NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: CC72/2007

DATE: 15 OCTOBER 2009

In the matter between:

THE STATE

and

RICHARD BOB MKHWEBANE	**FIRST ACCUSED**
BENJAMIN KEKANA	**SECOND ACCUSED**
MALEETO MOLOTO	**THIRD ACCUSED**

SENTENCE

PHATUDI (J)

[1] Richard Bob Mkhwebane, Benjamin Kekana and Johanna Mmaphuti Mponseng Maleeto Moloto, the convicts before me, have been convicted of Murder read with the provisions of Section 51(1) of the Criminal Law Amendment Act 105 of 1997. I will, for convenience, refer to them as Accused 1, 2 and 3 respectively.

[2] Whereas sentencing an offender was, still is, and will always, never be an easy task. There are numerous factors that one must satisfy himself before considering any appropriate sentence for an offender. On this basis, I enquired from counsel for the state if the accused were indeed made aware of the applicability of the Criminal Law Amendment Act; Act 105 of 1997 (Minimum Sentence Act) "The Act".

[3] Counsel for the state, accompanied by the counsel for accused, confirmed that at the beginning of the trial, the state applied unopposed for the amendment of the charge to read as set out in paragraph 1 of my judgment. I enquired to the said applicability to

satisfy myself if the legally represented accused were aware to that effect.

[4] It must be borne in mind that none of the legal representatives raised this issue throughout the trial up to and including mitigation.

[5] The principle set out in **S v Makatu 2006 (2) SACR 582 SCA** state (at head note) that;

> "it was incumbent on the state (page 583) to specify the case to be met in such a way that the accused person could appreciate properly not only the charges, but the consequences thereof."

[6] In Makatu, the appellant was sentenced in terms of the provisions of Section 51 (1) of the Act whereas, the indictment referred to the provisions of Section 51(2) of the Act. The court held at page 585 that such a sentence "is a blatant misdirection."

[7] It was further held that "as a general rule, where the state charged an accused with an offence governed by Section 51(1) of the Act, it should state this in the indictment."

[8] I am satisfied, after reassurance, that the legally represented accused was fully aware from the beginning of the trial when the state applied unopposed that the provision of Section 51(1) of the Act is applicable.

[9] Based on that finding, this court is empowered in terms of Section 51 (1) of the Criminal Law Amendment Act, Act 105 of 1997 (the Act) to sentence a person who is convicted of an offence referred to Part 1 of Schedule 2, notwithstanding any other law, but subject to subsection (3) and (6), to imprisonment for life. According, to Schedule 2 Part 1, one of the offences covered is murder, when (a) "It was planned or premeditated."

[10] Section 51(3) (a) provides that;

> "if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justified the imposition of a lesser sentence than the sentence prescribed in those circumstances on the record of the proceedings and must thereupon impose such lesser sentence..."

[11] This court is empowered to exercise its own discretion to determine if there exist substantial and compelling circumstances.

[12] Mr Van Der Westhuizen, counsel for Accused 1, submitted that the accused, born on 20 December 1962 (43 turning 44 in December 2006) when the offence was committed. He submitted further that the accused parents died when he was very young. He was raised by Mkhwebane's family, which surname he ultimately adopted. He left the country in 1982 and completed matric through correspondence while in exile. He received military training at ANC's Mkonto we Siswe in Mozambique and Angola. He returned to South Africa in 1991. He married but his wife passed on in 1992. He has a 17 year old child who has since been raised by his in-laws to date.

[13] The Accused 1 was once employed by the South African National Defence Force from 1992 -1995. He resigned for brick making business that later collapsed. He never had a fixed source of income since.

[14] Mr Van der Westhuizen, submitted further that the Accused has since 26 September 2006 been in custody.

[15] Further thereto; he referred me to Section 271 of Criminal Procedure Act, Act 51 of 1977 (CPA) in considering the accused's previous convictions. He said that the said previous convictions are older than 10 years. He must thus be regarded as a first offender.

[16] Counsel submitted that the Accused conduct of revealing and bringing to book the actual perpetrators, the planning and execution of the offence including up to concealment of the deceased body, be regarded as substantial and compelling, compelling the court not to impose the prescribed sentence, "Life imprisonment".

[17] Dimakatso Jennet Kekana, the wife to accused 2, was led to testify in mitigation for and on behalf of Accused 2. She testified that she is a retired nurse. She is married to Accused 2 and their marriage is blessed with 2(two) children who are 44 and 29 years

respectively. Their First child is blessed in her marriage with 2 children who happen to be the accused grand children.

[18] She pleaded with the court to exercise mercy when sentencing Accused 2 on the basis that they (accused 2 and herself) are indebted to creditors, the major being the bank loan which is secured by their house as a collateral.

[19] She opined that the accused mind and actions have been muddled by his "affair" (which she was not 100% sure of) with Accused 3.

[20] She conceded that the offence committed is very serious and that the sentence will not return the deceased to life.

[21] In addition thereto, Mr Makola, submitted from the bar that the accused was 67 at the time of committing the offence. He has just turned 70 on the 27 September 2009. He said further thereto that the accused suffers from High Blood Pressure and Sugar

Diabetes. He suffered from the said ailment since 1995 (during Rugby Wold Cup, as his wife placed on record.)

[22] Mr Makola said that the argument levelled on behalf of accused 1 in respect of the old previous conviction, be mutatis mutandis applied as that is "res ipsa loquitur." He however, left all other issues in the capable hands of this court.

[23] Mr Sehumane, counsel for Accused 3, submitted that the accused was 34 years at the time of the commission of the offence. She is now 37 years and residing at house 4378, Orchards, Rosslyn, North Gauteng.

[24] He submitted that the accused is taking care of her 4 younger brothers. She is the bread winner and all her brothers are wholly dependent on her. She has a business with 5(five) employees.

[25] He said that the accused is a first offender. He submitted further that the accused still maintain that she did not partake in the planning and execution of the offence. He said that the

appropriate sentence would be 10 Years, 5 years thereof be suspended.

[26] In rebuttal thereto, Mr Mashilo, counsel for the State, submitted that the crime committed is very serious in its complete nature. He said that it is clear from the evidence tendered surrounding the commission of the offence proved that Accused 2 and 3 planned the orchestrated the offence. Accused 2 caused involvement of Accused 1 it the execution.

[27] He said that the planning was not "in a spare of the moment". The planning was made some days before. Accused 2 and 3 meant what they did and never changed their minds.

[28] When one evaluates the evidence in totality, it is indeed clear that the planning and execution of the offence took place on a number of days. The deceased lived with Accused 3 in the same house not knowing that he was walking through the darkest shadow of his death. Accused 1 delayed the execution by his tactics of (i) buying groceries with the money given to buy a firearm and (ii) the

removal of a striking pin of the firearm handed to him by Accused 2.

[29] I do indeed find that Accused 2 and 3 involved Accused 1 in their merciless plan to execute the crime. I further find that their action of disposing of the body and scrubbing of the blood was with intent to conceal the evidence in completion of their planned deed.

[30] Mr Mashile further said that Accused 1's "coming out" should not be seen or considered as compelling circumstances. He said had it not be for Accused 2 and 3's failure to honour their agreement with Accused 1, he would not have "spilled the beans".

[31] Mr Mashile submitted that Accused 2 and 3 showed no remorse for what they did. He said that their ailments, High Blood, sugar diabetes and chronic headache by accused 2 and 3 respectively, should not be considered as compelling circumstances justifying deviation from imposing the prescribed minimum sentence.

[32] He submitted that life imprisonment is an appropriate sentence in the circumstances.

[33] He conceded that the previous convictions are old and should not be considered and that Accused 1 and 2 be regarded as first offenders. He, however, stated that that' should not be regarded as compelling to deviate from the prescribed sentence.

[34] In sentencing, the quest is to sentence the offender fairly and justly by properly consider the triad principle set out in Zinn's case, being;

(i) The crime committed;

(ii) The interest of the society;

(iii) The offender.

[35] The crime committed by the accused is, considering all evidence in totality, in my view, **HEINOUS** or better described as **UTTERLY ODIOUS,** motivated purely by Accused 2 and 3's selfishness and/or self centeredness. The killing was a merciless cold blooded

killing of a person in his "secured" home and house. To further mention how the body was charred, will be to open the wounds of the deceased family and sensitive members of the public with interest in this matter.

[36] In **S V DI BLASI 1996 (1) SACR 1 (A)** where the accused wife instituted divorce proceedings against him in United Kingdom, the Accused harboured feelings of bitterness and revenge toward his wife. The Accused watched and followed his wife on her arrival in South Africa and when the opportunity presented itself, he shot her in the street in front of her flat.

[37] The court held that 'a premeditated, callous murder should not be punished too leniently lest the administration of justice be brought into disrepute'.

[38] The court increased the sentence of four (4) years, which it held to have been "shockingly inappropriate", to 15 years. It must be borne in mind that the Criminal Law Amendment Act was, at the time, not enacted.

[39] In **DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL v NGCOBO AND OTHERS 2009 (2) SACR 361 SCA** where the appellants, after murdering the deceased, took his cell phone, a video machine and compact discs and drove away in the deceased's Toyota motor vehicle which they left in the bush a short while after they murdered the deceased. The court a quo sentenced the appellants to 18 years imprisonment on the murder charge.

[40] It is recorded at paragraph [10] page 364 that 'the learned in the trial court took into account, in favour of the respondents,... that they were first offenders and that "there had not been any proof of premeditated plans to kill the deceased or rob him".'

[41] The appeal court held at page 367 paragraph 25 that 'the murder was brutal and savage. Not only was the sanctity of the deceased's home breached and his trust betrayed, but he was also subjected to what appears to be a most painful and undignified death. It is the brazen manner and the brutality of the acts by the respondents that remained in the memory.'

[42] The supreme court of appeal further held that 'Courts are expected to dispense justice. This kind of brutality is regrettably too regularly a part of life in South Africa. Courts are expected to send out clear messages that such behaviour will be met with the full force and effect of the law. The legislature is concerned and so too should we be.'(page 367 paragraph 26)

[43] The sentences of 18 years were set aside and replaced with life imprisonment.

[44] The interest of the society was taken into consideration by the Parliament in enacting the Criminal Law Amendment Act (better known as minimum sentence) for imposing of minimum sentence on certain offences committed. The societies at large are watching these courts with critical eye on the type of the sentence we impose on convicts like accused before me.

[45] It is not only the deceased whose life has been taken in this matter, but the love of the father, breadwinner, son, uncle and shop steward who has indefinitely been removed from his loved ones. The children are left fatherless for life.

[46] I am not going to repeat all personal circumstances of each accused. The question to consider is whether the accused's "first offender" is regarded as substantial and compelling in the circumstances.

[47] Accused 1, the "bean spiller", did indeed be of help in the revelation of this "utterly odious" crime committed. If the accused would have sought indemnity in terms of section 204 of the Criminal Procedure Act, he would have succeeded and released. In my view, his conduct of "remaining an accused" and accepting the wrong he did, is substantial enough to compel deviation from imposing the minimum sentence.

[48] All circumstances levelled for and on behalf of Accused 2 and 3 are, in my view, far from being substantial to compel this court from deviating from the imposition of the prescribed sentence.

[49] Public interest is seeking not only justice but seeing it being done.

[50] I as a result, come to the conclusion that the following sentence is appropriate within the circumstances.

Accused 1- 12 years direct imprisonment

Accused 2- Life Imprisonment

Accused 3- Life imprisonment

The period served in prison while awaiting trial, be considered in calculating the period for purposes of parole in respect of Accused 1 and 2.

AML PHATUDI
JUDGE OF THE HIGH COURT.