

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
REPUBLIC OF SOUTH AFRICA

CASE NO: A916/2011

In the matter between:

13/8/2012.

DUMISANI SAMUEL ZWANE

First Appellant

SKHUMBUZA RICHARDT NDABA

Second Appellant

MBONGENI ISAAC NDABA

Third Appellant

and

(1)	REPORTABLE:	<u>YES / NO</u>
(2)	OF INTEREST TO OTHER JUDGES:	<u>YES / NO</u>
14/08/12		
DATE		SIGNATURE

THE STATE

Respondent

JUDGMENT

Tuchten J:

- 1 The appellants were convicted together with Mandla Petrus Khumalo on their pleas of guilty in the Eastern Circuit Division of murder. The second appellant was also convicted of malicious injury to property and the second and third appellants were convicted of housebreaking with the intent to steal and theft.. The crimes in question related to an attack on their employer, a farmer, and the theft and damage of his

property. The second and third appellants simultaneously shot the deceased dead with the firearms of which they were in lawful possession. In the course of an incisive analysis of the facts the learned judge found that the case had to be decided on the basis that the motive for the crimes was

... a combination of resentment for perceived unreasonableness and unfairness by the deceased, anger over relatively minor but constant assaults, sexual humiliation and distaste, frustration at their rejection by the community because they were members of the Commandos and finally, the total rejection of the deceased's demand that they kill Mr Lukhele.¹

- 2 The learned judge further found that the murder had not been committed for financial gain and that the thefts had been committed out of hotheadedness. Shortly after the murder the second appellant pushed the deceased's vehicle, with his body in it, down a donga, threw away the deceased's firearm. They took home and shortly thereafter dumped in the veld a Hi-Fi set and eight CDs which they had also stolen. They left a lot of valuable items at the home of the deceased.

¹

A person with whom a friend of the deceased had had "trouble". The deceased and Moolman caused the accused to intimidate Lukhele in various ways and then shortly before his death, the deceased insisted that the second and third appellants murder Lukhele.

- 3 All the appellants were in their 20s when they committed the crimes and were found by the learned judge to be simple farm labourers with no education worth speaking of. Although they initially tried to hide what they had done, they very soon began cooperating with the police and admitted their guilt. The learned judge had “some reservations” about their remorse. She found that the first appellant had probably been influenced by the second and third appellants into joining the conspiracy because the latter appellants were the first appellant’s induna. The appellants were all first offenders.
- 4 Turning to the factors in aggravation of sentence, the learned judge observed that the murder remains a serious offence, particularly where it is premeditated and that the appellants and their co-accused were in a position of trust in the eyes of the deceased. The learned judge then proceeded:

Farmers are particularly vulnerable to attacks. By the nature of where they live they are relatively helpless and especially so when an attack comes from trusted staff members. The impression must not be created that even if ill-treatment has occurred, such murder is a minor offence. The murders of farmers are also unacceptably prevalent, according to statistics which were placed before the court by the state.

5 Under s 51 of Act 105 of 1997, a life sentence is mandatory for premeditated murder unless the court finds substantial and compelling circumstances present. The learned judge did not expressly make a finding that such circumstances were present but sentenced the appellants as follows:

5.1 First appellant: 20 years for murder;

5.2 Second appellant: 25 years for murder; six months for malicious injury to property and six months for housebreaking and theft.

5.3 Third appellant: 25 years for murder; six months for housebreaking and theft.

6 The sentences for the lesser offences were made to run concurrently, so the effective sentences imposed on the appellants were those imposed for the murder.

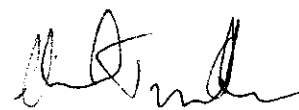
7 In the course of argument on the applications for leave to appeal, the learned judge observed that although she did not say that the sentences were wrong, it was a possibility that she had given inadequate weight to the situation in which the appellants had found

themselves, ie that they could not extricate themselves from their relationship with the appellant without ruining their own lives and those of their families and that there was a possibility that the sentences had been too severe. The learned judge accordingly granted leave to appeal against sentence.

- 8 Counsel for the appellants, in addition to repeating the factors found in the appellants' favour by the learned judge, submitted that we should take into account the mental anguish which he says the appellants are suffering because of the period which has elapsed between the granting of leave on 14 February 2008 and the hearing of this appeal, a period which counsel characterised as being unacceptable in our constitutional dispensation.. I do not think we should take this fact, if such it is, into consideration. If we interfere with the sentence, we must substitute the order which the learned judge should, on that hypothesis, have made. Factors arising after sentence can axiomatically have no bearing on an appropriate sentence.
- 9 Counsel for the appellants could point to no misdirections on the part of the learned judge but referred to the facts of numerous other cases which he urged us to take into consideration. I do not think that the cases quoted to us are helpful. Each case must be decided on its own facts

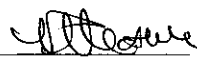
- 10 I do however think that the learned judge placed too much influence on the dreadful prevalence of murders of farmers in this Division. Such murders are generally committed for financial gain amongst possible other motives. The present was not such a farm murder. It was not a "farm murder" as that term is understood in our jurisprudence and public discourse but a murder of a farmer on a farm. The present was a case in which, on the facts found by the learned judge, there had been serious provocation on the part of the deceased. In my view, the incorrect characterisation of the crime by the learned judge as a "farm murder" amounted to a misdirection which entitles this court to substitute its own discretion for that of the trial judge, a discretion which I shall now proceed to exercise.
- 11 In my view, appropriate sentences for the murder would have been 12 years in the case of the first appellant and 15 years in the cases of the second and third appellants.
- 12 I therefore make the following order:
1. The convictions of the appellants are confirmed.
 2. The sentence imposed upon the first appellant by the trial judge for the murder of the deceased is set aside and substituted by a sentence of 12 years imprisonment.

- 3 The sentence imposed upon the second and third appellants by the trial judge for the murder of the deceased are set aside and substituted in the case of both the second and the third appellants by a sentence of 15 years imprisonment.
- 4 The sentences imposed in respect of malicious injury to property and housebreaking and theft are confirmed as is the direction of the learned judge that the sentences for the offences other than murder should run concurrently with that imposed for murder. The effective sentences imposed are therefore 12 years in the case of the first appellant, Dumisani Samuel Zwane, and 15 years in respect of both the second appellant, Skhumbuza Richard Ndaba, and the third appellant, Mbongeni Isaac Ndaba.
- 5 All the sentences imposed upon each of the appellants are ante-dated to 29 January 2001 in accordance with s 282 of the Criminal Procedure Act, 1977.



NB Tuchten
Judge of the High Court
13 August 2012

I agree.



SP Mothle
Judge of the High Court
13 August 2012

I agree.

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HMS Msimang
Acting judge of the High Court
13 August 2012

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