

SOUTH AFRICA / JUDGMENT

S v Nkosi (CC29/2013) [2016] ZAECPEHC 20 (30 March 2016)

[2016] ZAECPEHC 20

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

P.W. Tshiki

CASE / FILE NUMBER

CC29/2013

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CASE NO. CC29/2013

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

DATE: 30 MARCH 2016

THE STATE v NCEBA NKOSI + 3

BEFORE: THE HON. MR JUSTICE TSHIKI

JUDGMENT ON SENTENCE

TSHIKI, J:

This is a judgment on sentence in the matter between the 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 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

Elizabeth. They had conspired with each other to aid or

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 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 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 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 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 different when a policeman fails to report a 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 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 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 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 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 sentences. Accused No. 2 was born on 7 February 1980. He 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 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 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 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 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 offender is a mitigating factor and should be regarded as 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 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 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) 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 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 serious and in such offences Courts are required to approach 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.

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.

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 000.00 or in default of payment of the fine, to undergo imprisonment for TWO YEARS.

P.W. TSHIKI

JUDGE OF THE HIGH COURT

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