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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION: MTHATHA**

CASE NO.CC16/24

Reportable: Yes /No

In the matter between:

THE STATE

VS

T[...] F[...]

JUDGMENT

MJAME AJ

[1] The accused person was indicted in this Court on a charge of murder read with the provisions of section 51(1) Act 105 of 1997

[2] It is alleged that upon or about 09 May 2020 and at or near H[...]’s complex, High Street in Cofimvaba, the accused did unlawfully and intentionally kill S[...] M[...] an adult female person by shooting him with a firearm.

[3] The accused is represented by Mr Modi on private instructions.

[4] Prior to pleading, the accused was apprised of the prescribed minimum sentence applicable which is life imprisonment. The accused was also apprised of competent verdicts in all counts.

[5] He pleaded not guilty to the charge of murder. He reserved his plea explanation.

Summary of substantial facts.

[6] The summary of substantial facts attached to the indictment and provided to the accused in terms of section 144(3) (a) of the Criminal Procedure Act 51 of 1977 (the CPA) read as follows:

“1. The deceased and accused were married, they separated due to personal conflict.

2. On 9 May 2020, the accused person arrived at the workplace of the deceased and found the deceased inside. He then shot and killed deceased.

3. Accused phoned a certain lady who was working with the deceased in the office. He informed her that he shot the deceased. During the commission of the offence the lady who was working with the deceased was not in the office.

4. Accused handed himself over to the police at Cofimvaba Police station. He arrived at the police station still carrying the fire arm. He reported to the police that he had shot and killed the deceased. Accused was then arrested.

5. Deceased died on the scene as a result of “multiple gunshot wounds”.

6. Section 51(1) is applicable in that the accused planned or premeditated to commit this offence.

[7] The evidential material handed in by consent is as follows: -

7.1 Identification of the deceased body - Marked Exhibit “A”

7.2 SAP 13 Register in which the fire arm was recorded -Marked Exhibit “B”

7.3 Notice of rights in terms of the Constitution – Marked Exhibit “C”

7.4 Photo Album which depicts the crime scene – Marked Exhibit “D”

7.5 Ballistic Results - Marked Exhibit “E”

7.6 Primer Residue results – Marked Exhibit “F”

7.7 Blood test results – Marked Exhibit “G”

7.8 Deceased post Mortem report and section 212 (4) affidavit- marked Exhibit “H” and “I”

7.8 Affidavit of the police officer who dispatched crime scene kit to laboratory – Marked Exhibit “J”

7.9. Affidavits by Forensic Pathology Officer -Marked Exhibit” K”and L

7.10 Licence of accused to possess firearm – Marked Exhibit ‘M’

Evidence of the state

[8] **Luvuyo Hanjana** testified under oath that he knows accused person. His wife was employed by the accused. On 9 may 2020 about 9.00 a.m. accused arrived at his place looking for his wife. He told him that his wife was not present, she had gone to Ngcobo to fetch her child. Accused gave him keys to hand them over to his wife. Accused had blood stains on his track top. He did not ask as to why he had blood stains. Accused left and he looked like a person who was in a hurry.

[9] **Nosiphiwo Hanjana’s** testimony is that she is working for the accused and deceased at H[...]’s place in Cofimvaba. On 9 May 2020 she was not at work. She had gone to Engcobo to fetch her child. Whilst she was in a taxi she saw the deceased passing by driving her motor vehicle. She called and talked to her requesting her to take care of her clients as she was going to Ngcobo. The deceased agreed and also informed her that accused was already in the office.

Whilst still on the way she received a phone call from accused who told her that he had shot and killed deceased because she was cheating on him. She was shocked and dropped the phone. She later called accused who confirmed that he had killed the deceased. On coming back from Ngcobo she went to police station where she found accused. Accused told her that the office keys are with her husband. Accused

also told her not to talk to anyone about the case as he (accused) has not yet made any statement. Accused also told her to keep safe the money for clients which was in the office.

[10] **ANELE TSHIJILA**, a police officer stationed in Cofimvaba testified that on the date of the alleged incident he was on duty. He received a phone call from Sergeant Skeyi to urgently come back to the station. He told him that there was someone who was at the station reporting that he had shot and killed his wife. On arrival he found the accused who was bleeding and enquired from him as to what had happened. He told him that he had shot and killed his wife. He also got injured when he was firing shots. Accused told him that he fired shots at the deceased because she was cheating on him and he saw WhatsApp chats on her phone. He and other police officers proceeded to the crime scene. They found the deceased lying down being naked on the lower part. There was blood on the floor. There was a navy tight pant, underwear with sanitary pad next to the deceased. He summoned other stakeholders. He observed injuries on the deceased body. She sustained three wounds on the right side of the stomach, two wounds on the left thigh, one wound on right thigh, one wound below breast. The body of the deceased was taken by forensic to Queenstown.

They managed to collect evidence. They found 5 empty cartridges, 2 projectiles, two live ammunition. The exhibits were collected by Sergeant Vellem and entered them in SAP 13 register.

[11] **LUNDI SKEYI** testified that he was on duty when accused arrived at the police station driving his car. He was outside when accused arrived. Accused came to him crying and told him that he has shot and killed his wife. He tried to calm him down. Accused was carrying a firearm. He then requested the accused to hand over the firearm to him. He told him that he had an argument with his wife who was cheating. He lost control of himself and fired shots at her. The accused was not charged neither a suspect when he came to the police station. He spontaneously narrated the story to him. He and other police officers proceeded to the crime scene. He then left other police officers to the police station. He opened a case after he visited the crime scene.

[12] **A[...]** **O[...]** **M[...]**, the brother to the deceased testified that he received a phone call from his mother that something had happened where the deceased was working. He drove from Mthatha proceeding to Cofimvaba. On arrival the deceased body was already taken to mortuary. He identified deceased body. He observed many wounds on the body of the deceased.

[13] **MALIBONGWE NDLWANA**, the police officer stationed in Cofimvaba testified that he was on duty when accused arrived carrying a fire arm. He then called Sergeant Skeyi who was about to leave the charge office. Sgt Skeyi met with the accused outside. He calmed down the accused and took the fire arm from him. On entering the charge office accused was explaining to Sgt Skeyi that he had shot and killed his wife. The fire arm was entered in SAP 13 register. A case was opened after police visited crime scene.

Some of the state witnesses were cross examined by the defence attorney.

Thereafter the state case was closed.

[14] **T[...]** **F[...]**, the accused testified under oath that deceased was his wife. On the day before the alleged offence he was from his home at Thornhill. He slept over at Mahlubini where his wife was staying. On the following day he proceeded to town where he has a business operating as cash loan. He went there to check books. He waited for Nosiphiwe who is his employee to arrive. Whilst still there his wife, the deceased arrived. Deceased told her that Nosiphiwo was not coming to work because she has a personal problem. Deceased did not stay for long in the office. She told him that she was going to the bank.

After she left he noticed the window of the vehicle which was driven by deceased was opened. The car was parked in front of the office. He went outside to close it. It transpired that deceased left her cell phone in the car. The phone rang. He did not answer it. It continued ringing. He took it to the office. He noticed that the caller who was continuously calling was one Iviwe. He suspected that his wife was cheating with Iviwe. Even before this day his wife was cheating on him and he ended up leaving his wife. He suspected that his wife had an extra marital affair because her behaviour had completely changed. He then waited for his wife to come back. When his wife came back, he confronted her about Iviwe. Deceased told him that it could be the friend of her child. He then drew out his fire arm threatening the deceased. He

forced her to open her phone pointing the fire arm at her. Deceased opened the phone. He saw a picture of her wife sleeping with another man. There was also a message which read "*I miss you my Bhadela I wish I could come to you at Magwaba.*"

He then confronted her about her refusal to have intimate encounter the previous night. The deceased got into another room and undressed herself showing him that she was in menstrual cycle. He told deceased to dress up giving her assurance that he will not shoot her. Deceased jumped at him and they struggle over the fire arm. Shots were fired during the struggle. He then saw deceased falling down. The fire arm also fell down. It continued firing shots whilst still down. He also got injured on his little finger.

He realised that deceased has passed on. He then called Nosiphiwo and told her that he left the keys at her residential place. He proceeded to the police station. On arrival at the police station he told the police officers that he had shot and killed his wife.

[15] During cross examination he admitted that his fire arm is a semi-automatic and it cannot release shots simultaneously without pulling a trigger. He admitted that when this happened the fire arm was pointed towards the deceased. He admitted that he is the one who told the police that he had shot deceased. He admitted that it could have happened that he pulled the trigger and fired shots at deceased. He admitted pointing deceased with a fully loaded and cocked fire arm was unlawful and was violent by forcing deceased to open her cell phone at gun point. He could not explain as to how the fire arm which was down could continue firing shots.

ARGUMENTS

[16] The state argued that the accused be found guilty as charged of murder. It has proved its case beyond reasonable doubt. The accused does not dispute that he shot the deceased. The accused premeditated the killing of the deceased. The evidence before court is that the relationship between accused was not good. Accused suspected deceased to have extra marital affairs. The injuries sustained by the deceased clearly shows that the accused had intentions to kill her. The accused waited for the deceased to confront her. He drew fire arm forcing the deceased to open the cell phone. He was violent towards deceased. The state referred the Court

to a case of **Kekana vs S** to determine whether the killing of the deceased was premeditated.

It argued that accused concedes that he was the one who was holding fire arm pointed towards the deceased. State argued that the evidence of the accused is full of improbabilities. It further argued that the injury on accused's little finger was caused by his conduct.

[17] Defence argued that the evidence before court is what was said by the accused to the witness. It argued that the duty is on the state to prove its case beyond reasonable doubt. There is no evidence that accused planned or premeditated the shooting of the deceased. Defence referred court to **Zikhali vs S 2005 ZA KZN PHC 37 @ paragraph 36, Dhlomo vs S 2023 (1) SACR 314 KZP paragraph 27.**

It was further argued that deceased jumped to the accused and they both wrestled over the fire arm. There was no intention to kill the deceased. The accused drew out fire arm threatening the deceased which suggests a different scenario. It was argued that the accused could not have foreseen that deceased would jump over the fire arm. It was submitted that accused was negligent by drawing out a cocked fire arm without putting on a safety pin. The only verdict the court may reach is Culpable Homicide.

Onus of proof

[18] The longstanding principle in criminal law and the law of evidence is that the guilt of the accused must be proved by the State and that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. **In S v T**¹ the importance of this principle was stated as follows: -

“The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof – universally required in civilised systems of criminal justice is a core component of the fundamental right that every person enjoys under the Constitution.

When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be

¹ 2005(2) SACR 318(E)@ paragraph 37

suspicious that he or she was, indeed, the perpetrator of the crime in question.”

EVALUATION OF THE EVIDENCE

[19] The duty of the Court is to evaluate the evidence in its totality to establish whether the state has met the required standard of proof.

[20] The principle in evaluating evidence was clearly stated by the Supreme Court of Appeal in **S vs Chabalala** ²

“the correct approach in evaluating evidence is to weigh up all elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities, and having done so, decide whether the balance weighs so heavily in favour of the state so as to exclude any reasonable doubt about the accused guilt. Of course, this cannot be done in isolation, but the court must consider the totality of the evidence before it to come to a just decision. It is therefore imperative to evaluate all the evidence and not to be selective in determining what evidence to consider.”

[21] The Supreme Court of Appeal in **S vs Chabalala** (supra) amplified as follows, the “*holistic*” approach required by a trial court in examining the evidence on the question of guilt or innocence of an accused:

4: “court when evaluating the evidence in totality does not have to be convinced that every detail of an accused’s version is reasonable true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused’s version against the inherent probabilities, but the accused’s version cannot be rejected merely because it is improbable, it may only be rejected on the basis of inherent probabilities if it is said it is so improbable that it cannot be reasonably possible true,”

[22] A conspectus of all evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any evidence

² 2003(1) SACR 134 SCA

tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. See – **S vs Trainor** ³

[23] It is common cause that the deceased died as a result of multiple gunshot wounds. It is common cause that deceased and accused were staying together as husband and wife. It is common cause that the gunshots were fired from the accused fire arm.

The issue in dispute is whether the accused had premeditated and had intentions to kill of the deceased.

[24] In this case there is no eye witness. The state relied on informal admissions made by the accused to the witnesses.

The evidence of Nosiphiwo is that the accused telephonically called her and spontaneously or voluntarily told her that he had shot and killed deceased because she was cheating.

The evidence of three police officers who were at the police station when accused arrived is consistent with each other that accused voluntarily made informal admissions that he had shot and killed his wife because she had extra marital affair. This evidence of informal admissions was not disputed to the witnesses. This evidence is also corroborated by the accused who under cross examination admitted pulling the trigger and fired shots at deceased whilst they were wrestling over the fire arm. There are improbabilities on the evidence of the accused, for instance the issue of a semi-automatic fire arm firing shots simultaneously without pressing a trigger. It is highly improbable a fire arm to fire shots whilst lying on the ground without being handled.

I find that the evidence of the witnesses is reliable. Their credibility was not shaken by cross examination.

[25] Informal admissions can be admitted as evidence to prove the truth of their contents. Informal admissions are governed by section 219 A of the criminal procedure Act 51 of 1977 which ensures that statements made extra-judicially will

³ 2003 (1) SACR 35 SCA

be admissible in court if it was made freely and voluntarily. In this matter accused voluntarily made admissions without being unduly influenced. He also admitted that he told Nosiphiwo and police officers that he had shot and killed deceased.

Premeditated Murder

[26] Premeditation involves a thought process that contemplates a certain outcome and the means to achieve the outcome. Intention in all forms involves the perpetrator's state of mind before and while the criminal act is being committed.

[27] In **S vs Raath**⁴, 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. On 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 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.

[28] In **S vs Makatu**⁵, it was said:

"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 meaning "to decide on, arrange in advance, prepare 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

⁴ 2009(2) SACR 46 (CPD)

⁵ 2006(2) SACR 582 (SCA) at paragraphs 12-14

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."

[29] The Supreme Court of Appeal in **Kekana vs S** ⁶, held that:

"Premeditation does not necessarily entail that the accused should have thought or planned his or her action for a long period of time in advance before carrying out his or her plan. this is because even few minutes are enough to carry out a premeditated action".

[30] In *casu*, the accused in his evidence told the court that his marriage relationship with the deceased was not in good state. Deceased had extra marital affairs. This had been happening for over a long period till such time he decided to leave. On the date of the incident deceased left him in the office proceeded to the bank. She did not immediately come back from the bank. Deceased had left her cell phone in the car. The deceased cell phone continuously rang. He ended up taking it to his office and waited for deceased. The caller was one **Iviwe**. The deceased came back and he confronted her about this **Iviwe** and ended up drawing out his cocked fire arm threatening and forced her to open the phone. He was suspicious that the caller was the person whom she was cheating with.

[31] It is clear from the evidence of the accused that the moment deceased 's cell phone rang he suspected the caller to be deceased 's side lover and thought of confronting the deceased. There is an element of thought. He waited for her to come and explain to him who was **Iviwe**. He drew out a cocked fire arm forcing the deceased to open her cell phone. This confrontation ended up shots being fired at the deceased which led to her death. If a perpetrator carries through with his plan to cause another person bodily harm which ultimately results in person's death where

⁶ 2014 ZASCA 158 @ paragraph 13 (1 October 2014)

the death was foreseen by the perpetrator, premeditated murder is established. The accused drew out a cocked fire arm, pointed at the deceased. His conduct was violent and unlawful towards deceased. The injuries sustained by the deceased clearly shows that the accused had intentions to kill her. The chief post mortem findings were:

- Multiple gunshot wounds on the skull, neck, chest, abdomen, upper limbs and lower limbs.
- Subendocardial haemorrhages in left ventricle.
- Creamy discharge on the vagina.

[32] Having evaluated the evidence in its totality I find that the state has proved its case beyond reasonable doubt. The accused did unlawfully with intent fired shots and killed the deceased. The court rejects the evidence of the accused as it is not reasonable possible true.

[33] In the circumstances I found accused guilty as charged of Murder read with the provisions of section 51(1) Act 105 of 1997.

P.C.N. MJAME

ACTING JUDGE OF THE HIGH COURT

Appearances:

For State : Mr Qebeyi

Instructed by : NPA

Mthatha

For Accused : Mr Modi

Instructed by : Modi Attorneys DPP'S Office

Queenstown

Dates Heard : 03/09/24,04/09/24; 23/06/25, 24/06/25

Date Delivered : 25 June 25