

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
MPUMALANGA DIVISION (MAIN SEAT)**

Case Number: CC03/22

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

3 MAY 2022

[SIGNED]

DATE

SIGNATURE

In the matter between:

THE STATE

and

CELUMUSA DUBE

JUDGMENT

Roelofse AJ:

[1] A intends, decides and plans to assault B. A assaults B. B dies as a result of the assault. Did A commit premeditated murder if his plan was only to assault B but as a result of the assault, B died?

[2] In my view, the only manner in which this question can be unravelled is to revisit the basics in respect of the crimes of assault and murder with a specific focus on intention as one of the essential elements of both crimes as well as the concept of premeditation.

Assault and murder

[3] Assault consists the unlawful and intentional: (a) applying force to the person of another directly or indirectly; or (b) threatening another with immediate personal violence in circumstances which lead the threatened person to believe that the other intends and has the power to carry out the threat.¹

[4] Murder is the unlawful and intentional causing of the death of another human being.²

¹ See: The State v Marx [1962] 2 All SA 11 (N).

² R v Ndhlovu 1945 AD 369 373.

Intention

[5] Intention is one of the elements of the crimes of assault and murder.

[6] INNES CJ, in R. v. Jolly and Others, 1923 A.D. 176 at pages. 181, 182 concluded that intention may be inferred from the intrinsically probable consequences of an act, whatever intentions the doer may profess.

[7] Culpability in the case of assault and murder is either *dolus directus* or, *dolus indirectus* or, *dolus eventualis* and *dolus indeterminatus* or *generalis*. Other descriptions of *dolus eventualis* are “constructive”³ or “legal” intention and employs a technical and artificial meaning of the word “intention”.⁴

[8] In S v Pistorius 2016 (1) SACR 431 (SCA), the Supreme Court of Appeal articulated the concept of *dolus eventualis* in murder cases as follows at paragraph 26:

‘In cases of murder, there are principally two forms of dolus which arise: dolus directus and dolus eventualis. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. In the case of murder, a person acts with dolus directus if he or she committed the offence with the object and purpose of killing the deceased. Dolus eventualis, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to dolus directus, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person’s intention in the form of dolus eventualis arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore

³ R v Nsele 1955 2 SA 145 (A) 151B. Intention in the form of *dolus eventualis* in the case of assault is sufficient – R v Basson [1961] 1 All SA 91 (T).

⁴ R v Huebsch 1953 2 SA 561 (A) 566–568.

‘gambling’ as it were with the life of the person against whom the act is directed. It therefore consists of two parts: (1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act ‘reckless as to the consequences’ (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been ‘reconciled’ with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent.’

[9] The Supreme Court of appeal confirmed that the foreseeability test to be applied is subjective. The Supreme Court of Appeal says in this regard as follows at paragraph 29:

‘Furthermore, the finding that the accused had not subjectively foreseen that he would kill whoever was behind the door and that if he had he intended to do so he would have aimed higher than he did, conflates the test of what is required to establish dolus directus with the assessment of dolus eventualis. The issue was not whether the accused had as his direct objective the death of the person behind the door. What was required in considering the presence or otherwise of dolus eventualis was whether he had foreseen the possible death of the person behind the door and reconciled himself with that event.’

[10] The Supreme Court of Appeal proceeded to analyse the facts of the case and found that the accused was guilty of murder, *culpa* being *dolus eventualis*.

[11] Therefore, in our law, *dolus eventualis* in relation to murder is present where the accused, while subjectively foreseeing the possibility that his or her act may cause the death to another, nevertheless persists in the act while reconciling himself or herself with the outcome.

[12] A premeditates to kill B by assaulting B. A follows through with the act. A assaults B. B dies as a result of the assault. A's plan and his direct intention was to kill B. A's premeditation and direct intention therefore coincide. What if A did not plan or premeditate to kill B but only to cause B bodily harm? A assaults B so severely that B dies. A knew that B may die as a result of the extent of the assault. A reconciles with that possibility. A thus committed murder where his plan was to cause B bodily harm and not to kill B. A premeditated assault but committed murder. This is where the difficulty lies. What if intention in the form of *dolus eventualis* is proven together with premeditation?

Premeditated Murder

[13] The concepts of premeditation and intention are different. Premeditation involves a thought process that contemplates a certain outcome and the means to achieve that outcome. Intention in all of its forms (*dolus directus*, *dolus indirectus* and *dolus eventualis*) involves the perpetrator's state of mind before and while the criminal act is being committed.

[14] Premeditated murder is more blameworthy than a murder committed at the spur of the moment or when death results after an assault. Premeditated murder remains the crime of murder. It does not constitute a special species of murder. The circumstances under which the murder was committed must show that the murder was premeditated so that the court is able consider an appropriate sentence. If premeditated murder is proven a court is obliged to impose a minimum sentence of life imprisonment unless exceptional circumstances exist to deviate from that

sentence. This is prescribed in section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the Minimum Sentence Act”).

The Minimum Sentences Act

[15] The Minimum Sentences Act does not create statutory crimes. The aim of the Act is to lay down minimum sentences for certain serious crimes after having regard to the crime, the circumstances under which it was committed, the victim of the crime and the circumstances of the perpetrator. The requirements for a conviction of a crime mentioned in the Act must be proven during the merits stage of the trial and not during the sentencing stage. For example, if the State wishes to rely upon section 51(1) of the Act for the minimum sentence of life imprisonment to apply, the State must prove that the murder was premeditated.

[16] In *S v Raath* 2009 (2) SACR 46 (CPD), the Full Court had to decide on appeal, whether the murder committed by the accused upon his wife constituted premeditated murder. The accused was prone to violent and aggressive behaviour towards the deceased and also abused alcohol. At the night of the incident, the accused had gone out drinking. The evidence showed that the accused decided that he wanted to kill his wife and within a few minutes carried out the murder. The accused was heavily intoxicated when he shot his wife. The court had to decide whether the murder was premeditated or not. The time lapse between the accused deciding that he was going to shoot his wife and the time of the actual murder became a prominent factor in deciding the issue of premeditation. The court said at paragraph 16 as follows:

'Planning and premeditation have long been recognised as aggravating factors in the case of murder. See S v Khiba 1993 (2) SACR 1 (A) at 4 and S v Malgas 2001 (1) SACR 469 (SCA) at para 34. As Terblanche, Guide to Sentencing in South Africa, Lexis Nexis, 2nd edition 6.2.2 states, planned criminality is more reprehensible than unplanned, impulsive acts. However, there must be evidence that the murder was indeed premeditated or planned. See e.g. S v Makatu 2006 (2) SACR 582 (SCA) at paras 12 – 14. 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, 10th edition, revised, gives the meaning of premeditated 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".'

[17] Ultimately the Full Court found that even if the evidence suggested that the time between the accused taking the decision to murder his wife and the actual murder was no more than a matter of a few seconds and that it was correct that ‘... [f]rom the moment he appeared to conceive the idea of shooting his wife the appellant brooked no opposition and almost immediately proceeded to carry out the terrible deed.’ However the court held that this did not ‘.....[t]ransform what appears to have been the deadly, but spur of the moment act or acts of a man in an emotional rage, into a planned and premeditated murder.’

[18] In *Kekana v The State* (629/2013) [2014] ZASCA 158 (1 October 2014), the Supreme Court of Appeal held that it was not necessary that an accused should have thought or planned his action a long period of time in advance before carrying out the plan. The court held that time is not the only consideration because even a few minutes are enough to carry out a premeditated action.

[19] In *Francis & others v The State* (866/2018) ZASCA 177 (2 December 2019), the accused savagely assaulted the deceased. It does not appear from the judgment of the Supreme Court of Appeal that it was proven by the State that the accused had a direct intention i.e., *dolus directus*, or that they premeditated to murder the deceased. After considering the evidence, the trial court convicted the accused of murder in terms of the provisions of section 51(1) the Minimum Sentences Act. The Supreme Court of Appeal considered the totality of the evidence regarding the assault and the injuries caused by the assault. It then confirmed the accused’s conviction under section 51(1) of the Minimum Sentences Act on the basis of intention in the form of *dolus eventualis*.

[20] How then is premeditated murder reconciled with intention in the form of *dolus eventualis*? In my view, it is not the death that had to be premeditated or planned but rather the aim of the criminal act. The aim that is planned for, namely the causing of bodily harm to another person should take prominence. If a perpetrator carries through with his plan to cause another person bodily harm which ultimately results in that person's death where the death was foreseen by the perpetrator, premeditated murder is established. Therefore, if A premeditates an assault upon B, carries out the assault while foreseeing that the assault may cause B's death, B's murder is premeditated despite that the original plan was only an assault.

[21] I gather from Raath, Kekana, Francis and Others and Pistorius that premeditation and the particular form of intention must be considered with reference to the facts and circumstances of each case.

The case before this court

[22] I turn to the case before me.

[23] The accused is Mr Celumusa Dube ("Mr Dube"). Tragedy struck on the day Mr Dube's turned 42. Mr Dube's girlfriend ("the deceased") died at his hands on that day.

[24] Mr Dube is being charged on counts of housebreaking with the intent to

murder, murder and a contravention of Immigration Act.⁵ Upon his conviction, on murder, the State relies upon the provisions of section 51(1) the Minimum Sentences Act. The State therefore alleges that Mr Dube committed premeditated murder.

[25] At the commencement of the trial, Mr Dube handed in a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (“the statement”). Mr Dube pleaded guilty to housebreaking with the intention to assault and murder as contemplated in section 51(2)⁶ of the Minimum Sentences Act. The immigration charge was not dealt with in the statement.⁷ Mr Dube pleaded not guilty to the immigration charge.

[26] I entered a plea of not guilty on the counts of housebreaking and murder for Mr Dube did not confess all the elements of the charges. In particular, Mr Dube did not admit that he broke into the deceased’s home with the intention to murder her and he did not admit that the murder was premeditated.

[27] The State only led the evidence of Mr Dube’s brother. Mr Dube was the only witness to testify in his defence.

[28] Mr Dube’s criminal liability therefore has to be determined by what is recorded in the statement, the evidence of Mr Dube’s brother and Mr Dube.

⁵ Act 13 of 2002. The State alleged that Mr Dube, a citizen of the Kingdom of Eswatini (formerly known as Swaziland).

⁶ The section provides that the minimum sentence for a first offender in the case of murder that is not premeditated is 15 years.

⁷ The State has lead no evidence in respect of this charge.

[29] In the statement, Mr Dube alleges that on the night in question, he was celebrating his birthday party at a tavern. He received a call from his brother, Njabulo Shongwe. Njabulo wanted to know where Mr Dube was. Mr Dube told him that he was at a tavern and invited Njabulo to join him. Njabulo agreed. However, when Mr Dube later called Njabulo, Njabulo's cell phone was off.

[30] Mr. Dube continued the celebration at the tavern with some of his friends. Mr Dube left the tavern to return to his home. On his way, he passed the deceased's home. Mr Dube attempted to phone the deceased. He could not get hold of her. Mr Dube called Njabulo. Njabulo confirmed that he was still going to join him in celebrating his birthday.

[31] Mr Dube went to the deceased's home. He was about to knock on the door when he heard the voices of a male and female talking inside. They mentioned Mr Dube's name. Mr Dube testified that he was standing close to the door and could hear that the people inside the home was having sexual intercourse.

[32] Mr Dube knocked on the door. There was no response. He heard sounds as if the people were dressing. He knocked again. Yet again there was no response. Mr Dube decided to break into the home to assault the deceased. Mr Dube kicked the door open. Mr Dube saw that Njabulo attempted to run out of the dwelling. Mr Dube attempted to block Njabulo but Mr Dube tripped and fell as he was ... '*under the influence of alcohol.*' Njabulo jumped over Mr Dube and ran away. Mr Dube saw the deceased. According to Mr Dube, the deceased had a knife but he grabbed the

knife from her. The deceased apologised that she was with Njabulo. Mr Dube's states in the statement as follows: '[b]ut I was so angry I stabbed her several times with that knife. I was under the influence of alcohol but not to the extent that I didn't know what I was doing and could not act accordingly.....I also knew that when one stabs a person with a knife several times that that person could sustain serious injuries or even die as a result of such injuries.' [Emphasis is mine].

[33] Njabulo testified that he did not know that the deceased was Mr Dube's girlfriend. Njabulo was with the deceased in the house when he heard the neighbours' dogs barking. A few minutes later, he heard a window breaking. The next moment, the front door of the house was broken open. Mr Dube entered the house. Mr Dube asked Njabulo whether he knows what Mr Dube is of the deceased. Mr Dube took a knife from his pocket and started stabbing the deceased. Njabulo tried to hold Mr Dube back but Mr Dube pushed Njabulo away and continued to stab the deceased. Njabulo testified that the deceased attempted to defend herself. Njabulo testified that she was stabbed about five times. Mr Dube then left the house but returned a short while later. Njabulo testified that he wanted to know why Mr Dube returned. Mr Dube said that is what he wanted to do.

[34] Mr Dube's testimony accorded with the statement and set out the facts recorded in paragraphs 23 to 27 above. I have to choose between Mr Dube's version as to where he got the knife and the version of Njabulo. Whatever version is true does not change the fact that Mr Dube killed the deceased with a knife. Whether Mr Dube had a knife on him and whether he did not does not materially influence the outcome of the ultimate question to be answered.

[35] The post-mortem report records that the deceased died as a result of ‘HEAMORRHAGIC SHOCK DUE TO MULTIPLE SHARP PENETRATING FORCE TRAUMA TO THE CHEST AS PER SAPS 180’. The post-mortem report reveals that the deceased was stabbed five times. Two of the stab wounds were on the arms of the deceased one of which was located over the back of the of the left forearm and wrist. The other was on the deceased’s elbow. One stab wound was at the back of the deceased’s hand. One stab wound was over the deceased’s left ear and auditory canal. The other stab wound was over the left side of her neck penetrating the left common carotid artery.⁸

Analysis

Mr Dube stood outside of the deceased’s house for long enough to hear Njabulo and the deceased having intercourse and dressing. Mr Dube says in the statement that, although being under the influence of alcohol, he still knew what he was doing and could act accordingly. More importantly for purposes of determining Mr Dube’s culpability, Mr Dube states in the statement that he also knew that stabbing a person several times with a knife could lead to that person’s death. Mr Dube reconciled himself with that foresight for he continued to stab the deceased five times, including severing one of her main arteries.

[36] Mr Dube broke into the deceased’s home to cause her bodily harm. He carried

⁸ In anatomy, the left and right common carotid arteries (carotids) (English: /kəˈrɒtɪd/[1][2]) are arteries that supply the head and neck with oxygenated blood; they divide in the neck to form the external and internal carotid arteries. – Wikipedia [https://en.wikipedia.org/wiki/Common_carotid_artery]

out the assault upon the deceased with a knife while knowing that an assault with a knife may cause the deceased's death. Despite this knowledge, Mr Dube continued with the assault. Although the assault took place only within moments after breaking the door and entering the house, the evidence shows premeditation to cause the deceased bodily harm by assaulting her. The assault, unfortunately for Mr Dube, and more so for the deceased, led to the deceased's death. Mr Dube committed premeditated murder.

[37] In the premises, I made the following order:

- (a) The accused is found guilty of housebreaking with the intention to assault.
- (b) The Accused is found guilty as charged on Count 2, that is guilty of murder as contemplated in section 51(1) of Act 105 of 1997.
- (c) The accused is found not guilty on Count 3.

Roelofse AJ
Acting Judge of the High Court

DATE OF HEARING: 13 April 2022
DATE OF JUDGMENT: 3 May 2022

APPEARANCES

FOR THE STATE: MR. MSIBI

FOR THE ACCUSED: MS. ERASMUS OF THE LEGAL AID BOARD