

SOUTH AFRICA / JUDGMENT

S v Bodibe (conviction) (CC 14/2021) [2021] ZAGPPHC 714 (19 October 2021)

[2021] ZAGPPHC 714

COURT

North Gauteng High Court, Pretoria

BEFORE

C Van Veenendaal

CASE / FILE NUMBER

CC 14/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: CC 14/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

YES

19

October 2021

In

the matter between:

THE

STATE

and

DITABA

BODIBE

Accused

JUDGMENT

VAN VEENENDAAL, AJ

- [1] The accused stands before court, charged with two counts stemming from an incident on 17 August 2020 at or near Retlile Primary School, Fochville, in the district of Oberholzer. The first count is one of the murder of Thuliswa Sentia Dick, a 25 year old pregnant female, the second count is one of assault with the intent to cause grievous bodily harm on Mahlomola Joseph Mofokeng.
- [2] The Accused was warned, before pleading, of the state's intention to invoke section 51(1) of Act 105 of 1997 (the so-called minimum sentences Act) alternatively reliance on the court's inherent jurisdiction to impose life imprisonment, alternatively reliance on section 51(2) of the Minimum Sentences Act.
- [3] The Accused elects to plead guilty and submits a plea explanation in terms of section 112(2) of the Criminal Procedure Act 51 of 1977. Regarding the first count, he pleads guilty with reliance on section 51(2) of the Minimum Sentences Act. The State accepts the plea, but not regarding section 51(2) on count 1, instead relying on section 51(1). This is the only point of dispute between the two parties before court. The Parties agree that the Accused foresaw that the deceased could die as a result of his attack on her. On Count 2, he pleads guilty to common assault which is accepted by the state.
- [4] The State and the Defence agree on the facts of the case: ie that the Accused and Deceased were involved in a quarrel during which the accused was insulted by the deceased, who told him that the child she was expecting was not his. The Accused assaulted the deceased with an open hand on her face, she fell to the ground and the Accused kicked her. The complainant in the second charge intervened together with Thabang Daniel Phume. The Accused became angrier and produced an okapi knife and slightly stabbed Mofokeng on his hand. The Deceased ran away and the Accused chased after her. He stabbed her several times and she fell down on the street next to the school gate. The Accused then ran away to his sister's place in Greenspark. Community members came to him, assaulted him with sticks, stones, iron bars and stabbed him with a panga. The police assisted the Accused and took him to the police station before they called an ambulance to take him to the Carletonville Hospital for medical attention.
- [5] According to the medical report, the deceased suffered two stab wounds to the lungs and the cause of death was listed as "stab wound chest with large volume blood loss". The Accused admitted both the scene photographs and the post mortem report into evidence.
- [6] Mofokeng (the complainant in count 2) testifies that he knew both the Accused and the Deceased. He saw that the Accused was assaulting the Deceased. The Deceased asked him to assist her as she was afraid and the Accused wanted to kill her. The Accused stabbed the witness and then went after the Deceased, stabbing her 2 or 3 times when he caught up with

her, about 10 to 12 paces away. His friend helped the deceased when she fell. The Deceased was pregnant, to the witness' knowledge, with the Accused's child. He states that the Deceased had been assaulted previously and had a swollen face. They, the accused and deceased, stayed together in a shack that belonged to Tebogo.

- [7] Under cross-examination, Mofokeng states that he did not see the previous assault. He was not friends with the deceased such that she would discuss personal problems with him.
- [8] The only point of contention between the State and the Defence is whether the accused planned or premeditated the attack on the Deceased. The State maintains that the murder was planned or premeditated, the defence says the murder was committed in the heat of the moment. It is crucial to make this determination at this point of the trial, as the decision in terms of section 51(1) places a heavier burden on the Accused to show the existence of substantial and compelling circumstances for the court to deviate from the prescribed life imprisonment, whereas a decision of 51(2) places a heavier burden on the State to show aggravating circumstances to justify a sentence longer than the prescribed minimum sentence of 15 years imprisonment. See also the discussion of this aspect by Satchwell J in Taunyane (infra) at par [9] to [11].
- [9] The matter of "planning or premeditation" has been discussed in, inter alia, the reported cases of *S v Raath* 2009 (2) SACR 46 (C), *S v PM* 2014 (2) SACR 481 (GP), *S v Kekana* [2014] ZASCA 158 (629/2013; 1 October 2014) and *S v Taunyane* 2018 (1) SACR 163 (GJ).
- [10] The concept of "planning or premeditation" is not statutorily defined. The Raath matter (supra) pointed out that this question tended to be approached on a casuistic basis. The court then described planned or premeditated murder as follows in par 16:

'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.'

- [11] Raath was quoted with approval by the Supreme Court of Appeal in *S v Kekana* (supra).

[12] Satchwell J states in Taunyane (supra) that: “The distinction between 'planning' and 'premeditation' was made on the basis of dictionary definitions in Raath, but has subsequently been examined in some detail in S v PM 2014 (2) SACR 481 (GP) para [36] where it was found that the concepts were distinct from each other — premeditation referring 'to something done deliberately after rationally considering the timing or method of so doing, calculated to increase the likelihood of

success, or to evade detection or apprehension', while planning refers to 'a scheme, design or method of acting, doing, a proceeding

or making which is developed in advance as a process, calculated to optimally achieve a goal'. (at par 27).

[13] The period of time which may elapse between a perpetrator forming an intention to commit the murder and carrying out such murder is of importance but does not, as was said in Raath, 'prove a ready-made answer to the question of whether the murder was planned or premeditated' or, as was said in Kekana supra, 'time is not the only consideration'. (Taunyane par 28).

[14] On the evidence before the court there was an argument between the accused and the deceased which caused the Accused to become angry and later angrier when two people intervened. The Accused admits to taking out an okapi knife and stabbing at the deceased, hitting Mofokeng in the process. He admits to chasing after the deceased – here Mofokeng's evidence supplements the statement of the Accused – for about 10 meters or 12 paces, where he then stabs her at least twice, in the upper body, penetrating both her lungs, at least one wound is from behind. There is one fresh wound above the deceased's left eye and there is some debris or wounding on her chin and mouth. This indicates a serious assault on her. However, there is no indication in the evidence when she obtained these latter facial wounds.

[15] Since time is not the only consideration, space or distance must also be taken into account. From the scene album, this is at the gate of the school, where there is open space, nothing impeding the movement of either the witness Mofokeng, the Deceased or the Accused. Put differently, people could move with speed.

[16] There is no evidence before court as to how often there were altercations between the Accused and Deceased. We have evidence of maybe one other incident. Consequently, there is no evidence that this fight was the next in a sequence of fights that had steadily increased in violence, which may indicate a premeditation or planning of the demise of the deceased. There is similarly also no indication of the intensity of violence between the accused and the deceased, normally. Therefore, the court must accept that the violence in this one instance of an argument between the accused and the deceased increased exponentially when other persons, like Mofokeng, became involved.

[17] The Deceased asked for assistance from Mofokeng, because she said she feared for her life. However, the context of her fear was not clear in this case. Was she asking for assistance because the accused was angry, or because she had provoked his anger or because she was indeed in mortal fear? The okapi knife was only produced after she involved other people. Why had she involved other people? Was she afraid of the result of her provocation of the accused's anger, or did she know she had taken that one step too far to make the accused angry? Why would she have said that? Because there is no context to these questions, no conclusions can be drawn from her conduct. At the time they were quarreling and the accused had hit her so that she fell. Can one deduce from this that the accused planned to kill the Deceased? I am inclined to say no, due to the lack of context. As Hiemstra in Criminal Procedure says, the court must not grope in the dark and speculate, but must make findings based on the

facts.

However, each case must still take into account its particular set of circumstances on which the court must make a finding. These questions indicate doubt in the mind of the court regarding the planning or premeditation, and the benefit of this doubt must be given to the accused.

[18] In taking into account the relative speed with which violence escalated and the short distance and large space within which the violence occurred, that led to the stabbing of the deceased, it would appear that there could not have been premeditation, as defined in PM (supra) – a deliberate act after a rational consideration of the timing and the method, calculated to increase the likelihood of success, to evade detection or apprehension. Nor was there planning – referring 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.

[19] The conduct of the Accused after the fact of stabbing indicates a realisation of the enormity of the implication of his conduct and his intention, as he himself admits in his plea, which confirms that there was no plan to escape or evade detection after the fact. As a matter of fact, the police came to his rescue from the attacking horde. It is hardly conclusive of planning or of premeditation.

[20] I am not satisfied that the state has proved beyond reasonable doubt that the Accused is guilty of murder in circumstances of planning or of premeditation.

[21] In the circumstances, I make the following order:

1. The Accused is convicted of murder on count one, with section 51(2) applicable;
2. The accused is convicted of common assault on count 2.

C VAN VEENENDAAL

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

APPEARANCES

For the State:

Mr Jacobs

For the Accused:

Mr Kgagara (Legal-Aid)

Heard on:

18 October 2021

Delivered on:

19 October 2021

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