

**REPORTABLE / NOT REPORTABLE**

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO.: AR: 55/11

In the matter between:

FRANCE SIPHELELE KHOMO

1<sup>st</sup> Appellant

GODFREY SANDILE KHOMO

2<sup>nd</sup> Appellant

and

THE STATE

Respondent

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**J U D G M E N T**

Delivered on : 06 JANUARY 2015

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**PATEL JP**

Introduction

[1] The appellants were convicted by the trial court sitting at Ramsgate of murder (count 1) and theft (count 2). They were both sentenced to life imprisonment for murder and seven years imprisonment for theft. The appellants applied for leave to

appeal against their sentence and conviction on both counts. The trial court granted the first appellant (France) leave to appeal only against his sentence on count 1. The second appellant (Godfrey) was granted leave to appeal against his conviction on count 1. France subsequently petitioned the Supreme Court of Appeal (SCA) for leave to appeal against his conviction. By order dated 21 October 2013, the SCA dismissed his petition.

### Background

[2] The appellants are biological brothers and were convicted of the murder of Nomvula Ngubane, a policewoman (the deceased). The Respondent led the evidence of 14 witnesses whilst the appellants did not call any witnesses but testified in their own defence. The main witnesses for the Respondent were Nomvula Mbutho (Nomvula) and Captains Lockem, Bosman and Myburgh.

[3] Nomvula was a Section 204 witness and pleaded guilty to theft and fraud charges relating to this case. France had been her boyfriend since 2003. She knew Godfrey from the time she began her relationship with France. According to Nomvula, from March 2008 until his arrest, France was unemployed and he operated a taxi service with his car.

[4] She testified that on 15 August 2008 France arrived home around 11:30pm wearing a white leather jacket. The next morning, being the 16<sup>th</sup> August 2008, she

was told to have a bath because Godfrey was coming over. She was told that they were all going to the bank.

[5] At 8:30am Godfrey arrived in a white VW Polo which Nomvula had never seen before. Godfrey was carrying a white handbag, inside which was a brown purse. The purse contained clothing store cards, a union membership card and a FNB credit card. France told her that the items belonged to Godfrey's girlfriend. According to the appellants, Godfrey's girlfriend had gone overseas and she had left all her belongings with Godfrey. Nomvula was told by both the appellants that she had to make an affidavit at the police station stating that she lost her bag in the Isipingo area. Once she obtained the affidavit she would then be able to go to the bank and collect a bank card and would thereafter be able to withdraw money. According to the appellants, the Polo was broken and they needed money for it to be fixed.

[6] Nomvula, together with the appellants, proceeded to the Isipingo Police Station. Godfrey drove the Polo. She told the police that she had lost her bag, as she had been instructed by the appellants. The police asked for her identity document but she produced the driver's licence which was in the bag, which belonged to the deceased. She then obtained the affidavit.

[7] They then drove to FNB in Isipingo. She went inside the bank while the appellants waited outside. She was told by the teller that she had to go to the branch where she had opened her account in order to get a new card. She handed the teller

the deceased's drivers licence to check where the account was opened. The teller then told her that she had to go to Musgrave, Durban. They then drove to Musgrave. The teller at the bank requested her identity document but she produced the deceased's drivers licence once again. The teller also requested the address that she had used when opening the account. She returned to the car and France found a letter in the car which reflected an Inanda address. She went back to the bank but the security informed her that the bank was closed and she had to go to the Pavillion Shopping Centre (Pavillion).

[8] They then proceeded to Pavillion. The appellants informed her that she should tell the bank that her card had been stuck in the ATM machine, and not stolen. And she was further told to say that it was her sister who was using the card, not her. She went to the bank and the appellants waited in the parking area. After being questioned by the bank and producing the driver's licence, a new card was given to her. She then went with the lady from the bank to the ATM, checked the balance in the account and had the pin code changed.

[9] They then drove to the Sasol garage in Isipingo. France took the bank card and went into the garage and withdrew R300. They then proceeded to Umlazi. Godfrey left the Polo at France's home.

[10] On 29 August 2008 France went to the airport to check if there was money in the account. There was money but he could not withdraw it from the machine. The next day, on the instructions from France, Nomvula went to FNB in Amanzimtoti and

advised them that there was a problem with the card. A new card was issued to her. She withdrew R1000 from the outside ATM and from inside the bank she withdrew R5000. France phoned her and told her to meet him in Isipingo. She met him and gave him the money that she had withdrawn. They went back to Umlazi whereupon Godfrey arrived. She did not know what France had done with the money she had given him. Neither did she know whether France had told Godfrey about the money.

[11] According to Nomvula the Polo was parked in the yard until France's arrest. France did use the car after Godfrey had left it there on 16 August 2008. Godfrey, on the other hand, did not use the car after he had left it with France.

[12] As for the deceased's retail cards, Nomvula admitted to having used the Edgars and Hub cards. France was with her when she made purchases using these cards. France told her to flush them down the toilet after his arrest. But when the police arrived she handed over the cards. During cross-examination it was put to her that France knew nothing about the purchases made on the deceased's cards and the money withdrawals. She replied that he was fully aware of it.

[13] France had given her a Vodafone 225. She did not know who it belonged to but France was seen using it on the 16<sup>th</sup> August. She used the phone but lent the phone to her friend Busisiwe Blose from whom the phone was subsequently recovered.

[14] Nomvula handed over the handbag and purse to the police. The police also took possession of the radio and some clothing items. She had been instructed by France, after his arrest, to take items to his aunt's house in eMalukazi. A number of items were subsequently recovered from France's aunt's residence.

[15] During cross-examination Nomvula stated that she visited France once after her release. She denied visiting him on several occasions in prison. According to her their relationship ended after his arrest.

[16] Captain Lockem who was attached to the Organised Crime Unit and part of its Detective Unit, testified as follows: on 10 September 2008 he was introduced to France by Captain Brown; he conducted an interview with France through an interpreter, Warrant Officer Makhanya; prior to the interview France was informed of his rights; France said he did not need legal representation at that stage; he made a report to Captain Lockem that the deceased was held captive in the eMaghabeni area and that she was later strangled and dumped in the Craigieburn area; he, Godfrey, and two friends Sikhumbuzo Ndlovu and Tiwiwi were present when she was killed; France said that he could take Captain Lockem to the place where the deceased's body was dumped.

[17] They then proceeded to the Craigieburn area. France was giving the police directions. France said that the deceased was killed and dumped near a drain pipe. Upon inspection nothing was found near the drain pipe. Captain Lockem assumed that the body had been recovered by the police. France informed Captain Lockem

that some of the deceased's property could be found with Godfrey. Godfrey's home was approximately within a 10 to 15 kilometres radius from the murder scene.

[18] A search of Godfrey's house was undertaken. The police found various items, including a pair of spectacles, a Samsung camera inside a bag, a red kit bag and a blue camping chair. Nkululeko Khoza, the deceased's boyfriend, was present when these items were recovered. He identified the red kitbag as belonging to him but that it had been in the possession of the deceased. He also identified the other items which were recovered from Godfrey's house as belonging to the deceased. He went on to later identify other items that had been recovered during the course of the investigation which included a cooler bag, pepper spray, a vacuum cleaner and its bag.

[19] It was put to Captain Lockem that Godfrey had explained to him (Lockem) that the reason he was in possession of the abovementioned items was because he and the deceased were romantically involved and the deceased had left them with him. Captain Lockem denied that Godfrey had offered him any explanation.

[20] Godfrey denied that the deceased's spectacles were found in his room. He also alleged that the camping chair belonged to him.

[21] Captain Lockem informed Godfrey of his rights, through an interpreter, and then placed him under arrest. They thereafter proceeded to Sikhumbuzo Ndlovu's

house and arrested him. Tiwiwi was not at home. They then proceeded back to the Cato Manor Police Station. Godfrey was informed of his rights and was then interviewed by Captain Lockem. Godfrey made an admission to Captain Lockem that he and the three others strangled the deceased.

[22] Captain Lockem began to make enquiries at the various mortuaries in the South Coast as to whether a female body had been recovered. On 11<sup>th</sup> September 2008 Captain Lockem was informed that the body of an unidentified female had been found. An identification of the body was then made. The matter was then handed over to Captain Myburgh who became the investigating officer in the case.

[23] During cross-examination by Mr *Shange* who represented Godfrey, Captain Lockem stated that he did not take down any statements from Godfrey because Captain Myburgh took over the investigation and said he would arrange for the taking down of statements and confessions. Further he did not think it was proper to take down a statement because he was the arresting officer. It was put to Captain Lockem that Godfrey denied making any statement/confession to him to which Captain Lockem replied that it was not true.

[24] At all times Warrant Officer Makhanya acted as interpreter. He was later called as a witness and corroborated the evidence of Captain Lockem.

[25] Captain Myburgh gave evidence that on 22 January 2009 France's attorney contacted him and asked him to interview France. On 6 February 2009 he



interviewed France and asked him whether he would do a pointing out. France agreed. He contacted France's attorney on 11 February 2009, advising that France wanted to do a pointing out and enquired whether he would want to be present. The attorney said it was not necessary. He then contacted Captain Bosman to conduct the pointing out. Captain Myburgh also informed France that he could have his attorney present, but France said he did not need his attorney present for the pointing out.

[26] The next witness's evidence which must be considered is that of Captain Bosman. On 12 February 2009 he found France in the Scottburgh cells and proceeded to a private room in the station to interview France in the presence of an interpreter [Warrant Officer Mbhele]. Captain Bosman used a prescribed form called "notes on the pointing out of scenes or points". The form had questions which were completed by himself. After the interview France read the statement. France even added his own note on the form in isiZulu. The statement was signed by France, the interpreter (Warrant Officer Mbhele) and himself. Photographs of France were taken by Captain Mthembu before the pointing out to ensure that there were no signs of injury.

[27] Captain Bosman then took France to do the pointing out. He made notes himself. France directed them to a burnt house in eMaghabeni and stated that this was where Godfrey got the rope from whilst he and the deceased were waiting outside in the Polo. France mentioned that Godfrey and the deceased had been fighting with each other. They then drove towards Craigieburn on a small road where France directed the police towards a tree from which he stated the deceased was

hanged. France stated that “*myself and my brother dragged her down to that tree by her arms*”. He even showed the police the branch on which the rope was tied. He explained how they hanged the deceased. Godfrey was tall so he tied the rope around the deceased’s neck whilst he held the deceased upright. Photographs of everything that was pointed out were taken.

[28] After the pointing out they returned to the private room in Scottburgh Police Station where France was asked questions about his satisfaction regarding the pointing out. Photographs were taken again of France to indicate that there were no signs of injuries.

[29] During cross-examination by Ms Singh, counsel for France, it was put to Captain Bosman that France lied to the police because he was in a state of panic. Captain Bosman denied this and said that France was at ease. The admissibility of the pointing out was not challenged in the trial court.

[30] Counsel for Godfrey then made an application in terms of s 174 of the Criminal Procedure Act 51 of 1977 (‘the CPA’) for the discharge of Godfrey on the murder count. The application was refused by the trial court and Godfrey went on to testify.

[31] Godfrey testified that he had been in a relationship with the deceased for three months prior to her death. During this period he had only seen the deceased three or four times. He had never been to her home or her work. She told him that

she lived in Inanda and worked for the Social Welfare Department. He had last seen her on the 15<sup>th</sup> August 2008 while at France's house at eMalukazi. The deceased had asked him to spend the weekend with her at South Coast but he said he could not at that stage.

[32] The deceased had also told him that her car needed a service. He had suggested that she leave her car behind and use his car, a Golf. She then told him to ask France to keep her vehicle. France agreed but asked whether he could use the vehicle, to which the deceased answered "yes" but that the car could only be used for short distances. He stated that the reason the deceased did not leave the Polo at his home was because his home was in eMaghabeni and secondly, he did not want her to go to his home because he was married.

[33] The appellants then accompanied the deceased to the garage, where they got off. The deceased proceeded to the South Coast. Godfrey went back to France's house and France took him to eMaghabeni later that evening.

[34] Godfrey told the deceased that she should contact him later that evening to see if he could take time off work and join her on the South Coast. She did phone him later that evening. He told her he had to work and could not join her. She told him to ask France to remove her handbag and identity document from the car. After that evening he had no further communication with the deceased. He had tried calling her but could not get hold of her.

[35] Godfrey confirmed that various items belonging to the deceased were found in his house. He said the red bag was given to him by the deceased as she had asked him to use it to put his belongings which he would need for the weekend. He confirmed that the camera belonged to the deceased. He did not know how the spectacles ended up in the house. The blue camping chair belonged to him. This chair was part of a set of 4 which he purchased from Game stores. He was not asked by the police why he had these items in his possession.

[36] Godfrey further stated that Captain Lockem lied when he testified that Godfrey admitted to being a part of the murder and having strangled the deceased. He could not recall if he even had an interview with Captain Lockem. He went on to state that Officer Makhanya lied that he was interpreting because he had spoken in English to the police. He also denied making a statement (Exhibit H).

[37] Godfrey alleged that Nomvula lied when she gave evidence. He denied having arrived at France's house in the deceased's car but stated that he had arrived on foot from his sister's house. He further stated that he did not give Nomvula a white handbag and denied knowledge of its contents.

[38] He testified that he accompanied France and Nomvula on the Saturday morning as they were going out. France informed him that Nomvula was going to town to withdraw money. He drove them because the deceased's Polo was being used. He denied that he instructed Nomvula to get a bank card and make withdrawals from the deceased's account.

[39] According to Godfrey he purchased his Golf for R19 000 and still owed the owner of it R5000. The car was still in the name of its owner, one Thomas Banda. The car was going to be transferred into his name once he finished making payments. At no stage did he think that his car was missing and therefore there was no need to contact the police.

[40] The deceased was expected back from the South Coast on Monday, 18 August. But by the 20<sup>th</sup> she had still not arrived. He stated that he did not worry about his car because he had her car with him.

[41] He described the first meeting between France and the deceased as follows. He was going to meet the deceased at France's home. The deceased did not know where France lived so he asked France to fetch her from Muthwa's garage in U Section, Umlazi. He later joined the deceased at France's house. It was put to him that France had earlier testified that the first time he met the deceased was when Godfrey himself brought her to his house. He replied that there must be an explanation for that.

[42] Godfrey stated that the deceased had made a booking for them to go away for the weekend. When questioned as to the exact location of the weekend getaway in the South Coast, he replied that he did not know.

[43] It was put to him that it was bizarre that the deceased would arrange a weekend away when her car needed a service. Godfrey's reply was that the

deceased knew that he would use his car and must have assumed that he would go with her for the weekend. It was also put to him that it was strange that the deceased would leave for the weekend without her handbag. He replied that she may have forgotten her handbag when she changed cars.

[44] It was further put to Godfrey that if the deceased gave him the camera and red bag why did she not give him her jacket or handbag? He replied that he did not know. He also did not have any idea how her spectacles ended up on top of his dvd player.

[45] During cross-examination by the State it was put to him that the deceased's car was valued at R80 000 and she was still paying for it. He was then asked why she would leave her car behind and use his car. He replied that he did not know but went on to state that his car was more expensive as it had more expensive things in it than the deceased's car.

[46] Upon questioning by the trial court as to when he was going to report the deceased as missing because 23 days had already gone by and he had done nothing, his reply was that he was waiting for a further week.

#### Appeal on conviction

[47] The trial court found that there was sufficient circumstantial evidence, in the absence of an acceptable explanation, to come to the conclusion that Godfrey was involved in the killing of the deceased.

[48] Godfrey admitted to Captain Lockem that he and three others had strangled the deceased. During cross-examination Mr *Shange* put it to Captain Lockem that Godfrey denied making an admission, because if he had it would have been reduced to writing. Conversely, if it was not reduced to writing, it inevitably meant that an admission was not made.

[49] The trial court found that the statement made to Captain Lockem amounted to an admission in terms of s 219A of the CPA and therefore did not need to be reduced to writing. All that was required was that the admission needed to be made voluntarily.

[50] A commissioned officer of the SAPS is a member holding the rank of lieutenant or higher, and is in terms of s 4 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 read with the First Schedule to that Act, *ex officio*, a justice of the peace and therefore entitled to take a confession. Section 217 (1) (a) of the CPA does not make it a requirement for a confession to be reduced to writing if it is made to a justice. See *S v Gama* 2013 JDR 2138 (SCA) para 8. As an officer holding the rank of a Captain, Lockem was entitled to take a confession or admission from Godfrey. The fact that Captain Lockem was involved in the initial investigation to which the confession ultimately relates, does not constitute an irregularity. See *S v Mavela* 1990 (1) SACR 582 (A).

[51] Captain Lockem's evidence was damning against Godfrey and France. When Godfrey was cross-examined about what he had told Captain Lockem, he said that he did in fact make a statement to him, but that whatever he told him was lies. Godfrey, on the other hand, simply denied that he had made such statements to Captain Lockem. This does not add up with the sequence of events that had transpired. The police were not aware that the deceased had been killed until France's interview with Captain Lockem. Furthermore Captain Lockem's search for the deceased's body only took place after Godfrey admitted to having strangled the deceased. Had Captain Lockem not been told about the strangulation of the deceased, he would not have made enquiries about locating the body of the deceased. It must be further noted that Warrant Officer Makhanya, who acted as an interpreter for Captain Lockem, confirmed the evidence of Captain Lockem regarding Godfrey's admission.

[52] At the time of testifying in this case, Nomvula had pleaded guilty to theft and fraud charges relating to this case. She had taken responsibility for her conduct and stood to gain nothing from giving false evidence against the appellants.

[53] A reading of the record indicates that neither Captain Lockem nor Warrant Officer Makhanya was shaken in their testimony under cross-examination. Their evidence was straightforward. They came across as reliable witnesses.



[54] Dr Alli, who conducted the post-mortem, opined that the deceased did not commit suicide but died as a result of compression of the neck structures, which finding is consistent with the admissions that the deceased was strangled, made by both Godfrey and France to Lockem.

[55] The inherent improbabilities in Godfrey's version include the following :

- The deceased was missing for 23 days and he did nothing about it;
- He still owed money on his car and yet he did not search for it more than three weeks after the deceased had taken it. In addition, he did not know where the deceased lived or worked. Why would he trust a stranger with his property?;
- Similarly, why would the deceased leave an expensive and relatively new vehicle with France, who was a stranger to her?;
- Why would the deceased leave her expensive motor vehicle worth R80 000 behind and take Godfrey's car which was worth R19 000?;
- If the deceased wanted to go away for the weekend with him, being aware that he was having a problem getting time off work and aware that her car needed a service, why did the deceased proceed in Godfrey's vehicle without him;
- Why did the deceased leave for the weekend and leave behind her handbag which contained her driver's licence and bank cards?; and
- Why would Godfrey and France have different versions of how the deceased first met France?

[56] I am prepared to accept that the very fact that Godfrey was in possession of the deceased's property justifies the inference that he was involved in the deceased's death. This is compounded by the fact that he did not search for the deceased for three weeks after she had disappeared, implying that he knew she was dead. In the circumstances of this case, these inferences appear to be both reasonable and compelling. The trial Judge was correct in rejecting Godfrey's version as false.

#### Appeal on Sentence

[57] The murder in question, being premeditated, is subject to a prescribed life sentence in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997, unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed. Counsel for France argued that the trial court should have found that substantial and compelling circumstances existed and that it therefore erred.

[58] The Respondent, on the other hand, argued that sentencing is pre-eminently a matter for the discretion of the sentencing court and that such discretion should not be lightly interfered with by a court of appeal. It may only interfere if it finds that the sentencing court misdirected itself on the law or facts or the factors relevant to sentencing.

[59] The role to be played by an appeal court in terms of sentencing was described as follows in *S v PB* 2013 (2) SACR 533 (SCA) para 20:

‘What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.’

Bosielo JA went on to explain the meaning of substantial and compelling reasons as follows at para 21:

‘The most difficult question to answer is always: what are substantial and compelling circumstances? The term is so elastic that it can accommodate even the ordinary mitigating circumstances. All I am prepared to say is that it involves a value judgment on the part of the sentencing court. I have, however, found the following definition in *S v Malgas* (above) para 22 to be both illuminating and helpful:

“The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hastened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed

sentence unjust, or as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If it is the result of a consideration of circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.”

[60] It was submitted on behalf of France that the role he played was not great and that the trial court Judge did not give due consideration to the lesser role played by him. That the degree of participation of an accused in a murder can, in a proper case, be taken into consideration as a mitigating factor is clear. See *S v Dikgale* 1965 (1) SA 209 (A) at 214E-F; *S v Sauls & others* 1981 (3) SA 172 (A) at 184F. However, I am mindful of the following statement made by Smuts AJA in *S v Smith & others* 1984 (1) SA 583 (A) at 618A-B:

‘I see no difference worth mentioning between the man who stabs and the man who places a knife in the hand of the killer with knowledge that it will inevitably and immediately be used to kill the victim’.

[61] The trial court found that France played an important role in the commission of the crime. France could have changed his mind and withdrawn his participation at any time. At the stage when Godfrey went to fetch the rope from his house, France was alone with the deceased. He had the power to help the deceased but he chose to do nothing. This demonstrates a lack of remorse on his part and an intention to proceed with the murder.

[62] The evidence revealed that the deceased had been kept captive for a period of time before she was killed. France explained how the deceased was hung from the tree and the murder was staged to look like a suicide. This clearly indicates premeditation and that considerable planning had taken place.

[63] France's role was not of someone that played a passive role. From the evidence it is clear that France knew exactly what was being planned and assisted Godfrey to achieve the desired results.

[64] The reason given by France for implicating himself in the murder so as to get bail, is difficult to comprehend. He gave evidence that he believed that the more he implicated himself, the better his chances were of getting bail. During the trial he tried to distance himself from the murder. He did this by first stating that his report to Captain Lockem was made because of information he had received from one Pat Dlamini. Secondly, whatever he said during the pointing out was done on the instructions of Captains' Myburgh and Mthembu. The trial court was correct in its finding that France was a blatant liar.

[65] Assuming that the moral blameworthiness of France is diminished by the fact that he became involved in Godfrey's plan, the extent of that diminution is of so small a degree, when considered in the light of the circumstances in which the crime was committed, that it does not justify a finding that it constitutes a substantial or compelling reason.

[66] The following emerges from the record with regard to the appellant's personal circumstances: at the time of the trial he was 29 years old. He had attained a standard 10 education and was a qualified welder; and he had three children aged 8, 4 and 2.

[67] Murder is unarguably a very serious crime. One must take into account that this was a callous crime. The deceased died a horrible and violent death. Her child has been robbed of a mother. And to make matters worse she was a policewoman. France on the other hand, enjoyed use of the deceased's possessions which included her vehicle, money, clothing and cell phone. This indicates that there was no remorse shown by him. A further aggravating factor is that he had been convicted of being in possession of a firearm and ammunition and was out on bail when the murder was committed.

[68] The trial court carefully considered all the necessary factors and concluded, correctly so, that no substantial and compelling circumstances existed to justify a lesser sentence. Nowhere in imposing sentence on France did the trial court misdirect itself. I find that the appeal against sentence cannot succeed.

### Order

[69] In the result, the following order is made:

1. The appeal against the first appellant's sentence is dismissed and the sentence of life imprisonment imposed by the trial court is confirmed.

2. The appeal against the second appellant's conviction is dismissed.

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PATEL JP

I agree

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MOODLEY J

I agree

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HENRIQUES J

Date of Hearing : Friday, 28 NOVEMBER 2014

Date of Judgment : Tuesday, 06 JANUARY 2015

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