

SOUTH AFRICA / JUDGMENT

S v Baster (Sentence) (K/S29/2023)

[2024] ZANCHC 25 (16 February 2024)

[2024] ZANCHC 25**COURT**

Northern Cape High Court, Kimberley

BEFORE

Tyuthuza

CASE / FILE NUMBER

K/S29/2023

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**IN THE HIGH COURT OF
SOUTH AFRICA
NORTHERN CAPE
DIVISION, KIMBERLEY**

Case No: K/S29/2023**Heard on:** 13 – 15/02/2024**Delivered on:** 16/02/2024
Reportable: YES / NO
Circulate to Judges: YES
/ NO**Circulate to Magistrates:** YES / NO
Circulate to Regional
Magistrates: YES / NO**In the matter of:** THE
STATE
and
DAVID
FRANS
BASTER
ACCUSED

JUDGMENT**– SENTENCE**

Tyuthuza AJ

INTRODUCTION

1. On 15 February 2024, the accused was convicted as follows: count 1: housebreaking with the intention to commit an offence unknown to the State with the provisions of section 262 of the CPA and count 2: murder read with the provisions of section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997.
2. The State submitted a victim impact report to the Court, which was accepted as exhibit “D”.
3. The victim impact report prepared by Ms. Ndubulla, social worker, who interviewed the deceased sister, Petronella Jacobs, the deceased sons, daughter and uncle.
4. The victim’s sister Annita Beesveel has taken on the role of mother to the deceased children and is their caregiver. She reported that the deceased’s children do not like to talk about their mother, as they were traumatised by her death and talking about her brings painful memories. She accounts further that the family is still triggered because they have not received justice as the accused is still roaming the streets freely. According to her, the deceased and the accused were in a toxic relationship and the accused had stabbed the deceased on two previous occasions. The loss of the deceased has left a void in the family. The deceased’s daughter mentioned that she misses her mother and misses the warmth of a mother. The deceased’s sons refused to talk about their mother. As a result of the deceased’s death, the deceased’s children have been left parentless. The deceased’s death has caused trauma to her children, the children are withdrawn and struggling with anxiety and abandonment issues. According to the deceased’s family they believe that the accused wanted to murder their mother/sister because of the wounds she sustained. The deceased’s sister acknowledges that the accused has tried to apologise but because justice has not been served, she will never forgive the accused.
5. The accused admitted his previous convictions marked exhibit “E”, which include assault, neglect of children and assault with the intent to do grievous bodily harm. All these previous convictions are older than 10 years and unrelated to the offence of murder. The accused had been declared unfit to possess a firearm on a previous occasion.

6. In determining an appropriate sentence, a court must have regard to the triad which consists of: the crime, the offender and the interests of society as enunciated in *S v Zinn*.^[1] A court must consider the personal circumstances of the accused, the nature of the offence that has been committed and the interests of the society. It must also consider the recognized objectives of sentencing which are prevention, rehabilitation, deterrence, and retribution.
7. It is trite that the punishment effected by this Court must fit the crime for which the accused is convicted. In *S v Rabie*^[2], it was held as follows: - “Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances”.
8. An appropriate sentence should have regard to and serve the interests of society and the protection of its needs and the deterrence of the would-be criminals.
9. Section 51(2) of the Criminal Law Amendment Act 105 of 1997 provides that where an accused is convicted of murder which falls under Part II of Schedule 2, the Court is obliged to impose a sentence of imprisonment for a period of not less than 15 years if the accused is a first offender unless compelling and substantial circumstances are found to exist^[3].
10. When faced with the application of the prescribed minimum sentence, a court may only depart therefrom if the said court, upon a

consideration of the circumstances of the particular case, is satisfied that such circumstances rendered the prescribed sentence

unjust, in that it would be disproportionate to the crime, the accused and the need of society, so that an injustice would be done

by imposing that sentence.^[4]

PERSONAL CIRCUMSTANCES OF ACCUSED

11. Mr Biyela on behalf of the accused provided the Court with the following personal circumstances of the accused as follows:

11.1 The accused is 52 years old;

11.2. He is married but has been separated from his wife for the past 8 years;

11.3. The accused has four children who are all majors and residing with their mother;

11.4. The accused is unemployed and receives a monthly disability grant in the amount of R2,090.00;

11.5. The disability grant is received due to the fact that the accused suffers from epilepsy and high blood pressure for he is using medication;

11.6. The accused attended school until standard 5.

12. The State argued that the accused has previous conditions and despite the fact that his convictions are older than 10 years, these previous convictions are relevant in that they demonstrate the accused's character. The State submitted that two of the previous convictions relate to offences with an element of violence and that the sentences imposed did not deter the accused from committing this offence. The State submits that this is demonstrative of the fact that the accused is an individual that resorts to violence.

THE OFFENCE

13. According to the accused's written statement; whilst the accused was approaching the house of Petronella Jacobs, he met a gentleman by the name of "Sheepdog", whom he had heard was involved in a relationship with the deceased. He states that he asked Sheepdog about the deceased and Sheepdog simply opened the door to Petronella's shack house. According to the accused he "was overwhelmed with anger" thinking about the rumour of their relationship and just "lost it", took out a knife which he had with him and stabbed the deceased several times on her body. The accused knew that his actions of stabbing the deceased a number of times on her body would cause injuries which might result in her death, but he nevertheless continued to stab her.
14. The seriousness of the offence committed, was illustrated by the photographs and medico-legal report. The photos of the deceased's lifeless body paints a bleak picture of a ruthless murder of a helpless and defenceless person. The deceased who was dressed in only underwear, was stabbed numerous times with a knife. According to the medico-legal report the deceased's body had multiple incised wounds and all the wounds had sharp edges. The wounds were inflicted on various parts of the deceased's body including her back. It is clear from the evidence presented and the photos that the deceased was killed in a ruthless manner and that the accused had no regard for the deceased's life.
15. The murder was committed in the presence of the deceased's friend Ms Petronella Jacobs and three children. Despite an attempt to stop the accused, the accused continued to stab the deceased and even threatened Ms Jacobs by pointing the knife towards her and telling her to keep quiet.
16. The accused did not attempt to speak to the deceased first, to establish the truth to the rumour. The accused's first instinct was one of violence.
17. The State submitted that the primary motivation for the accused's action was jealousy.
18. The State referred to a decision of this Court, the matter of *S v Smous*[5], wherein it was stated as follows at para 23:

"Violence in our society, particularly by men against women is prevalent. The interests of society dictate that a strong message to the public that violence will not be tolerated should be sent. Failure to do so would feed into the unjustifiable trend of the society taking the law into their own hands by punishing, without due process, alleged suspects of crime. Respect for the law must be guaranteed. A sentence should be fair to the society, the offence, the offender and be blended with a measure of mercy."

19. Our courts have consistently held that where death occurs as a result of jealousy or anger, such as between lovers, constitutes a crime of passion due to the emotive condition in which the guilty party finds himself/herself. It is dependent on the facts whether such a situation would give rise to a mitigating factor.[6]
20. In deciding an appropriate sentence this Court had regard to the degree and extent of the violence used in the commission of this offence, the nature and weapon used, the brutality and cruelty of the attack, the fact that the accused had acted with direct intent, the physical, emotional and psychological trauma that the deceased's family endures every day of their lives, the loss of a mother and sister and the destruction of innocent children, being robbed of a mother's love.

INTERESTS OF SOCIETY

21. In *S v Chapman*[7] Mohammed CJ said:

"The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible

civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to

walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

22. In *S v Kekana*[8] it was stated that:

"Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily integrity."

23. The Preamble to the Domestic Violence Act[9] reads in part thus:

"Domestic violence is a serious social evil; that there is a high incidence of domestic violence within South African society; that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; that acts of domestic violence may be committed in a wide range of domestic relationships; and that the remedies currently available to the victims of domestic violence have proved to be ineffective."

24. In the matter *S v Sejake*[10] it was stated as follows:

"The accused gained nothing of worth for the perpetrating and inflicting of this terrible and horrific suffering on the deceased and her family. Gender Based violence, threatens every woman and particularly poor and vulnerable in our society. In our country, it occurs far too frequently that women

are violated or murdered at the hands of their partners. The time has come to send a clear message that and anyone perpetrate these crimes against the most vulnerable in our society, does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish perpetrators severely. Communities are outraged and if we fail to take account of that outrage, we risk encouraging the breakdown of law and order and communities taking the law into their own hands."

25. The accused does not dispute that he murdered the deceased. He pleaded guilty to the offence of murder. Despite the accused's three previous convictions, it would seem that the accused has failed to learn that violence does not solve anything. It is clear that his violent inclination has escalated from assault to murder. The accused ruthlessly killed a woman who he professed to be in a relationship with and cared about. Instead of protecting her, the accused caused a lot of pain to the deceased, a pain which is still carried by her friends and family.
26. A sentence of imprisonment will not bring the deceased back to life, but it will bring closure to the community and in particular her family, whose lives have been severely impacted by the untimely death of the deceased. The message must go out to the community that the law is serious about gender-based violence; and that such acts will not be tolerated and will be dealt with effectively.
27. "It is thus important and the duty of the Courts to contribute in our role as the justice system to impose appropriate sentences,

particularly where women are murdered in the context of their marriages, their relationships and homes. Whilst it is so that

you, as the accused, cannot be sacrificed at the alter of deterrence for other would-be offenders, nor can it impose punishment in anger, the interests of the community must be satisfied that offenders of serious crimes such as these be punished accordingly. If offenders are punished too lightly for serious offences, society would lose confidence in our Courts and so too would law and order be undermined. Serious crimes of this nature therefore compel that the objectives of retribution and deterrence weigh more than the objectives of rehabilitation of the offender and accordingly the interests of the accused would recede to the background.[11]

28. Sadly, despite the legislation enacted to deal with domestic violence, the sentences imposed by our courts and the measures put in place to help women fight domestic violence, violent crimes against women continue to scourge our country. The South African Police Service's latest crime statistics show that during the months of July 2023 and September 2023 eight hundred and eighty-one

(881) women were murdered.

29. The accused is convicted of a very serious crime, wherein the minimum sentence is applicable. Regardless of the sentence imposed, the deceased's family will always remain affected by the actions of the accused. The sentence imposed by this Court must indicate to the deceased's family and the community that this type of violence is unacceptable in a civilized society. I refer to the dictum from *S v Matyityi*[12] wherein the court stated:

"this is unacceptable in any civilized society, particularly one that ought to be committed to the protection of the rights of all persons, including woman and children."

SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

30. Mr Biyela submitted on behalf of the accused that there are substantial and compelling circumstances that justify the imposition of a lesser sentence than the prescribed minimum of 15 years imprisonment.
31. He argued that the accused had pleaded guilty to the offence and did not waste the Court's time. He furthermore submitted that his personal circumstances such as his age and state of health should be considered. He added that the accused acted irrationally and out of anger and has learnt his lesson and that the accused has conceded that there is no justification for his actions.
32. Adv Engelbrecht submitted that there are no substantial and compelling circumstances warranting a departure from the prescribed minimum sentence of 15 years imprisonment. It was submitted that the accused's personal circumstances are not substantial and compelling and therefore do not warrant a deviation. It was submitted that the accused would still have access to medical treatment and that the accused is not the primary care giver of his children.
33. Adv Engelbrecht submitted that the offence is serious and attracts the minimum sentence and that if the Court were to deviate therefrom that the Court does so in excess of 15 years.
34. After hearing the submissions made on behalf of the accused and the state and having considered the seriousness of the offence; the fact that the accused continuously stabbed the deceased; the fact that the deceased was not in possession of any weapon or posing any danger to the accused, I am of the view that the accused had no choice but to plead guilty as there was overwhelming evidence against him. It is trite that a guilty plea in circumstances where the case against the accused is strong, does not serve as mitigating but remains a neutral factor.
35. The Court has had regard to the fact that the deceased was stabbed multiple times in a place where she felt safe and protected, that the deceased and the accused were in a relationship, and the emotional and psychological trauma the deceased's children and family have to endure every day.

36. Even more concerning was the fact that the accused realized that the deceased would sustain serious injuries that could cause her death, and despite this, he persisted in stabbing her and once he was done, instead of calling for help, he ran to his mother's house where he was arrested the next day.
37. I find it aggravating that the accused committed this act in the presence of children, whilst the deceased was in a vulnerable position and even though Ms Jacobs had tried to intervene, he threatened her and made no effort to pull back on his attack of the deceased and killed the woman he was in a relationship with. The accused does not strike me as a person who has changed from his violent ways and has not shown any remorse to this Court for his actions. The accused violated the deceased's right to life and failed to protect her and as a result, the deceased's children must continue their lives without the love and nurturing of a mother.
38. For these reasons I find that there exists no substantial and compelling reasons to justify a deviation from the prescribed minimum sentence of 15 years and that an increase in the sentence is appropriate.
39. The accused has also been convicted of housebreaking with the intent to commit a crime unknown to the State. The essential and accepted elements of the crime as it is known in our law are:
- (i) the "breaking into" the premises – in a legal as opposed to a physical sense i.e. by the displacement of any obstruction to entry which forms part of the premises (such as a door or window) by opening, breaking or (re)moving it;
 - (ii) entry into the premises – either completely or by means of any part of the person or via an instrument (thus the insertion of a part of the body such as a hand or even a tool which is used to effect the break-in will suffice);
 - (iii) wrongfulness i.e an unlawful break-in and entry without lawful authority such as consent, an order of court or a search warrant; and
 - (iv) the necessary criminal intent i.e. the intent to commit an offence.[13]
40. The evidence clearly showed that the accused had entered the residence of Petronella Jacobs by kicking open the door, without the permission of Petronella Jacobs and with the intent to commit an offence.
41. I therefore, impose the following sentence on the accused:
- 1. In respect of the conviction of housebreaking read with the provisions of section 262 of the CPA: 2 years direct imprisonment
 - 2. In respect of the conviction of murder, read with the provisions of section 51(2) of Act 105 of 1997: 20 years direct imprisonment.

3. The sentence on count 1 is to run concurrently with the sentence on count 2.
4. The accused is declared unfit to possess a firearm.

T TYUTHUZA AJ

ACTING JUDGE

APPEARANCES:

On behalf of the State: Adv Engelbrecht (oio The NDPP) On behalf of the Accused: Adv Biyela (oio Legal Aid SA)

[1] S v Zinn 1969 (2) SA 537 (A) at 540G

[2] 1975

(4) SA 855 (A) at 862G-H

[3] See also Section 51(3) (a) of the Act

[4] S v Malgas 2001 (1) SACR 469 (SCA) at para 25

[5] S v Smous 2018 (1) SACR 108 (NCK)

[6] S v Meyer 1981 (3) SA 11 (A)

[7]

[1997] ZASCA 45; 1997

(3) SA 341 (SCA)

[8] 2014 JDR 2139 (SCA); (629/2013) [2014] ZASCA 158, para 20

[9] 116 of 1998

[10] (28/2022)

[2022] ZAFSHC 266 (16 September 2022) at para 21

[11] S v Rohde (CC43/2017) [2019] ZAWCHC 18 (27 February 2019)

[12] 2011

(1) SACR 40 (SCA)

[13] Bam v S 2020 (2) SACR 584 (WCC) (20 July 2020) at para 26

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