IN THE HIGH COURT OF SOUTH AFRICA
BOPHUTHATSWANA PROVINCIAL DIVISION

CASE NO.: CA 20/2008

In the matter between:

ALPHEUS MALULEKA **APPELLANT**

and

THE STATE **RESPONDENT**

FULL BENCH CRIMINAL APPEAL

MOGOENG JP, LANDMAN J & KGOELE AJ

DATE OF HEARING	:	**20 June 2008**
DATE OF JUDGMENT	:	**04 August 2008**
FOR THE APPELLANT	:	**ADV KAUPANE**
FOR THE RESPONDENT	:	**ADV MOLEFE**

JUDGMENT

LANDMAN J:

[1] Mr Alpheus Maluleka appeals, with leave of Waddinton J, against a sentence of life imprisonment imposed upon him for murdering his spouse.

[2] In his heads of argument Mr Kuapane, who appeared for the appellant on appeal, submitted that the trial court had misdirected itself in finding that the murder was a premeditated. The appellant was sentenced on the basis that the murder was a premeditated one which brought section 51(2) of the Criminal Law Amendment Act 105 of 1996 (the Act) into operation. Counsel who appeared for the appellant at the trial, not Mr Kuapane, was aware that the Act applied. However, when Mr Kuapane was on his feet he did not pursue this point. This is the correct attitude to adopt if the trial court had made a finding that the murder was premeditated. As a finding of premeditation relates to the form of the crime it must be decided when the verdict is delivered. Once the finding has been made, it is not open to challenge if the appeal is only against sentence. Cf **S v Legoa** 2003 (1) SACR 13 at 21.

[3] This brings to the fore the question whether the trial court had indeed found, at the time the appellant was convicted, that the murder was premeditated. The judgment of the trial court does not make an express finding to this effect. Mr Molefe, who appeared for the state, submitted that the concluding line of the judgment is a finding of premeditation. The trial court says at page 17 of the revised judgment:

> "As a result, in my view, the accused has been shown to have lost patience and decided to kill the deceased."

[4] This is a very tenuous line upon which to hang a verdict of premeditated murder. The evidence itself is rather slender. A finding of premeditation does not appear to have been made on the basis that the appellant had said to the deceased before he killed her: "… you are undermining me and I told you long ago that I will kill you". (See page 8 line13-14.) This much is evident from the interchanges between the bench and counsel. Rather it seems that the finding of premeditation was made on the basis that, after assaulting the deceased, the appellant went to the garage, collected his firearm and returned with it. He cleaned it, asked his children whether he should kill their mother, prayed for her and then shot her six times.

[5] However, as the trial court, when sentencing the appellant, proceeded from the assumption that the murder was premeditated (and so did not make a post conviction finding) this court must infer that the trial court convicted the appellant of the form of premeditated murder contemplated in the Act.

[6] The result is that the trial court was correct in deciding that the minimum sentence legislation applied so that the minimum sentence to be imposed was a life imprisonment unless substantial and compelling circumstances were found to be present. The trial court, although, extremely troubled by the restriction on its sentencing discretion, could find no substantial and compelling circumstances present.

[7] The trial court restricted its inquiry into these crucial questions to the appellant's belief that the deceased had taken a lover or concubine and had been with him the night of the murder. The court had, in delivering judgment, rejected this version. The trial court said in determining whether there were substantial and compelling

circumstances present limited itself to the possibility that the deceased had a lover as the appellant said he believed she had. The trial court said:

> "There is no reasonable evidence of the existence of a boyfriend. It seems that there was a possibility which the accused believed only might have existed."

(See page 4 lines 15-17 of the revised judgment on sentence.)

and

> "There is no evidence in the Sate's case which raises a reasonable possibility that that belief could reasonably possibly have been justified.
>
> Under those circumstances, try as I have, I find myself unable to record that the holding of that belief could possibly fall within the provisions of section 51(3) of the Criminal law Amendment Act 1997."

(See page 4 lines 1-5 of the revised judgment on sentence.)

[8] The result is that no substantial and compelling circumstances were found and the minimum sentence was imposed.

[9] The trial court, when it sentenced the appellant in 1999, did not have the benefit of the seminal decision in **S v Malgas** 2001 (1) SACR 469 (SACR) at 482e-f. This decision held that:

> "If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence."

[10] It follows that as the trial court applied a too restrictive interpretation of the crucial concept that this court is at liberty to revisit the issues and consider the question afresh. In undertaking this exercise we have the advantage of the trial court's views on some of the elements which must be taken into account.

[11] The relevant considerations are the following:

1. The appellant murdered his spouse in the presence of two of their young children aged 13 and 9.
2. He even asked them whether he should kill the deceased as she sat on the sofa.
3. The murder was premeditated but only marginally so. The trial court remarked during the address on sentence that:
4. The murder took place in the course of a domestic quarrel; probably about money and the deceased spending of it. (See page 3 lines 6 of the revised judgment on sentence.)
5 He expressed remorse.
6. He was 38 years old.
7. He had no proven previous convictions.
8. He had four school going children when sentence was passed whose ages ranged from 13 to 5.
9. He was employed at Bargain Purse in Pretoria where he earned R485 per week.
10. He handed himself over to the police.
11. He, as the trial court recorded, believed, albeit unjustifiably, that the deceased had taken a lover. (See page 3 lines 7 of the revised judgment on sentence.)

[12] All these facts and circumstances cumulatively constitute, in my view, substantial and compelling circumstances. The result is that this court is at large to impose a lesser sentence.

[13] Mr Kuapane submitted that a sentence of 15 years, with a portion suspended, would be fitting. On the other hand Mr Molefe submitted that a sentence of 20 years would be more appropriate in view of the prevalence of domestic violence in our society.

[14] In deciding what would be an appropriate sentence I am influenced by the fact that the trial court regarded the premeditation as marginal, so that although minimum sentence of 15 years, applicable to non-premeditated murders, seems a more appropriate yardstick than that prescribed for premeditated murder.

[15] The question is whether more that 15 years should be imposed? I am of the view that a sentence of 18 years is appropriate especially in view of the fact that the murder was committed in the presence of two young children.

[16] In the premises:

1. The appeal is upheld.
2. The sentence of life imprisonment is set aside and substituted with one of 18 years imprisonment.

A A Landman
Judge of the High Court

I concur

M R T Mogoeng
Judge President of the High Court (BPD)

I concur

A M Kgoele
Acting judge of the High Court

ATTORNEYS:

For the Appellant	:	Legal Aid
For the Respondent	:	State Attorney