IN THE HIGH COURT OF SOTH AFRICA
EASTERN CAPE HIGH COURT: MTHATHA

CASE NO. 267/2004

In the matter between:

THE STATE

and

BUYELEKHAYA DALINDYEBO

SENTENCE

ALKEMA J

[1] The crimes of which the accused was convicted are the following:

1. Arson i.r.o the four rondavels (collectively referred to as the homestead) of Stokwana Sonteya on 20 June 1995;
2. Kidnapping of Nocingile Sonteya and her six children (the wife and children of Stokwana Sonteya) on the same day 20 June 1995);
3. Arson i.r.o. three rondavels (collectively referred to as the homestead) of Wayiya Sonteya on 20 July 1995;

4. Arson i.r.o. two huts (homestead) of Mbuzeni Makhwenkwana on the same day, 20 June 1995;
5. Acts with the intent to defeat the course of justice in contravention of section 40(a) of Act 9 of 1983 (The Transkei Penal Code) by unlawfully and unduly influencing Stokwana Sonteya to withdraw the arson charge (referred to in para 1 above) against him;
6. Three counts of assault with intent to cause grievous bodily harm to Malandela Sontonase, Lunga Pama and Welile Dumo respectively, on 23 January 1996;
7. Culpable homicide i.r.o. the death of Saziso Wofa on 27 January 1996; and
8. Acts to defeat the course of justice as contemplated by the said section of the Transkei Penal Code in that he unlawfully and intentionally concealed the death of Saziso Wofa from the relevant authorities and instructed Koto Wofa, the father of the deceased, not to report the death of his son to the SAPS, to conceal the true cause of death from the mortuary authorities, and not to take any legal action in connection with the death of Saziso.

[2] In summary, the accused was convicted of ten crimes committed on his farm Tyalara over a period of eight months from June 1995 to January 1996. This brings me to the most difficult issue in the trial, namely the question of sentence.

[3] In search for an appropriate sentence the court is called upon to consider all the relevant facts, factors and circumstances, and then to afford to each separate component a certain weight depending on the facts of the case. The next step is then to balance the components in conjunction with one another and to strive for the attainment of all the purposes of punishment. This much is trite; the difficulty lies in the practical application of theoretical ideals. Fortunately, our courts have developed, over the years, certain criteria in accordance with which the appropriateness of a sentence may be achieved.

[4] The *locus classicus* is the remark of Rumpff JA in **S v Zinn** 1969 (2) SA 537 (A) at 540 G-H which has now become known as the **Zinn triad**:

> *"What has to be considered is the triad consisting of the crime, the offender and the interest of society."*

[5] I will deal with each leg separately.

The crime

[6] The seriousness of the crimes in relation to the sentence imposed plays an important, if not dominant, role in the sentencing process. In **S v Holder** 1979 (2) SA 70 (A) at 81A Rumpff CJ stressed that, in the case of serious crimes, whatever their nature, the punishment component has to be given priority. The opposite is also true: in less serious crimes, the punishment component plays a lesser role, if at all.

[7] In the present case, the crimes of which the accused was convicted do not fall into the category of the most serious crimes our courts very often deal

with. Those are not the types of crimes which attract sentences of life imprisonment. By the same token, they can certainly not be described as trifling offences. Also, and within their own category of seriousness in relation to other types of crimes they can be described as serious cases of their particular type of crimes. For instance; assault with intent to do grievous bodily harm cannot be equated with murder, and the sentence must reflect this recognition. However, the assaults perpetrated by the accused in this case must, in my view, rank as one of the worst cases of assault which can be perpetrated.

[8] The three victims were undressed; their hands tied between their backs; they were prostrated on the floor; they were assaulted over a period of two hours; their assailants assaulted them by using sjamboks; they were made to *"frog jump"* while the accused was whipping their feet; when the accused got tired he instructed other people to continue with the flogging *"until they screamed"*; the whipping caused their skin to open and left permanent scarring, and the assault continued until *"hut smelled of blood."*.

[9] On the uncontested medical evidence the three victims would have died, had they not received timeous medical attention. The state evidence, supported by the medical evidence and not disputed by the accused, was to the effect that one of the victims, Lunga Pama, became mentally deranged after the assault. They were unable to walk after the assaults and had to be carried away. Malandela urinated blood, indicating internal injuries. Their assaults were not only witnessed by members of the community, but also by their own family members.

[10] The assaults were cruel, humiliating and degrading. Mr Price, on behalf of the accused, submitted in mitigation that the victims were offenders and guilty of crimes and were merely disciplined by the accused in his capacity as King. There is, in my view, no merit in this submission. Even assuming they were guilty of the alleged offences, the accused had no legal right or jurisdiction to punish them in respect of the alleged crimes. To his own knowledge, he should have reported them to the police for investigation and prosecution. There was no juristification whatever for the brutal assaults.

[11] The seriousness of the assaults, the circumstances under which they were committed, the effects and harmfulness in relation to the victims, and the degree of the accused's own culpability, all constitute aggravating features which contribute to the weight to be attached to the first leg of the triad.

[12] The same principles apply to the three crimes of arson. Arson, as I said in the judgment, is simply a feature of the crime of malicious injury to property. Normally, the consequences of malicious injury to property (including arson) are confined to economic or patrimonial losses. In this case, the three acts of arson stretched much further; three families were without warning instantly deprived of one of the most basic and fundamental necessities of life: the protection, shelter and comfort of a home. Not only did the husband and wife lose their home, but so did their children. In the case of Stokwana, one of the six children left without a home was a babe.

[13] As I indicated in the judgment on conviction, the right to housing is a fundamental right in the Bill of Rights under the Constitution. In terms of

section 26 (3) no one may be evicted from their home, or have their home demolished, without an order of court. It is true that section 26 and the right to housing was not at the time of commission of the offences entrenched in the (then) interim Constitution. However, in the context of the seriousness of the crime of arson on the facts of this case, I do not believe this is a relevant consideration. The fundamental and basic human right not to have your family home unlawfully demolished, thereby leaving an entire family destitute and dependent on others, existed in 1995 even before it was drafted into the final Constitution one year later in May 1996.

[14] Not only did the complainants and their families under the arson charges suffer financially and materially; they were traumatized by being unlawfully evicted from their homesteads and from the area where they had lived their entire lives. Having listened to and observed the witnesses who testified in this case, the court sensed a feeling amongst the Tyalara community of despair and fear that if the King (the accused) is disobeyed or displeased, then the offender and his entire family will simply be evicted by setting their homesteads alight,

[15] Again, these features are all aggravating circumstances contributing to the weight to be attached to the seriousness of the crimes of arson.

[16] In regard to the crimes of kidnapping, I do not for a moment believe, as Mr Price contended, that the accused kidnapped Mrs Sonteya and her six children *"...out of a feeling of compassion."* I never sensed any compassion on the part of the accused at any stage of the trial. He kidnapped them, as I

held in the judgment, to force Stokwana Sonteya to come to the Great Place to pay his fines.

[17] Notwithstanding, and given the prevailing circumstances, Mrs Sonteya and her children were not badly treated during the period of detention. They were released during midday the following day, but warned to leave the Tyalara area. On the scale from *"extremely serious"* to *"trivial,"* I do not believe the crime of kidnapping on the facts of this case, or the circumstances under which it was committed, can be regarded as *"serious."* By this I do not intend to convey that the crime of kidnapping is not serious – it certainly is, as are all crimes. However, relevant to its own category and parameters of seriousness as a crime, I do not believe any inherent aggravating features are present in the kidnapping and which warrant particular attention.

[18] In regard to the crime of culpable homicide, it must be borne in mind that this type of crime also does not fall within the class of the most serious types of crimes such as murder. Nevertheless, within its own parameters of seriousness, it was a serious case of culpable homicide.

[19] It bears repeating that in the case of culpable homicide, as opposed to murder, it is not the frame of mind (intention) of the offender which attracts the sentence, but his **conduct** as measured against that of the reasonable man in his place. On the facts of this particular case, the reasonable man in the shoes of the accused at the time and against whom his conduct must be measured, can only be the reasonable, average, abaThembu King.

[20] As I held in the judgment on conviction, it should have been apparent to the reasonable, average King after the assaults on the three assault victims, that they may possibly die from the assaults in the absence of medical treatment. Armed with this knowledge, the reasonable King would in these circumstances have taken reasonable steps to prevent such possible occurrence. The first and obvious step would have been to warn the captors of the three assault victims specifically, and the members of the community in general, not to arrest and assault the deceased, Saziso Wofa. This, the accused failed to do. He expressly instructed the captors of the three victims to arrest Saziso and assault him in the same manner in which he (the accused) assaulted the three victims. These instructions, as I held in the judgment on conviction, resulted in the arrest and assault on Saziso, and his eventual demise.

[21] I think it is clear from the above that the accused escaped a conviction of murder by hair's breadth. The court was unable to find on the facts of this case that the accused, as a matter of fact, subjectively foresaw the death of Saziso.; but found that a reasonable, average King would have foreseen such eventuality and would have taken steps to prevent it. The accused could not have come closer to a conviction of murder. His serious degree of misconduct borders on recklessness, and this fact alone catapults the crime of culpable homicide on the facts of this case into the bracket of a serious level of culpable homicide crimes. Saziso was brutally assaulted to death, and the accused's gross misconduct in his acts and behaviour as King of the abaThembu caused such assault and death.

[22] Mr Carpenter, for the State, submitted that the callous behaviour of the accused after he learned of the death of Saziso constitute an aggravating factor. The accused, for instance, suggested that the body of Saziso should be thrown into the Mbashe River, but he was persuaded to allow the body to be taken to his father's homestead. Thereafter, the accused ordered his subjects not to report the death of Saziso to the authorities. He instructed Saziso's father, Koto Wofa, to tell the mortuary officials that his son had died of natural causes, and he forbid Koto to consult a lawyer on the subject of his son's death. Out of fear for the King, Koto followed these orders. As a last measure, and a chilling, but telling feature pointing to his total lack of compassion, the accused then fined Koto for the alleged misdeeds of Saziso.

[23] The above features in other circumstances would undoubtedly constitute aggravating factors, but in my view they can not both constitute aggravating circumstances in respect of one conviction, and at the same time also constitute the jurisdictional facts on which he is convicted in respect of another crime. In this case, the State chose to use these facts as constituting the crime of defeating the ends of justice, and the accused was convicted of such crime. If he is sentenced in respect of the last mentioned crime, the same facts can no longer play a role, as aggravating circumstances, in respect of another crime. I therefore do not consider these facts as aggravating circumstances.

[24] The last two crimes of which the accused was convicted are, as I said, defeating the ends of justice. The one charge relate to the undue influence on Stokwana Sonteya to withdraw the charges; and the other to his attempts to conceal the death of Saziso Wofa.

[25] Again, relevant to the most serious charges of fraud, extortion and corruption, the facts of this case probably point to the lower scale of seriousness. The court can nevertheless not close its eyes to the growing prevalence in present day South Africa of crimes having as an element the undermining of the Rule of Law. Courts are unable to escape the uncomfortable feeling that many criminals, particularly people occupying important roles of leadership in commerce and social and political life, believe they are out of reach of the law and may act with impunity.

[26] Section 1 of the Constitution contains as a fundamental value of our democracy the supremacy of the Constitution and the rule of law. A traditional leader such as the King of the abaThembu is expected to uphold and cherish the Rule of Law; not to defeat the ends of justice. I believe, for the reasons more fully discussed later in this judgment, that these factors constitute aggravating features which influence the weight to be attached to the nature of these particular crimes.

[27] I now turn to consider the second leg of the triad, namely the personal circumstances of the accused.

The Offender

[28] Most of the personal circumstances of the accused appear from the record, and others were supplied by Mr Price from the bar. In summary, they are these.

[29] The accused is the King of the abaThembu and a constitutionally recognized traditional leader. He has reigned as a King over the abaThembu for a period of eighteen years, from 1992. In his capacity as such, he earns an income of R44.000,00 per month. He is forty four (44) years old, and at the time of the commission of the offences he was thirty (30) years old. He has five wives and five children with ages raging between one week and seventeen years. His highest level of formal education is std. eight, or now known as grade ten. His father, the late King Sabata Dalindyebo, has passed away and is survived by his mother, an elderly lady. He has no previous convictions.

[30] Save for four features which require particular attention and to be mentioned shortly, the personal circumstances of the accused as set out above are important considerations to be taken into account in the sentencing process. Nevertheless, in my view, and balanced against all the other circumstances, they constitute neither mitigating nor aggravating circumstances. The four features which deserve closer scrutiny are the following.

[31] First; that the accused is a prominent leader in the Transkei region. Mr Price submitted that he still enjoys the support of the majority of his subjects. I believe that this aspect of the case should be discussed in the consideration of the third leg of the triad, namely the interest of the community. I will therefore in due course return to this feature.

[32] Second; I accept that at the age of thirty when the crimes were committed, the accused was still relatively young. I accept this feature as a mitigating factor.

[33] Third; the fact that the accused has no previous convictions, is undoubtedly an important mitigating factor. I am alive to the principle that a first offender should not be imprisoned if the imprisonment *"... can legitimately ..."* be avoided. The leading case is **Persadh v R** 1944 NPD 357 at 358, which has been followed in numerous judgments since, including **S v Ghoor** 1969 (2) SA 555 (A) at 559 G; **S v Jivan** 1970 (4) SA 62 (T) at 64 B-C; **S v Allen** 1991 (1) SACR 301 (T) at 305f.

[34] The above consideration, coupled with the relatively young age of the accused at the time of the offence and his station in life, are extremely important mitigating features which must be weighed against the seriousness of the crimes, the interest of the society, and the general aims of punishment.

[35] Fourthly; the accused has shown no remorse whatever. On the contrary, he creates the impression that he seriously believes that he did no wrong. He believes that he is being persecuted by certain members of the community, and that this trial is the result of a political conspiracy against him (of which this court is a party). I therefore believe his chances of rehabilitation are remote, if at all. Whereas remorse and chances of rehabilitation are normally mitigating features, the absence of remorse is not necessarily an aggravating factor, but it is an important aspect in the consideration of certain features of punishment such as imprisonment, alternative forms of punishment, and suspension of sentence.

[36] The last leg of the triad is the interest of the society.

Interest of the Society

[37] Of course, as was held by the SCA in **S v Mhlakaza** 1997 (1) SACR 515 SCA at 518 E-F:

> *"... the object of sentencing is not to satisfy public opinion but to serve the public interest."*

[38] The interests of the society are not served by a sentence which is either too lenient or too severe. See **S v Flanagen** 1995 (1) SACR 13A at 17E-F. It is best served by an appropriate sentence after having balanced all relevant considerations in conjunction with each other. In some cases, depending on the weight to be attached to the particular components of sentence, public interest will require a severe sentence with a long term of imprisonment; in others a lenient sentence with no term of imprisonment at all.

[39] I now turn to consider the requirements of the public interest in the present case.

[40] Who is the public? The society of South Africa generally whose norms and values are defined in the Bill of Rights; or the rural community of Tyalara far removed from the average, educated and affluent South African? The answer, I believe, is both. Notwithstanding the relatively low level of education and poverty in rural areas, the quest for fairness, human dignity, the rights to life and freedom and security of a person, the rights to property and housing, the right to a fair trial and not to be subjected to slavery,

servitude and torture, are all basic and fundamental human values and expectations irrespective of level of education, wealth, station in life, culture and creed. In this sense there is no difference between the interests of the Tyalara community and the interests of any other community including the South African community at large. These are the interests which must be served in arriving at an appropriate sentence. What are these interests?

[41] First, society in general, and the Tyalara society in particular, require that all persons are subjected to the Rule of Law. No one, including traditional leaders and even judges, is above the law. Mr Price has criticized the use of words and expressions used by the State in describing the accused and his reign as *"tyrant," "reign of terror," "despot"* and *"medieval tyranny"* as inappropriate and over-stated dramatizing. With respect, I believe the evidence show that these expressions aptly describe the reign of the accused. He reigned with terror and fear and with total disregard to the Rule of Law.

[42] He arbitrarily and discriminately burnt down the homesteads of entire families simply because he perceived the husband to be a *"troublemaker"* or criminal. He brutally and savagely assaulted, and caused to be assaulted, members of the community alleged to have committed crimes in circumstances where the suspects were not subjected to any trial, and in respect of which crimes he had no jurisdiction. He ordered the arrest and assault of a subject in circumstances where any reasonable King would have foreseen the death of such person, and where such person in fact died. He contemptuously ordered that the death of the person who died in consequence of his own deeds not be reported to the Police. He ordered that

the charges of arson against him be withdrawn. He acted in every respect in a manner contrary and harmful to the interests of the society which he is supposed to serve, and in respect of which he earns a salary funded by South African society in general.

[43] In short, the accused acted in total disregard to the laws of the land which he is required, as King, to uphold. He believed he may do so with impunity. I believe the interests of the society demand that any sentence which is imposed should adequately reflect the need to protect society from rulers not fit to serve its interests.

[44] The interests of society require that leaders in general perform their functions responsibly. They are not in positions of power to serve their own selfish interests, but to serve and lead the people over whom they preside. The sentence this court intends to impose, must send a clear message to not only traditional leaders, but to all people in power that their actions, whatever and whoever they are, are always subject to the Rule of Law.

[45] Having given each component of sentence its proper weight, and in balancing the various considerations, the court must strive to achieve the purposes of punishment with a sense of mercy. The main purposes of punishment are deterrent, prevention, reformative and retributive. See **R v Swanepoel** 1945 AD 444 at 455 followed in all cases on sentence to this day. In regard to the component of mercy, Holmes JA said in the leading case of **S v Rabie** 1975 (4) SA 855 A at 862H.

"To sum up, with particular reference to the concept of mercy –

(i) It is a balanced and humane state of thought.

(ii) *It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.*

(iii) *It has nothing to do with maudlin sympathy for the accused.*

(iv) *It recognizes that fair punishment may sometimes have to be robust.*

(v) *It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.*

(vi) *The measure of the scope of mercy depends upon the circumstances of each case."*

[46] I am influenced by the above considerations in the quest for an appropriate sentence.

[47] In this case, the balancing of the relevant components of sentence is required in respect of each separate crime of which the accused was convicted. This means he must be sentenced in respect of each separate crime which he committed. The cumulative effect of this exercise may result in the combined punishment of all charges becoming too severe and disproportionate to the accused's moral blameworthiness over the period the crimes were committed. See **S v Young** 1977 (1) SA 602 A at 611D; **S v Coales** 1995 91) SACR 33A. In order to counter the cumulative effect of the various sentences, the court may, *inter alia*, reduce each separate sentence and/or order some or all of the various sentences it has imposed to run concurrently. Should this court impose a sentence in respect of each of the ten crimes of which the accused was convicted, then the cumulative effect will result in a too severe sentence and, in the circumstances, I intend to order that some sentences are to run concurrently with others.

[48] Mr Price urged me to totally suspend the sentence which I intend to impose, but in the interest of restorative justice to couple such suspended sentence to an order that the accused make payment of compensation to the victims and/or their families. I do not believe this is a proper case where such an order should be made.

[49] First and foremost, in my respectful view, such an order will not serve the interests of society and nor will it give proper effect to the seriousness of the crimes and the aggravating features of the case. It will also not adequately serve the purposes of deterrence and retribution. Secondly, and save for a description of the goods and their value which were destroyed during the acts of arson, there is insufficient evidence before the court to place a value on the compensation. Thirdly, the outrage, anguish and trauma of the victims, the family of the deceased, and of the community in general, cannot on the facts of this case be measured in monetary terms.

[50] Mr Carpenter, on behalf of the State, urged me in the event of a custodial sentence to invoke section 276B of the Criminal Procedure Act 51 of 1977 by ordering that the accused should not be eligible for parole until he has served at least two thirds of his sentence. In this regard, section 73 (6) (a) of the Correctional Services Act 111 of 1998 provides that the accused would be eligible for parole after serving one half of his sentence, but subject to any order of Court under section 276B of the said Criminal Procedure Act. Mr Carpenter pointed out that had the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 (the minimum sentences Act) applied, then in terms of section 73(6)(b)(v) of the

Correctional Services Act 111 of 1998 the accused would only be eligible for parole after serving four fifths of his sentence. It is common cause that the minimum sentences Act 105 of 1997 does not apply to the facts of this case.

[51] In support of his submission, Mr Carpenter referred to **S v Pakane & Others** 2008 (1) SACR 518 SCA at para's 46-47 as authority for the proposition that the administration of justice in the eyes of the community will be brought into disrepute if the accused is not kept in imprisonment for at least two-thirds of his term of imprisonment.

[52] I do not believe, with respect, that this is a proper case where the court should interfere with the administration of the executive in fixing the non-parole period. Generally, I believe that the court is only empowered to fix this period when there is good cause to do so. Good cause is often found in, but not confined to, extremely serious crimes of violence such as rape, robbery or murder resulting in life-long sentences; declarations as habitual and/or dangerous criminal; and cases containing strong retributive elements. This is not such a case. In any event, public opinion does not determine the period of imprisonment, and in this case I believe the court has given adequate weight to the interests of society in balancing the various factors.

[53] I therefore do not believe it is proper to make any order under s.276B as submitted by Mr Carpenter, and I decline to do so.

[54] Finally, I am pleased to conclude that the sentence which I intend to impose carries the approval and consent of my learned assessor.

[55] Having regard to all the aforesaid considerations, and applying the principles mentioned above to the facts and circumstances of this case, I believe the following sentence is appropriate:

[56] The accused is sentenced as follows:

1. In respect of the arson charges, namely counts 1, 14 and 15, the accused is sentenced to 5 years imprisonment in respect of each count.
2. In respect of the kidnapping charge namely counts 5, 6, 7, 8, 9,10 and 11 which were taken as one count of kidnapping for purposes of conviction, the accused is sentenced to one year imprisonment.
3. In respect of the charge relating to defeating the ends of justice by unduly influencing Stokwana Sonteya to withdraw arson charges, namely count 13, the accused is sentenced to one year imprisonment.
4. All the sentences referred to in paragraphs 1, 2 and 3 above shall run concurrently with each other, resulting in an effective sentence of 5 years imprisonment in respect of all the aforesaid charges.
5. In respect of the assault charges, namely counts 24, 26 and 28, the accused is sentenced to 5 years imprisonment in respect of each count.
6. The sentences of 5 years in respect of the aforesaid assault charges under counts 24, 26 and 28, shall run concurrently with each other.

7. In respect of the culpable homicide charge, namely count 31, the accused is sentenced to 10 years imprisonment.
8. In respect of the charge relating to defeating the ends of justice by concealing the death of Saziso Wofa, namely count 34, the accused is sentenced to two years imprisonment.
9. The sentence of two years imprisonment referred to in paragraph 8 above shall run concurrently with the sentence of 10 years under the culpable homicide charge mentioned in para.7 above.
10. It is ordered that 5 of the 10 years imprisonment in respect of the culpable homicide charge mentioned in para.7 above, shall run concurrently with the 5 years imprisonment in respect of the assault charges mentioned in paragraphs 5 and 6 above.
11. The effect of the aforegoing is that the accused is sentenced to an effective term of 15 years imprisonment.

ALKEMA J

JUDGE OF THE HIGH COURT

I agree :

ASSESSOR

Delivered on 04 December 2009

Z.M.N 24/05/2012.

IN THE EASTERN CAPE HIGH COURT, MTHATHA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 731 / 2010

In the matter between:
HIS MAJESTY KING BUYELEKHAYA DALINDYEBO: ZWELIBANZI Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS & 30 OTHERS Respondents

In Mthatha on the 24 May 2012
Before the Honourable Nhlangulela J
Mr Bodlani for the applicant
Mr Madlanga SC and Mrs Majova for the 1st and 31st respondents

W H E R E U P O N after reading documents filed of record and hearing Counsel, it is ordered by agreement between the parties that the:

1. decisions brought for review by way of an application for review made in terms of the notice of motion dated 08 March 2010 (the application for review) are hereby declared not reviewable.

2. application for review is hereby dismissed.

3. applicant pay costs of the application for review, including costs of the separated issue that is before this Court today and costs consequent upon the employment of two Counsel.

COURT / REGISTRAR