

SOUTH AFRICA / JUDGMENT

S v Ratau (CC46/2013) [2022] ZAMPMBHC 64; 2023 (2) SACR 40 (MM) (1 August 2022)

[2022] ZAMPMBHC 64

COURT

Mbombela High Court, Mpumalanga

BEFORE

Roelofse

CASE / FILE NUMBER

CC46/2013

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IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION (MAIN SEAT)

Case

Number: CC 46/2013

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED.

1

August 2022

In

the matter between:

THE

STATE

and

JOHANNES

WALTER RATAU

Accused

JUDGMENT

Roelofse AJ:

- [1] A robber's accomplice is shot and killed by one of the robbers' victims during an attempted robbery. I have to decide in this matter whether the robber is guilty of the premeditated murder of his accomplice. This judgment finds that the robber is guilty of the premeditated murder of the accomplice.

Summary of the State's case

- [2] The State alleges that the accused (Mr Johannes Walter Ratau) and Mr Tony Lipson Madutela (the deceased) was being detained by the Police and being conveyed by Sergeant Lebone Walter Makhufola (Sergeant Makafola) and Ms Ngakwana Sarena Boloka (Ms Boloka)[1] in a minibus from Sekhukune to Mbombela.
- [3] On route to Mbombela, the deceased attempted to rob Sergeant Makhufola of his service pistol. At the same time, Mr Ratau also attacked Ms Boloka and also attempted to rob her of her service pistol. Sergeant Makhufola shot and killed the deceased during the attempted robbery. For the conviction of Mr Ratau, the State relies upon the doctrine of common purpose.

The charges and plea

- [4] Mr Ratau stands trial before this court on charges of attempted robbery (Count1) and premeditated murder[2] (Count 2).
- [5] Mr Ratau pleaded not guilty to both counts. In his plea explanation, Mr Ratau said that he did not attempt to rob the police officers of their firearms and he did not murder the deceased.
- [6] Mr Ratau made admissions in terms of section 220 of the Criminal procedure act 51 of 1977. The State also, by agreement between it and Mr Ratau, handed in the report of the post mortem that was conducted upon of the deceased and a photo album which shows the scene of the crime. The post mortem report confirms that the deceased died as a result of a gunshot wound. This evidential material was not disputed by the deceased and was admitted into evidence.
- [7] The only dispute remaining to be resolved between the State and Mr Ratau was whether the accused attempted to rob the police officers of their firearms; whether Mr Ratau is guilty of murdering the deceased; and whether the murder was premeditated.

The evidence

- [8] The State relied upon at the evidence of the two police officers, Sergeant Lebone Walter Makhufola and Ms Boloka.

Sergeant Lebone Walter Makhufola

- [9] Sergeant Makhafola is based at the detective branch at the Sekhukune police station. He was on duty on 23 August 2012 and was requested to transport Mr Ratau and the deceased from Sekhukune to Mbombela in a minibus.
- [10] The deceased and Mr Ratau was seated in last row of the minibus. Ms Boloka was seated in the second row from the back, just in front to the deceased and Mr Ratau. Sergeant Makhafola was the driver of the minibus.
- [11] On the road between Sabie and Mbombela, Sergeant Makhafola heard a commotion at the back of the minibus. Sergeant Makhafola saw Mr Ratau leaning over Ms Bolka's seat. The next moment Sergeant Makhafola saw the deceased next to him. The deceased grabbed hold of the minibuses' steering wheel. Sergeant Makhafola fought with the deceased to remain in control of the steering wheel. A struggle ensued between the deceased and Sergeant Makhafola. At some stage the minibus came to a standstill and crawled backwards were after it stopped against a tree stump.
- [12] The struggle between Sergeant Makhafola and of the deceased continued. The deceased attempted to take Sergeant Makhafola's service pistol. Sergeant Makhafola prevented this from happening and succeeded to get the pistol from its holster. Sergeant Makhafola the warned the deceased that he would shoot him if he did not stop the attack. The deceased continued with his attack. Sergeant Makhafola fired a warning shot which penetrated the minibuses' roof. The bullet missed the deceased. The deceased continued with his attack upon Sergeant Makhafola. Sergeant Makhafola fired another shot. The bullet hit the deceased penetrating the deceased's heart. The deceased fell down. Sergeant Makhafola saw that the deceased made no further movements.
- [13] At that stage the struggle between Mr Ratau and Ms Boloka was continuing. Sergeant Makhafola managed to get out of the passenger door next to the driver seat and entered the big sliding door of the minibus. Sergeant Makhafola pointed his fire arm at Mr Ratau. Mr Ratau immediately ceased his attack on Ms Boloka and held his two arms over his head appearing to be shielding himself from a possible gun shot.
- [14] Sergeant Makhafola testified that the deceased and Mr Ratau were cuffed to each other with a chain that was cuffed to one of each other's ankles. The chain between the cuffs was approximately 600 mm long.
- [15] Sergeant Makhafola reported the incident to his superiors. Members of the Sabie police station arrived and took control of the crime scene.
- [16] Under cross examination Sergeant Makhafola was challenged on the likelihood that the deceased could have reached Sergeant Makhafola at the drivers' seat while the deceased and Mr Ratau were chained together. Sergeant Makhafola's response was that it was possible because the deceased pulled him from the drivers' seat. Sergeant Makhafola ended up at behind the driver's seat of the minibus in the struggle. In addition, Sergeant Makhafola

testified that if the deceased and Mr Ratau's legs were stretched while attached to the ankle chain and therefore it was possible for the deceased to reach Sergeant Makhafola where he was seated while Mr Ratau was fighting Ms Boloka.

- [17] It was put to Sergeant Makhafola that Mr Ratau's version would be that he never attacked Ms Boloka and that he was only in handcuffs and not chained by his ankle to the deceased. This Sergeant Makhafola denied. Sergeant Makhafola referred to the photo album of the crime scene where it can be clearly seen that Mr Ratau was chained to the deceased. Upon this response, it was put to Sergeant Makhafola that it would be Mr Ratau's version that he was chained to the deceased after the deceased was shot. This Sergeant Makhafola denied.

Ms Boloka

- [18] Ms Boloka testified that she was with Sergeant Makhofola when they conveyed Mr Ratau and the deceased. Ms Boloka confirmed Sergeant

Makhafola's evidence over the positions where she, the deceased, Mr Ratau and Sergeant Makhofola were seated in the minibus.

- [19] Ms Boloka testified that Mr Ratau grabbed her from behind and covered her eyes with both his hands. Mr Ratau also applied force to her neck. Ms Boloka succeeded to remove Mr Ratau's hands from her eyes. During the attack, and after Ms Boloka succeeded to remove Mr Ratau's hands from her eyes, Ms Boloka attempted to go forward to assist Sergeant Makhafola but Mr Ratau grabbed her by her hair and pulled her back.
- [20] Ms Boloka saw that her handbag had fallen to the floor of the minibus during the struggle with Mr Ratau. She reached out for her handbag because her service pistol was in the handbag. Mr Ratau got hold of the service pistol and grabbed it by its bud. Ms Boloka held the pistol by its barrel. A struggle in ensued over the pistol. Ms Boloka saw that the deceased was grabbing the steering wheel of the minibus while Sergeant Makhafola was preventing the deceased from doing so.
- [21] Ms Boloka also saw that there was a struggle between Sergeant Makhafola and the deceased at the seat behind the driver's seat when the minibus came to a standstill. This was while she was still busy fighting off Mr Ratau. Ms Boloka heard a gun shot being fired. Prior to the gun shot being fired, she heard Sergeant Makahafola warning the deceased that if he does not stop his attack, he would be shot. After the first gunshot Ms Boloka heard another gunshot.
- [22] Ms Boloka testified that she saw Sergeant Makhafola exiting from the passenger door of the minibus and entering into the sliding door of the minibus. Sergeant Makhafola pointed his service pistol at Mr Ratau who immediately stopped his attack on Ms Boloka.

Mr Ratau

- [23] Mr Ratau testified that he was being conveyed in the minibus with Sergeant Makhafola, Ms Boloka and the deceased. Mr Ratau saw the deceased storming to Sergeant Makhafola. Mr Ratau testified that he was only in handcuffs and that he was not cuffed with an ankle chain

to the deceased prior to the deceased launching his attack. Mr Ratau testified that he did nothing while he was seated at the back seat of the minibus. He did not did not attack Ms Boloka. Mr Ratau testified that, after the minibus came to a standstill and the deceased was a shot, Sergeant Makhafola chained Mr Ratau's ankle to the deceased's ankle after the deceased had already died. Mr Ratau denied the version of the state witnesses.

Evaluation of the evidence

- [24] The only variance between the version of the state witnesses and Mr Ratau is over Mr Ratau's conduct in the minibus. Mr Ratau says he did nothing and only observed what transpired between Sergeant Makhafola and the deceased. Mr Ratau therefore alleges that he did not attack Ms. Boloka and did not attempt to rob her of her service pistol. During cross examination, Mr Ratau could think of no reason why the state witnesses would lie to implicate him as they did.
- [25] The state witnesses gave detailed accounts of the events and their versions are beyond reproach. They testified honestly and made a good impression upon me.
- [26] The same is not true for Mr Ratau. As for Mr Ratau, the version he proffered is so farfetched that it cannot possibly be true. Mr Ratau was a bad witness. Mr Ratau resolved to ask the prosecutor questions during her cross examination. For this court had to reprimand Mr Ratau and also warned him that his conduct may lead to an adverse finding against him.
- [27] I find that the state witnesses' evidence is a true account of what transpired. The deceased attacked Sergeant Makhafola in an attempt to rob him of this service pistol. Mr Ratau attacked Ms Boloka in an attempt to rob her of her service pistol. All of this happened while the deceased and Mr Ratau were being conveyed in the minibus from Sekhukune to Mbombela by Sergeant Makhafola and Ms. Boloka.

Common purpose

- [28] The State relies on the doctrine of common purpose for the conviction of Mr Ratau only on the count of premeditated murder.
- [29] In my view, it is not necessary to turn to the doctrine of common purpose in this case in order to determine Mr Ratau's guilt of murder. Even if I am wrong, all the requirements for the application of the doctrine of common purpose in order to attribute the criminal conduct of the deceased and Mr Ratau to each other are satisfied in this case.

- [30] In *Jacobs and Others v S*[3], the Constitutional Court held:

'[71] One of the justifications for the doctrine of common purpose is crime control. As "a matter of policy, the conduct of each perpetrator is imputed (attributed) to all the others". Simultaneously, the doctrine of common purpose assists at the practical level where the causal links between the specific conduct of an accused and the outcome are murky. The doctrine of common purpose is often invoked in the context of consequence crimes in order to overcome the "prosecutorial problems" of proving the normal causal connection between the conduct of each

and every participant and the unlawful consequence. In Thebus, Moseneke J explained:

“The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social ‘need to control crime committed in the course of joint enterprises’. The phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a causal prerequisite for liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprises intractable and ineffectual.” (Footnotes omitted.)

[72] There are two possible ways in which a common purpose may arise:

“(a) By prior conspiracy (agreement) to commit the crime in question: for example, where X and Y (or X, Y and Z) agree in advance to commit a particular crime, which implies a bilateral or multilateral act of association.

(b) By conduct (spontaneous association): for example, where X notices (or Y and Z) committing a crime, and simply joins in. This would be a unilateral act of association. This form of association is most commonly found in cases of mob violence.”

[73] This case does not concern the first form of common purpose, but only the second. For conduct to constitute active association, the requirements set out in Mgedezi need to be met. These are well-established. I set them out in the context of the crime of murder. Firstly, the accused must have been present at the scene where, for example, the assault was being committed. Secondly, the accused must have been aware of the assault on the deceased, in Mgedezi this contemplated that the accused had knowledge of a previous assault. Thirdly, the accused must have intended to make common cause with those who were perpetrating the assault. Fourthly, the accused must have manifested a sharing of a common purpose with the perpetrators of the assault by performing some act of association with the conduct of the others. Fifthly, the accused must have had the requisite mens rea (intent). In the context of this case, the applicants must have intended that the deceased be killed, or they must have foreseen the possibility of him being killed and performed an act of association with recklessness as to whether or not death was to ensue. Of particular relevance in this matter is the requirement that the applicants must have been present at the time when the fatal blow was inflicted for them to be guilty of murder.’ (Endnotes omitted)

[31] With regards to the requirements for common purpose: both the deceased and Mr Ratau were present when the robberies took place; both of them were aware of the assaults; both the deceased and Mr Ratau made common cause with each other and they associated with each other’s conduct – they almost simultaneously launched the attacks on Sergeant Makhofela and Ms Boloka; and they had the required mens rea to rob the police officers of their service pistols, undoubtedly either to harm the officers or to make an escape or both.

Murder[4]

[32] Murder is the unlawful and intentional causing of the death of another human being.[5] The elements of the crime of murder being, an act causing the death of another human being, unlawfulness and culpability or put differently, mens rea.[6]

Intention

[33] Intention is one of the elements of the crime of murder.

[34] 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.

[35] Culpability in the case murder is either dolus directus or, dolus indirectus or, dolus eventualis and dolus indeterminatus or generalis. Other descriptions of dolus eventualis are “constructive”[7] or “legal” intention and employs a technical and artificial meaning of the word “intention”.[8]

[36] 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 ‘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.’

[37] 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.’

[38] Leach JA said in *Pistorius* at para 34:

‘As this court has pointed out, while the subjective state of mind of an accused person in a case such as this is an issue of fact that can often only be inferred from the circumstances surrounding the infliction of the fatal injury, the inference to be properly drawn must be consistent with all the proved facts.’

[39] 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*.

[40] 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.

[41] It is often difficult to determine what an accused subjectively foresaw from the available evidence. Holmes JA, in *S v Sigwahla*[9] outlined the essential facts of that case and confirmed that reasonable inferences may be used in order to determine a perpetrator’s subjective foresight. He said as follows:[10]

‘...[T]he appellant was armed with a long knife which he held in his hand; that he advanced upon the approaching deceased; that as he came up to him he jumped forward and raised his arm and stabbed him in the left front of the chest; that the force of the blow was sufficient to cause penetration for four inches and to injure his heart; and that there is nothing in the case to suggest subjective ignorance or stupidity or unawareness on the part of the appellant in regard to the danger of a knife thrust in the upper part of the body. In my opinion the only reasonable inference from those facts is that the appellant did subjectively appreciate the possibility of such a stab being fatal.

[42] The aim of the deceased and Mr Ratau’s attack was to rob Sergeant Makhafola and Ms. Boloka of their service pistols. Fire arms are weapons designed and used to kill. There is nothing in this case to suggest that the deceased and Mr Ratau were ignorant as to the danger of a fire arm.

[43] The deceased was killed by Sergeant Makhafola when he defended himself against the deceased who had attempted to rob him of his service pistol. The deceased and Mr Ratau’s aim was to rob Sergeant Makhafola and Ms Boloka of their service pistols. In doing so, both the deceased and Mr Ratau subjectively foreseen that their attempt to rob the fire arms may

lead to one or both of the firearms discharging leading to one or more of the occupants of the minibus's (or even an innocent bystander's) injury or death. Yet, in the instance of the deceased, he continued with his attempt to rob Sergeant Makhafola's service pistol after one shot had already been fired. Mr Ratau did the same and only stopped his attack on Ms Boloka when he was pointed by Sergeant Makhafola with his fire arm.

- [44] There is no question in my mind that the deceased and Mr Ratau nevertheless persisted with their attacks while reconciling themselves with the outcome, that is that someone may get injured or may die

Premeditated murder

- [45] 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.
- [46] 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

- [47] 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.
- [48] 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”.’

- [49] 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.’
- [50] 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.
- [51] 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*.

- [52] 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.
- [53] 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.
- [54] The circumstance of this case is such that both the deceased and Mr Ratau foresaw that serious injury or even death may ensue as a result of their plan (and the execution thereof) to rob the police officers of their service pistols. In my view, the attacks were pre-planned for why else would the first thing Mr Ratau did was to attempt to close Ms Boloka's eyes. Clearly the only reason could have been in order to prevent her from seeing what the deceased was doing. By keeping Ms Boloka occupied with Mr Ratau's own attack on her, he was also preventing Ms Boloka from reaching Sergeant Makhofola who was driving the minibus. Not even the two shots that were fired made Mr Ratau to stop the assault. Mr Ratau pulled Ms Boloka back by grabbing her hair so that she could not reach Sergeant Makhofola and the deceased.
- [55] Having regard to the principles set out above measured against the facts of this case I find that the robbery was pre-meditated. A robbery implies the use of force or threat of force aimed at bodily harm. The deceased and Mr Ratau foresaw that someone might be killed or injured as a result of the robberies and notwithstanding this knowledge nevertheless perpetrated the attempted robbery. It does not matter that obviously not one of them wanted their accomplice to be injured or killed. Because the causing of harm was premeditated which harm lead to the death of the deceased, Mr Ratau is guilty of premeditated murder, *mens rea* being, *dolus eventualis*. Mr Ratau and the deceased must have known that the police officers would endeavour to use their fire arms when attacked....they

must have known their attack on the police officers could lead to the fire service pistols to be used either in an arrack on the police officers or on Mr Ratau and/or the deceased – they must have foreseen that the harm could lead to death.[11]

[56] Mr Ratau attempted to rob Ms Boloka of her service pistol in brazen disregard of the consequences of his act. This is not better demonstrated by the evidence that Mr Ratau got hold of Ms Boloka's fire arm at its bud while she was holding the barrel. A shot could have gone off at any time, yet Mr Ratau did not cease the attack. He only stopped when he was pointed by Sergeant Makhafola with his service pistol.

[57] In the premises, Mr Ratau is found guilty of both counts as charged.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 18, 19 and 25 July 2022

DATE OF JUDGMENT: 1 August 2022

APPEARANCES

FOR THE STATE: MS MNISI

FOR THE ACCUSED: MR MUTHIVHITIVHITI

INSTRUCTED BY: LEGAL AID BOARD

[1] Ms Boloka was employed by the South African Police Service (the SAPS) as a constable at the time of the incident but has since then resigned from the SAPS.

[2] As contemplated in Section 51(1) of the General Law Amendment Act 105 of 1997.

[3] 2019 (1) SACR 623 (CC).

[4] Under the headings 'Murder' and Premeditated murder', I repeat what I have set out in S v Dube, Case Number: CC03/22 for the principles in S v Dube equally apply in this case.

[5] R v Ndhlovu 1945 AD 369 373.

[6] Mens rea means 'a guilty mind' while culpability must, in the eyes of the law, be grounds for blaming the perpetrator personally for his or her unlawful conduct.

[7] 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).

[8] R v Huebsch 1953 2 SA 561 (A) 566–568.

[9] 1967 (4) SA 566 (A) At 570G-H.

[10] At 570G-H.

[11] See: S v Nhlapho and Another 1981 (2) SA 744 (A).

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