THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 740/2021

In the matter between:

BENEDICT MOAGI PELOEOLE
APPELLANT

and

THE DIRECTOR OF PUBLIC PROSECUTIONS
RESPONDENT
GAUTENG DIVISION, PRETORIA

Neutral Citation:	*Benedict Moagi Peloeole v The Director of Public Prosecutions, Gauteng* (740/2022) [2022] ZASCA 117 (16 August 2022)
Coram:	MOLEMELA, MAKGOKA and MOTHLE JJA and TSOKA, and SMITH AJJA
Heard:	9 May 2022
Delivered:	16 August 2022

Summary: Criminal law and procedure – appeal and cross-appeal on sentence – appellant convicted on two counts of murder – whether the murders were premeditated – whether the effective sentence of 30 years' imprisonment was appropriate – on cross-appeal whether the minimum sentence of life imprisonment was applicable in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 – appellant's appeal against sentence dismissed and the respondent's cross-appeal upheld – life imprisonment imposed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Jordaan J sitting as a court of first instance):

1 The appellant's appeal against the sentence is dismissed.

2 The cross-appeal by the respondent against the sentence is upheld.

3 The sentence imposed by the Gauteng Division of the High Court, Pretoria, is set aside and substituted by the following:

'The accused is sentenced to life imprisonment on each count of murder.'

4 The order is antedated to 1 April 2019.

JUDGMENT

Mothle JA (Molemela JA and Tsoka and Smith AJJA concurring):

[1] During September 2015, Mr Benedict Moagi Peloeole, (the appellant) was a warrant officer in the South African Police Service (SAPS). He was assigned to the VIP Protection Unit of the President of the Republic of South Africa, at the presidential residence, Mahlambandlovu, near the Union Buildings in Pretoria. In

June 2017, in the Gauteng Division of the High Court, Pretoria (the high court), the appellant stood trial on two counts of murder, read with s 51(1)*(a)* of the Criminal Law Amendment Act 105 of 1997 (the Act). Section 51(1)*(a)* refers to, amongst others murder that was planned or premeditated. On 11 June 2018 the appellant was convicted of the two counts, the high court having found that on 12 September 2015 at his house in Westville, Pretoria West, he fatally shot, with his service pistol, his wife Mrs Jane Keitumetse Peloeole, aged 42, and his daughter, Ms Tsholofelo Trecia Peloeole, aged 23.

[2] During sentencing, the high court found that the murders were premeditated, but that there were substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment. On 1 April 2019, the high court sentenced the appellant to 20 years' imprisonment on each count and ordered that 10 years' imprisonment of the 20 years imposed in respect of count 2, should be served concurrently with the sentence in count 1. Thus, the effective sentence was 30 years' imprisonment.

[3] The appellant, contending that the 'effective sentence of 30 years' imprisonment is shockingly inappropriate', successfully applied in the high court for leave to appeal the sentences. The State also contended that the high court erred in finding that there were substantial and compelling circumstances, and was also granted leave to cross-appeal. It is thus with the leave of the high court that the appellant and the State are before this Court on appeal and cross-appeal respectively.

[4] The issues in this appeal were twofold, first, by the appellant, whether the high court erred when it found that the murders were premeditated, and second, by the State in cross-appeal, whether the high court erred when after it found that the murders were premeditated; it nevertheless accepted that there were substantial and compelling circumstances, sufficient to justify a deviation from the prescribed sentence of life imprisonment. In considering these issues, it is essential to revisit the events that unfolded in the appellant's house on the evening of 12 September 2015.

[5] On 12 September 2015, the appellant travelled from Taung to Pretoria, having arrived in Taung from Pretoria the previous night. He had gone to Taung following a message he had received, that his cousin, Ms Eunice Molale, who was Mr Ikageng Molale's (Ikageng) mother, had died. The appellant left Taung and travelled with Ikageng to Randfontein to solicit financial assistance from Ms Molale's employers, to cover the funeral expenses. They could not find the employers. On their way to Randfontein, they had stopped at Jan Kempdorp where the appellant bought liver and a sheep's head. Once they arrived in Randfontein they met Ikageng's stepfather, who was drinking brandy with friends. The appellant drank brandy and a beer. Afterwards, the appellant and Ikageng drove to Pretoria where they met the appellant's nephew, Mr Ignitious Peloeole (also known as Papa) in Atteridgeville. Initially, the three of them went to a tavern where the appellant bought beer for Papa. They thereafter went to the appellant's house, where they found the appellant's wife and daughter.

[6] The appellant asked his wife if there was any food, and she replied that there was only bread. She then volunteered to cook the liver which the appellant had brought with him. The appellant asked his daughter if there was any problem. She replied that she was not saying anything. At that stage both Papa and Ikageng were sitting in the living room watching television with the appellant's daughter. After washing his hands, the appellant went down the corridor in the direction of his bedroom. It was while he was watching television that Papa heard the sound of a firearm being cocked. He saw the appellant in the corridor walking towards the living room. The appellant came closer to where his daughter was sitting and fired a shot at her. Papa heard the wife shouting from the kitchen 'what are you doing'. The appellant then turned and shot at his wife, followed by another shot at his daughter. He proceeded towards the kitchen and fired another shot at his wife. He returned to the living room, looked at Papa and Ikageng, and went down the corridor to the bedroom. He thereafter returned without the firearm and told them that they must leave with him. They all exited the house.

[7] As they were walking to the house in the direction of his opposite neighbour, Mr Eric Nobela (Nobela), the appellant repeatedly said 'I am sorry'. When they arrived at Nobela's house, the appellant entered, while Papa and Ikageng remained

outside crying. Nobela came out of his house and rushed to the appellant's house, where he discovered the gruesome scene. Nobela returned to his house and left with the appellant in his vehicle to the police station. On arrival, Nobela handed the appellant over to the police, and reported to the police that the appellant had killed his wife and daughter. Sergeant Phasha, the Chief Commander at the charge office, took the appellant behind the counter. The appellant wanted to greet him by shaking his hand but the Sergeant refused whereupon the appellant threatened him by saying 'you are the next one'.

[8] In addition to the evidence of the two eye witnesses, Papa and Ikageng, the high court also heard the evidence of Nobela and the police officers who arrived at the crime scene. The high court also considered the photographs of the crime scene and the post-mortem report, which materially corroborated the eye witnesses' evidence. The high court rejected the appellant's version that just before the shooting, he felt dizzy and walked to the corridor, where he blacked out and collapsed. His evidence, in essence, was to the effect that he was unconscious on the floor during the shooting. According to him, he only became aware that his wife and daughter had been killed when he regained consciousness. He said he was told by Papa that he (the appellant) had shot his wife and daughter. This was essentially the evidence on which the appellant was convicted. In considering sentence, the high court concluded that the two murders were premeditated. I turn to deal with the appellant's contentions on which he had grounded his appeal in this Court.

[9] In support of the appellant's contention that the high court erred in finding that the murders were premeditated, his counsel submitted that the high court conflated 'intent' with 'premeditation'. Murder is and remains a common law offence, with all its elements of intent, unlawfulness and the act of killing of a human being (*actus reus*.) It is thus trite that in order for the State to secure a conviction on a murder charge, it must prove all the common law elements of the offence, including the element of intent (*dolus).* The number of shots a perpetrator fires at the deceased is one of the factors a court would consider as indicative of *the intent* to kill; the determination to end life. The phrase 'planned or premeditated' is not an element of murder. It is a phrase introduced by the minimum sentence legislation (the Act), as one of the aggravating factors in the commission of murder. In the instance where one or more

of these aggravating factors are found to be present, the courts are enjoined to impose a sentence not less than the minimum prescribed. In the case of murder, such a sentence would be life imprisonment. These aggravating factors are listed in s 51(1) of the Act. In *S v Malgas*[1] this Court held that it is permissible to depart from the sentence prescribed by the Act, should the court find that there are substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence. The question whether the murder was planned or premeditated is thus relevant for sentencing, and not for conviction. Though the perpetrator in his state of mind may have both the intent and premeditation to commit the crime, the intent has to be present *during* the commission of the crime, while premeditation is, as a matter of logic, limited only to the state of mind *before* the commission of the crime. It is for that reason that premeditation would not exist in the case of negligence (culpa). There is therefore, a symbiotic relationship between the two concepts, in that they both relate to the state of mind of the perpetrator. The submission by appellant's counsel that the Learned Judge in the high court conflated the two concepts is thus incorrect. I will return to the question of the appellant's state of mind before he committed the murders.

[10] Counsel for the appellant contended, correctly so, that the high court failed to pronounce on the issue of premeditation in its judgment on conviction. It only did so during sentencing. The question which arises is what would be the implication of failure by the trial court to find and pronounce, before conviction, that the murder was premeditated? This Court has recently, in *Rasimate Samuel Baloyi v The State,*[2] pronounced upon this issue as follows:

'The question arises: must a trial court determine whether the murder was planned or premeditated at conviction? The answer lies in what this Court said in *Michael Legoa v State* when it determined whether at the trial of an accused charged with dealing in dagga, 'the State is entitled to prove the value in question after conviction but before sentencing, so as to invoke the minimum sentences'. Cameron JA said that the court acquires the jurisdiction in respect of the minimum sentences legislation 'only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present'. Our courts

[1] *S v Malgas* [2001] ZASCA 30; 2001 (1) SACR 469 (SCA) 2001 (2) SA 1222; [2001] 3 All SA 220 (A) para 18.
[2] *Rasimate Samuel Baloyi v The State* [2022] ZASCA 35.

have consistently followed this approach. However, the ultimate question remains 'whether the accused had a fair trial under the substantive fairness protections afforded by the Constitution'.[3]

[11] This Court held that even though the trial court in that case had misdirected itself in pronouncing that the murder was premeditated only at the sentencing stage, '[w]hat remains to be determined is whether the appellant was prejudiced by such misdirection'. The learned judge held that the 'question of whether an accused is prejudiced by the failure of a trial court to refer to an offence in Part 1 of Schedule 2 varies from case to case', and would not in every case result in an accused being prejudiced'.[4] This Court continued thus:

'There will undoubtedly be cases where the proved facts compellingly and ineluctably point to premeditation. In such a case there cannot be any conceivable prejudice to an accused person if the minimum sentence is imposed despite the fact that a finding regarding premeditation had not been made prior to conviction. In my view, this is such a case. The accused was duly warned of the applicability of the minimum sentencing legislation on the basis of premeditation and, as I have said previously, the proved facts incontrovertibly established that the murder was premeditated. Accordingly, there can be no conceivable basis on which he can complain about the fairness of the trial.'[5]

[12] The high court was therefore justified in finding, during the sentencing proceedings, that the murders were premeditated. It was able to do so, having considered the conspectus of the evidence on which the appellant was convicted on both counts. As I demonstrate below, that evidence established beyond a reasonable doubt that the murder had been premeditated. To my mind, the high court's failure to pronounce upon the issue of premeditation at the conviction stage of proceedings did accordingly not prejudice the appellant, neither did it impact on the fairness of the proceedings.

[13] The high court in concluding its judgment stated: 'On both counts he is convicted of murder'. 'On both counts' simply means as averred in the indictment, that the accused was guilty of the crime of 'murder read with section 1 of the

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[3] Ibid para 18, citing *Legoa v S* 2003 (1) SACR 13 (SCA) para 1.
[4] Ibid at para 21.
[5] Ibid at para 23.

Criminal Law Amendment Act 1 of 1998 and further read with section 51(1)*(a)* and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997'. As I demonstrate below, the proven facts in this case also ineluctably impelled the finding that the murders had been premeditated.

[14] I return to the issue of premeditation. The appellant's counsel launched another attack on the finding of the high court that the murders were premeditated. He submitted that it must have taken only a few seconds for appellant to get to the bedroom, reach into the safe, take out the firearm and return to the living room to shoot at the deceased. There could not, so continues the submission, have been time to plan or premeditate. Accordingly, the appellant was agitated, enraged and had acted at the spur of the moment.

[15] The question whether the crime was premeditated requires a consideration of the factual matrix of each case, in order to establish the state of the perpetrator's mind before the crime was committed.[6] This Court considered the question whether the murder was premeditated in two decisions, namely *Kekana v S, 2014*[7] (Kekana 2014), and *Kekana v S, 2018*[8] (Kekana 2018). In *Kekana 2018* this Court held:

'In summary therefore, it was for the appellant to lay a factual foundation for a conclusion that the murders were not premeditated, and the issue was one for the trial court to decide. *In coming to a decision, the court would have had regard to all the circumstances of the murders, including the appellant's actions during the relevant period.* Anything short of this could not bind the court to the sentence in terms of s 51(2) of the CLAA.'[9]

[16] The submission by counsel that the appellant was agitated or enraged and acted 'at the spur of the moment, literally in the matter of seconds' is not supported by evidence. First, on the appellant's own version, which was rejected by the court, he was unconscious during the shooting. He could not have been in a position to assist the high court on how long it took him to fetch the firearm from the safe in the bedroom. Second, the appellant testified in chief and under cross-examination that he does not remember the conversation with his daughter shortly before he

[6] *S v Raath* 2009 (2) SACR 46 (C).
[7] *Kekana v S* [2014] ZASCA 158.
[8] *Kekana v S* [2018] ZASCA 148; 2019 (1) SACR 1 (SCA).
[9] Ibid para 21, own emphasis.

collapsed. He could only remember asking her as to how things were at her work place. As he recalled, her answer was 'I am saying nothing' to which he replied "Oh, okay, it is fine'. The notion that at that moment he was enraged, is thus contradicted by appellant's own evidence.

[17] The argument in relation to how long it took for premeditation to manifest, was also raised in *Kekana 2014*, where the appellant had murdered his wife by pouring petrol on the bed, lighting it and locking her in the room. The wife died a few days later in the hospital. The appellant in that case pleaded guilty to the charge of murder, read with s 51(1) of the Act. Having found no substantial and compelling circumstances, the trial court sentenced him to life imprisonment for the murder count and five years' imprisonment for the arson count. The full court dismissed his appeal but this Court granted him special leave to appeal against the sentence of life imprisonment. As *in casu,* the appellant in *Kekana 2014* was aggrieved that the trial court had found that the murder was premeditated. He had contended that he acted in the 'heat of the moment and that he had not conceived any plan to burn the house with the deceased inside.'[10] At paras 12 and 13 of the judgment, this Court stated as follows:

'Another argument advanced on behalf of the appellant was based on *S v Raath*, where it was held that to prove premeditation, the State must lead evidence to establish the period of time between the accused forming the intent to murder and the carrying out of his intention. In the present matter there is no evidence as to how much time passed between the appellant's admitted decision to kill the deceased and when he doused the bed with petrol and set it alight. But a consideration of the appellant's evidence suggests that it was a matter of a few minutes, at the least.

In my view it is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. Time is not the only consideration because even a few minutes are enough to carry out a premeditated action.' (Footnotes omitted.)

[18] Similarly, in *Kekana 2018*, this Court also found that the murders were committed with premeditation. In that case, the appellant faced 4 counts of murder read with s 51(1) of the Act, having killed his own children by cutting their throats. He also had a stormy marriage with their mother. The appellant in that case had,

[10] Footnote 7, para 5.

indicated that he pleaded guilty to all counts 'in terms of s 51(2) of the Act', apparently to avoid a finding that the murders were either planned or premeditated as envisaged in s 51(1) of the Act. He was convicted and sentenced to 20 years' imprisonment on each count of murder, 10 years' imprisonment of the sentence on counts 2, 3 and 4. By operation of law, all sentences were ordered to run concurrently with the sentence on count 1. As regards the question of the period required for one to premeditate, Makgoka JA in *Kekana 2018* held:

'It was also submitted that the appellant's conduct occurred on the spur of the moment, and that his actions were not premeditated. I disagree. The appellant's overall conduct puts paid to that suggestion. It all began with the argument he had with his wife, after which he decided to commit suicide. He rationalised to himself that his children would suffer in his absence. He killed the first child, after which he instructed one of the children to call his wife. He called his wife to listen to the horror of the killing.

This conduct, to my mind, points to pre-planning or premeditation. In this regard, one must bear in mind what this court said in *S v Kekana* [2014] ZASCA 158 at para 13, 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 a few minutes are enough to carry out a premeditated action.'[11]

[19] This Court, in both *Kekana 2014* and *Kekana 2018*, has rejected the notion of determining whether the murder was premeditated one with reference to time. For the appellant's counsel to attempt to measure the time it took the appellant to murder his wife and daughter by estimating it as a matter of seconds (as opposed to a few minutes as stated in the two *Kekana* matters) is really clutching at straws; This submission is simply not borne out by the evidence. On his own version, which he still maintains, the appellant is hardly able to estimate the period it took to execute the murders. As late as 2019, before he was sentenced, the appellant persisted in accusing his nephew of the murders, even after that version was rejected by the high court.

[20] There is, however, evidence preceding the events of 12 September 2015, which provides the context and accounts for the presence of premeditation. Logically, the brief conversation the appellant had with his daughter that evening, on its own, can hardly be the reason for such a callous act. It is common cause that, for

[11] Footnote 4, paras 36-37.

quite some time, certainly for several months preceding the murders, the appellant was dissatisfied with the continued state of his marriage. These facts emerged in detail in the pre-sentencing report and oral evidence of Ms Bronwynn Stollarz, the clinical psychologist, who testified in mitigation on behalf and at the behest of the appellant.

[21] The following are salient points, stated in her pre-sentencing report and repeated as oral evidence in court: she interviewed the appellant on 15 and 25 March 2019. At that time, the appellant, at age 49, had been in custody for almost four years since the murders. The appellant told her that in 1989, he had joined the South African Defence Force and had spent 20 years in the military before he transferred to SAPS in 2009. He and his wife were married in January 2001. They had a tempestuous marriage which was characterised by arguments concerning alcohol abuse and the wife's suspicions of infidelity on his part. He admitted the allegations of alcohol consumption and had indicated that he needed alcohol to cope with stress. At some stage, his wife had caused his previous commander at SAPS to take his service firearm, which he only got back when a new commander took over. He alleges that his wife frequently shouted at him and that on one occasion he had slapped her once 'as a corrective measure'. In the light of Nobela's testimony, he admitted that his wife was frequently checking his cell-phone. She suspected him of having extra-marital affairs and in 2013, she phoned his previous female commander, accusing her of having a relationship with the appellant. The appellant claimed that the marital relationship was so bad that he was *'*so upset with her just looking at her could make me want to vomit.*'* He did not want to divorce her, although he had sought advice from a para-legal organisation with the intent of threatening his wife with divorce.

[22] Regarding his daughter, the appellant felt that she was disrespectful of him, after he had assisted her to get education. He learned from his wife that his daughter was dating Nobela's brother, hence the change in attitude. The appellant had fathered three daughters, one of which had died. The other daughter resulted from a relationship with a colleague in the military in 1997, before his marriage to the deceased. When he had his relationship with that colleague, she contributed to the

household as they stayed together. His wife, who was unemployed was a financial burden. The psychologist further wrote:

'At present the accused reported immense feelings of anger and hatred at being incarcerated when he believes that he is not guilty of the crimes for which he has been convicted. He reported that each day he is incarcerated he feels more anger. He reported that his anger is directed at his previous attorneys and at Ignitious Peloeole (Papa) in particular. He stated that he imagines running his previous attorney and others who have stolen money from him over with a car or hiring someone whilst he is incarcerated to have them killed. He reported that he also wants Papa dead, and that whether he is released in twenty or fifty years' time, "Papa must be dead". He believes he needs psychotherapy to assist him with this anger, but that such psychotherapy will only be beneficial once he is released from prison. If given a long sentence the accused stated that he will kill himself.'

[23] The appellant in his testimony in court admitted that he and his wife had experienced marital problems at some stage. Nobela, too, testified that the appellant had confided in him and complained that both his wife and her daughter were disrespecting him. He had also stated that he was considering a divorce. It seems to me that, having regard to the appellant's utterances to the clinical psychologist, for months before the murders, he had harboured resentment towards his wife and daughter, which evolved into a deep-seated rage. He sought solace in excessive alcohol consumption, which in itself became a source of tension in the house. The appellant silently carried this burden for some time. By 12 September 2015 he was at the end of his tether. It was only a matter of how and when the gnawing distress should be ended as he failed to act on the advice from Nobela to seek the intervention of the elders of the family. It is evident that the state of his marriage troubled him. This is the historical background which gives context to the tragic incident of 12 September 2015.

[24] As regards what transpired immediately before the shooting, there does not seem to be any overt trigger. The daughter's reply that she was not saying anything can hardly be considered as a disrespectful remark that could have been a trigger. Even on appellant's version regarding the conversation between him and his daughter at that critical time, this conversation could not have been the trigger. Rage, as a trigger, must therefore be left out of the equation. However, the manner

in which the murders were carried out suggests an intent to give effect to what he had premeditated all along. He fired a fatal shot at the daughter, then at the wife, then fired another shot to the daughter before firing another shot at his wife. The number of bullets he fired at his daughter and wife, and the parts of the body he targeted, leaves no doubt about his intention to see them dead. That suggests that this is a result he premeditated.

[25] Implicit in the attack on the finding by the trial court that the murders were premeditated, is the false notion that the courts can only impose the stated minimum sentences as prescribed in the Act. This mistaken view is, for example, that absent premeditation, the court must impose a sentence of 15 years imprisonment as envisaged in s 51(2) of the Act. In *Malgas* and a whole line of decisions, including *Kekana 2018*, this Court made it clear that the promulgation of the minimum sentence legislation did not divest the high courts of their inherent jurisdiction, where appropriate, to impose a more severe sentence than the minimum prescribed. That would include instances where the aggravating factors listed under s 51(1) are absent, but where the consideration of the triad of sentencing as laid down in *S v Zinn* justify the imposition of a sentence of life imprisonment. In the present case, the murders were premeditated. When he testified in the high court, the appellant failed to take the court into his confidence as to the reason he committed the murders. He refrained from disclosing evidence of his state of mind at the time of the shooting. In 2019, before sentencing, he revealed to his expert witness to having had a tempestuous relationship with his wife, which had been a burden to him long before the events of 12 September 2015. It points to his state of mind that he premeditated the murders prior to 12 September 2015.

[26] Regarding the cross-appeal, the State contended that the high court, having found that the murders were premeditated, erred when it deviated from imposing life imprisonment. Section 51(1)*(a)* read with Schedule 2 Part 1 of the Act, specifically prescribes a sentence of life imprisonment for a conviction on murder, where that offence was planned or premeditated. The high court reasoned that there were substantial and compelling circumstances. These included the fact that the appellant was a first offender, he spent more than three and a half years in custody awaiting trial and according to Nobela, the appellant appeared intoxicated at the time of the

murders. In his own evidence, the appellant rejected the notion that he experienced an emotional disturbance. Further, the evidence of Papa did not support the assertion that the appellant was intoxicated. The high court concluded thus:

'Under all these circumstances I am satisfied that I can find that due to emotional disturbance and due to the intoxication of the accused there are substantial and compelling circumstances present to deviate from the prescribed sentence of life imprisonment.'

[27] In considering the aggravating factors, the high court was referred to *Kekana 2018*. The high court acknowledged the similarities in the cases but also stated that there were differences, which were expressed as follows: '… there was liquor involved in this case and the fact that in the Kekana [2018] case the accused killed his children to spite his wife.' After quoting para 38 of *Kekana 2018*, the high court continued thus: 'I would like to add to this paragraph the heinous crimes committed especially against women in this country which has reached epidemic proportions.'

[28] Apart from acknowledging that the heinous crimes committed especially against women in this country has reached epidemic proportions, the high court failed to consider other aggravating factors. These include: the manner in which the appellant, without provocation, shot his daughter and wife at close range, the daughter with the first and the third shots and the wife with the second and fourth shots; that the victims were unarmed and were not a threat to him; that the victims were vulnerable women who were in the sanctity of their home; that the appellant had previously assaulted his wife and had his firearm taken from him due to concerns about their safety; that once he had carried out the murders on the deceased, he did not even approach them to see whether they were still alive or make any attempt of assisting them or summoning an ambulance. Instead, he calmly returned his firearm to the bedroom, after which he told Ikageng and Papa to accompany him outside; that he subjected his two nephews to the trauma and terrifying experience of witnessing the execution of the deceased. Furthermore, not long after committing the two murders and during his arrest, he told the station commander 'you are the next one' merely because he had failed to shake his hand; and that four years after the murders, the appellant did not show any regret, let alone remorse for his actions, He brazenly continued to make statements intending to kill or cause his erstwhile legal representative and his nephew, a state witness, to be

killed. The evidence intended for mitigation as tendered by appellant's expert witness, turned out to be aggravating[12].

[29] The high court did not consider the overwhelming aggravating factors referred to in the previous paragraph. As a result, the views expressed by this Court in *S v Matyityi*[13] were ignored. In para 23 of that judgment, Ponnan JA wrote:

'Despite certain limited successes there has been no real let-up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from *Malgas*, it still is 'no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from minimum sentences prescribed by the legislature for the flimsiest of reasons - reasons, as here, that would not survive scrutiny. As *Malgas* makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of State owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order.'

[30] There is no doubt in my mind that the sentence imposed is far too lenient, having regard to the scourge of gender-based violence in our country. As far back as 1994, before the promulgation of the minimum sentence legislation, the Constitutional Court in *S v Makwanyane and another*[14] at para 117 warned:

'The need for a strong deterrent to violent crime is an end the validity of which is not open to question. . . It is of fundamental importance to the future of our country that respect for the

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[12] In *S v Roslee* [2006] ZASCA 14; 2006 (1) SACR 537 (SCA) this Court held that while there is no onus resting on the accused to prove the presence of substantial and compelling circumstances, an accused wishing to persuade the court to impose a sentence less than the one prescribed should pertinently raise such circumstances for consideration.

[13] *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA).

[14] S v Makwanyane and Another [1995] ZACC 3; 1995 (6) 665.

law should be restored, and that dangerous criminals should be apprehended and dealt with firmly.'

[31] I have had the pleasure to read the concurring judgment of Makgoka JA, in which he primarily found in para 74 thus:

'I therefore conclude that it cannot reasonably be discounted that the appellant formed the intention to kill immediately after his attempted conversation with the daughter.'[15]

He continues at para 75 as follows:

'Therefore, applying the second of the *Blom* 'cardinal rules of logic', I am unable to exclude as unreasonable, the inference that the appellant's conduct might have been triggered by his perceived disrespect by his daughter in front of his nephews, and that, overwhelmed with rage and on the spur of the moment, he decided to shoot her and his wife. Without suggesting that this is the case, I merely mention it to demonstrate that the proven facts do not lead only to inferences of planning or premeditation, to the exclusion of all other inferences. I am therefore unable to confidently conclude that the appellant had time to 'think out or plan beforehand' or 'to decide on, arrange in advance, make preparations' for the shootings, as remarked in *Raath.'*

[32] The concurring judgment opined that the murders were not premeditated. There is no evidence of the appellant being 'overwhelmed with rage' as a result of the conversation with the daughter that evening. It is a fact that none of the eye witnesses, including the appellant, testified that they considered the conversation to have caused him to be 'overwhelmed with rage'. On the contrary, Papa testified that appellant did not appear to be agitated or angered as a result of his conversation with his daughter. As stated in this judgment, the appellant testified both in chief and under cross-examination that there was nothing untoward in his conversation with his daughter that evening, even though he could not remember all of it. Not even in mitigation of sentence was it asserted by the psychologist that the appellant had experienced an emotional outburst as a result of the daughter's response. In addition, the trial court did not find that the murders occurred because appellant was overwhelmed with rage as a result of the conversation with his daughter. Under these circumstances, I am of the respectful view that there are no objective facts or evidence from which it can be inferred that the daughter's innocuous response was

[15] Concurring judgment paras 74 and 75.

the trigger or reason for the appellant's actions. It bears being mindful that the process of inferential reasoning must be consistent with all proved facts. In *R v Reddy & Others*,[16] this Court remarked as follows:

The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in *R v Blom* 1939 AD 188 at 202-203, where reference is made to two cardinal rules of logic which cannot be ignored. These are, first, that the inference sought to be drawn must be consistent with all the proved facts and, second, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn". I am also fortified in this view by the following passage in *S v Mtsweni 1985 (1) SA 590 (A) at 593F-G*, where this Court, in emphasising that only proven facts can form the basis for legitimate inferences, said:

'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish …if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'

[33] The issue of appellant being overwhelmed with rage as a result of the conversation with the daughter, raises a related question left unanswered in the concurring judgment. If indeed the anger arising from the conversation with the daughter was the cause of the shooting, what could possibly have been the reason for the appellant to shoot his wife? As regards the murder of his wife, there was no evidence of any unpleasant conversation he had with his wife or other incident that overwhelmed him with rage that resulted in the shooting. It is my respectful opinion that in the absence of supporting facts, to regard the innocuous response of the appellant's daughter as a trigger for the commission of the murders amounts to speculation. Respectfully, my view is that on the conspectus of the facts and circumstances as evidenced by the record, it cannot reasonably be inferred that the daughter's response was the trigger for her and her mother's tragic death at the hands of the appellant.

[34] As pointed out in this judgment, the turbulent nature of the parties' marital relationship had previously resulted in the appellant threatening to shoot both his wife and daughter, which culminated in his service firearm being confiscated. The

[16] *R v Reddy* [1996] ZASCA 55; 1996 (2) SACR 1 (A) at 8C-D.

psychologist's evidence paints a picture of a build-up of appellant's resentment towards his family as a result of the various past violent incidents that characterised the tempestuous marriage, which resentment continued even four years beyond the murders. The evidence of the appellant's neighbour, who happened to be his confidante, revealed that two weeks before the incident, the appellant had mentioned that he was considering a divorce as a way out of the marriage, but later acceded to his neighbour's advice regarding asking for the intervention of the elders of his family. The evidence of the same witness also revealed that the day before murdering his wife and his daughter, the appellant had mentioned that there was no improvement in the marital relationship. Again, he was urged to ask his family elders to intervene, which he did not do. As at the night of the murders, he was at the end of his tether. Put differently, he had reached a level of frustration and helplessness. He was not overwhelmed with rage.

[35] As things turned out, in response to the first shot, the appellant's wife shouted: 'what are you doing?' Logically, this was another opportunity for the appellant to reflect on what he had just done to his daughter. He, however, notwithstanding the fact that his wife had respectfully volunteered to prepare the liver and had not done anything that could remotely be considered disrespectful, decided to silence her with a fatal shot. Instead of reflecting on what he had just done to his wife, he again directed another shot at his already fatally injured daughter, this time shooting her in the neck. Once again, the appellant had another opportunity to reflect about his deeds. Instead, he decided to move towards the kitchen to direct a second fatal shot at his helpless wife. He then calmly returned to the living room and thereafter proceeded to the bedroom, where he locked the firearm in the safe. On his return from the bedroom, he calmly exited the kitchen, where his wife was lying on the floor, without as much as an attempt to render any assistance to his victims. In my opinion, while these facts prove intent, as correctly stated in the concurring judgment, they also prove that this was an implementation of a premeditated outcome, as opposed to a 'spur of the moment' as alleged. Therefore, on the conspectus of the evidence, cumulatively viewed, ineluctably impel the finding that the murders had been planned or premeditated.

[36] The concurring judgment alludes to the finding by the high court that alcohol played a role in the commission of the murders. This finding arise from the evidence

of Nobela, when he encountered the appellant just after the shooting. The appellant had gone to Nobela's house, entered and went straight to the bedroom where Nobela was. Nobela testified thus:

'COURT: Yes? … He made use of the word surprised but initially he wanted to say by the time when he saw the accused the accused seemed to be very shocked.

Shocked? … Ja, M'Lord.

Okay, surprised is then not the correct word. He uses the word shocked? … It is correct so yes M'Lord.

He was shocked and you say his eyes were wide open? … It is indeed so M' Lord. According to me he was smelling liquor.

He smelled of liquor? … Yes, what I observed M'Lord he seemed to be intoxicated.

He seemed to be intoxicated? … Indeed so M'Lord.'

Nobela's evidence was clear. He testified that the appellant *seemed* intoxicated. Papa testified that though they had had liquor that evening, the appellant was not intoxicated. The appellant also denied that he was intoxicated. Against this evidence, the high court during sentencing found *as a fact* that appellant was intoxicated on the night of the murders. The high court, as in the concurring judgment, did not deal with the version of Papa, which contradicts what Nobela assumed. Papa who had been staying with the appellant in his house and was with the appellant that evening, would have been better placed to know the quantity of liquor that the appellant consumed and to attest to his state of sobriety. The appellant's version corroborated that of Papa. Though both Papa and Nobela testified for the State, the high court and the concurring judgment advanced no reasons as to why Papa's evidence was rejected in favour of Nobela's assumption. Save from what I stated above, it is worth mentioning that the concurring judgment ably illustrated that the question whether murder was planned or premeditated is answered with reference to the facts of each case.

[37] The finding in this judgment that the murders were premeditated arose mainly from the appellant's expert evidence in mitigation. Throughout the trial, there was no evidence tendered, as to the reason or motive for the shooting. It was only when the appellant presented the evidence of the psychologist, in mitigation, that his state of mind prior to the commission of the murders was revealed. The psychologist's

evidence enabled the high court to find that the murders were premeditated. The appellant's mind was preoccupied with the resentment and it would explain the reason or motive to get rid of the deceased. He had premeditated the murders.

[38] The aggravating factors in this case far outweigh the mitigating factors which the high court accepted as substantial and compelling, and in the high court's view, justifying a deviation from the prescribed sentence. That deviation was a material misdirection, which justifies this Court's intervention on appeal. I have already demonstrated that *in casu*, a balanced consideration of the triad of sentencing as stated in *Zinn* and *Malgas*, calls for the imposition of the sentence of life imprisonment. It follows that the appeal must fail and the cross-appeal must succeed.

[39] In the result, I make the following order:

1 The appellant's appeal against the sentence is dismissed.
2 The cross-appeal by the respondent against the sentence is upheld.
3 The sentence imposed by the Gauteng Division of the High Court, Pretoria, is set aside and is substituted by the following:
'The accused is sentenced to life imprisonment on each count of murder.'
4 The order is antedated to 1 April 2019.

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SP MOTHLE
JUDGE OF APPEAL

Makgoka JA

[40] I concur in the order of the judgment prepared by my Colleague, Mothle JA (the
first judgment). I agree that the appellant's appeal should be dismissed, and that the State's counter-appeal should be upheld. In respect of the latter, I support the substitution of the sentence of 30 years' imprisonment with a sentence of life imprisonment. The first judgment's imposition of life imprisonment is predicated on a finding that the murders were premeditated. I harbour some considerable anxiety about whether the evidence conclusively and beyond reasonable doubt, establishes planning or premeditation. I therefore arrive to the same conclusion that life imprisonment ought to be imposed, but on a different juridical basis, namely this Court's inherent power.

[41] The concern about the finding of premeditation is not an idle one, and is beyond the present case. For an accused charged with murder subject to s 51 of the Criminal Law Amendment Act 105 of 1997 (the Criminal Law Amendment Act), a finding that the murder was planned or premeditated can mean the difference between a sentence of life imprisonment and 15 years' imprisonment, in terms of ss 51(1) and 51(2), respectively, of the Criminal Law Amendment Act. As Professor Terblanche points out, 'planned criminality is more reprehensible than unplanned, impulsive acts.'[17]

[42] The concept of 'planned or premeditated' murder is not defined in the Criminal Law Amendment Act. In *S v Raath* 2009 (2) SACR 46 (C) para 16, the full court said the following about the concept:

'. . . [T]he 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

[17] S S Terblanche *Guide to Sentencing in South Africa* 2 ed (2007) para 6.2.3.

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”.’

[43] Although each case must be determined on its own unique facts, I find it useful to reflect on how our courts have grappled with this vexed concept of ‘planned or premeditation’ murder. Unfortunately, all of the cases, like the present one, the murders were committed by men, highlighting the endemic nature of gender-based violence in our country.

[44] One of the earlier cases after the introduction of the Criminal Law Amendment Act, is *S v Makatu* [2006] ZASCA 72; [2007] 1 All SA 470 (SCA) (*Makatu*). The appellant was convicted of murdering his estranged wife. Their relationship had soured, for which the appellant blamed the deceased, and towards whom he harboured resentment. Four days before the murder, the appellant stole a firearm from its licensed owner. Two days before the murder, the parties’ families had met in an attempt to effect a reconciliation, which the deceased was not amenable to. On the day of the incident, the appellant went to the deceased’s workplace. He was in possession of the stolen firearm. The deceased told him that she was not interested in him and that he should move out of the house that he was busy renovating. He fired seven times at her with the stolen firearm. The trial court found that the appellant had planned her murder before going to her office. It inferred that from fact that he had obtained a firearm shortly before he shot the deceased. He was sentenced to life imprisonment. On appeal against that sentence, this Court accepted the appellant’s explanation that the deceased’s response triggered bad memories of what she had done and said in the past, and that it was then on the spur of the moment he felt hurt and started shooting at her. It concluded that the inference drawn by the trial court could not be the only one, and that there were other inferences to be drawn, and the evidence did not support a finding that the appellant had taken the firearm with the intention of shooting his wife. The court also pointed out that premeditation could not be established from the fact that the appellant unlawfully acquired possession of another person’s firearm shortly before killing the deceased.

[45] In *Raath* the marriage between the appellant and his wife (the deceased) had become an unhappy one and a divorce was inevitable. The appellant was prone to violent and aggressive behaviour towards the deceased and abused alcohol. Three months before the shooting, the appellant had verbally abused the deceased and threatened to kill her, as a result of which she obtained a protection order against him. On the night of the shooting, the deceased, who had been out drinking, arrived home to find that the deceased and the children were not home. Just after midnight, he phoned one of his children, a son, enquiring where they were. The son explained to him that they were attending a youth-group sleep-over and film show at a neighbour's house across the street. The deceased sent the son home to check that all was well with the appellant. When the son arrived home, the appellant, who was visibly angry and intoxicated, forced the son into a bedroom to open a safe in which a firearm was stored. The son was reluctant to do so, as he suspected that the appellant intended to shoot his mother, and begged him not to do so. However, the appellant forced him to open the safe and then grabbed the firearm. The son continued to plead with the appellant not to do anything to the deceased. The appellant responded by hitting the son with the flat of the firearm. He stormed out of the house brandishing the firearm and walked towards the neighbour's house, uttering words to the effect that the deceased 'had been looking for trouble' and she was going 'to get it.' When the deceased emerged from the neighbour's house and saw the appellant with a firearm, she turned to flee. The appellant shot her at the back and fatally wounded her.

[46] The trial court found that the murder was premeditated. It referred to the following factors to substantiate that finding: (a) the lengths to which the appellant went to retrieve his firearm from the safe; (b) the fact that he struck his son with the firearm when he tried to dissuade him from harming the deceased; (c) the appellant's utterances when he stormed out of the house that the deceased had been looking for trouble, and (d) that within seconds thereof, he fatally shot the deceased. On appeal, the full court disagreed. It reasoned although there was ample evidence of the appellant's violent behaviour towards the deceased in the months preceding the shooting, there was nothing to suggest that he conceived an intention or plan to shoot or kill the deceased before that night or, for that matter, before his son entered the house. The full court inferred that the appellant 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. According to the court, the appellant's anger turned into rage when the deceased sent the son to see that there was nothing amiss at home. It was then that he conceived the idea of killing the deceased using his firearm. On these considerations, the trial court's finding of premeditation was set aside.

[47] One of the most horrific murders occurred in *Kekana v S* [2014] ZASCA 158 (*Kekana 2014*), where the relationship between the appellant and his wife (the deceased) was also tempestuous. On the day of the killing, after an argument, the deceased told the appellant that their marriage was over, and packed his clothes in a bag and placed it outside their bedroom. The appellant, enraged by this, decided to kill the deceased. He went outside to fetch petrol, which he poured on the deceased's bed while at the same time telling her of his intention to burn her to death. He set the bed alight. He locked the deceased in the room and spilled the petrol in the passage, kitchen and dining room. This Court found that the locking of the door and further pouring of petrol showed that he was carefully implementing a plan to prevent her escape and to ensure that she died in the blaze. Accordingly, it confirmed the trial court's finding that these acts proved premeditation on the appellant's part.

[48] In *S v Taunyane* 2018 (1) SACR 163 (GJ) (*Taunyane*) the appellant killed a man who was having an affair with his estranged wife, with whom he had children. He would occasionally visit the children where they lived with their mother. On the day of the incident, he arrived there and found the deceased. He was having a firearm with him. He was provocative, and insulted the deceased. Thereafter, he fired a shot at the deceased, but missed him. He fired a second one, which hit the deceased, who called out 'Are you aware … that you have [struck] me [?] You have got me'. The deceased then ran off. The appellant pursued him and fired a third shot, then a fourth shot. By that time, the deceased was lying on the ground. The appellant fired two further shots at the deceased and left the scene. The full court grappled with whether this sequence of events was sufficient to sustain a finding of premeditation. It concluded in the negative, holding that:

' . . . There can be no doubt that appellant intended to kill and did in fact kill the deceased. The last four shots which he fired make this quite clear – he did not intend to wound but to

kill. The period of the shooting must have been very quick – there was insufficient time for the deceased to get into his motor car at the gate between the second and the fourth shot. This is the point at which one has to enquire whether or not these events were planned or premeditated.'

[49] Another unhappy marriage that had a gruesome and tragic ending is *S v Kekana* [2018] ZASCA 148; 2019 (1) SACR 1 (SCA); [2019] 1 All SA 67 (SCA) (*Kekana 2018*). The appellant was convicted on his plea of guilty to four counts of murder, in that he had killed each of his four young children. The appellant and his wife were experiencing marital problems. The appellant lived with the children in Limpopo, as his wife worked in Gauteng. On the day of the killings the parties' families had unsuccessfully endeavoured to reconcile the parties. Later the parties had an argument relating to the wife's extra-marital affair. The appellant drove with the children to Limpopo that evening, and upon arrival, the argument between the parties continued over the phone, during which the wife insulted and belittled the appellant. According to the appellant, he got extremely angry and decided to kill himself, but thought that his children would suffer in his absence. He then decided to kill them by slitting their throats. Before he killed one of the children, he called his wife and instructed the child to bid her goodbye. He thereafter tried to commit suicide but was unsuccessful as the police came in and arrested him. On appeal, this Court rejected a submission on behalf of the appellant that he acted on the spur of the moment, and accordingly found that the murders were premeditated. At para 28, it was pointed out that, irrespective of the minimum sentences provided for in the Criminal Law Amendment Act, the court retains its inherent power to consider life imprisonment, if the gravity of the offences so requires.

[50] The appellant in *Aliko v S* [2019] ZASCA 31 (*Aliko*), went to a mosque where the deceased, a disabled man, lived. He strangulated him with an electric cable and plunged a pencil into the deceased' ear with such violent force that it penetrated his inner ear and tore into his temporal muscles. As a result, the deceased had bled severely into his chest cavity and lungs. There was uncertainty as to whether the murder had been planned or premeditated. Despite that, this Court confirmed a sentence of life imprisonment, and concluded that it was not necessary to concern itself with the issue of planning or premeditation for it to confirm the sentence of life

imprisonment. With reference to the dictum in *Kekana* para 28, referred to above, the Court emphasised that premeditation is not an essential requirement for sentence of life imprisonment, as the court exercises inherent discretion in determining a suitable sentence.

[51] Lastly, in *Baloyi v S* [2022] ZASCA 35; 2022 (1) SACR 557 (SCA) (*Baloyi*) this Court confirmed a finding of premeditation in circumstances where, after a fight with the deceased, the appellant left the scene of the fight. About three hours later he returned to the scene, armed with a panga. Without a word, he hacked the deceased from behind with it. This Court concluded that the attack was a sequel to their prior fight three or so hours earlier. The appellant had time to think about the attack, which did not occur on the spur of the moment. Accordingly, the finding of premeditation was confirmed on appeal.

[52] What I discern from these cases is confirmation of a trite proposition that a finding of premeditation should be made only where the evidence establishes this beyond reasonable doubt. This was clearly the case in *Kekana 2014*, *Kekana 2018* and *Baloyi*. In borderline cases, our courts seem to lean more against making a finding of planning or premeditation. This is discernable in *Makatu*, *Raath* and *Taunyane*.

[53] Before I set out reasons for my separate concurrence, I need to give proper context to the dictum in para 13 of *Kekana 2014*, that ‘even a few minutes are enough to carry out a premeditated action’. This has often been quoted out of context as having declined to follow the key holding in *Raath* as to the importance of the time frame between the formation of an intent to kill and when the execution thereof, in the enquiry whether a murder has been planned or premeditated.

[54] This Court in *Kekana 2014* was dealing with a submission (purportedly based on *Raath*) that absent proof of the period of time between an accused forming the intent to murder and his carrying out of that intention, premeditation could not be found to exist. This was a wrong submission, as there was no such finding in *Raath*. Instead, the following point, correctly in my view, was made at para 16 of the judgment:

'. . . In such an evaluation [of whether there was planning or premeditation] 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.'

[55] Of the same issue, this Court in *Kekana 2014*, said the following at para 13:
'[I]t is not necessary that the appellant should have thought or planned his action a long period of time in advance before carrying out his plan. *Time is not the only consideration* because even a few minutes are enough to carry out a premeditated action'. (emphasis added.)

[56] Thus, properly construed, *Kekana 2014* accepts the holding in *Raath* that the time between the forming of an intention to kill, and the execution thereof, is an important factor, albeit not the only one. The full court in *Taunyane* neatly summarised the position as follows at para 28:
'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* supra "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".'

[57] As I see it, the effect of *Raath* and *Kekana* is this. The time frame between the intention to kill and the execution thereof, is always an important consideration in an enquiry whether a murder was planned or premeditated. It could well be that on the facts of a given case, the time frame assumes a crucial role, while in another, it plays a lesser one. It thus depends on the circumstances of each case. The longer the period between the intent to kill and the killing, the more likely (and easier) a finding of planning or premeditation.[18] The corollary is that the shorter the time frame, the more closely the circumstances must be scrutinized in the enquiry whether there was planning or premeditation.[19] This is where one moves closer to the borderline. But it is difficult to imagine a situation where the time frame does not play a role at all or is discarded as a matter of default. Viewed in this light, the *Kekana 2014* dictum is no authority for the proposition that it is not necessary to establish the point in the continuum where the intention to kill is formed, and when the killing occurs.

[18] A good example in this regard is *Baloyi*.
[19] This seems to have been a major factor that swayed the full courts in *Raath* and in *Taunyane* away from finding premeditation in the respective cases.

[58] With these conceptual considerations out of the way, I revert to the reasons for my separate concurrence. These turn largely on the inferences to be drawn from the established facts, which have been comprehensively set out in the first judgment. Accordingly, they will not be regurgitated in this judgment, except where it is necessary, for context and emphasis.

[59] It is clear from the record that the murders occurred against the backdrop of a strained marital relationship between the appellant and his wife. He perceived his wife and daughter to be disrespectful to him. The first judgment admirably sets out the relevant context to the murders, and correctly, with respect, observes at para 23:

'. . . [F]or months before the murders, [the appellant] had harboured resentment towards his wife and daughter, which evolved into a deep-seated rage. He sought solace in excessive alcohol consumption, which in itself became a source of tension in the house. The appellant silently carried this burden for some time. By 12 September 2015 he was at the end of the tether. . . .'

[60] In addition to the history of the marital problems experienced by the appellant and his wife, and in respect of the shooting incidents, the first judgment infers premeditation from that the appellant had time to reflect when his wife shouted: 'what are you doing?' after he had shot the daughter, but nevertheless shot her and thereafter shot each of them the second time, and remained calm thereafter, without rendering any assistance to his victims.

[61] It seems, with respect, that these facts point more to intention, and less to planning or premeditation. That the appellant shot the two deceased once and twice in turn, proves that he committed the murder with direct intention. The manner in which the shooting took place in the present case bears some resemblance with what occurred in *Taunyane*, where, as mentioned already, the appellant fired six shots in quick succession at the deceased, of which five were fatal. The full court explained in para 30:

'In deciding whether or not appellant killed the deceased in circumstances where such killing was planned or premeditated, the test is not whether there was an intention to kill. That had already been dealt with in finding that the killing was an act of murder. The question now is

whether or not appellant "weighed – up" his proposed conduct either on a thought-out basis or an arranged-in-advance basis (as set out in Raath supra at [16]) . . . . '

[62] Also, the fact that the shootings were preceded by the appellant going to his bedroom to remove the firearm from the safe, point to intention. Compare, in this regard, the facts of this case with those in *Raath*, where the appellant took his son to a bedroom where he forced him to open the safe and took out the firearm. In both cases the respective full courts regarded these preparatory steps as manifestation of intention, rather than planning or premeditation.

[63] Thus, we should guard against being unduly influenced by the preparatory steps which the appellant took before the shootings (which point to intention), to conclude that the murders were premeditated or not. In other words, we should maintain the thin conceptual difference between intent, on the one hand, and planning or premeditation, on the other.

[64] From the outset, it is important to delineate factors which should not come into consideration in the enquiry whether there was planning or premeditation. The first of those is the appellant's version that he did not remember the conversation with his daughter, and that he was unconscious when the deceased were shot. This version was correctly rejected by the trial court, even though the appellant persists with it. Secondly, the fact that the appellant failed to provide a reason why he committed the murders, or that he gave a false version. These factors, while they might be relevant to the guilty verdict or sentence, are both irrelevant to the enquiry regarding the presence or otherwise of planning or premeditation. Thirdly, the fact that the appellant has not shown any remorse. That is relevant to the question of sentence, and in particular, whether there are prospects of rehabilitation.

[65] A conclusion as to whether there was planning or premeditation has to be inferred from the proven or established facts. As already mentioned, those are that the appellant and his wife experienced marital problems, which resulted in the appellant harbouring deep-seated anger and resentment towards his wife and daughter, whom he perceived to be disrespectful to him. The appellant had, five

years before the shootings, threatened to kill his wife. He also once slapped her. On the night of the shootings, the appellant arrived home with his two nephews. One of them lived at the house, and the other was a guest that evening. Before the shootings, the appellant was in the kitchen with his wife preparing supper. There does not seem to have been any argument or tension between them. At some stage the appellant went to the living room where his daughter was seated with the appellant's two nephews. Apparently, the appellant attempted to have a conversation with his daughter. When asked about this attempted conversation, the witness testified as follows:

'I heard [the appellant] asking the daughter …does she have a problem…And the answer from the daughter was that you can see that I am not responding to your question.' Thereafter, the record reflects the following:

'COURT: Come again? --- I am, I am not saying anything, I am, I there is nothing.

She said I am not saying anything? --- Yes [indistinct].

MS VAN RENSBURG [State Advocate]: Just to get clarity on that because first I heard the interpreter saying that she said, you can see I am not saying anything.

INTERPRETER: Yes, that is …what he said initially and, he confirms that.

COURT: Ja, wait, please do not, do not attempt to confuse me. She, he asked her if she has any problem?

INTERPRETER: Yes.

COURT: What was her response? --- You can hear that I am not saying anything.'

[66] It is not clear from the record as to what prompted that question, 'is there a problem?'. Also, how the daughter responded to that question is by no means clear from the record, given the different iterations referred to above. Regrettably, the trial court did not properly clarify these. Ordinarily, a shooting, as had happened here, is often triggered by something. Thus, when an endeavour is made to determine a possible trigger, one looks to that which took place immediately before the shooting. In the present case, the shootings followed immediately after the brief conversation between the appellant and the daughter. For that reason, the brief conversation should have been properly and fully explored. It does not appear that the trial judge was alive to this. So oblivious was he that during sentence, he got the sequence between the conversation and the shootings wrong when he said that the appellant '.

. . cocked the firearm in the passage and then after a short conversation with his daughter, shot her. . . .'

[67] The first judgment regards the brief conversation between the appellant and the daughter, as being of no moment. This is where I part ways with my Colleague. A response to the effect that 'you can see that I am not responding to your question' or 'you can hear that I am not saying anything', (especially from child to parent) might subjectively be considered rude, discourteous or disrespectful. Although ordinarily, this would not trigger any physical response, let alone an extreme one like shooting. However, in a toxic domestic atmosphere which prevailed in the appellant's home at that stage, and in the state of mind that the appellant found himself, this could well trigger an unexpected response. The first judgment states that 'it is a fact that none of the eye witnesses testified that they considered the daughter's response to be disrespectful.' But with respect, that is an objective test. When dealing with an accused's state of mind at the time of the killings, a subjective test is applied. Williamson JA put it thus in *S v Mini* 1963 (3) SA 188 (A) at 196E:

'In attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time, it seems to me that a trier of fact should try mentally to project himself into the position of that accused at that time.'[20] Thus, it is a subjective test.

[68] The question remains whether the inferences in the first judgment are the only ones to be drawn. In reasoning by inference, the lodestar remains Watermeyer JA's enduring 'cardinal rules of logic' enunciated in *R v Blom* 1939 AD 188 at 202-203:

'(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

[69] To my mind, the inferences drawn in the first judgment, plausible as they are, are not the only ones, and do not exclude other reasonable inferences, including that the appellant could have been enraged, and acted on the spur of the moment, because of how his daughter spurned his attempt to speak to her. Viewed in the light of the appellant's perception that his daughter was disrespectful to him, this could, in

[20] See also *S v Ferreira and Others* [2004] ZASCA 29; [2004] 4 All SA 373 (SCA) para 33.

his mind, have been a manifestation of that disrespect. It must also be borne in mind that the daughter's dismissive behaviour was displayed in front of the appellant's two young nephews, one of whom was a first-time guest at the house.

[70] It must be borne in mind that the appellant was 'at the end of the tether', as succinctly encapsulated in the first judgment. Viewed in this light, and without excusing the appellant's ghastly conduct, the daughter's response, in my view, cannot reasonably be discounted as a trigger. This could well explain two aspects – the timing and sequence of the shootings. As regards timing, in my view, it was not coincidental that the shootings occurred almost immediately after the brief conversation between the appellant and the daughter. As to the sequence, it is instructive that despite the fact that his main gripe was with his wife, the appellant did not shoot the wife first. He went back to the person with whom he had the last conversation with – the daughter. The wife was shot when she protested. It must also be borne in mind that before the appellant's attempted conversation with the daughter, the appellant was having a calm and peaceful conversation with his wife in the kitchen. The fact that the appellant did not appear to one witness to have been agitated before the shootings, does not mean he was not. People manifest their emotions differently. The appellant in *Taunyane*, for example, did not appear to be angry before he shot the deceased. For that reason, I consider this to be a neutral factor.

[71] Except for an isolated incident when the appellant slapped his wife, there is no evidence that the appellant had been violent towards any of the deceased in the immediate period preceding the shootings. When the appellant's firearm was confiscated from him in 2011, the wife's complaint to the appellant's superiors was that the appellant was demanding of her and the daughter to leave the house. In the course of the discussion the wife explained that a year earlier, in 2010, the appellant had threatened to kill her. However, although that was not the cause of the complaint on that occasion, it appears that the appellant's commander, out of caution, confiscated the appellant's firearm on hearing about the death threat.

[72] Thus, the threat to kill the wife was made in 2010, and the murders were committed in 2015. In *Raath*, the appellant had threatened to kill the deceased a

mere three weeks before the murder, but this was not enough to persuade the full court to find that the murder was planned or premeditated. In the present case, where the threat to kill was made five years before the murders, I find it difficult to accept that the appellant had planned to shoot his wife and daughter before the night in question or, any time before his attempted conversation with his daughter.

[73] There is no dispute that the appellant and his wife experienced marital problems, which were never resolved, and that the appellant had shared these with his neighbour, even in the period shortly before the shootings. But, as demonstrated in *Raath*, which does not without more, translate the subsequent intent to kill, into one formed with planning or premeditation. Also, if the appellant had planned to shoot the deceased that evening, it is highly improbable that he would bring his nephew to the house to witness the shootings, and thus run the risk of him testifying against him. As the trial court correctly remarked: 'That is not a normal thing to do. He knew that these two witnesses would testify against him at the subsequent trial.' Therefore, had the shootings been planned, it would have been easier for the appellant to kill the deceased when he would have been alone with them in the house without eyewitnesses.

[74] I therefore conclude that it cannot reasonably be discounted that the appellant formed the intention to kill immediately after his attempted conversation with the daughter. When it considered the presence of substantial and compelling circumstances, the trial court, correctly in my view, said that 'something happened that emotionally upset' the appellant. This conclusion places the murders within the category of those '. . . committed without rational reflection . . .' as stated in *S v Mvamvu* 2005 (1) SACR 54 (SCA) para 13.

[75] Therefore, applying the second of the *Blom* 'cardinal rules of logic', I am unable to exclude as unreasonable, the inference that the appellant's conduct might have been triggered by his perceived disrespect by his daughter in front of his nephews, and that, overwhelmed with rage and on the spur of the moment, he decided to shoot her and his wife. Without suggesting that this is the case, I merely mention it to demonstrate that the proven facts do not lead only to inferences of planning or premeditation, to the exclusion of all other inferences. I am therefore

unable to confidently conclude that the appellant had time to 'think out or plan beforehand' or 'to decide on, arrange in advance, make preparations' for the shootings, as remarked in *Raath* at para 16.

[76] There is also the role of alcohol. The appellants' nephew who drove with the appellant from Randfontein earlier that day, testified that the appellant started drinking earlier that day whilst they were in Randfontein. He drank brandy and when they arrived in Pretoria, he drank beer. The appellant's neighbour, who encountered him shortly after the shootings, testified that according to his observation, the appellant was intoxicated. The trial court accepted this in its consideration of sentence. This constitutes a factual finding by the trial court. We are therefore not at large to simply overturn it, unless it is shown to be vitiated by material misdirection or is shown by the record to be wrong. See *S v Naidoo and Others* 2003 (1) SACR (1) (SCA) para 26. There is no suggestion that the trial court misdirected itself in this respect. Its finding that the appellant was intoxicated on the night in question, must therefore be accepted as correct.

[77] Lest I be misunderstood, I am not suggesting that the appellant was so intoxicated that he did not appreciate what he was doing. But it is common knowledge that alcohol affects one's judgment. It should therefore not be discounted that had the appellant not consumed alcohol, his response to the daughter's dismissive conduct towards him might have been different. In *S v M* 1994 (2) SACR 24 (A) at 29H, it was pointed out that 'liquor can arouse senses and inhibit sensibilities'. The court went on further to say the following about the effect of alcohol on the appellant in that case at 30B-C:

' . . . [O]ne 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.'

[78] Although made in the context of the court considering the effect of alcohol on sentence, these remarks are apposite to the enquiry to determine whether or not

there was planning or premeditation. To borrow from Nienaber JA in that case, the appellant 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.'

[79] But this does not mean that the appellant cannot be sentenced to life imprisonment. Below I briefly explain my pathway to that sentence. A court of appeal can interfere with a sentence imposed by a trial court only in two instances. First, where material misdirection by the trial court vitiates its exercise of that discretion. Second, where the disparity between the sentence imposed by the trial court and that which the court of appeal would have imposed had it been the trial court, is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'.[21]

[80] In my view, the sentence imposed by the trial court falls within the latter category. An effective sentence of 30 years' imprisonment does not reflect the gruesome nature of the crimes. The deceased were murdered in the sanctuary of their own home, by a person who, ordinarily, would have protected them. Importantly, the appellant has not shown any remorse. On the contrary, he remains a danger to society, demonstrated by his remarks and comments to the clinical psychologist, of his desire to kill his former attorney and his nephew. Accordingly, his prospects of rehabilitation are almost non-existent. Whilst lack of remorse is not an aggravating factor,[22] it plays a significant role in the overall consideration of sentence.

[81] In the circumstances, the mitigating factors – the appellant being a first offender, his emotional disturbance, intoxication and the time spent in custody awaiting finalisation of the trial – all pale into insignificance when weighed against the aggravating factors. This Court is therefore at large to interfere with the sentence

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[21] *S v Sadler* 2000 (1) SACR 331 (SCA); [2000] 2 All SA 121 (A) para 8; *Cwele and Another v S* [2012] ZASCA 155; [2012] 4 All SA 497 (SCA); 2013 (1) SACR 478 (SCA) para 33; *S v Swart* 2000 (2) SACR 566 (SCA) para 21; *S v Coetzee* 2010 (1) SACR 176 (SCA); *S v Matlala* 2003 (1) SACR 80 (SCA).

[22] *S v Hewitt* [2016] ZASCA 100; 2017 (1) SACR 309 (SCA) para 16.

imposed by the trial court and impose a sentence which it considers appropriate, which, in this instance, is life imprisonment.

[82] Save for the above reasons, I agree with the order of the first judgment.

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T MAKGOKA

JUDGE OF APPEAL

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