REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A82 / 2008

In the matter between:

EDWIN PEDRO RAATH	Appellant
and	
THE STATE	Respondent

Counsel for the Appellant:	Adv. A Caiger
Instructing Attorneys:	Heyns & Partners Goodwood *Mr. R Bezuidenhout*
Counsel for the Respondent:	Adv. S Galloway
Dates of hearing:	23 July 2008
Date of judgement:	10 December 2008

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JUDGMENT : 10 DECEMBER 2008

BOZALEK, J:

[1] On 23 November 2005 the appellant, then a 42-year old non-commissioned telecommunications officer in the South African Air Force, was convicted in the Cape High Court on counts of murder and assault with the intent to grievous bodily harm. He had pleaded not guilty to both charges and had raised the defence of non-pathological criminal incapacity to the charge of murdering his wife, Christina Jacoba Raath, by shooting her using his firearm.

[2] The accused was legally represented in his trial. In a meticulous and comprehensive judgment, Dlodlo J rejected the appellant's defences on both counts. In doing so he found that the appellant had planned to

fatally shoot the deceased. On 25 November 2005 the learned judge sentenced the appellant to life imprisonment on the count of murder and to three years imprisonment on the count of assault with intent to do grievous bodily harm to his late wife. The court ordered that the two sentences would run concurrently.

[3] With the leave of the court *a quo* the appellant now appeals against the life sentence imposed upon him. In his notice of appeal the appellant contends that the court *a quo* erred in not finding that "substantial and compelling circumstances" existed which justified the imposition of a lesser sentence. In particular, it is averred, the court erred in finding that the fact that the appellant was under the influence of liquor had no effect on the commission of the offence. It is also contended that the court over-emphasised the deterrent, preventive and punitive purposes of sentences and failed to take into account that the applicant had an inflexible, authoritarian and patriarchal personality and attitude towards the role of his wife and family and that these factors had played an important role in his actions. Various other factors, including the appellant's remorse and his devotion to his children, are cited as mitigating factors, all of which are said to make up the substantial and compelling circumstances which the court *a quo* should have found.

[4] In sentencing the appellant, Dlodlo J approached the matter on the basis that, unless substantial and compelling circumstances were found to exist, he was obliged to impose a sentence of life

imprisonment for the murder. This approach accorded with the provisions of s 51(1)(a) of the Criminal Law Amendment Act, 105 of 1997, read with the provisions of Part I of Schedule 2 to such Act which provides for a minimum sentence of life imprisonment for murder where such murder was "planned or premeditated". This, however, raises the question of whether the appellant was properly advised, prior to the commencement of the trial, that this would be the case which the State was seeking to make and that he therefore faced the prospect of life imprisonment.

[5] As a result of this Court's concerns concerning this and other aspects, counsel were formally requested, prior to the hearing of the appeal, to address the following further questions:

> "1. had the State proved that this was a murder which was 'planned or premeditated' (beplan of met voorbedagte rade gepleeg) as referred to in Part I of Schedule 2 of Act 105 of 1997?
>
> 2. was the accused, before the closing of the State case and/ or before being convicted, informed that he ran the risk of being sentenced to life imprisonment?;
>
> 3. having regard to a certain passage in the court *a quo*'s reasons for sentence, had it approached the question of the effect of alcohol upon the appellant correctly."

[6] The issues which must be considered in this appeal are then, in my view, the following:

1. was the appellant notified that he ran the risk of being sentenced to life imprisonment in terms of Act 105 of 1997 and, if not, was such prior notification a requirement in law?;

2. was the murder 'planned or premeditated' as envisaged by the Act?;

3. did the court *a quo* err in sentencing the appellant to life imprisonment on the count of murder?"

BACKGROUND

[7] At the time of the fateful shooting the appellant and the deceased had been married for some 19 years and were living in Bredasdorp. There were three children of the marriage: a daughter then aged 17 years, a son, S, then 16 years old and another son aged 13 years. The marriage had become an unhappy one and it appeared as if divorce was in the offing. From evidence led at the trial it appeared that the appellant was prone to violent and aggressive behaviour towards the deceased and abused alcohol. In January 2004, just three months before the shooting, the deceased obtained a family violence interdict against the appellant. This was precipitated by the deceased smashing two TV-sets in the house, verbally abusing the deceased and threatening to kill her. It appears that the children were also dragged into the incidents. Following the intervention of his commanding officer, the appellant moved out of the family home and found alternative

accommodation. With the deceased's apparent approval he moved back into the common home after two months but the problems in the marriage continued unabated.

[8] It would seem that the primary source of tension between the couple was the appellant's inflexible and patriarchal view of the deceased's role as a mother and wife and her refusal to conform to this role. The deceased had taken up employment working at a bar from early evening to late at night, something of which the appellant strongly disapproved particularly since the family were as a result spending less time together. For several years the couple's children had been home schooled but the appellant increasingly believed that the deceased was neglecting her responsibilities in this regard with the result that the children's academic results had sharply declined. A further aggravating factor appeared to be the couple's quite different personalities. Whereas the appellant was inclined to be reserved, if not reclusive, the deceased was outgoing and sociable. She had joined a particular church and their children were part of its youth group. The attendance by the deceased and the two children at a youth group sleep-over and film show appears to have been the immediate catalyst to the fateful shooting.

[9] On the night in question the Koekemoer family, which lived almost directly across the road from the appellant's home, screened a film for the church youth group. Amongst those who attended were the

deceased and her two younger children. The appellant remained at home alone although he had gone out drinking earlier in the evening. Approximately half an hour after midnight, during a break in the film show, S received a telephone call from the appellant asking where they were. The deceased sent him home to check that the appellant was alright. S went across with a friend and found the appellant sitting in the lounge evidently angry about the situation. The appellant forced S into a bedroom to open a safe in which the appellant stored his revolver. S was reluctant to do so, telling his father that he must not do anything because there were also children where the deceased was. He testified that he suspected that the appellant intended to shoot the deceased. However the appellant forced S to open the safe and then grabbed the revolver. S continued to plead with the appellant not to do anything to the deceased saying that there were too many children with her but the deceased's only response was to turn and hit S in the neck with the flat of the revolver. The appellant then stormed out of the house brandishing the revolver and crossed the road to the neighbour's house.

[10] Apparently sensing impending trouble and determined to head it off, the deceased had emerged from the neighbours' home. When the appellant saw the deceased he lifted the revolver and fired a shot at her from a distance of approximately 6 metres, fatally wounding her. According to the post-*portem* report the deceased died as a result of a respiratory failure caused by the fatal bullet wound, the point of entry

being the posterior left thorax and the point of exit the anterior thorax. In other words, the deceased was shot from behind. This accorded with evidence that she turned to flee when she saw the appellant bearing down on her brandishing his revolver.

[11] After the shooting, and until the police arrived and arrested him, the appellant cradled the deceased in his arms, tried to assist her and implored her not to leave them alone, presumably referring to himself their children.

WAS THE APPELLANT PROPERLY ADVISED THAT HE FACED A LIFE SENTENCE?

[12] Turning to the question of whether the appellant was adequately apprised that he faced a possible life sentence, it must first be noted that the charge sheet simply advised the accused that the provisions of s 51 of Act 105 of 1997 were applicable. This notification in itself was ambiguous, however, because it did not specify whether the State viewed the murder as planned or premeditated or whether it saw this as a murder "in circumstances other than those referred to in Part I", in which event Part II of Schedule 2, read with the provisions of s 51(2), provided for a minimum sentence for a first offender of 15 years imprisonment. This ambiguity was not addressed in the summary of substantial facts furnished to the appellant together with the charge sheet. Nor can I find any stage in the record of the proceedings when the appellant was directly advised of the State's intention to prove a

planned or premeditated murder. Significantly, however, the appellant's plea explanation in terms of s 115 of Act 51 of 1977 contains the following statements:

> **"3. Beskuldigde ontken dat hy enige moord beplan het.**
>
> **4. Beskuldigde ontken dat hy met voorbedagte rade gehandel het soos bedoel in art 51 van die Strafregwysigingswet, Wet 105 van 1997".**

[13] In *S v Legoa* 2003 (1) SACR 13 (SCA) in considering whether the increased sentencing jurisdiction provided for by Act 105 of 1997 could be invoked against an accused, the Court dealt with the related question of whether the charge sheet should include reference to the specific form of the offence which triggered the increased sentencing jurisdiction. It noted that under the new constitutional dispensation the criterion for a just criminal trial is "*a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa, Act 108 of 1996 came into force*".[1] Cameron JA went on to say that one of the specific rights constituting the right to a fair trial is the right:

> **"to be informed of the charge with sufficient detail to answer it". What the ability to 'answer' a charge encompasses in this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts that the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge sheet. The matter is, however, one of substance and not form, and I would be reluctant to lay down the general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to**

[1] *S v Zuma and Others* 1995 (1) SACR 568 CC (1995 (2) SA 642 CC)

> **prove to establish it. A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge sheets are frequently drawn up. The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a superior court, from a summary of substantial facts the State is obliged to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination on the relevant circumstances".**[2]

In *S v Ndlovu* 2003 (1) SACR 331 (SCA) the Court held that the relevant provisions of the Act must be brought to the attention of an accused in such a way that the charge can be properly met before conviction.

[14] In the present matter, in my view, although not directly advised by the State in either the charge sheet or the summary of substantial facts, that it intended to make out a case that the murder was planned or premeditated, the appellant must nevertheless have been fully aware of this. This much appears not only from the contents of his plea explanation which I have referred to, but also from the manner in which the appellant's defence was conducted. In the circumstances I am satisfied that the appellant's right to a fair trial was in no way infringed and that it was open to the court *a quo*, upon a finding that the murder was indeed premeditated or planned, to sentence the appellant to life imprisonment.

WAS THE MURDER PLANNED OR PREMEDITATED?

[2] At page 923a - e

[15] The next and central question in this appeal is whether the murder was in fact planned or premeditated. In rejecting the accused's defence of non-pathological criminal incapacity, Dlodlo J found that the appellant had indeed planned to murder the deceased by shooting her and that this was why he forcibly struck S with the revolver when the latter had tried to persuade him to desist from going across the road with his revolver in search of the deceased. In further substantiation of this finding the court *a quo* referred to the lengths to which the appellant went to retrieve his firearm from the safe and S's evidence that the deceased had said words to the effect that the deceased had been looking for trouble and she was to now going to get it. It was at this point that the appellant stormed out of the house across the road and, within seconds, had fatally shot the deceased.

[16] 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 that 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] In the present matter, although there is ample evidence of the appellant's violent behaviour towards the deceased in the months preceding the shooting, there is nothing to suggest that he conceived an intention or plan to shoot or kill the deceased before the night in

question or, for that matter, before S entered the house. The trial court found that S's evidence offered the best account of what took place that night. From his evidence it is clear that the accused was angered by the fact that his wife and children were not at home and had not returned home by the early hours of the morning. When his telephone call to his son resulted in the latter being sent across by the deceased to see that there was nothing amiss at home, his anger seems to have turned into rage simply because the deceased had sent S to check that all was well at home. At worst for the appellant it was then that he conceived the idea of killing the deceased using his firearm. Thereafter, for some perverse reason, the appellant forced his son to open the safe so that he could retrieve the firearm, violently pushed him aside and, storming out of the house, crossed the road and shot the deceased just as she emerged from the neighbours' house.

[18] Although there is no direct evidence as to how much time passed between the appellant's eruption into rage in the lounge and his shooting of the deceased, a consideration of what actually took place suggests that it was no more than a matter of a few minutes. The appellant's plan, such as it was, was rudimentary, involving him shooting the deceased virtually before the horrified eyes of his neighbours and children. It is correct that from 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, this does not, in my view, transform 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.

[19] It follows from the conclusion which I have reached that the court *a quo* erred when it approached the sentencing of the appellant on the basis that, unless it found that there were "substantial and compelling circumstances" present, it was obliged to sentence him to life imprisonment. Instead, the court *a quo* should have approached sentencing on the basis that the appellant qualified for a minimum sentence of 15 years unless substantial and compelling circumstances existed which justified the imposition of a lesser sentence. The effect of the court *a quo* having misdirected itself in this respect is that this court must now determine afresh an appropriate sentence for the appellant and not on the basis that it is bound, unless substantial and compelling circumstances are found to exist, to impose a life sentence.

[20] It must be borne in mind, of course, that the provisions of Act 105 of 1997 prescribe a minimum and not a maximum sentence and it is thus open to the court, in appropriate circumstances, to sentence the appellant to a more severe sentence, including life imprisonment, even though, *prima facie*, he qualifies for a lesser minimum sentence.

[21] This leads to the ultimate question, namely, the appropriate sentence for the appellant on the murder conviction. Before this can be

answered, however, the question of the role of alcohol in the commission of the crime must be examined.

THE ROLE OF ALCOHOL

[22] This factor came to prominence during the sentencing proceedings. The appellant testified that he had drunk heavily and steadily through the night in question, consuming 13 quarts of beer in all. It was his habit to nightly consume between 7 and 8 such beers. The neighbours outside whose house the deceased was shot, Mr and Mrs Koekemoer, both confirmed that the appellant was heavily under the influence of alcohol at the time. According to Mr. Koekemoer the appellant was so drunk that he had to use the passage wall to prop himself up. Mrs Koekemoer described the deceased as “horribaal dronk” and doubted that he knew what he had done. S himself expressed the view that his father had been drunk, a conclusion he drew *inter alia* from the fact that deceased had been unsteady on his feet and red in the face.

[23] Against this there was the evidence of Inspector Van Breda of the South African Police who arrested the appellant at the scene of the shooting shortly afterwards. He concluded that the appellant was under the influence of alcohol but only for the reason that there was a strong smell of alcohol emanating from him. He had seen no other signs of abnormal behaviour on the part of the appellant. However, this evidence is somewhat belied by Insp. Van Breda’s further evidence that the appellant did not react to questions which he put to him and his

resisting of arrest which led to the inspector finding it necessary to handcuff him.

[24] In his reasons for judgment Dlodlo J found that the appellant had not been influenced by the alcohol which he consumed. He based this on his finding that the accused's ability to think and conduct himself had not been affected and that he had committed the murder in complete disregard of those who had been present at the time. Dlodlo J fortified his conclusion with the observation that had the appellant indeed been under the influence of alcohol he would have shot the wrong person. The learned judge, correctly noting that the consumption of alcohol in itself is not a mitigating factor, proceeded to find that it could not so operate in the present circumstances because of the lack of any evidence that it had indeed affected the appellant.

[25] All of these findings were challenged on appeal and, in the light of the evidence, in my view with justification. Notwithstanding Insp. Van Breda's reservations about the extent to which the appellant was under the influence of alcohol, there was a substantial and persuasive body of evidence that not only had he consumed a considerable amount of alcohol but that this had affected the appellant both physically and psychologically. In my view in the circumstances, there can be little if any doubt that the alcohol played a role in impairing his mental faculties and possibly fuelling the appellant's anger to such an extent that he embarked on the catastrophic series of acts of first seizing his

firearm and then storming across the road to find and shoot his wife in the presence of neighbours and many children, including his own. Even taking into account his rigid and authoritarian personality and his resentment and great anger towards his wife, I find it most unlikely that the appellant would have performed such an act or acts unless alcohol had played a substantial role in diminishing his inhibitions and his capacity for clear and rational thought. This conclusion is borne out by actions of the appellant immediately after the shooting, when he appeared to disassociate himself from his earlier action of firing a fatal shot at his wife. His conduct immediately before and after the shooting contributes towards the picture of someone whose brain was addled by alcohol at the relevant time.

[26] There is ample authority in our law that intoxication can operate as a mitigating factor where an accused's moral blameworthiness is diminished as a result of the consumption of liquor. In *S v Cele* 1990 (1) SACR 251 (A) Nestadt JA, in upholding an appeal against sentence *inter alia* on the grounds that the trial court had disregarded intoxication as a mitigating factor, stated as follow:

> **"Full effect had to be given to it (intoxication) and, in particular, to the fact that the accuseds' moral blameworthiness was thereby diminished. This was in other words not one of those cases where the accused is simply shown to have consumed some liquor. The finding that it diminished the accused's moral blameworthiness carried with it the corollary that intoxication had impaired or affected their mental faculties or judgment and thereby influenced them in regard to the crime. This was the approach to adopt rather than it had to be shown that 'their crime was that of somebody who was so inebriated that he did things that no sober man would ever do'. And it should have**

> **tempered the inferential finding that the killing was a deliberate, calculated and cold-blooded one. The proposition that blameworthiness for an act of deliberate violence can never be reduced by the effects of liquor is plainly too widely stated."**

This *dictum* is of particular relevance to the present matter and to Dlodlo J's reasoning.

[27] In *S v M* 1994 (2) SACR 24 (A) the court was required to consider the role that the influence of alcohol on the accused had played in its determination of an appropriate sentence. Nienaber JA stated as follows:

> **"Liquor can arouse senses and inhibit sensibilities. It is for the State to discount it as a mitigating factor, to show that it did not materially affect the appellant's behaviour."**[3]

He went on to state[4]:

> **"The case is on the borderline. But in the end one cannot ignore the possibility that the liquor the appellant had consumed during the day, combined with his immaturity, impaired his faculties and loosened his grip on events. He undoubtedly had the volition to act. He knew what he was about. But he was less in command of himself than he would have been if he had not been drinking and in the final analysis one cannot confidently say that it did not contribute to the unfolding of the events ending in the death of the deceased."**

[28] In the present case there is a considerable body of evidence that, as a result of the very substantial quantity of alcohol consumed by the appellant on the night in question, his faculties were substantially impaired and thus his moral blameworthiness was diminished. In my view, therefore, the learned judge erred in finding that the appellant's

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[3] At page 29g
[4] At page 30b - d

consumption of alcohol played no role and was therefore not a mitigating factor.

[29] Apart from this aspect there were in my view other strong mitigating factors. At the age of 42 years the accused was a first offender. He had hitherto been a useful and productive member of society holding down a responsible job and supporting his family and three children. Although the appellant pleaded not guilty, and in so doing compelled his son to give painful evidence in the trial, he expressed remorse for killing his wife virtually from the outset. From a prison cell, within days of the shooting, he wrote a long letter to his children begging their forgiveness and acknowledging his wrongdoing to them. Although at times the tone of letter is self-pitying, there can be no doubt that the appellant was remorseful of his actions, particularly insofar as they had devastated the lives of his children.

[30] A further important factor was the psychiatric evidence suggesting that the appellant was a prisoner of his own inflexible and authoritarian personality. The State psychiatrists who examined the appellant prior to the commencement of the trial commented in their report that the accused had abused alcohol for many years. The State psychologist described him as being a rather “rigid and perfectionist individual…” who “in the home situation was somewhat inflexible and authoritarian”. He similarly described the appellant as holding patriarchal views regarding his and his wife’s relative roles, with her place being that of

mother and housewife. Appellant's own psychiatrist, Dr. Teggin, described him as being "an especially obsessive and particular person" who was "a very methodical, very rigid individual, very family orientated with his own rigid moral ethics".

[31] Dlodlo J, whilst recognising that the appellant was not a danger to society, considered that the aggravating factors completely outweighed the mitigating factors. The aggravating factors are not difficult to find. With little or no justification, and certainly no provocation, the deceased cold-bloodedly shot dead his wife in the presence of neighbours and his own children. This was not completely aberrant behaviour by the appellant either. There had been a history of the appellant behaving violently and aggressively towards the deceased so much so that she had recently taken a family violence interdict against him. Dlodlo J correctly noted, that in such instances, the courts must impose sentences which operate to offer protection to women against men who believe that they have the right to control their partner.

[32] Having regard to the purposes of punishment and the seriousness of the crime there can be no doubt that the only appropriate punishment for the appellant is a sentence of long-term imprisonment. In my view, however, when all the aggravating and mitigating factors are taken into account, and bearing in mind that every sentence must be blended with a measure of mercy, a sentence of life imprisonment is inappropriate. The appellant spent some 22 months in prison awaiting trial and, as I

have noted, was 42 years old at the time of sentencing. He will live forever more knowing that he deprived his children of their mother. In my view an appropriate sentence which will properly serve the retributive, deterrent and rehabilitative purposes of sentencing, would be one of twenty-two (22) years imprisonment.

[33] I would therefore uphold the appeal against sentence and replace the sentence of life imprisonment on the count of murder with one of twenty-two (22) years imprisonment in terms of s 276(1)(b) of the Criminal Procedure Act, 51 of 1977. The balance of the sentence imposed by the court *a quo* remains intact.

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LJ BOZALEK, J

LOUW J:

I agree, and it is so ordered.

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WJ LOUW, J

GOLIATH J:

I agree.

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PL GOLIATH, J