

SOUTH AFRICA / JUDGMENT

S v Tai-Tai and Others - Sentence (CC21.2020) [2023] ZAECMHC 45 (30 August 2023)

[2023] ZAECMHC 45

COURT

Eastern Cape High Court, Mthatha

BEFORE

M.S. Jolwana

CASE / FILE NUMBER

CC21/2020

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IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

CASE NO. CC21/2020

In the matter between: THE STATE vs LUZUKO TAI-TAI Accused No.1 M[...] M[...] Accused No.2
SAMKELO NONTWANA Accused No.3

SENTENCE

JOLWANA J:

[1] The accused were charged with one count of conspiracy to commit the murder of the deceased in count 3, Mr N[...] M[...] in contravention

of section 29 of Act 9 of 1983, one count of arson in contravention of section 125 of Act 9 of 1983 which was which was in connection

with the burning of Mr N[...] M[...]’s homestead and three counts of murder in contravention of section 84 of Act 9 of 1983 The murder charges were for the death of the deceased in count 3, Mr N[...] M[...], the death of the deceased in count 4, Ms Kekeletso

Catherine Senoamadi and the death of the deceased in count 5, S[...] B[...].

- [2] With regard to the murder charges the State invoked the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997. This was on the basis that the commission of these murders was premeditated and the three accused acted in furtherance of a common purpose. The accused persons were convicted in respect of arson and the murder charges. They must now be given appropriate sentences.
- [3] Before the accused were asked to plead to the charges, they were each asked to confirm if they understood all the charges. All three of them confirmed that they understood each and everyone of the charges. The court further explained to them the implications of the State's invocation of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act) in respect of the murder charges. On their confirmation that they understood that they may be sentenced to life imprisonment in the event of a conviction in respect of counts 3, 4 and 5, the murder charges, they were then asked to plead. Their legal representatives also confirmed that the provisions of section 51 (1) of the Minimum Sentences Act were explained to the accused. All the accused pleaded not guilty to all the charges preferred against them.
- [4] Section 51 (1) of the Minimum Sentences Act reads:

“Notwithstanding any other law, but subject to subsections (3) and (6) a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life.”

- [5] The relevant parts of Part 1 of Schedule 2 read:

“Murder, when –

- (a) it was planned or pre-meditated,
- ...
- (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy;”

- [6] On premeditation and common purpose, this Court made the following findings in convicting the accused persons[1]:

“[119] Having considered with great care, all the evidence of the State witnesses and the evidence of each one of the accused persons, it is clear to me that the three accused persons were not at the wrong place at the wrong time. The evidence considered as a whole point to carefully planned and executed crimes which were designed to procure the outcome that they did, the killing of the deceased and the destruction of their home. On the evidence, it is accused no.1 and 3 who set the N[...] homestead on fire at the behest of accused no.2 who masterminded the whole operation in what, if it was not criminal acts, would be said to be commendable skill to evade detection. The meeting at her place was not to discuss a dagga deal. It was evidently to plan and execute the crimes that were committed with the willing assistance and participation of accused no.1 and 3 who ordinarily had no axe to grind against the deceased persons.

[120] The fact that accused no.2 never set her feet at the N[...] homestead at the time it was set on fire is neither here nor there.

Accused no.1 and 3 acted on her behalf and executed a plan they had all hatched together. They both had no reason of their own to kill the deceased persons. The doctrine of common purpose under which they were charged makes all of them equally liable for all the crimes that were committed that night....”

[7] The court, having found that the murders were premeditated and that the accused acted in furtherance or execution of a common purpose, convicted them in respect of arson and the three murder charges. Therefore, section 51 (1) of the Minimum Sentences Act which the State had involved when charging the accused is applicable in the consideration of an appropriate sentence. Section 51 (1) is however subject to section 51 (3) of the Minimum Sentences Act. While section 51 (1) provides for the imposition of the prescribed minimum sentences, section 51 (3) opens up a possibility for the court to consider each case individually and apply its discretion in considering whether in a particular case the particular prescribed minimum sentence would be appropriate in the circumstances of the case as a whole and in particular, the personal circumstances of the person so convicted.

[8] Section 51 (3) of the Minimum Sentences Act reads as follows:

“If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.”

[9] Before I consider the evidence of the accused who testified in mitigation of sentence and the submissions that were made on behalf of all the accused I consider it instructive to bring to the fore, in brief, the nature of the crimes involved in this matter. At or about midnight on 6 November 2019 the N[...] homestead was set on fire and it was not known what or how the fire started. All the people who were there that night were scorched to death. Those people were the three deceased persons in this case. Dr Jwaqa, the forensic pathologist who examined what remained of the deceased after the fire described two of the deceased persons, Mr N[...] M[...] and Ms Kekeletso Catherine Senoamadi as having been burnt beyond recognition with their limbs burnt to amputation. The third deceased person, S[...] B[...], a 13 year old boy was also found to have been completely burnt beyond recognition.

[10] The accused persons were charged in connection with the incident and they pleaded not guilty during their trial. After a very lengthy trial, the evidence established that the fire was not accidental. It was in fact a deliberate and well-planned arson attack on the three unsuspecting people who were known, at least by accused no.2, to be living in that homestead as their home. She had conspired and planned together with accused no.1 and 3 to set that homestead on fire. As part of a plan to commit the offences accused no.2 hired a cab in which accused no.1 and 3 loaded 10 litres of petrol contained in a 20 litre container and two empty five litre containers. All three of them proceeded to Walaza location at about

midnight in the hired vehicle. At an identified spot not far away from the N[...] homestead, accused no.1 and 3 alighted from the vehicle and offloaded the above mentioned containers and proceeded to the N[...] homestead. Accused no.2 remained in the vehicle with the driver and directed that the vehicle should move to a different spot while accused no.1 and 3 went to set alight the N[...] homestead which resulted in the death of the three deceased persons. On the return of accused no.1 and 3 the vehicle took them back to Mokhesi location near where they lived.

- [11] The question of the seriousness of these offences is not in dispute. Similarly, the disgust and the desire of the community of Walaza location, the people of Sterkspruit and the society in general for those who commit these offences to be dealt with harshly are obvious. The expectation of society for those convicted of serious crimes such as the ones for which the accused persons have been convicted in this case have long been recognized by our courts. In *S v Di Blasi* 1996 (1) SACR 1(A) at 10 f – g 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.”

- [12] This type of crime in which people are burnt to death is shockingly very prevalent in the area of Sterkspruit. So prevalent it is that this Court alone, in 2022 and in 2023 convicted and sentenced the arsonists involved in some of the cases. This is a third conviction and sentence in a short period of time. There can be no doubt that the people of Walaza location and Sterkspruit and indeed the people of South Africa in general look upon our courts to send a clear message to the other would be arsonists that those who are found to have committed these types of crimes will be given stiff sentences. Where police do their work in investigating such crimes and the culprits are convicted it is up to the courts to ensure that they pass fitting sentences that reflect the society’s indignation with such barbaric behaviour.

- [13] The proper approach that must be applied by courts in their exercise of the sentencing discretion was summarized very succinctly as follows by Smalberger JA in *S v Ingram* 1995 (1) SACR 1 (A) 8i-9b:

“It is trite law that the determination of an appropriate sentence requires that proper regard be had to the triad of crime, the

criminal and the interests of society. A sentence must also, in fitting cases, be tempered with mercy. Murder, in any form, remains a serious crime which usually calls for severe punishment. Circumstances, however, vary and the punishment must ultimately fit the true nature and seriousness of the crime. The interests of society are not best served by too harsh a sentence, but equally so they are not properly served by one that is too lenient. One must always strive for a proper balance. In doing so due regard must be had to the objects of punishment.”

- [14] Accused no.1 testified in mitigation of sentence. He started his evidence by expressing an apology to the families of the deceased persons. He testified that after his arrest he cooperated with the police and in fact made a statement which was later ruled as an admissible confession by this Court. His co-operation led to the arrest of his co accused. He testified that he had to dispute that he had voluntarily made a confession which then led to a trial within a trial having to be conducted to determine the admissibility of the confession. He said this was because he feared being seen as a traitor and a sell out by his co accused. He testified that he had been drinking the whole day on the day of the incident. He went on to say that the police failed him in that after he had made the confession, the police just let him go without offering him any protection.
- [15] There are a number of problems with the evidence in mitigation of sentence that accused no.1 gave. Just on the issue of him having been let down by the police, there were many opportunities for him to ask the police for protection if he indeed felt that his life was in danger. He never asked the police for protection and in fact he never told them that he could be in danger. Even when he appeared before the magistrate who took his statement he never expressed any fear or made any indication that he ever needed protection from any form of harm that accused no.2 and 3 might cause him.
- [16] Even in that confession statement while he placed himself at the crime scene, he suggested that he was drunk or drugged at the time and he was forced to be there or to commit the offences with threats of being killed by accused no.3. He also falsely claimed that accused no.2 was also present at the N[...] homestead when it was being set alight. However, credible evidence established that he lied in that regard. It seems to me that at some point after his arrest and because he knew that accused no.2 was not at the N[...] homestead he decided to falsely place her at that homestead so that accused no.2 as well would be convicted in the event that he and accused no.3 were convicted. He was clearly operating under the wrong impression that accused no.2 could escape conviction only because she was not personally present at the N[...] homestead.
- [17] What is clear is that he is a liar, who lied even in his confession in some respects. He appears to be somebody who is prepared to do and say anything to save himself. This also speaks to the false expression of remorse which conveniently was only expressed after the conviction. In doing so, he was again trying to save his own skin by pretending to be a victim of circumstances over which he had little or no control. During trial he distanced himself from involvement in these crimes and testified under oath giving false testimony in which he narrated a dagga story that appears to have been very well rehearsed by the three of them.

In this process a lot of time was spent with State witnesses being subjected to unnecessary cross-examination at his instructions when all along he knew that those witnesses were right about him and his co-accused's involvement in these crimes.

- [18] With regard to his personal circumstances the following submissions were made on his behalf. It was submitted that he is 33 years old and is a first offender. He is unmarried with one child who stays with his mother. He was an awaiting trial prisoner for about a year from his arrest in November 2019 until he was released on bail in October 2020. Alcohol played a role in him getting involved in these offences although he appreciated the unlawfulness and wrongfulness of his actions. Prior to his arrest he was a security guard earning a salary of R3500.00 per month. He had co-operated with the police and referred them to certain State witnesses all of which led to the arrest of his co-accused.
- [19] Accused no.2 also testified in mitigation of sentence. Like accused no.1, she embarked, cunningly on an elaborate strategy of getting undue sympathy from this Court. She gave a very long story of having been abused by the deceased, her former husband, Mr N[...] M[...]. She testified that she got married to Mr N[...] M[...] in 1999 and had her first child from that marriage who unfortunately passed on when she was 9 months old. She fell pregnant again but even their second child passed on. The second child was one month old when she passed on. The third child who was also a girl passed on when she was two months old. As a result of these terrible misfortunes regarding these babies who died, she decided not to fall pregnant again. She testified that her then husband, the deceased, N[...] M[...], supported her decision not to conceive again.
- [20] Some years passed during which they were happy together but in 2006 problems began. Her husband began not sleeping at home and at times he would disappear on a Friday and come back on a Sunday. He was not bringing money home anymore. When she asked him about these things he would beat her up. She then decided to start an informal business selling food in a caravan in town in Sterkspruit to make some money. The deceased did not like this but she persisted and continued with her business. She would travel from Walaza to Sterkspruit in town where she conducted her small business and would go back to Walaza after knocking off. The quarrels continued and on one occasion he hit her and caused her a heamatoma on her head. One of her friends, Matshepang called the police. When the police came, the deceased closed her up in the house using a sofa. He placed a knife and a stick on the table. He opened for the police who asked him what was happening. At that stage the deceased was not dressed on his upper body. His clothing on his lower body was full of blood. The police asked him why he had a knife and a stick on the table and he said that he was killing a rat or mouse. However, he could not account for the blood or give a proper explanation.
- [21] I have included this story if only to show the endless lies that accused no.2 told to this Court even when she was testifying in mitigation of sentence. If this story is understood very well Matshepang called the police because she was being assaulted by the deceased. The police came and saw the deceased having a knife and a stick which were on the table. He had a lot

of blood on his clothing in the lower body. All he could say was that he had been killing a rat. Seemingly the police who came all the way from town to Walaza to intervene because accused no.2 was being assaulted went back having been told about a rat, which is so utterly improbable that it is clearly false. All of this story was being made up just to show that her husband was physically abusive to her.

- [22] In all the years of her alleged clearly false physical abuse at the hands of her late husband, there is not a single witness who was called. Not her friend Matshepang who had called the police or even her brother Lefu who witnessed some of the abuse. At some stage in her evidence she testified about her father not having been able to come to her inlaws for a meeting to resolve their issues because he had to attend a wedding on that day. Her mother and her sister came for that meeting that had been arranged to discuss their quarrels with Mr N[...] M[...]. That meeting did not succeed because one of the uncles, one Bhuti M[...] would not talk to her mother and her sister because he would not talk to women.
- [23] Very strangely, her mother was not called and her sister was also not called as a witness. Therefore, this whole story is seriously questionable and was probably made up as well. She also testified about a protection order that she sought against her husband. Her husband was summonsed about the protection order. He came but allegedly went to a wrong office while she was waiting in another office. As a result, the domestic violence office did nothing about her domestic abuse and about the contemptuous behavior of her husband who, having been summonsed, did not come about the protection order. As a result, that too fizzled out. All these stories were probably made up to create this monstrous idea about her husband. The unfortunate thing about accused no.2's false stories is that they undermine and even water down the serious problem of domestic abuse especially of women by their husbands or partners.
- [24] Eventually she left in 2010 and separated from him. She carried on with her life and now has two children, one seven years old and another one five years old. Having moved on from her monster of an abusive husband, she would on her evidence, come back to him at Walaza and at times he would visit her at her place in town. He had accepted her children even though they were not his. If Mr N[...] M[...] was as bad an abuser as she said he was, it escapes my mind how she came back from Secunda at some stage to the abusive Mr N[...] M[...] carrying children that were not his. On her evidence, he accepted and loved these children who were not his despite being a jealous abusive husband.
- [25] The above are some of the falsehoods told by the accused no.2, some for the first time after her conviction. It will be recalled that just like accused no.1, she had testified in her defence before they were all convicted. She never gave any of this detailed evidence at all. It was clearly cooked up so that she could be seen as a victim of domestic abuse at the hands of the deceased which then justified her actions in killing him. I reject all these false stories as mischievous attempts to get underserved sympathy from this Court through peddling fictitious stories that she would not corroborate beyond her false testimony.

[26] It was submitted on her behalf by her legal representative during submissions in mitigation of sentence that accused no.2 is 50 years old. She is a first offender. She has two minor children aged 7 and 5 respectively. She is a sick person with a number of chronic illness including heartaches, blood pressure and diabetes for which she is taking treatment. She was a breadwinner at her home and also supported her sickly mother who is also diabetic and suffers from other old age related ailments. She was married to the deceased and was subjected to domestic violence by her abusive husband. She has had a lot of misfortune in her life including losing her children and a miscarriage caused by her abusive husband. She had consumed alcohol when she committed these offences although she could appreciate the wrongfulness of her actions. Therefore, alcohol played a role in the commission of these offences. She was remorseful and during her evidence in mitigation of sentence, she apologized to all the families of the deceased for having been involved in the death of their loved ones.

[27] Besides the many lies and concocted stories that accused no.2 told this Court, her personal circumstances fizzle into insignificance

especially when viewed against her cunning and deceitful nature and in particular the cruelty with which the deceased were all killed.

[28] Similarly with accused no.3, submissions were made by his legal representative as he elected not to testify. It was submitted

that he is 31 years old and is not married. He has four minor children who stay with their mothers. Before conviction he had a car wash business in which he generated R3500.00 a month. His health condition is not good in that he suffers from chronic illnesses for which he receives treatment from public health facilities. Before conviction he was looking after his sickly mother who suffered from diabetes and poor eyesight. He is a first offender and he had consumed alcohol on the day of the incident. He never applied his mind to the possibility that there might be people in that house. He had been told by accused no.2 that there was no one there and that they were going there to destroy that house because it had been built by her.

[29] In aggravation of sentence the state called witnesses who are relatives of the deceased. The pain that they suffered in losing their loved ones was palpable during their testimony. What made their pain even more unbearable was not being able to have a proper burial for the deceased. They ended up burying pieces of the badly burnt remains of their loved ones and a collection of parts of their bodies and limbs that were amputated by fire.

[30] As indicated earlier in this judgment, section 51 (1) of the Minimum Sentences Act is applicable. In *S v Vilakazi* 2009 (1) SACR 552 at 574 c – d the court dealt with the issue of the personal circumstances of a convicted criminal as follows:

“The personal circumstances of the appellant so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crimes the personal circumstances of the offender by themselves will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial

period of imprisonment the question whether the accused is married or single, whether he has two children or three whether or not he is in employment are in themselves largely immaterial to what that period should be and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided."

[31] The three accused in this case have all failed to come up with any personal circumstances that could be regarded as substantial and compelling so as to justify a departure from the prescribed minimum sentence. Accused no.1 and 2 testified to save themselves and made a dishonest belated apology. During their testimony in mitigation of sentence, they disclosed very little, if anything at all, that the State witnesses in the main trial had not already testified about. The bulk of their evidence was about

themselves and they tried dishonestly, to ensure that they escaped with a lesser punishment than the one prescribed by pretending to be victims of circumstances when it became clear that after their conviction they faced lengthy periods of imprisonment. They were therefore deceitfully trying to bargain with the court.

[32] In the result the accused persons are sentenced as follows:

1. Accused no.1, 2 and 3 are each sentenced to five years imprisonment in respect of count 2, arson.
2. Accused no.1, 2 and 3 are each sentenced to life imprisonment for the killing of the deceased in count 3, Mr N[...] M[...].
3. Accused no.1, 2 and 3 are each sentenced to life imprisonment for the killing of the deceased in count 4, Ms Kekeletso Catherine Senoamadi.
4. Accused no.1, 2 and 3 are each sentenced to life imprisonment for the killing of the deceased in count 5, S[...] B[...].
5. All three accused are 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: NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS MTHATHA Counsel for Accused No. 1: M. SAKWE Instructed by: LEGAL AID SOUTH AFRICA MTHATHA Counsel for Accused No's 2 & 3: Z. NGXISHE Instructed by: LEGAL AID SOUTH AFRICA MTHATHA Date heard: 28 August 2023 Date Delivered: 30 August 2023

[1] S v Tai-tai and Others (CC21/2020) [2023] ZAECMHC 16 (29 March 2023)

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Prepared on 12 October 2026 · Esheria