
**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

(Coram: Henney, J et Cloete, J et Nziweni, J)

Case No.: **A98/2024**

In the matter between:

**MUEPA PAUL KASONGO** Appellant

and

**THE STATE** Respondent

**Heard: 24 January 2025, supplementary notes delivered on 30 January 2025 and 7 February 2025**
**Delivered electronically: 20 March 2025**

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**JUDGMENT**

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**HENNEY, J (CLOETE, J concurring, NZIWENI, J dissenting):**

Introduction:

[1] I have considered the judgment of my colleague and whilst I agree with some of her findings, I am unable to agree firstly, with her finding that the court a quo was correct in concluding that the murder that was committed by the appellant was planned and premeditated. The facts require some further elaboration and elucidation in order to have a proper understanding of the evidence placed before the court a quo, which it took into consideration and upon which it made its factual findings. Secondly, I am also unable to agree that the sentence imposed by the court a quo, of life imprisonment was an appropriate sentence.

[2] In coming to the conclusion that there was premeditation in relation to the murder of the deceased, the court a quo stated at paragraph 37 of its judgment … "The course of action in which the killing of the deceased was carried out, the circumstances under which it was carried out and the putting into effect of a performance to mislead the police and everyone on how her life came to an end, established premeditation." Accordingly, the court a quo found in effect that premeditation can, as a matter of law, also be established by evidence as to what occurred during the commission of an offence and thereafter. Before I deal with this aspect, it is however necessary at the outset to state the following.

[3] It is well established that when leave to appeal is granted only against sentence as was in this case, a court of appeal may not, save possibly in exceptional instances, deal with the merits of the case. Although considered within the context of an attempt to appeal a conviction when leave had only been granted against sentence in: *S v Matshoba and Another* 1977 (2) SA 671 (A); *S v Heller* 1970 (4) SA 679 (A); *S v Cassidy* 1978 (1) SA 687 (A) 690, it follows logically that an appeal court is not at liberty, without more, to delve into the merits of the case again and make fresh factual findings not dealt with in the trial court's judgment on conviction, when considering whether interference with the sentence imposed is warranted. Put differently, the sentence imposed must be evaluated within the "constraints" of the trial court's factual findings in its judgment on conviction.

[4] Accordingly, we must consider whether on the facts found proven by the trial court, premeditation was established, which in my view is not the case. Even if this could be regarded as an exceptional case, the court a quo did not set out on what facts it concluded that there was planning and premeditation.

Summary of evidence and findings of the court a quo:

[5] Unfortunately, I have to deal with the merits of this case in considering whether there were facts upon which the court a quo correctly concluded that premeditation was established since my colleague has made separate factual findings on the merits that were not included in the court a quo's judgment on conviction to support her conclusion that the court a quo was correct in finding that there was planning and premeditation.

[6] The case for the prosecution was not confined to evidence when the murder was committed, being the evening of 3 December 2018, but also on certain events and occurrences that happened in particular on the evening of 1 December 2018, at the house in Silversands that the deceased was house sitting; and to a lesser extent, the events of 2 December 2018, and the morning of 3 December 2018, when the appellant tried to have contact with the deceased at her place of employment at Poetry, Tygervalley Centre.

[7] On the evening of 1 December 2018, a friend of the deceased, Zintle Fekisi ("Zintle") who was a student at the University of Western Cape ("UWC") together with her boyfriend Xolela Nosana ("Xolela") and another male person visited the deceased at the house in Silversands that she was house sitting for the owners. After their arrival at the house, the deceased and the appellant were involved in an argument. This, according to the appellant, related to the deceased being dissatisfied with messages that were sent on her cellular phone to her about the appellant's alleged infidelity the previous evening. Another version given by one of the state witnesses was that she had been told by the deceased that the appellant was upset and jealous because of information contained on her cellular phone which he believed was evidence that she was unfaithful to him.

[8] At some stage while they were sitting in the lounge the cellular phone of the deceased disappeared, and after some search it was found under the seat where the appellant was sitting in the lounge. Shortly after that, the appellant disappeared from the company and went to one of the bedrooms. The deceased after some time followed him into the bedroom and both stayed away for about 15 minutes.

[9] Zintle was annoyed by their absence and went to look for them and heard them in the bedroom with the door closed where she heard the deceased shouting, and she could hear that the appellant and the deceased were involved in an argument. There was some tussle and movement, and it sounded like he wanted to take away her cellular phone. Zintle opened the door and observed that the appellant held onto the one hand of the deceased and in his other hand, he was holding onto her cellular phone which he did not want to give back to her. The deceased told her that the appellant had strangled her, but the appellant denied it. And in response to this, the deceased was laughing. Zintle did not take this allegation seriously. She left them alone in the room to talk things out while she was standing outside. At some stage after that, she again heard the deceased screaming and once again opened the bedroom door.

[10] The appellant insisted that he wanted to continue speaking to the deceased, whereupon Zintle said that she had given him a chance to talk to her and refused that he continue speaking to her. At that same time the two other male persons intervened as well, and the appellant was forced to give the cell phone back to her. Zintle then dragged the deceased away and requested her to pack her things. After the appellant was separated by the two male friends who were present, the appellant wanted to go back to her, and he had to be restrained by the two male persons, who dragged him outside.

[11] Zintle and her two friends, the deceased and the appellant left the house and the deceased spent the night with them at the hostel of UWC. The deceased's friends did not want the appellant to go with them, but the deceased, however, begged Zintle to take the appellant with them, and he accompanied them in the car to UWC. But due to the appellant's earlier conduct the deceased's friends did not

want to be in the appellant's company and refused that he join them at UWC. He was dropped off at UWC and had to take an Uber taxi, to where he wanted to go.

[12] The deceased later discovered that her cellular phone was missing and thought that the appellant may have taken it. It needs to be stated that certain hearsay evidence was given by State witnesses and taken into account by the court a quo without the trial judge making a ruling on its admissibility. Especially, where Zintle stated that the deceased on more than one occasion told her that the appellant strangled her. Xolela confirmed more or less what she testified, except that he heard that the deceased whilst in the room shouted "Ouch Muepa you are slapping me." He furthermore testified that after he went to the room he observed that the appellant was pulling the arm of the deceased. The deceased furthermore told the appellant "No I don't want to talk because you are strangling and biting me."

[13] At that stage Xolela and the other male friend separated the appellant and the deceased from each other. This, however, did not deter the appellant from scratching the deceased at the back of her shoulder. Thereafter all of them left and went to UWC. The appellant was in the car, and he continued to reach out to the deceased and was pulling and scratching at her. The appellant was warned that should he continue doing this, he would be asked to leave the car and be left at the side of the road. After they arrived at UWC, the appellant took an Uber taxi and went on his own way.

[14] Accordingly the only evidence about the deceased allegedly being strangled was inadmissible hearsay evidence, emanating from Zintle who said that when she entered the room the deceased said she was strangled, which the appellant denied, and the deceased in reaction to this just laughed.

[15] Further hearsay evidence that was taken into account by the court a quo was of a witness, Denzil Cupido, a policeman to whom the deceased allegedly reported the next day that the appellant strangled her in front of her friends, which apart from being hearsay is inconsistent with the evidence of Zintle who did not see it happening, and neither did Xolela.

[16] There was also evidence that on the next day, 2 December 2018, the appellant tried to see the deceased at her place of work at Poetry Store, Tygervalley, but she refused to speak to him. On the morning of 3 December 2018, he made another attempt to see her at her place of work, this attempt was also unsuccessful. Two witnesses, her colleagues from Poetry, gave evidence which is hearsay and was basically about what the deceased had told them, and does not take the matter any further. The only useful pieces of this evidence is that the deceased had no cellular phone which caused her to ask one of her colleagues to lend her phone to the deceased in order for her to send a message to the appellant to return her cellular phone; and that the appellant on these two days came to the Poetry Store where he wanted to speak to the deceased. She refused to speak to him and he insisted that he wanted to. He was asked to leave when he did not respect her wishes.

[17] Little if any value can in my view be attached to this evidence, because it is mainly based on hearsay evidence of the deceased. None of the witnesses, especially those who were present on the evening at the house on 1 December 2018 observed that the deceased had been strangled by the appellant or bitten by him. What is, however, clear from their evidence was that he pulled her arm, lashed out at her and that he scratched her while they argued.

[18] My colleague in her judgment states without any substantiation that ‘Evidence (sic) shows that amongst other things he strangled her’. On the further evidence of the appellant himself he later on the evening of 3 December 2018 visited the deceased at the place where she was house sitting, and where he killed her. The appellant described what happened between him and the deceased which eventually led to him stabbing her 11 times.

[19] Caroline Visser, a neighbour living in a house not far from where the incident occurred, was sleeping inside her house and heard a lady crying which she described as if she was badly hurt. She was not sure where it came from and thought that if something should happen her children would alert her. She later fell asleep while the crying continued. Her son, Curtley Visser who was standing outside testified that he heard an argument between two persons. He heard a girl

shouting and saying, ‘why are you doing this to me’. He further testified he heard nothing else. He and his friends saw two persons at the house and at one stage they went to the shop and walked past the house, but they could only see two persons but could not see any faces.

[20] His further evidence was that on the next day the appellant came to their house and told him that his girlfriend was lying in the passage of the house and that there is blood on the floor. He went to the house and observed that the front door was partially open, but the burglar gate was still closed, and they could not gain access to the house. They used a hammer and managed to break open the burglar gate and gained entry to the house, where they found the body of the deceased. It is clear, unlike the court a quo found, that the Vissers did not observe what happened. There is no evidence as the court a quo found that the appellant went back into the house. Or that he was carrying a knife, whilst doing so.

[21] A further concern is that although the legal representative of the appellant did not challenge the contradictions in the evidence of the Vissers, the court a quo also did not deal with it. It seems that the son Curtley did not hear a person crying as if she was hurt, like his mother who was inside did, although he was outside and closer to where the deceased and the appellant were.

[22] I agree that the appellant’s version was correctly rejected by the court a quo where he tried to proffer a version that it was the deceased that attacked him first and he tried to defend himself, although there were no other witnesses to the incident. Clearly, even if the deceased was the one who attacked him, his conduct in retaliation far exceeded the bounds of self-defence.

[23] However the court a quo further misdirected itself by concluding that the conduct of the appellant on the day after he committed the murder by ‘putting into effect of a performance to mislead the police and everyone on how her life came to an end’, was indicative of planning and premeditation. The conduct of a perpetrator not prior to, but after, the commission of an offence cannot be regarded as evidence of planning and premeditation.

[24] It is well established[1] that the conduct to be considered of a perpetrator of a crime for the purposes of planning and premeditation must be the conduct before (although not even long before), but not during, or after the commission of the offence. A person cannot plan or premeditate to commit an offence whilst such a person is in the process of committing it through the conduct or the manner in which it was committed, in the absence of any evidence to substantiate such a finding. Further, the conduct of the person afterwards cannot be regarded as conduct to establish or infer planning and premeditation.

[25] It is clear from the record that the evidence of the circumstances under which the killing of the deceased was carried out is sparse and was principally based on the version of the appellant, who was not an honest and trustworthy witness and the court a quo was correct to reject his version of events as 'beyond reasonable doubt false'. However, what is not clear are the circumstances under which the trial court considered that the killing took place. These circumstances were not dealt with by the court a quo, and nor was any factual basis set out by the trial court as to what those circumstances might be in concluding that there was premeditation. On a conspectus of the evidence, I am not persuaded that the trial court was correct in its finding that there was planning and premeditation.

<u>The findings and decision of my colleague with regard to whether there was planning and premeditation</u>:

[26] In my respectful view, my colleague impermissibly delved into the merits of the case again and made fresh factual findings not dealt with in the trial court's judgment on conviction, when she sought to make factual findings as to the circumstances, which the court a quo did not make, in concluding that the murder was premeditated.

[27] She refers to the numerous stab wounds the appellant had inflicted upon the deceased in committing the murder to substantiate that there was planning and premeditation, which the trial court did not do. As I understand her judgment, what

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[1] See Jordaan, Kekana and S v Raath 2009(2) SACR 46(C)

my learned colleague is saying is that planning and premeditation to murder on the part of a perpetrator can also be formed during the commission of the offence, and is not limited to events preceding it, i.e that by having regard to the consequences (the violence meted out) of a perpetrator's action during the commission of the murder and not prior to it, one can ex post facto conclude that there was planning and premeditation.

[28] Put differently, and in the absence of evidence proving premeditation (whether direct or by inferential reasoning) it cannot be inferred only from the manner in which the violence was meted out that there was planning and premeditation. Such an approach is contrary to the trite legal principle that this inferential reasoning must exclude every other reasonable inference, especially in the absence of any other evidence, which the state did not adduce. In other words, based on the trial court's own factual findings, one cannot exclude the possibility that the murder could also have been committed in the heat of the moment. (*R v Blom 1939 AD 188* at *202*).

[29] As previously stated my colleague's approach is also not consistent with the well-established principle that planning and premeditation occur before the commission of the offence, and as stated in *Kekana* (2014[2]), even where the planning and premeditation occurred minutes before the commission of the offence, and that there should be clear evidence about that to establish premeditation beyond reasonable doubt. In this regard Mathopa AJA (as he then was) stated … "[13] *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.*

*The appellant pertinently admitted that after he saw his clothes, he formed an intention and in his own words he decided to end it all and kill the deceased. He then gave effect to this decision. He went outside to fetch petrol. He re-entered the house and poured it on the bed of the deceased while at the same time telling her of his intention. He set it alight with the petrol. He locked the deceased in the room. He spilled the petrol in the passage, kitchen and dining room. The locking of the door*

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[2] S v Kekana [2014] ZASCA 158(1 October 2014 at paras 13 -14

*and further pouring of petrol show that he was carefully implementing a plan to prevent her escape and to ensure that she died in the blaze. To my mind, this is proof of premeditation on his part. It follows that the appellant was correctly convicted of premeditated murder*."

[30] Accordingly, even if the time frame between planning and premeditation and the commission of the offence was for a relatively short period it must occur before the commission. The timeframe before the commission plays a role. In *Jordaan*[3], Binns- Ward stated the following about the definition of premeditation … "*Indeed, the definition of 'premeditation' in the Oxford Dictionary of English suggests that the concept of planning is wrapped up in that of 'premeditation': viz 'the action of planning something (especially a crime) beforehand; intent': the defendant said there was no planning or premeditation*." (own emphasis)

[31] A full bench of this court in *Raath*[4] (Bozalek J; Louw J and Goliath J concurring) said definitively that "*The concept of a planned or premeditated murder is not statutorily defined. We were not referred to, 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 10 ed, revised, gives the meaning of premeditate 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*

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[3] S v Jordaan and others 2018 (1) SACR 522 WCC at para 129
[4] S v Raath 2009 (2) SACR 46(C) at para 16

*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*" (emphasis added)

[32] In my view, by having regard to the 'violence meted out' and the number of stab wounds inflicted as referred to by my learned colleague in great detail in her judgment, these factors are instead indicative of an intention to murder and not indicative of premeditation. In *Taunyane*[5] it was aptly stated that … "*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*."

[33] The SCA said the following with regards to the distinct differences between planning and premeditation and intention in *Peloeole*[6]*:*

> "*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 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*

[5] S v Tuanyane 2018(1) SACR 163 (GJ)
[6] Benedict Moagi Peloeole v Director of Public Prosecutions. Gauteng (740/2021) [2021] ZASCA117;2022(2) SACR 349 (SCA) at para 9

*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*." (emphasis added)

[34] It is accordingly clear that by having regard to violence meted out and the multiple times the appellant in a very violent manner stabbed the deceased to death are factors a court would consider as indicative of an intention to kill. And as stated in the *Peloeole* case "*the determination to end life*".

[35] In my view, the trial court as well as my learned colleague with respect conflated the concepts of premeditation and intent to murder. The conduct of the appellant during the attack on the deceased clearly demonstrated that he had direct intention to murder the deceased if regard is to be had to the gruesome and violent manner as described by my colleague how he killed the deceased and the multiple times he stabbed her. Thus, it was said in *Dlodlo*[7] in respect of drawing an inference of an intention to murder:

"*The subjective state of mind of an accused person at the time of the infliction of a fatal injury is not ordinarily capable of direct proof, and can normally only be inferred from all the circumstances leading up to and surrounding the infliction of that injury. Where, however, the accused person's subjective state of mind at the relevant time is sought to be proved by inference, the inference sought to be drawn must be consistent with all the proved facts, and the proved facts should be such that they exclude every other reasonable*

[7] S v Dlodlo 1966(2) SA 401 (AD) at 405 G-H

*inference save the one sought to be drawn. If they do not exclude every other reasonable inference, then there must be a reasonable doubt whether the inference sought to be drawn is the correct one. (See R v Blom, 1939 AD 188 at pp. 202 - 3.)*"

[36] In dealing with intention to murder, a court deals with the subjective state of mind of the perpetrator at the time of commission of the offence, whereas when dealing with the question whether there is planning and premeditation, the court deals with the state of mind of a perpetrator to give effect to his murderous intent, before the commission of the offence. There is in my view no evidence, direct or circumstantial, from which an inference be drawn that in the present case the murder of the deceased was premeditated when regard is had to the established legal principles referred to above.

[37] None of the circumstances and facts referred to by the court a quo established planning and premeditation. It is trite that there is an onus on the prosecution to prove beyond reasonable doubt planning or premeditation. The state did not attempt to do so because firstly, it never alleged in the indictment that the murder was committed with planning and premeditation; and secondly, because it could not have had such evidence, or it would have been adduced. This concession was made by counsel for the State during argument in the appeal, and rightly so. It is for all of these reasons that I am unable to agree with my learned colleague as well as the court a quo that the murder was planned and premeditated.

Jurisdiction to impose sentence of life imprisonment

[38] My colleague has comprehensively dealt with the legal position where an indictment or charge sheet does not specifically refer to premeditation when proffering a particular charge against an accused. I agree with her assessment. In my view, given what is stated earlier in this judgment, there was no need for the court a quo to conclude there was planning and premeditation, or even for the prosecution to allege and prove that it was such, in order for the court as a High Court to impose a sentence of life imprisonment. In any murder case or crime where there is justification or sufficient aggravating circumstances to impose a sentence of

life imprisonment the High Court may impose such a sentence. This is because of the High Court's inherent power to impose a sentence of life imprisonment. See *Peloeolo*[8] where the minority judgment found that the absence of planning and premeditation is not a jurisdictional fact that has to be established for a High Court to impose a sentence of life imprisonment, where there are sufficiently aggravating circumstances by the High Court to impose such a sentence: It is different in the case of a Regional Court which ordinarily, but for the provisions of section 51(1) of the Criminal Law (Sentencing) Act 105 of 1997, does not have jurisdiction to impose a sentence of life imprisonment. In this regard, Du Toit, De Jager, Paizes, Skeen and Van Der Merwe[9] state the following in this regard, with reference to *Baloyi* and *Peloeolo*:

> "*It should be noted that, in these cases, the trial courts were High Courts, which had the jurisdiction to impose life imprisonment, even when the minimum sentences were not involved. Had the trial court been a regional court, the judgment in S v Ndlovu 2017 (2) SACR 305 (CC) is clear: without a finding by the trial court that the murder had been planned and premeditated, a regional court cannot establish the increased jurisdiction to impose life imprisonment during the sentencing*".

In my view, therefore the court a quo was entitled to impose a sentence of life imprisonment. The question however remains whether this was an appropriate sentence.

Whether the sentence imposed by the court a quo should stand

[39] It is trite that in an appeal against sentence that the principle that should guide the appeal court is that punishment is pre-eminently a matter for the discretion of the trial court, and a court of appeal should be slow to interfere with such discretion. Furthermore, that a court of appeal can only interfere with a sentence imposed by the trial court under the following circumstances. Firstly, where there is a material

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[8] See paragraphs 78 and 79 Du Toit, De Jager, Paizes, Skeen and Van Der Merwe
[9] Commentary on the Criminal Procedure Act at 28-18D Service Issue 70, 2023

misdirection by the trial court that vitiates the exercise of that discretion. Secondly, where there is a disparity between the sentence that was imposed by the trial court and that which the court of appeal would have imposed had it been the trial court, to the extent that such a sentence can be characterized as shocking, startling or disturbingly inappropriate.

[40] In my view, the trial court made findings against the appellant in aggravation of sentence that were not based on admissible evidence, like hearsay evidence, when it found that the deceased was strangled and bitten by the appellant. No one testified that they were witnesses to such conduct on the part of the appellant. The only evidence that was placed before the court of this conduct was based on inadmissible hearsay evidence which should in the first place never have been admitted, other than in terms of the proper application of section 3 of the Law of Evidence Amendment Act 45 of 1988.

[41] The appellant in any event denied these allegations and no signs of any strangulation or biting were recorded on the postmortem report. It is true that the conduct of the appellant on the evening of 1 December 2018, was deplorable which resulted in the cancellation of their social get together. But besides the evidence of him pulling her arms and tightly holding her wrists, there is no other positive evidence of an assault on her. His main aim it seems on that evening was not to assault her but to get hold of her cellular phone.

[42] The court a quo in my view was influenced by generalized extraneous factors based on studies of the conduct in general of perpetrators and victims of gender-based violence that was not borne out by the evidence regarding the behaviour of the appellant and that of the deceased as a victim, and in my view unfairly attributed those factors to the appellant. There was no admissible evidence presented that the appellant had a history of abusing the deceased.

[43] I agree with the submissions of counsel for the appellant that in the absence of any other evidence, on the evidential material before the trial court, the only reasonable inference to be drawn is that the offence was committed in the heat of the moment. There is no evidence, as I pointed out earlier, that the appellant went to

visit the house where the deceased was to hunt her down and kill her. Apart from what happened on 1 December 2018 the only real and substantial evidence of violence committed by him on the deceased is the brutal, cold-blooded and abhorrent manner in which he killed the deceased. This repulsive conduct together with his conduct on 1 December 2018 nonetheless does not justify the generalized and unsubstantiated aggravating findings the court a quo made against him in relation to the scourge of gender-based violence. By making these findings in aggravation, the court a quo materially misdirected itself.

[44] I agree with the court a quo and my colleague, that for perpetrators of gender-based violence who callously murder their intimate partners, a strong message needs to be sent out that acts of gender-based violence are taken seriously by our courts. Such a sentence should however not be disproportionate to the crime, the offender and the interests of society. Sentencing is always an individualised exercise.

[45] The appellant was a young man and was 19 years old when he committed the offence. He was barely an adult at the time of the commission of the offence. If he had committed the offence a year and a few months earlier (approximately 20 months) the provisions of the Child Justice Act 75 of 2008, and in particular s 77 thereof, would have applied. This is a strong factor that the trial court should have taken into consideration. He is also a first offender and was never previously on the wrong side of the law. He comes from a stable family. He completed matric and tried to gain a post-matric qualification. He also was employed in various capacities from a petrol attendant to a part time model. He had been in an intimate relationship with the deceased for a long time. His abhorrent conduct appears to have been fuelled by jealousy and possessiveness when the deceased rebuffed his attempts to reconcile with her. This does not necessarily translate into an individual with a deep rooted, irreversible, propensity for violence against women such as to place society at large at risk, particularly given the absence of any evidence before the trial court to this effect.

[46] Whilst he may not have been honest and upfront with the Vissers and the police, he nonetheless went back to the scene the next day. He could have stayed

away. It is equally reasonable to infer from this conduct that he realized the consequences of his actions which greatly concerned him, and he wanted to process what he had done. He was sad and crying when he realised the consequences of his actions. This was not the conduct of a totally heartless individual.

[47] In my view, there was an over-emphasis only on the offence that was committed even if it was horrific and abhorrent. When imposing a sentence, the court must strive to impose a balanced sentence and avoid imposing an exemplary sentence. Just like an overemphasis on the crime is deprecated, a sentencing court should guard against placing an overemphasis on the public interest and to appease public opinion.

[48] In *S v Maseko* 1982 (1) SA 99 (A) at 102E-F the court held:*'…*What has to be guarded against when exemplary sentences are imposed (concerning which see *S v Khulu* 1975 (2) SA 518 (N) at 521-2) is the danger that excessive devolution by a judicial officer to furtherance of the cause of deterrence may so obscure other relevant considerations as to result in very severe punishment of a particular offender which is grossly disproportionate to his deserts. (See also *S v Christodoulou*; *S v Savides*; *S v Temple; S v Zwyssig 1979 (3) SA 523 (A) at 536E-F*.)'

[49] And in *S v Khulu* (at 521B-522C) the court held:

> *'It is clear from the magistrate's reasons in this case that he decided to impose what I might call an exemplary sentence. He regarded it as "a need" because of the tendency described by the witness called by him. The accused was to be punished in such a way that the punishment would demonstrate to those disposed to deal in dagga that youths would not necessarily induce a court, because of their youth, to "avoid" the punishment described by Act 41 of 1971. In Smith and Logan,* Criminal Law*, 2nd ed., p. 12, Asquith L.J., is reported to have said:*
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> > *"Everyone has heard of an 'exemplary' sentence: and nearly everyone agrees that at times such sentences are justified. But it is not*

*always observed that an exemplary sentence is unjust, and unjust to the precise extent that it is exemplary. Assume a particular crime is becoming dangerously frequent. In normal times the appropriate sentence would be, say, two years. The Judge awards three; he awards the third year entirely to deter others. This may be expedient; it may even be imperative. But one thing it is not; it is not just. The guilt of the man who commits a crime when it happens to be on the increase is no greater than that of another man who commits the same crime when it is on the wane. The truth is that in such cases the Judge is not administering strict justice but choosing the lesser of two practical evils. He decides that a moderate injustice to the criminal is a lesser evil than the consequences to the public of a further rise in the crime-wave."*

*It is implicit in the observations of the learned Lord Justice that an "exemplary" sentence may be justified only where the injustice thereby done to the individual is "moderate"; a degree of injustice in that sense may be a lesser evil than the neglect of the broad interests of society which sometimes require that severe sentences, possibly in excess of the true deserts of the offender in the particular service circumstances of his case, should be imposed for deterrent effect. But I cannot conceive of any principle which could justify, for the sake of deterrence, the imposition of a sentence grossly in excess of what, in the circumstances of a particular case and having regard only to the crime and the degree of the particular offender's moral reprehensibility, would be a just and fair punishment. This would be to lose sight of the fundamental principle of sentencing;*

*"What has to be considered is the triad consisting of the crime, the offender and the interests of society". (*S. v. Zinn*, 1969 (2) S.A. 537 (A.D.) at p. 540). This crisp but comprehensive* dictum *by Rumpff, J.A. (now Chief Justice), has been quoted and applied times without number. Some further observations made by the learned Judge of Appeal in the course of his judgment sometimes appear, however, not to be fully appreciated, to judge by cases which come up for review. It should be remembered that the learned Judge of Appeal also pointed*

*out that the over-emphasis of one of the constituents of the triad and the under-estimation of another constituted a misdirection and that it was wrong to exaggerate "beyond permissible limits" the nature and effect of the crime.*

*It is, I think, a truism that just as a court should not, in an excess of compassion or pity, show a criminal convicted of a serious and prevalent type of crime undue leniency at the expense of the best interests of society, so it should not by over-zealous protection of society denigrate the concepts of justice and fairness in relation to the individual offender. That, when all has been said, remains the true function of the court in any criminal case---to do justice to the State and to the man in the dock---to acquit him if he is not guilty but to convict him if he is guilty and then to sentence him, within the framework of the law, according to what is just and fair in all the circumstances. Where it is not possible to reconcile with the need to protect society a sentence which, having regard only to the crime and the offender, appears to be appropriate, a court would disregard its duty and abuse its powers if it did not ensure that the deviation from justice (in the sense of imposing punishment more severe than the particular offender merited) was no greater than was necessary in the public interest and that the sentence, though more severe than it would otherwise have been, was nevertheless not unreasonable in all the circumstances.'*

[50] Our country and society without a doubt suffers a scourge of gender-based violence in the form of either rape or femicide and all other horrific forms of abuse against women In *S v SMM*[10] the following was said about this in the context of deterrence and retribution in cases like these:

*'Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children . . . The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to*

[10] S v MM 2013 (2) SACR 292 (SCA) at [14]

*exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge—the other sentencing objectives, including rehabilitation, can never be discarded altogether, in order to attain a balanced, effective sentence*'.(emphasis added)

[51] I endorse the sentiments expressed in this case. To impose a sentence of life imprisonment on a young man with a clean track record and who is barely an adult which means that he has to be removed from society for the rest of his life, induces a sense of shock and it is a disturbingly inappropriate. Such a sentence unduly places an emphasis on the retributive aspects of punishment and pays scant regard to the appellant's prospect of rehabilitation. There is no evidence that the appellant cannot be rehabilitated and that he should therefore spend the rest of his life in prison. Not even the expert witness on gender-based violence called by the State during the sentencing proceedings suggested this. In fact she was candid that she was simply not qualified to comment on rehabilitation programs available to sentenced prisoners and whether there was no likelihood that the appellant could be rehabilitated.

[52] I am of the view that the interests of society, the seriousness of the offence as well as the retributive and deterrent aspects of punishment can be satisfied by imposing a sentence of long-term imprisonment other than a sentence of life imprisonment. In the result, the following order is made:

1) The appeal against the sentences imposed on counts 1 and 2 is dismissed.

2) The appeal against the sentence imposed on count 3 (Murder) is upheld and replaced with the following sentence:

"*That the accused is sentenced to Twenty-Five (25) years imprisonment*. *The sentences imposed on counts 1 and 2 shall run concurrently with the sentence imposed on count 3.*"

3) The sentence on count 3 is antedated to 4 November 2022.

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**R.C.A. HENNEY**
**JUDGE OF THE HIGH COURT**

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**J.I. CLOETE**
**JUDGE OF THE HIGH COURT**

**NZIWENI, J:**

***Introduction***

[53] This is an appeal with leave from the trial court, against a sentence of life imprisonment that was imposed upon the appellant after a conviction for premeditated murder. The case was tried before Thulare J. The appellant, who was legally represented, was convicted of (count one) assault with intent to do grievous bodily harm; (count two) theft; and (count three) murder. Although the convictions on the three counts involved the same victim, they were committed on different occasions and were only consolidated for trial purposes.

[54] It is common cause between the parties that the indictment expressly indicated that the murder charge was read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997 ("CLAA") [in essence, the State invoked the mandatory minimum term of imprisonment of 15 years for a first offender ]. It was also common cause before the court a *quo* that facts alleged in the indictment did not fall within the purview of section 51 (1) of the CLAA, as the indictment did not expressly mention that the murder was committed with premeditation. Thus, the appellant was not forewarned in the indictment about the possibility of such a finding by the trial court.

[55] Notably, in respect of the murder charge, the trial court in its verdict made a specific finding that the circumstances of the case established premeditation. In the result, notwithstanding the fact that the State did not invoke the provisions of section 51 (1) of the CLAA, the appellant was sentenced to a term of life imprisonment in terms of section 51 (1) of the CLAA.

[56] So far as the provisions of section 51 (1) are concerned, the appellant asserts that it was incumbent on the State to specify the case to be met in such a way that an accused person properly appreciates the charges against him and the consequences thereof. The appellant further asserts that the trial court exercised its discretion unreasonably by imposing life imprisonment. Accordingly, the appellant asserts that the life imprisonment sentence is disproportionate to the relevant crime.

[57] Therefore, the central issue that falls to be considered in this appeal is whether, in the circumstances, the trial court was correct to invoke the provisions of section 51 (1) of the CLAA. And whether there were substantial and compelling circumstances that warranted the trial court to deviate from the prescribed sentence.

[58] It is necessary to briefly recite the background and the circumstances of each offence.

***Events of 01 December 2018 to 04 December 2018***

[59] The appellant was convicted mostly on the following facts. The deceased was searching for her phone and it was found where the appellant was seated; the appellant and the deceased went to the bedroom because of what was on the deceased's phone; the appellant had the deceased's phone when they were in the bedroom; the deceased never got her phone back; the appellant never handed the deceased's phone to her; that the friends of the deceased did not want the appellant and the deceased to be in the same place; that the appellant was asked to leave the house of the deceased. The appellant saw a message on the deceased's phone, kept her phone, assaulted her on 01 December 2018. Evidence shows that amongst other things, he strangled her. He had to be taken away to the University of Western

Cape and the party the deceased was hosting had to be abruptly stopped because of the actions of the appellant.

[60] On 02 December 2018, a police man who had been a neighbour of the deceased, observed that she was fearful of the appellant, when she went to him to seek advice about what to do concerning the events of 01December 2018.

[61] On the very same day [02 December 2018], the appellant went to the deceased's place of work, notwithstanding the fact that the deceased refused to see him; he remained there. As a result, he had to be escorted out of the store where the deceased worked.

[62] On 03 December 2018, the deceased related to a co-worker that the appellant still had not returned her phone to her and that she was fearful of the appellant.

[63] On the evening of 03 December 2018, the appellant went to the deceased's place and an argument ensued inside the house. The altercation proceeded outside and a neighbour is reported to have heard the deceased asking the appellant why he was doing the things he was doing to her.

[64] When the altercation went back inside the house, the appellant stabbed the deceased 11 times with a knife he had in his possession and left her to die.

[65] On 04 December 2018, the appellant contacted the police and acted as if he discovered the body of the deceased, and that he did not know what had happened to her.

***The Law***

[66] The question concerning failure to inform an accused person beforehand regarding the applicability of the provisions of the CLAA imposed upon him or her; or in an instance where the indictment incorrectly states an offence as one of contravening s 51 (2) instead of s 51 (1) of the CLAA, have been the subject of

judicial scrutiny both in the Supreme Court of Appeal ("SCA") and the Constitutional Court.

[67] In this regard, the SCA has developed an established jurisprudence on this issue. Thus, there is a long line of cases stemming from the SCA that state that incorrect stating or not mentioning applicability of the CLAA, does not mean to say that the sentencing court cannot impose a sentence that falls within the purview of the applicable penalty regime. However, the SCA has repeatedly emphasised that each case must be assessed on a case-by-case basis and in the light of its particular circumstances.

[68] The SCA also stressed that emphasis must be at substance and not just at form. The breadth of its [SCA] authority demonstrates that if an accused person was not prejudiced in the defence of his case, the SCA will show reluctance in overturning the result of a fair trial where there was no denial of accused's constitutional rights.

[69] The SCA, for obvious reasons, eschews and is also quite wary to laying down a general rule that the indictment or chargesheet must recite in every case either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. In my view, it makes absolute sense that our courts avoid rigidity and formalistic application of the law so as to elevate form over substance. In essence, the SCA concluded that despite a flaw in the indictment or chargesheet, the defect may be curable if it would not affect the accused person's fair trial. At this point, a detailed discussion of the SCA cases is necessary.

[70] In *S v Mashinini and Another* 2012 (1) SACR 604 (SCA) (21 February 2012), the appellants, who were legally represented were charged in the Regional Court, with rape read with the provisions of s 51(2) of the CLAA. The accused pleaded guilty to the charge. The accused were 'convicted as charged'. Pursuant to the conviction, the Regional Magistrate stopped the proceedings and referred the matter to the High Court for sentencing.

[71] In the High Court, the indictment reflected that the accused were convicted of an offence referred to section 51 (2) of the CLAA. During the sentencing proceedings, no evidence was led in mitigation or aggravation of sentence. The High Court proceeded and sentenced the accused to life imprisonment. The accused appealed their sentence to the SCA. The argument before the SCA, proceeded on the footing that the sentencing judge acted incorrectly in sentencing the appellants to life imprisonment in terms of section 51 (1) of CLAA, where the appellants were convicted of rape read with the provisions of s 51(2) of the CLAA and whether the sentence imposed rendered the trial unfair.

[72] The SCA found that there was a misdirection which vitiated the sentence. According to the SCA, the misdirection stemmed from the fact that the appellants were sentenced for an offence different from the one for which they were convicted. As such, the SCA found that in the *Mashinin*i matter, there was absolutely no basis for the matter to be referred to the High Court as the Regional Court Magistrate had the necessary competence to sentence the appellants. The *Mashinini* matter, is similar in some respects to the Constitutional Court case of *S v Ndlovu* 2017 (2) SACR 305 (CC), where the Regional Court Magistrate, when sentencing the appellant, made reference to the fact that the appellant was charged with Rape read with section 51 (2) of the CLAA. And when the Regional Magistrate pronounced the verdict, he stated that the appellant was found 'guilty as charged.' Based on that, the Constitutional Court held that the magistrate's statement that the accused was found 'guilty as charged', means that he was convicted of rape read with the provisions of section 51 (2) and not an offence referred to part I of schedule 2.

[73] The questions presented by the *Mashinin*i case in the SCA and the *Ndlovu* matters, are readily distinguishable from the present one because the trial court in the instant case, before the conviction, specifically indicated in its judgment that it had made a finding of premeditation, notwithstanding the failure of the State to invoke the appropriate statutory penal provision under section 51 (1) of the CLAA.

[74] In *S v Legoa* [2002] 4 All SA 373 (SCA); 2003 (1) SACR 13 (SCA) (26 September 2002), the SCA dealt with two issues. The first one related to the

elements of the offence set out in the schedule of the CLAA. The second one dealt with failure to warn an accused with the correct applicable penalty regime.

[75] In the *Legoa* matter, the SCA, through Cameron JA, stated the following at para 20-21:

> "Under the common law it was therefore 'desirable' that the charge sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasised 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 came into force'. The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is 'to be informed of the charge with sufficient detail to answer it'. What the ability to 'answer' a charge encompasses 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 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 a 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 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 the 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 of the relevant circumstances.

The question thus remains whether the accused had a fair trial under the substantive fairness protections afforded by the Constitution. In this regard, the judgment of the Full Court of the Transvaal Provincial Division in *S v Seleke*, though delivered before the Constitution, remains instructive. The Full Court held under the provisions of the Dangerous Weapons Act 71 of 1968 that although it was desirable for the charge to contain reference to the penalty, this was not essential, and its omission not irregular: the test was whether the accused had had a fair trial (681-2). The Full Court observed (my translation from the Afrikaans):

'To ensure a fair trial it is advisable and desirable, highly desirable in the case of an undefended accused, that the charge sheet should refer to the penalty provision. In this way it is ensured that the accused is informed at the outset of the trial, not only of the charge against him, but also of the State's intention at conviction and after compliance with specified requirements to ask that the minimum sentence in question at least be imposed.' (682H).

[24] . . . Although the legislature had not created new offences, it had to appear at conviction that elements in question were present. Botha J observed (I translate):

'The words in my opinion convey the meaning that the facts that must be present to make the minimum sentence compulsory must be established at conviction in the sense that they must be included in the facts on which the conviction is based.'

[76] While I readily accept that the circumstances of the case would more readily lend themselves to the *Legoa* matter, however, the *Legoa* matter is distinguishable from this matter merely because the evidence to enhance penalty jurisdiction was led after a verdict on guilt. As already mentioned in paragraph three that, the finding of premeditation in this matter was made before the verdict. Thus, the trial court acted correctly in doing so.

[77] In *S v Tshoga* 2017 (1) SACR 420 (SCA), the matter was heard by a panel of five judges, and it was a split judgment. The majority judgment is penned by Schoeman AJA with Dambuza JA and Nicholls AJA concurring. In *Tshoga*, in charging the appellant, the charge sheet only made mention of the fact that the complainant that was raped was a 10 - year- old. There was no mention of the provisions of the CLAA. The majority decision at paras 13-16; 20, 22 and 23 the following is stated:

> "[13] In dealing with the contents of the charge sheet and what should be contained therein, and comparing the position pre- and post- Constitution, the court found that the salient facts the State intended to prove in order to increase sentencing jurisdiction under the Act ought to be clearly set out in the charge sheet. But, the court continued, the matter was one of substance and not form and as a result concluded that a requirement that every charge must set out either the 'specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it, if applied with undue formalism may be insufficiently heedful of the practical realities under which charge sheets are frequently drawn up.
>
> [14] As stated above, a vigilant examination of the relevant circumstances is necessary to determine whether an accused has had a fair trial. Thus, *Legoa* pertinently required that the evidence, before conviction, should encompass all the elements that bring it within the purview of s 51 of the Act and the increased penal regime. It was not a requirement that the provisions of the Act should be set out in the charge sheet, but the enquiry remained whether the accused had a fair trial, which included his ability to answer the charge.
>
> [15] Later in S v Mthembu this court (Ponnan JA and Petse AJA writing for a full court) stated, with reference to *Legoa* and *Ndlovu*, that 'a fair trial enquiry does not occur in vacuo, but . . . is first and foremost a fact-based enquiry'.
>
> [16] In *S v Ndlovu* the issue whether a firearm was a semi-automatic weapon was not mentioned in the charge sheet. The prosecutor did not lead evidence in

that regard and a policeman, in response to a question by the magistrate, casually mentioned that the firearm in question was a semi-automatic firearm, without providing a basis for this conclusion. In setting aside the compulsory sentence of 15 years' imprisonment and substituting it with three years' imprisonment, Mpati JA said:

'*The enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial*. And I think it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused **at the outset of the trial**, if not **in the charge sheet then in some other form**, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences. Whether, or in what circumstances, it might suffice if it is brought to the attention of the accused only during the course of the trial is not necessary to decide in the present case. It is sufficient to say that what will at least be required is that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly.'

[20] This court in *Kolea* thus digressed from the other cases that stated that there had to be a vigilant examination (*Legoa* and *Mashinin*i); 'a fair trial enquiry does not occur in vacuo, but . . . is first and foremost a fact-based enquiry' (*Mthembu*); that '[T]he enquiry, therefore, is whether, on a vigilant examination of the relevant circumstances, it can be said that an accused had had a fair trial'; and '. . . at least be required that the accused be given sufficient notice of the State's intention to enable him to conduct his defence properly (*Ndlovu*). The court however found, in *Kolea*, that the appellant had not been prejudiced. The court considered the fact the appellant did not raise any prejudice in the conduct of his trial due to the failure to refer to s 51(1) of the Act in the charge sheet in the regional court. Nor was this an issue on two occasions in the high court on sentencing and appeal. It was raised for the first time in this court. The court also had regard to the fact that the State had, at the outset, made it clear that it intended to rely on the Act in the charge sheet. It is this latter factor that

distinguishes *Kolea* from the instant matter: no reference to the Act was made in the charge sheet.

[22] In Kolea the court was not saddled with, and it did not pronounce upon, what the position would have been had the Act not been mentioned, as it had been mentioned. Therefore, the pronouncement that the Act had to be mentioned in a charge sheet at the outset of a trial was *obiter dictum* for it was not necessary for the decision of this Court in determining whether or not there had been prejudice. Since it decided that there was a reference to the Act, any discussion as to what the position would have been had there been no reference to the Act, 'could not advance the reasoning by which the decision was reached.' It is also clear that the discussion in Kolea as to the possibility of prejudice considered that substance was of paramount importance and that form was secondary. I am of the view that a pronouncement that the Act had to be mentioned in the charge sheet or at the outset of the trial would be elevating form above substance. Every case must be approached on its own facts and it is only after a diligent examination of all the facts that it can be decided whether an accused had a fair trial or not.

[23] The appellant in this matter had opportunities in five separate proceedings to raise a complaint of possible prejudice in the proceedings: in the regional court after conviction, during two sentencing procedures in the high court and during two appeals to the full court. He failed to do so and only belatedly raised it in this court. He was not ambushed as the charge sheet set out that he was charged with the rape of a ten-year-old girl, [I thought this argument is related to this case before you because you started the sentence with "The appellant in this matter…" maybe you should say "The appellant in the Legoa…"] which brought the offence within the ambit of s 51(1) of the Act as was required in *Legoa*. He was convicted of the rape of a girl under 16 years, which is a conviction that attracts the minimum sentencing regime in terms of the Act. He had effective legal representation throughout the trial until his conviction and the transfer to the high court. Furthermore, he was legally represented during both sentencing proceedings in the high court and in both appeals to the full court. There was no objection in the regional court after his conviction to the fact that

the matter was being transferred to the high court and to the prospect of life imprisonment being imposed. He participated fully in the trial and pleaded not guilty. He did not raise any prejudice prior to either of the two sentencing procedures in the high court or raised it in either of the two appeals to the full court. In both sentencing proceedings he knew the consequences of his conviction, as the magistrate informed him that he faced life imprisonment, but he chose not to testify during the sentencing procedures." Footnotes omitted and emphasis added.

[78] Again recently, the SCA has emphasised and recognised in the case of *Benedict Moagi Peloeole v The Director of Public Prosecutions*, 2022 (2) SACR 349 (SCA); [2022] 4 All SA 1 (SCA) (16 August 2022), that the ultimate question remains 'whether the accused had a fair trial under the substantive fairness protections afforded by the Constitution'.

[79] From the aforegoing, it is evident that in a series of decisions beginning almost two decades ago, the SCA has held the view that though it is desirable, it is not essential that the facts the State intends to prove to increase sentencing jurisdiction under the CLAA be clearly set out in the chargesheet or to warn an accused with the correct applicable penalty regime. This then means that in such circumstances, the correctness of the impugned sentence does not depend on the form but on whether the accused person received a fair trial.

[80] Adopting the view of the SCA, I do not believe that the fact that the State invoked an incorrect statutory penal provision is the deciding factor in this case. Instead, as mentioned above, the answer to the question raised in paragraph five of this judgment in turn depends upon the relevant circumstances of the case.

***Premeditation***

[81] Premeditation is an aggravating factor that falls within the statutory criteria set out in section 51 (1) of the CLAA. To that end, the absence or presence of premeditation is an important sentence feature.

[82] Dealing with the issue of premeditation, the question that arose during the hearing of the appeal was whether the proven facts justified the inference that the killing of the deceased was not a momentary flare up and whether the trial had sufficient evidence to infer premeditation. In as much as cases that present direct evidence showing a resolution to kill are rare, in most instances the resolve to kill is inferred from the proven facts of each case including the behaviour of the accused person at the critical time.

[83] For the State to prove premeditation it is not necessary to prove that an accused person was in a certain mind set at a certain point before the commission of the crime. The element of premeditation can be present even if the act of killing happened quite fast. Premeditation does not take long to form in the mind of the accused. Furthermore, there is nothing wrong with consideration of preceding events as forming part of premeditation. In this matter, the State had wealth of evidentiary foundation, to show premeditation. While the appellant may not have started out that particular evening intending to kill the deceased, by the time he stabbed her 11 times that was his intention.

[84] I have considered the submission that there was no evidence of premeditation in relation to the murder. The violence meted upon the deceased is one of the factors that point to the fact that the appellant premeditatedly set out to kill the deceased. So far as this case is concerned, the facts clearly indicate that the attack on the deceased was vicious and gruesome and involved use of a weapon. Judging by the injuries that were sustained by the deceased, it is far more likely that a substantial weapon was used to inflict a wound that measured 110 mm x 10mm and to stab her through her clothing and into her stomach, kidney and lungs. The weapon used does not suggest that it was a spontaneous pick of an object that happened to be there by chance. The ferocity, extent and the nature of violence inflicted upon the deceased was of the most severe kind. The ferocity of violence meted out on the deceased suggest that the appellant was prepared for trouble and, judging by the weapon, it is evident that the appellant was prepared to cause serious injury with it. At least moderate force had to be used for the type of injuries that were sustained by the deceased. This was a deliberate, callous and calculated killing.

[85] The injuries were inflicted in the most vulnerable area of the body. The persistent stabbing was inflicted with the clearest possible intention to kill and the injuries inflicted upon the deceased do not point to spontaneity. If there was one or three stab wounds, perhaps it could be said that the stabbing of the deceased was an impulsive act taken in a sudden moment of rage. The appellant continued stabbing the deceased 11 times. By all accounts, committed over an extended period of time.

[86] Moreover, the actions of the appellant show that he was determined and resolved to complete his murderous intent. The injuries depicted in the pathologist's report evince the amount of rage exhibited on the deceased. As such, this demonstrates that the attack on the deceased was cold-blooded and without mercy.

[87] On top of that or perhaps more importantly, the evidence also reveals that the appellant had stabbed the deceased in such a way that she was incapacitated to seek help, that was also a significant factor to take into account when assessing whether the appellant had the requisite intention and whether the killing was premeditated. Given the nature of the injuries sustained by the deceased, it is apparent that at the time the appellant intended to kill her, and not merely to seriously hurt her.

[88] Furthermore, on his own version the appellant's evidence evinces that after he had stabbed the deceased, the deceased was in a perilous state. It is not the evidence of the appellant that when he left the deceased, she was already dead or was standing on her own. He knew that the deceased was in immediate danger of losing her life.

[89] Given the infliction of clearly serious injuries upon the deceased that obviously rendered her immobile; helpless; unable to raise alarm; bleeding and more so without any phone. In the circumstances, surely before the appellant left the premises, at this point he must have stopped and thought about the clearly precarious state of the immobilised deceased; and then resolved that he was going to leave the deceased to die from the serious injuries that he had just inflicted on her.

The appellant callously abandoned the seriously injured deceased alone and during the night while she was dying. As such, the deceased bled from her injuries.

[90] It is perhaps, at this point, appropriate to set out the injuries that were inflicted to the deceased by the appellant: The deceased's body exhibited the following wounds:

1. she had an incised wound to the right side of her skull.. The wound extended to the thickness of the scalp and measured approximately 110 x 10mm.

2. About 200 millimetres to the left posterior midline a further sharp force stab wound measuring 22 mm x 11 mm was noted on the left side of the thoracic part of the back. The wound track continued to the third intercostal space, perforating the upper lobe of the lung and the aortic arch.

3. An inverted "V" shaped incise wound on the left side of the occipital part of the scalp posterior of the left earlobe, measuring 25 mm x 3mm and 20 mm x 2mm.

4. She also had a sharp stab wound to the left side of the abdomen that measured 20 mm x 7mm and penetrated the lobe of the liver. The track of the wound perforated the muscle of the abdomen, the left kidney and the aorta inferior to the renal vessels.

5. A stab wound to the left side of the thoracic part of the back which measured 40mm x 11mm. The wound was located 180 mm to the left posterior midline.

6. Another stab wound measuring 13mm x 7mm was noted to the lateral aspect of the left side of the back. The track of the wound perforated the underlying intercostal muscles.

7. An incised wound measuring 17mm x 3mm on the right side of the thoracic part of the back superiority.

8. Another incised wound measuring 18 mm x 3mm was noted to the right side of the thoracic part of the back.

9. A small stab wound measuring 4 mm x 3mm on the left side of the abdomen.

10. Another stab wound measuring 15 mm x 6mm, on the left upper arm, perforating the muscles of the left upper arm.

11. A large stab wound measuring 30mm x 18mm on the lateral aspect of the left upper arm.

12. There were abrasions to her right elbow posterior, on the right and the left breasts. There were also abrasions to the third finger on the right hand.

[91] As regards the appellant deciding to leave the deceased in the position she was in and with those injuries that he had inflicted, that proved a moment of calm reflection about him deciding to seal the deceased's fate. It is important in this context to bear in mind that by leaving the deceased alone in the state she was in, he knew of the grave danger which he placed the life of the deceased in. She did not give her an opportunity to survive. He knew of the deceased's vulnerability state due to the injuries that he had inflicted.

[92] At the cost of repetition, of more significance is the fact that the appellant took a deliberate step to seal the fate of the deceased. He took no steps to obtain assistance. It is quite clear in my mind that in such circumstances, the appellant was able to think and appreciate the obvious inevitable consequences of his action. It is thus an inescapable inference that the appellant had at least made preparation for the death of the deceased by seriously injuring her and then living her alone to die. This in my mind shows the murder of the deceased was not an opportunistic crime but premeditated.

[93] Furthermore, in order to prove premeditation, the State also does not need to show that the weapon used was organised at a certain time before the crime was committed. In this case, the weapon used to attack the deceased was never discovered. The evidence also reveals that owners of the house where the deceased was murdered did not miss a knife.

[94] It would appear therefore, that from the aforegoing evidence, it is evident that there were sufficient proven objective facts that make it irresistible to infer and justify a finding of premeditation and intentional killing. Consequently, the only inference possible from the proven facts of this case is that the killing of the deceased was committed with premeditation.

[95] Thus, I do not accept that in the present case there was any error on the part of the trial judge in finding an element of premeditation. In this matter, there was sufficient evidence to justify a finding of premeditation.

***Fair trial***

[96] It is central to the principle of fair trial that the Constitution of the Republic of South Africa Act,1996 “the Constitution”, is the supreme statute of the Land. The Constitution embodies and safeguards the fundamental right to fair trial. In terms of section 35 (3) of the Constitution, the right to fair trial includes the right to be informed of the charge with sufficient detail to answer it. The record reflects that the appellant understood the charge he was facing. He understood the allegations levelled against him by the State. The appellant stated that he understood the charge against him. It was never asserted during the trial proceedings that the appellant did not understand the nature of the charges he was facing.

[97] The question that aptly arises is whether the appellant was aware of the direct consequences of the charges he faced, notwithstanding the fact that the indictment did not indicate that count three was read with the provisions of section 51 (1) of the CLAA.

[98] Despite the flaw in the indictment, however, it is easy to conclude that the flaw was in fact cured by a wealth of evidence that plainly indicated that there was an element of premeditation in this case.

[99] As far as this case is concerned, just by looking at the facts of this matter it becomes evident that the actions of the appellant were egregious. Certainly, one does not need a statute to be aware of that. That together with the fact that the appellant was arraigned in the High Court, plainly indicates that life imprisonment was a reality that was facing the appellant if convicted. This conclusion is buttressed by the SCA decision in *Tshoga* supra. Furthermore, there is nothing to suggest that the appellant would have handled his defence any differently had he been made aware in the indictment that he was facing life imprisonment and an allegation of premeditation. Importantly, even the appellant does not claim that. In the circumstances of this case, it cannot be said that the appellant was deprived of a fair trial guaranteed to him by the Constitution.

***Substantial and compelling circumstances***

[100] The brutal stabbing of the deceased was entirely unnecessary. The words to describe the horrific nature of this crime are insufficient. It need hardly to be pointed out that this particular case is gruesome. The events of 01 December 2018, to 03 December 2018 point in one direction. They reveal a sinister pattern of physical abuse and control. Clearly the evidence here reveals that the incident of the 03 December 2018 was not a random event. Particularly, in light of what happened in the days leading to the incident of 03 December 2018.

[101] The actions of killing the deceased, who was defenceless, were particularly bloody, brutal and indicative of wanton cruelty and impunity. The courts cannot allow impunity for serious crimes.

[102] Our country has an epidemic of violence against women. This matter involves a gender-related offence. The deceased was intentionally killed by someone who was closely related to her. Hence, the appellant's actions are a form of femicide. Despite efforts by courts to address the continuing scourge of femicide; this type of

offence remains prevalent. The prevalence of femicide cannot be ignored in sentencing proceedings. Sentences imposed by courts are one of the measures used in an effort to deter and prevent gender-based violence. There is therefore a need for deterrent sentences.

[103] It is not fanciful to think that the deceased suffered significant mental and physical trauma before her untimely death. The deceased was alive at the time of stabbing as indicated by her defensive wounds. The deceased's killing was committed with intense violence. The photographs of the scene depict a scene of gruesome violence. The deceased lost her life under terrible and unnecessary circumstances. It is frightening to know that another person can do this to another human being, particularly to a woman.

***Youthful offender***

[104] The appellant was 19 years old at the time of conviction and sentence. Our law treats young offenders aged 19 as adults. However, it is a fact that they are youthful offenders. It is thus in the interest of the community that a youthful offender should be afforded a second chance for a fresh start. Equally, it is in the interest of society that with youthful offenders the aim should always be rehabilitation. There is no question about this. However, a youthful offender should be deserving of the benefit of a second chance. It is paramount that the circumstances of each case must demonstrate that the youthful offender is not incorrigible but eligible to rehabilitation. The question that aptly arises in this case is whether the appellant's age ought to have operated in his favour.

[105] It is, of course, the case that the appellant's age makes him a relatively young person.

[106] Insofar as the age of the appellant there was no evidence led to show that the appellant was an immature 19-year-old. There was nothing that could have reduced his moral blameworthiness. Instead, the appellant had demonstrated himself as someone who is callous and ruthless, who does not hesitate to unleash extreme

violence on a woman. In fact, the deceased's suffering did not stop the appellant or make him get help.

[107] Furthermore, the events from 01 December to 04 December demonstrate the appellant as someone who always gets what he wants and gets away with it. The appellant showed no regard for the sanctity of human life. To stab a woman in that fashion and leave her to bleed to death, by almost any measure, was atrocious. In my mind, it is aggravating that this offence occurred within the deceased's 'place' and involved a gross abuse of trust and the worst kind of betrayal. What the appellant did is a socially reprehensible act.

[108] The sign of repentance is the desire to help fix the harm one has caused. For remorse, there must be some kind of accountability and responsibility. In the present case, the appellant has not admitted responsibility for the offences. It is also aggravating that the appellant after committing the brutal offence, was unrepentant and tried to cover his tracks by attempting to mislead the police. He has shown no remorse for what happened, and he continued to lie. During the trial, instead of taking responsibility, he blamed the victim. Blaming her own murder on her. Certainly, the actions of the appellant do not exhibit immaturity. In *S v Dlamini* 1991 (2) SACR 655 (A), it was stated that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his or her deeds rules out immaturity. See also S *v Matyityi* 2011 (1) SACR 40 (SCA) at paragraph 14.

[109] The appellant's premeditation and lack of remorse were also aggravating features. There was absolutely no iota of self-reproach. In my mind the chilling act of remorse reflects lack of accountability and shows that the appellant was not willing to admit his wrongdoing.

[110] Hence, it is difficult to believe that the appellant would be reluctant to reoffend. The type of criminal who has committed such a brazen crime is capable of the worst. I agree with the respondent's counsel that the fact that the appellant comes from a decent and caring-background makes the situation all the more worrying. In my view, that is clearly so when regard is had to the fact that there was no remorse.

[111] The only mitigating factors in favour of the appellant's are his age coupled with the fact that he is a first offender. That said, however, in the circumstances of this case, the appellant's age cannot, in my firm view, lower the degree of culpability he bears for this grave crime he has committed. It is striking that the appellant's first offence involves significant aggravating factors and is one of high culpability. Additionally, there is nothing to show that the appellant has a good potential to be rehabilitated within the community.

[112] It is important to keep in mind that, after everything the appellant did to the deceased, he left her lying alone on the ground bleeding to death from the stab wounds as if her life counted for nothing. The pathologist testified that the deceased lost a lot of blood and as a result her organs were pale. There was no hint of contrition. It may be so that the appellant did something out of character. However, he has also shown himself to be capable of a diabolical behaviour.

[113] No amount of sentence would be enough to make up for what the appellant did. Any sentence other than life will depreciate the seriousness of the offence committed by the appellant. I am therefore of the view that if the trial court did not give a life sentence for this type of case, then it would be difficult to imagine the kind of perpetrator deserving of such sentence. Certainly, the sentence imposed should not demonstrate a lack of comprehension of the magnitude and severity of the crime. Undoubtedly, the aggravating circumstances should be reflected in the sentence imposed.

[114] The next question which arises concerns whether substantial and compelling circumstances exist that warrants departure from the sentence of life. In the circumstances of this case, the age of the appellant and the fact that the appellant is a first offender were not sufficient to constitute substantial and compelling circumstances. These two mitigating factors are overshadowed by the serious impact of the offence. Thus, the appellant's personal circumstances pale in comparison to the gravity of the offence.

***Conclusion***

[115] This court should not overturn the decision merely on the ground that this court would have reached a different one. It must be persuaded that the sentencing decision involved an error of principle or was outside the range of conclusions which were properly open to the sentencing judge.

[116] In the result, I would have made the following order:

Appeal is dismissed

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**C.N. NZIWENI**

**JUDGE OF THE HIGH COURT**

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|---|---|---|
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