

SOUTH AFRICA / JUDGMENT

S v Kesa (Sentence) (CC19/2020)

[2023] ZAECMHC 7 (16 February 2023)

[2023] ZAECMHC 7

COURT

Eastern Cape High Court, Mthatha

BEFORE

M.S. Jolwana

CASE / FILE NUMBER

CC19/2020

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

CASE NO. CC19/2020

In the matter between:

THE STATE

vs

THOBANI KESA

Accused

SENTENCE

JOLWANA J:

Introduction.

- [1] The accused stands convicted of one count of arson and four counts of murder. The accused and all the four deceased persons are blood relatives. The deceased in count 3, Mr Mqondisi, Kesa, is the father of the accused. The deceased in count 4, Mrs Thubakazi Mbatyazwa is the accused's mother. The deceased in counts 3 and 4 were married to each other. The deceased in count 1, Nobubele Hazel Kesa is the accused's sister and the deceased in count 2, O[...] H[...] K[...] is the daughter of the deceased in count 1 and therefore the niece of the accused person. It must therefore be correct to refer to these murders as a typical case of familicide.

- [2] The facts and the circumstances in which the deceased were all killed need not be repeated. Suffice it to say that in the early hours of the morning on 22 July 2018, the Kesa homestead was mysteriously burned down with the deceased inside. As a result, they were all scorched beyond recognition. The accused was convicted for all the crimes related to that incident. This Court is now faced with the onerous task of considering and deciding on the appropriate sentences to be meted out to the accused for the crimes for which he was convicted after a long trial.

Sentencing principles.

- [3] It is trite law that in considering an appropriate sentence, the sentencing court must have due regard to the triad consisting of the crime, the offender and the interests of society[1]. Our courts have, over the years, refined what a sentencing court should look at in the sentencing process. In Tsoetsi[2] the court listed and restated the basic sentencing principles as follows:

“(a) The sentence must be appropriate, based on the circumstances of the case. It must not be too light or too severe.

- (b) There must be an appropriate nexus between the sentence and the severity of the crime; full consideration must be given to all

mitigating and aggravating factors surrounding the offender. The sentence should thus reflect the blameworthiness of the offender and be proportional. These are the first two elements of the triad enunciated in *S v Zinn*.

- (c) Regard must be had to the interests of society (the third element of the Zinn triad). This involves a consideration of the protection society so desperately needs. The interests of society are reflected in deterrence, prevention, rehabilitation and retribution.
- (d) Deterrence, the important purpose of punishment, has two components, being both the deterrence of the accused from re-offending and the deterrence of would-be offenders.
- (e) Rehabilitation is a purpose of punishment only if there is the potential to achieve it.
- (f) Retribution, being a society’s expression of outrage at the crime, remains of importance. If the crime is viewed by society as an abhorrence then the sentence should reflect that. Retribution is also expressed as the notion that the punishment must fit the crime.
- (g) Finally, mercy is a factor. A humane and balanced approach must be followed.”
- [4] It is with the above principles in mind that I must do the very difficult task of considering an appropriate sentence and sentence

the accused person accordingly. In the final analysis, the sentencing discretion vests with the sentencing court itself which

must be exercised carefully and judiciously.

The Minimum Sentences Act.

[5] In respect of the four murder counts for which the accused has been convicted the State had invoked the provisions of section 51(1) of Act 105 of 1997 (the Minimum Sentences Act) in terms of which the prescribed minimum sentence is life imprisonment. The accused was given the necessary warning by the court in this regard before he pleaded. His legal representative also confirmed that he had also advised him of the implications of the invocation of section 51

(1) of the Minimum Sentences Act.

[6] However, a sentencing court may depart from the imposition of the prescribed minimum sentences if it finds that there are substantial

and compelling circumstances to justify such a departure as provided for in section 51(3) of the Minimum Sentences Act. The approach to the consideration of whether or not a departure from the prescribed minimum sentences is justified in the particular

circumstances of a case was captured very succinctly and pronounced authoritatively in Malgas[3] in which the court said:

“A. Section 51 has limited but not eliminated the court’s discretion in imposing sentence in respect of the offences referred

to in Part 1 of Schedule 2 (or imprisonment for other prescribed periods for offences listed in other parts of schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. 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, standardized and consistent response from the courts.

D. The specified sentences are not to be departed from lightly or for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.”

Mitigating factors.

- [7] The accused testified in mitigation of sentence and in doing so, he brought to the attention of the court his personal circumstances that he wanted the court to take into consideration before he is sentenced. He testified that he is a first offender at the age of 39. He is unmarried and has three children with different mothers. Those children live with their respective mothers. He is therefore not a caregiver and has never been a caregiver to those children. He testified that at some point after his arrest for this case, he escaped from lawful custody and went to the homestead of his aunt at New Rest in Sterkspruit. On his evidence, he escaped from lawful custody on a Wednesday in April 2019, eight months after his arrest, and arrived at the homestead of his aunt, M[...], between 21:00 and 22:00 at night. He did not give any evidence about what he did the following day which would have been a Thursday.
- [8] However, on the following Friday members of the community arrested him. He testified that they assaulted him before they called the police. He was then re-incarcerated. His explanation for escaping from lawful custody was that he wanted to ask his aunt why his grandfather, presumably Mr William Kesa, was being allowed to sell his home while he and his brother, Ntembeko Kesa, his then co-accused were still alive. Significantly, he did not go back to custody on his own volition after he had had time to discuss the issue he wanted to discuss with his aunt. It took members of the community to re-arrest him after which they called the police who took him back to detention as an awaiting trial prisoner.
- [8] It was submitted on his behalf by his legal representative that the fact that he is a first offender, and has been in incarceration since his arrest on 22 July 2018 are justifications for a departure from the prescribed minimum sentences. Reference was also made to the fact that he had been assaulted by members of the community when they re-arrested him and in that sense, he was punished. What this submission ignores is that he would not have been assaulted if he had not escaped from the safety of lawful custody. It also ignores the fact that in escaping from lawful custody he had broken the law and was in fact running away from the consequences of his criminal conduct which had led to his arrest and incarceration in the first place. Even if he was indeed assaulted, that is in my view, irrelevant to the central question of whether or not his personal circumstances do indeed justify a departure from the prescribed minimum sentences. In any event he should have and he still remains entitled to lay criminal charges against those members of the community he said assaulted him. He is not automatically entitled to lesser sentences on account of his alleged assault by members of the community.

Aggravating factors.

- [9] The State made submissions in aggravation of sentence emphasizing the fact that the offences for which the accused has been convicted are of an extremely serious nature. Not everyday that one hears of a case in which a person has wiped out almost his entire family from the face of the earth. The accused testified that from his father and mother, the deceased in counts 3 and 4, they were three children. The first born was his elder brother, the erstwhile accused no.2 and he is the second born. The third born was his sister Nobubele Hazel Kesa, the deceased in count 1. The other member of that family was Nobubele's young daughter, O[...] H[...] K[...]. All these four family members were killed by the accused mercilessly. They were burnt beyond recognition and their bodies were virtually incinerated in that inferno.
- [10] The post mortem report in respect of his sister, the deceased in count 1 reflects that she was approximately 14 weeks pregnant at the time of her death. According to the post mortem report, the foetus was looking normal in its mother's uterus. What cushioned the foetus from being incinerated into smithereens like its mother is nothing short of a miracle. The accused has not taken this Court into his confidence and explained why he ended up killing his entire family including his young niece O[...], a child. There was no expression of remorse by him at all. He did not even try to give an honest account of what he did which led to the death of his entire family. How that Kesa homestead was set alight and what inflammable substance was used will never be known. What caused his mother and father to bleed which led to blood being found at the crime scene and blood stains being found in his tracksuit will never be known. He expressed no emotions about what had happened to his own parents who gave birth to him, fed and raised him. His unrepentant heartlessness is exposed by his escape from custody for the sole purpose of preventing his grandfather from allegedly selling the homestead he burnt.
- [11] The background to these crimes is that he and his brother's hostile relations with their mother and father went as far as the magistrates' court in Sterkspruit where he and his brother instituted civil court proceedings at the small claims court for the payment of about R20 000.00 for services rendered in building his own homestead. His parents obtained a protection order against him and his brother when the relations between them and their sons deteriorated further. This was to be followed by the painful premeditated murder of their parents, sister and niece under the cover of darkness in the early hours of the 22 July 2018. He was careful to hide all traces of his involvement in these crimes by dumping his blood stained tracksuit pants in a toilet pit at Kromspruit where he and his brother stayed. He clearly did not notice that the blood of his mother had somehow splattered to the hood strings of his tracksuit top despite his carefulness in ensuring that he would not account for his cruelty.
- [12] He is a cunning and devious criminal who killed his own family in what must have been a slow and painful death when they were

helplessly engulfed in flames which burnt almost every flesh of their being. In order to ensure that nobody survived to tell the tale of his parents' death, he had no difficulty in causing the death of his sister and an innocent young girl in that inferno. I still find it very strange that amongst the deceased not a single person was able to escape out of four people. This was after all, their own home in which they lived and they obviously knew their way around that two roomed flat structure they were sleeping in. However, the accused has chosen not to open up about how he ensured that not a single person would be able to escape. He has not said anything about his family's death besides his denial about his involvement in these crimes.

Conclusion.

[13] His personal circumstances are neither substantial nor compelling. He is just a dangerous criminal whose cruelty knows no boundaries. He has absolutely no respect for human life, even that of his own family members, not even his own niece, a young child. In the case of Di Blasi[4] the court expressed itself as follows:

"The requirements of society demand that a premeditated, callous murder such as the present should not be punished too leniently lest the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime but should also deter others from similar conduct."

[14] Violent crime in this country has become uncontrollable. Where police arrest suspects who, the evidence proves beyond reasonable doubt that they have in fact committed the offences and are subsequently convicted, must be punished appropriately.

Retributive and deterrent purposes of punishment for serious crimes have become indispensable tools in the administration of justice.

Courts must do what they need to do in appropriate cases and should not flinch in imposing stiff sentences for serious crimes if the rampant criminality and the prevalence of violent crimes are to be brought under control.

[15] In the result the accused is sentenced as follows:

1. In respect of count 5 arson, the accused is sentenced to 5 years imprisonment for burning the Kesa homestead at Teenbank, the home of all the deceased.
2. In respect of count 3, the murder of his father, Mqondisi Patrick Kesa, the accused is sentenced to life imprisonment.
3. In respect of count 4, the murder of his mother, Thubakazi Victoria Mbatyazwa the accused is sentenced to life imprisonment.
4. In respect of count 1, the murder of his sister, Nobubele Hazel Kesa, the accused is sentenced to life imprisonment.

5. In respect of count 2, the murder of his niece, O[...] H[...] K[...], the accused is sentenced to life imprisonment.
6. The accused is declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the State: L. Pomolo

Instructed by:

The Director of Public Prosecutions

Mthatha

Attorney for the accused: O.N. Mankanku

Instructed by:

Legal Aid South Africa

Date heard:

14 February 2023

Date delivered:

16 February 2023

[1] S v Zinn 1969 (2) SA 537 (A).

[2] S v Tsotetsi 2019 (2) SACR 594 (WCC) at page 604.

[3] S v Malgas 2001 (1) SACR 469 (SCA).

[4] S v Di Blasi 1996 (1) SACR 1 (A) at 10 f – g.

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