life imprisonment is set aside and is replaced with a sentence of 22 years' imprisonment, which is antedated in terms of section 282 of Act 51 of 1977 to the date of sentence, namely 17 May 2012.

MOSSOP J

APPEARANCES

Counsel for the appellant	Ms J Gates
Instructed by:	Pietermaritzburg Justice Centre 20 Otto Street Pietermaritzburg
Counsel for the respondent	Mr M E Mthembu
Instructed by	Director of Public Prosecutions, Pietermaritzburg

Date of Hearing : 22 July 2022
Date of Judgment : 5 August 2022