

CASE NO. CC29/2013

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

DATE: 30 MARCH 2016

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THE STATE

v

NCEBA NKOSI + 3

BEFORE:

THE HON. MR JUSTICE TSHIKI

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**JUDGMENT ON SENTENCE**

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TSHIKI, J:

This is a judgment on sentence in the matter between the  
15 State v Nceba Nkosi, Mfundo Reuben Gocini, Ntlakanipho  
Bukhayi, Francis Msomi, accused Nos. 1, 2, 3 and 5.

When the accused were initially charged they were six in  
number. Accused No. 6 died before the trial commenced.  
Accused No. 4 who was the son of the deceased. No. 6 was  
20 acquitted at the closure of the State case. That means when  
the defence case was opened there were only four accused in  
total, that is those listed in this judgment.

Accused Nos. 1 to 3 were convicted of conspiracy to  
commit murder at or near Forest Hill in the district of Port  
25 Elizabeth. They had conspired with each other to aid or  
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procure the commission of and unlawfully and intentionally killed the deceased, Mlungisi Michael Gwana, a male person, hereinafter referred to as the first deceased. The first deceased was murdered with axes, stabbed with knives and  
5 the accused also inflicted numerous wounds and injuries on his body. The second deceased, Vuyelwa Gwana, was the wife of the first deceased and she died before the case against her proceeded in Court. She had been charged with the murder of her husband. Accused No. 5, Francis Msomi, was convicted of  
10 being an accessory after the fact of murder of the first deceased. At the time of the offence accused No. 5 was a police officer. He failed to report the crime which was committed in his knowledge and in the premises when he was aware of its commission and at the premises he would  
15 frequently visit. When this Court convicted accused No. 5 it remarked as follows:

“Accused No. 5 has failed to report the crime in contravention of his duties as a policeman. See *S v PHELO AND OTHERS*  
20 *1999 (2) SACR 558 (SCA)*. See also *R v MLAMBO 1957 (4) SA 797*. The mere failure to report a crime is not unlawful and cannot result in a conviction of being an accessory after the fact but the position is  
25 different when a policeman fails to report a

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crime or to make an entry in the  
occurrence book.”

I must say though that when the trial commenced,  
accused Nos. 1 and 3 pleaded guilty to the charges and they  
5 both tendered statements in terms of *Sec 112(2) of the  
Criminal Procedure Act 51 of 1977*.

During the sentence stage Mr Saziwa, for the first  
accused, tendered a report on behalf of accused No. 1 which  
was prepared by a senior probation officer in the service of the  
10 Department of Social Development. Indeed the report confirms  
that accused No. 1 was convicted of conspiracy to commit  
murder and a second count of murder. The report shows that  
accused No. 1's father committed suicide during 1997 and his  
mother is still alive. Accused No. 1 and his two siblings reside  
15 with their mother in a two bedroomed house consisting of a  
sitting room, a kitchen and toilet. Accused no 1 occupies a flat  
in the backyard, made of zinc and has access to electricity.  
Prior to his arrest the accused was employed as a casual  
worker at Cape Building & Truss. His mother receives a  
20 pension from Coca-Cola where she worked prior to her  
retirement.

Mr Skepe, on behalf of accused No. 2 submitted, *inter  
alia*, that by looking at the personal circumstances of accused  
No. 2 the Court will obviously deviate from the prescribed  
25 sentences. Accused No. 2 was born on 7 February 1980. He  
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passed Matric and thereafter enrolled at MSC College. He is married with two girls. One is 16 years old, doing Grade 11. The other child is 5 years, attending crèche. At the time of his arrest accused No. 2 was working at BKB and was earning  
5 R780.00 per fortnight. His mother died in 2010 and his father in 2011. Mr Skepe is of the view that there are substantial and compelling circumstances which justify the evasion of the imposition of the minimum sentences.

Ms Coertzen, for accused No. 3, called the evidence of  
10 Linda Thotana, the probation officer. She testified that accused No. 3, Mr Bukhayi, has had his challenges and has undergone treatment for depression. According to the information accused No. 3 was diagnosed with depression. His family feared that if he was given the treatment for depression  
15 he would commit suicide and therefore suggested that he should not be given the medication for depression. There was also a fear that accused No. 3 would commit suicide. The probation officer has in fact allayed the fears of the Court by suggesting that prison is equipped with all the necessary  
20 treatment. Counsel for No. 3 also referred me to various decided cases. She submitted that accused No. 3 was 16 years at the time of the commission of the offences and therefore a minimum sentence of life imprisonment cannot apply in his case. She submitted further that the youthfulness of an  
25 offender is a mitigating factor and should be regarded as

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persuasive for a lesser sentence as would have been imposed if the accused was an older person.

Accused Nos. 1 to 3 in this matter were convicted of having murdered the first deceased by killing him with  
5 dangerous weapons. They were hired by the close relatives of the first deceased, in particular the first deceased's wife. I must say though that this Court accepted the evidence of the witness Siyabulela who testified to the effect that the second  
10 deceased, who was the wife of the first deceased, had a love affair with accused No. 5. In the present case the murder of the deceased was planned and premeditated. It was also committed by a group of persons acting in the furtherance of a common purpose or conspiracy.

In view of the ages of the accused relative to *Sec 51(1)*  
15 *of the Criminal Law Amendment Act, 105 of 1997*, only accused Nos. 1 and 2 are affected by the application of *Sec 51(1) of the Criminal Law Amendment Act, 105 of 1997*. This is so because at the time of the commission of the offences they were both over the age of 18 years. The result is that they  
20 have a burden to show this Court why the minimum sentence of life imprisonment should not be imposed. I must say though that accused No. 5 is not affected by the provisions of *Sec 51(1) of Act 105 of 1997*.

The offences committed by accused No. 1 to 3 are very  
25 serious and in such offences Courts are required to approach  
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the imposition of sentence conscious that the legislature has ordained life imprisonment in the case of accused Nos. 1 and 2 or a particular prescribed period of imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes and the specified circumstances. Unless there are and can be seen to be truly convincing reasons for a different response the crimes in question are therefore required to elicit a severe, standardised and consistent response from the Courts. In this regard I am quoting from the case of *S v MALGAS 2001 (1) SACR 467 at 481(25)H – I*. Where applicable, the specified sentences are not to be departed from lightly and for flimsy reasons. In this case there can be no doubt that the conduct of the accused, especially accused 1 to 3, has destroyed the first deceased's family. Both parents of Mhlali are already dead as a result of his mother's greed. This obviously has the potential to destroy Mhlali and his siblings as well. In my view, the conduct of this nature has to be discouraged by the Courts by imposing competent sentences.

Having heard the argument by counsel for the accused and counsel for the State, I am of the view that the following sentences are just in the circumstances.

In respect of count 1, conspiracy to commit murder, accused 1, 2 and 3 are sentenced to FIVE YEARS IMPRISONMENT.

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In respect of murder count 2, accused No. 1 is sentenced to LIFE IMPRISONMENT.

In respect of murder count 2, accused No. 2 is sentenced to LIFE IMPRISONMENT.

5 In respect of murder count 2, accused No. 3 is sentenced to EIGHTEEN YEARS IMPRISONMENT. In respect of accused No. 3 the sentences are to run concurrently.

In respect of count 3 being an accessory after the fact to murder, Accused No. 5 is sentenced to pay a FINE OF R5  
10 000.00 or in default of payment of the fine, to undergo imprisonment for TWO YEARS.

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P.W. TSHIKI

JUDGE OF THE HIGH COURT

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