IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION, PIETERMARITZBURG

Case No: AR 753/14

In the matter between:

BUHLEBUYEZA KWAZIKWAKHE MAJOLA	FIRST APPELLANT
SIBUSISO PHILEMON MAJOLA	SECOND APPELLANT

And

THE STATE	RESPONDENT

Coram : Jappie JP, Poyo Dlwati J et Maharaj AJ
Heard : 27 July 2016
Delivered : 05 August 2016

ORDER

On appeal from the KwaZulu-Natal High Court, sitting in Mtunzini, Henriques J sitting as a court of first instance:

Accordingly, I propose the following order:

'The appeal against sentence is dismissed.'

JUDGMENT

POYO DLWATI J

[1] The appellants were indicted before Henriques J and an assessor sitting as a court of first instance in the High Court, Mtunzini on one count of murder (count one), one count of unlawful possession of prohibited semi-automatic firearms (count two) and one count of unlawful possession of ammunition (count three). They pleaded not guilty to the charges but were convicted of all charges on 9 April 2013. On 2 May 2013 they were sentenced to life imprisonment for count one and eight years' imprisonment for counts two and three which were taken as one for purposes of sentence.

[2] Their applications for leave to appeal against convictions were refused by the court *a quo* but leave to appeal against sentence was granted. The first appellant petitioned the Supreme Court of appeal in respect of their leave to appeal against their convictions but same was dismissed on 19 February 2016. This appeal therefore pertains to sentence only.

[3] In order to have regard to the contentions raised on the appellants' behalf in this appeal, it is necessary to set out the facts and circumstance surrounding the commission of the offences leading to the convictions of the appellants. The deceased, Zenzele Abednigo Nxumalo, was employed as a manager at Bell Equipment in Richards Bay. He was a human resource practitioner. His duties included perusing and drawing up of charge sheets for disciplinary inquiries, notifying employees of such inquiries and informing them about the results of such inquiries. The first appellant was also employed at Bell Equipment. The

state alleged that he (the first appellant) was facing disciplinary proceedings for having been absent at work without leave. According to the evidence presented by the state the first appellant had been notified by the deceased on 4 August 2011 of an upcoming enquiry against him, something which he denied throughout his trial.

[4] The state further alleged that he (the first appellant) decided not to attend the inquiry as he thought that he might lose his employment. Instead, he decided to kill the deceased in order to avoid the inquiry. For this purpose he enlisted the services of the second appellant. On the morning of 5 August 2011 the appellants proceeded to the deceased's home. They found him at his home, seated in his motor vehicle outside his garage awaiting his wife and children. The second appellant fired several shots at him and he died as a result of gunshot wounds. The appellants were arrested shortly after the incident. After a lengthy trial they were convicted of all counts.

[5] At issue in this appeal is whether the learned judge erred in not taking into account the reason for the killing of the deceased as a factor that could constitute substantial and compelling circumstances therefore resulting in the imposition of a less severe sentence than the one prescribed. Mr Mngadi, on behalf of the appellants, argued that the reason for committing a crime should be taken as a core of the moral blameworthiness of the offender. The court therefore is required to strike a balance between the degree of harmfulness of the offence and the degree of culpability of the offender. He contended that blameworthiness or culpability of the offender is a measure of how severe punishment ought to be. He argued that moral blameworthiness therefore includes internal subjective factors like fear of losing employment. In this regard he referred us to *S v Mvuleni* 1992 (2) SACR 89 (A) at page 94E, which I will deal with later.

[6] The appellants, however, have never admitted that they killed the deceased for their fear of losing employment. They never took the court into their confidence even at the sentencing stage and to explain the real reason for having killed the deceased. For moral blameworthiness one must acknowledge their wrong first and not rely on the courts' finding. It cannot therefore be argued that one needs to look into their fear and establish whether it was real in the circumstances. In *S v Letsolo* 1970 (3) SA 476 (A) at pages 476 – 477, the court, as per Holmes JA pointed out that there are extenuating factors that have a bearing on the weight of moral blameworthiness of an accused. The court held as follows:

> 'Extenuating circumstances have more than once been defined by this Court as any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability. In this regard a trial Court has to consider –
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> (a) whether there are any facts which might be relevant to extenuation, such as immaturity, intoxication or provocation (the list is not exhaustive);
> (b) whether such facts, in their cumulative effect, probably had a bearing on the accused's state of mind in doing what he did;
> (c) whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.
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> In deciding *(c)* the trial Court exercises a moral judgment. If its answer is yes, it expresses its opinion that there are extenuating circumstances.
>
> Such an opinion having been expressed, the trial Judge has a discretion, to be exercised judicially on a consideration of all relevant facts including the criminal record of the accused, to decide whether it would be appropriate to take the drastically extreme step of ordering him [to life imprisonment] or whether some alternative, short of this incomparably utter extreme, would sufficiently satisfy the deterrent, punitive and reformative aspects of sentence. … Every relevant consideration should receive the most scrupulous care and reasoned attention; and all the more so because the sentence is unalterable on appeal, save on an improper exercise of judicial discretion, that is to say unless the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.'

If they had admitted the killing at some stage, then one would examine their actions leading up to the killing. The learned judge, correctly in my view referred to the reason for the killing as senseless. Even if therefore one were to

have regard to that reason, I do not believe, even when taken together cumulatively with other personal circumstances, there would be a deviation from imposing the prescribed sentence of life imprisonment for count one. Their ultimate cumulative impact is not such as to justify a departure from the prescribed minimum sentence. In *S v December* 1995 (1) SACR 438 (A) at 444E ffg, although the matter is distinguishable in that the murder of the two deceased was not premeditated, the accused had been insolent and unreasonable to his former employers, an elderly husband and wife couple. The accused never gave the reason for the sudden outburst and brutal, almost methodical murder of the two deceased and what the actual trigger was for his violent reaction. The court in that case held that the death sentence, especially for the one murder, was the only appropriate sentence – the death sentence at the time of the *December* judgment was still being deliberated on by the Constitutional Court.

[7] Mr Mngadi, in his heads of argument seems to suggest that the court in *Mvuleni supra* found that where the main source of discontent related to employment issues, the death sentence for murder is not the only proper sentence. I disagree. In my view, all that was said in *Mvuleni* was that the appellant's dissatisfaction with his conditions of employment and wages, as well as his disappointment with the first deceased's attitude when he tried to discuss the problem, these were factors that ought to have been considered. In the light of the above and considered in this context it does not necessarily mean that where employment issues are at stake, this would lead to an automatic reduction of the sentence.

[8] Furthermore, the facts in *Mvuleni* were quite distinguishable from the facts of this case. The deceased in this matter was not the cause of the disciplinary proceedings that the first appellant was facing. However, convening disciplinary hearings was something that fell within his job description.

Therefore he was killed only for performing his duties. That, in my view, is an aggravating factor. For that matter even if one has to accept that the first appellant's fear of losing employment was real, how could it have been so if he had not attended the hearing first. In fact in *Mvuleni supra* at page 94D Grosskopf JA held that the presence or absence of mitigating and aggravating factors must be considered against the background as supplied by the appellant's own evidence.

[9] The same goes for the second appellant and that is he knew that he was being asked to assist in the commission of a crime of a very serious nature. Nothing prevented him from resisting participation in such a heinous crime. Hence, *S v Smith and Others* 1984 (1) SA 583 (A) will therefore not find application in the present matter. It therefore cannot be said that the court a *quo* misdirected itself in any way or that the sentence imposed is shocking, startling or disturbingly inappropriate. Having considered the learned judge's sentence, I agree that there are no substantial and compelling circumstances that justified deviation from the prescribed sentence. The trial court gave careful consideration to all factors relevant to sentence and it gave a sentence which it considered appropriate. Our interference is therefore not warranted. Any mitigating factors that are present in the appellant's personal circumstances are outweighed by the gravity of the offence, its prevalence and the interests of society. The appeal must therefore fail.

Order

[8] Accordingly, I propose the following order:

'The appeal against sentence is dismissed.'

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POYO DLWATI J

I agree

_____ _____

JAPPIE JP **MAHARAJ AJ**

Date of Hearing	: 27 July 2016
Date of Judgment	: 05 August 2016
Counsel for Appellant	: Mr Mngadi
Instructed by	: Justice Centre Durban
Counsel for Respondent	: Adv F Van Heerden
Instructed by	: The Director of Public Prosecutions