

**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 No.1

NTEMBEKO KESA

Accused No.2

JUDGMENT

JOLWANA J:

Introduction.

[1] Accused no.1, together with his brother, Ntembeko Kesa were charged with arson and four counts of murder following the burning of the Kesa homestead at Teenbank in Sterkspruit on 22 July 2018. The deceased in count 1 is the sister of the accused and the deceased in count 2 is the daughter of the deceased in count 1 and therefore the niece of the accused. The deceased in counts 3 and 4 are the father and mother of the accused. The accused and his brother pleaded not guilty to all the charges but did not tender any plea explanation. After the case for the prosecution was closed Ntembeko Kesa was acquitted of all charges in terms of section 174 of the Criminal Procedure Act 51 of 1977 (the Act). However, accused no.1, Thobani Kesa's similar application was refused by this Court. For convenience, I shall in this judgment, continue referring to Thobani Kesa and Ntembeko Kesa as accused no.1 and accused no.2 respectively.

[2] The case for accused no.1 was opened with him giving evidence and testifying in his own defence. It behoves of this Court, now having heard the case for the accused, to assess all the evidence presented in this matter and decide whether or

not the guilt of accused no.1 has been proved beyond reasonable doubt. The State relied on circumstantial evidence and on the basis thereof Counsel for the State submitted that the guilt of accused no.1 has been proved beyond reasonable doubt.

The evidence of the State.

[3] The murder charges in this case are backgropped by what appears to have been evidently very seriously strained relations between the two accused and their parents, the deceased in counts 3 and 4. According to the evidence of Mr William Kesa, there were allegations of the deceased's money which was meant to be used to buy building material having been misused and squandered by the two accused. At some point he was told by the late Mqondisi Kesa, the deceased in count 3 who was his brother, that he intended obtaining a protection order against his two sons. It was that protection order which led to the accused having to leave their home in which they hitherto lived together with all the deceased. They went to stay at Kromspruit, some 10 kilometres or so from Teenbank. To his knowledge there was no body living at that homestead at the time save for the accused's paternal uncle's young daughter, Sinentlahla Kesa.

[4] Mr William Kesa further testified that on 22 July 2018 at about 05:00 in the morning he received a report that the deceased's homestead was on fire. He drove to the deceased's homestead where he found the place engulfed in smoke and it was black. He was told that the fire started at about 02:00 in the morning. The deceased's homestead was burnt down and the deceased were so badly burnt that they were beyond recognition. However, he was able to identify them as they were all well known to him. What shocked them as the family and was strange was that they had thought it was only the burning of the structure in that fire that had occurred and the deceased's death. But during the cleansing of the burned structure a sponge was discovered which was sopping blood.

[5] Police officers came to the crime scene and after doing their work and after the bodies had been removed they were allowed to start cleaning up the place. At the time the cleaning was taking place the accused had not yet arrived. They were still at his elder brother's homestead in Kromspruit where they were staying. They were phoned and informed about the incident and told to come. However, they had not

arrived by sunrise. His family and that of the accused's mother's family from the Tiyanane clan were mind boggled about the incident. This was because as the incident occurred on 22 July 2018, they were aware that the accused were required to be in court on 27 July 2018 about the protection order which had been obtained by their parents against them.

[6] They decided to drive to Kromspruit to fetch the accused persons from Kromspruit and brought them home in Teenbank where they were questioned about the incident. After the accused were questioned it was decided to go back to Kromspruit where they stayed. The police also went there as part of their investigations. The police searched the house after which they proceeded to a toilet that was at the back of the house. The police found an overall with blood stains in the toilet. It appeared that the overall had been washed but the blood stains had not washed off properly. When the accused were asked about the overall, they said that they did not know whom it belonged to and that it was a bigger size for them. Eventually, they were arrested by the police.

[7] Under cross-examination Mr William Kesa testified that the accused left their homestead during July 2018 but before the date of the incident. It was put to him that accused no.1 denied receiving a call informing him about the incident but admitted being fetched by him. Mr William Kesa testified that the accused were called and did say that they would come. They waited for the accused to arrive. It was only upon realizing that they were not coming and the time was passing that they decided to fetch them. He further testified that at the time the cleaning took place the accused were present as they had already fetched them. He however, denied the accused's version that they participated in the cleaning saying that the cleaning was done by the people from the funeral parlour. It was further put to Mr William Kesa that he was the one who asked accused no.1 to clean the floor. He denied this saying that accused no.1 was not telling the truth insisting that they did not participate in the cleaning process.

[8] After the sponge was found the police were called and came back again. He also testified that the overall was found inside the toilet but not in the toilet pit. He also testified that he had never seen accused no.1 wearing that overall before the

incident. It was the bottom part of the overall and had blood stains. He also confirmed that police took away a tracksuit pants which it appeared, he was referring to it in his evidence about an overall. He also testified that he was in the house when the tracksuit pants was found and that his evidence about it being found in the toilet but not in the toilet pit was how he was told. He was in the house when the police found it in the toilet.

[9] This brings me to the evidence of sergeant Mda, the next witness for the State and the investigating officer of the case. He confirmed attending at the crime scene in the Kesa homestead at Teenbank on 22 July 2018. He found the bodies of the deceased persons in a two roomed flat structure that was in the process of being extended. The bodies were so badly burned that some body parts or limbs were disremembered. The Local Criminal Record Center officers who were at the crime scene did their work after which the bodies were removed by people from the forensic pathology unit. He noticed that the crime scene had water because members of the community had tried to extinguish the fire. After the bodies were removed, he and his colleagues also left the crime scene. However, on the same day at about 17:00 he received a call from a Mr Socatsha requesting them to return to the crime scene because as people were cleaning the place they noticed some blood in the crime scene.

[10] He, together with one of his colleagues, Mr Belebesi returned to the crime scene where they were showed the spot at which blood had been noticed. He saw that there was blood which was on a burnt mat or floor rug. When he tried to lift up the floor rug or mat it tore off as it had also been burnt and he got just a piece of it. As he was doing this he was wearing protective hand gloves. He put that piece of floor rug in a plastic bucket together with other things that were wet. He put those items in the plastic bucket because they were too wet for a forensic bag. He was shown the two accused persons who were not there earlier when he had attended to the crime scene. He spoke to them and as he was speaking to them he noticed that the strings of the hood of the tracksuit top accused no.1 was wearing had blood stains. He asked the accused persons where they were staying and they told him that they stayed at Kromspruit. He asked them when was the last time they were at their homestead where the incident occurred. They said that they were last there three

weeks earlier. They also told him that they left their home because of a misunderstanding with their parents which led to them being expelled from home. Accused no.1 also told him that they were the ones who built the incomplete structure at their home and that their mother had given them money for the building of the structure which they squandered. This led to their expulsion which was why they left home to stay at Kromspruit.

[11] Because of the blood stains that he observed on the hood strings of accused no.1's tracksuit top, he asked him to give it to him. Accused no.1 took off the tracksuit top and gave it to him. He then put it in a sealed evidence bag in the presence of accused no.1. The serial number of that evidence bag was PA4002561679. He then asked the accused to come with him to their place of residence at Kromspruit. They agreed and he then put them in a police van. On their arrival the accused opened for them. Some family members also came along. He requested the family members to remain outside so that the police could do their work properly. They searched inside the house and found a pair of jean trousers which had blood stains. After they had finished searching the house, they searched in the premises and also went to a pit toilet that was in that homestead.

[12] He peeped through the toilet pit and saw a nike tracksuit pants which he retrieved from the toilet pit. The upper portion of the tracksuit pants was still dry but its bottom was wet. It was clear to him that the wetness was still fresh as if it had not been there for a long time. It also had some blood stains. He decided to arrest the accused persons. He also took the pair of jean trousers and the tracksuit pants with him to the police station. Because the lower part of the tracksuit pants was wet, he dried it and thereafter packed those exhibits in evidence bags. In all this process he kept them safe from contamination by ensuring that they remained in his custody and were not tampered with. He also requested the forensic pathologist to take some samples from the bodies of the deceased. When he received those samples, he sealed them in evidence bags and later took them to their laboratory in Gqeberha together with other exhibits after he had entered all of them in their SAP13 exhibit register.

[13] The DNA kits which he had received from the forensic pathologist were sealed in evidence bags number PA4007561855, a blood kit was in bag number PA4001790278 and another blood kit which was in bag number PA4002561856. The grey tracksuit pants recovered from the toilet pit at Kromspruit was in sealed evidence bag number PA4000876232. The brown jacket was in evidence bag number PA3000344503. This jacket was recovered in the house at Kromspruit. One ceaser box of cigarettes was in bag number PA6001816619 and two cigarette butts which were in bag number PA6001816628. The tracksuit top which he had taken from accused no.1 was sealed in evidence bag number PA4002561679. The pair of jean trousers was sealed in evidence bag number PA4002561853. It was also recovered from the house in Kromspruit. There was also a blood kit which was sealed in bag number PA4001825929. All these exhibits were put in one big sealed evidence bag with serial number PAB000165247 which is the one referred to in the acknowledgment of receipt from the laboratory. He took all these items to their laboratory in Gqeberha. All these exhibits are listed in a copy of the SAP13 register which was entered into the record as an exhibit as well as the acknowledgement of receipt of the sealed evidence bags referred to above. The chain evidence was not disputed or seriously questioned in any way.

[14] Under cross-examination, sergeant Mda was asked about Mr William Kesa's evidence regarding a sponge he said had blood in it. He testified that Mr William Kesa was mistaken about that as there was no sponge there. Because of the fire there was no sponge there. He was also mistaken in his evidence about an overall having been found. What Mr William Kesa referred to as an overall must have been the nike tracksuit pants which was retrieved from inside the toilet pit. He further testified that the cleaning at the crime scene was done by family members and the accused did not participate in it. He confirmed that the evidence he gave about why the accused left their homestead at Teenbank to go and stay at Kromspruit were the reasons given to him by accused no.1. He denied putting the tracksuit top in the load bin of his vehicle and insisted that in fact he put it in an evidence bag in the presence of accused no.1.

[15] At some point, at the request of advocate Gxaba who at the time represented accused no.1, sergeant Mda was recalled for further cross-examination to put

accused no.1's version to him which were specific instruction of the accused no.1. During that cross-examination it was put to him that accused no.1 had been asked by Mr William Kesa to clean the floor. During that cleaning process he, accused no.1, saw something that looked like blood. Sergeant Mda disputed accused no.1's version in this regard as lies. Mr Gxaba further put it to him that if there was any blood in accused no.1's clothing it might have gotten to his clothing when he was cleaning the floor. Sergeant Mda disputed this version of the accused. It was further put to him that accused no.1's tracksuit top hood strings were stained by a maroon water proofing paint. Sergeant Mda disputed this as well and insisted that he saw blood stains in the hood strings of the tracksuit top of accused no.1 and that is why he requested it from him and took it to the laboratory.

[16] The State then called Mr Sakhele Njadu. He testified that he is employed as a clerk of the court in Sterkspruit. In his capacity as such he dealt with criminal cases, small claims court cases as well as domestic violence cases. On 20 July 2018 he attended to members of the public in his office and at some point it was the turn of the accused to be assisted. They had lodged a complaint against their parents previously and on the 20 July 2018 they came in connection with that complaint. Their parents had also been advised to come and were present. The complaint of the accused related to payment for services allegedly rendered by them at their home. Apparently they had built a house at their home for which they wanted to be paid. The amount involved was about R20 000.00.

[17] He testified that when it was the turn of the accused to be attended to, he called their mother and father from outside to come to his office. When they were all in the office accused no.1, Thobani Kesa was doing most of the talking. He enquired from him what had happened. Accused no.1 stated that they wanted their parents to pay them for services rendered. Their parents were in the company of their daughter who said that they would be paid but the bank card was at home. Accused no.1 stated that they wanted to be paid for building a structure at home because even if it was not them who were the builders, any other person would have been paid for his services. Their mother retorted that if they wanted to be paid they should first refund her the expenses that had been incurred in connection with their traditional circumcision.

[18] At that stage accused no.1 became very angry and uttered words to the effect that he knew that his mother would be difficult. He said that his mother had an evil heart, she was cruel and she was a witch. When those heated exchanges took place he requested all of them to leave his office. Accused no.2 then spoke to accused no.1 telling him that they should leave. Before they left accused no.1 said that their parents must tell them if they were going to pay them or not so that if they were not going to pay them they could make other means of getting their money from their parents. When accused no.1 said those things his impression was that he was being rude to his mother and was in fact threatening her. They all left his office and that was the last time that he saw them.

[19] Under cross-examination it was put to Mr Njadu that accused no.1 was saying that it was not him who attended to the accused and their parents on that day. He denied that. It was further put to him that he, Mr Njadu, only attended to the issue of the protection order. Mr Njadu testified that he was not involved in the issue of the protection order. He only attended to their small claims court issue. He maintained that accused no.1 had mentioned the amount of R20 000.00 on the first occasion when they came to his office. He further insisted that accused no.1 had said that his mother was evil, cruel and was a witch during their exchanges in his office on the 20 July 2018. He further confirmed accused no.1's utterances in which he said that they must be told if they were going to get their money or not so that if they were not going to be paid they could make other means of getting their money. Mr Njadu disputed that it was another official who attended to the accused and their parents on that day. He explained that the official who was in his office at the time was an intern who could not have attended to members of the public while he was present. He further testified that the said intern was capturing domestic violence files in their computer while he was attending to the accused's small claims court issue.

[20] The next witness for the State was Sinentlahla Kesa. Her evidence was that she was 21 years old and stayed at Kromspruit in Sterkspruit. She knew both accused as they are from the same family as herself. In July 2018 she was at Kromspruit when accused no.1 came to her asking for house keys for her homestead. At the time there was no one staying at her home as she was staying

with another family member because she had a small baby. She gave him the keys. On a certain Monday police came to her and asked her about a particular tracksuit. She told the police that that grey tracksuit belonged to accused no.1 as she would see him wearing it from time to time.

[21] Under cross-examination Sinentlahla maintained that she saw accused no.1 wearing the tracksuit on a number of occasions. Sometimes she would be walking past her home from where she stayed at the time while visiting her boyfriend. She would see him wearing it. Even during the funeral of her grandmother, accused no.1 was there wearing the same tracksuit. She confirmed that it was the same tracksuit top that police showed her when they came to see her and it was grey in colour. She explained that the funeral which she said accused no.1 attended was not the funeral of the four deceased persons in this case. It was the funeral of her direct grandmother. Sinentlahla explained in response to the court's questions that the deceased in count 3, Mqondisi Kesa and her father were brothers.

[22] The next witness for the State was Dr Jwaqa. His evidence was that he is a forensic pathologist. On 24 July 2018 he performed autopsies on four bodies of the deceased persons in this matter. He observed that they had sustained 100% burns. He testified that all the four bodies were burned beyond recognition. He completed a medico legal post mortem report in respect of each one of the bodies. He testified that burned bodies do not bleed. They do not lose blood, they lose fluid. He explained that if blood was found at the crime scene, that would indicate that the cause of bleeding was something else as burned bodies did not bleed.

[23] The last witness for the State was warrant officer Francis-Pope. She testified that she is a member of the SAPS, working at the Biology Unit in the Western Cape. On 29 July 2019 she handled a case file in respect of this matter in her capacity as a forensic analysis and reporting officer. Her responsibility was to look through the case file and compare DNA profiles obtained from the crime scenes with samples. In this matter four DNA samples were received which were two samples from possible suspects and two samples from some of the deceased individuals. She compared all those reference samples to all the DNA profiles obtained from the exhibits and compiled a report. She testified that one of the DNA profiles was

possible blood from a tracksuit top which was in sealed bag number PA4002561679. There was also a reference sample in sealed bag number PA4002561855 which was obtained from one of the deceased, Thubakazi Kesa.

[24] The possible blood from the tracksuit top and the reference sample were from a female person. The findings were that the reference sample of Thubakazi Kesa in sealed bag number PA4002561855 was read into the mixture DNA from possible blood from the tracksuit top in sealed bag number PA4002561679. Her conclusion was that the DNA of the deceased Thubakazi Kesa was found on the tracksuit top. The second deceased reference sample was that of Owam Kesa and it could not be linked to any of the exhibits. The two suspects' reference samples were from Ntembeko Kesa and Thobani Kesa. Ntembeko Kesa's DNA was linked to possible blood from the jean pants. The DNA sample of Ntembeko Kesa in sealed bag number PA4001825929 matched the DNA sample from possible blood from the jean pants in sealed bag number PA4002561853. The jean pants was labelled as belonging to Ntembeko Kesa. Therefore, it was his own blood that was found in his own jean trousers.

[25] With regards to the reference sample of one of the deceased, Thubakazi Kesa which was in sealed bag number PA4002561855, warrant officer Francis-Pope's evidence was that it matched the DNA from the left nails contained in sealed bag number PA4001790278. This was in respect of a swab taken from under the left hand nails of Thubakazi Kesa and therefore it was her own DNA that was found under her nails. Her DNA was also read into the mixture results from another swab from the right hand nails also contained in sealed bag number PA4001790278. The mixture results from that DNA meant that there was another person's DNA but only her DNA could be read into that mixture. There was not enough DNA obtained from the burnt remains contained seal bag number PW3000096785. These burnt remains were from a household item that tested positive for possible blood. Indeed that item tested positive but the DNA from it could not be found at all the 16 locations for the purposes of making a conclusive DNA analysis. This means that there was not enough DNA in it. All that could be established was that it was human blood but there was not enough DNA to conclude whose blood it was.

[26] There was also an unknown male DNA which was obtained from possible blood found in the tracksuit pants contained in sealed bag number PA4000876232. She testified that that tracksuit pants allegedly belonged to Thobani Kesa. From them a male DNA profile was found. However, that DNA could not be matched with any of the four reference samples that had been set to them. From the samples of the deceased persons, that they had received there was no sample from a male person. Because the covering letter indicated the names of the four deceased persons they requested to be furnished with the reference samples of the other two deceased persons, Mqondisi Kesa and Nobubele Kesa which were not amongst the samples they had been furnished with. They did not receive the requested samples from the police. Therefore, the DNA samples of both Mqondisi Kesa and Nobubele Kesa could not be compared to any of the exhibits as they were not available.

[27] She explained that without Mqondisi Kesa's reference sample it could not be determined if the male DNA found in the possible blood from the tracksuit pants was his blood. While it was possibly his blood, this could not be confirmed without a reference sample from him. She explained that, that blood from a male person which was found in the tracksuit pants was not the blood of one of the accused. At the end of the evidence of this witness the State closed its case. Thereafter the defence made applications for the discharge of the accused in terms of section 174 of the Act. The application by accused no.2, Ntembeko Kesa was successful and he was acquitted and discharged. However, the application in terms section 174 of the of the Act made on behalf of accused no.1, Thobani Kesa was dismissed.

The defence case.

[28] In opening his case, accused no.1 took to the witness stand to testify. He testified that when they arrived at the crime scene or their homestead he and accused no.2 were given two spades and told to clean up the area that had been burnt down. He used the spade in picking up and collecting the ashes. He picked up twice and he was told to stop. As he was instructed to stop another gentleman approached them and said it looked like there was blood there. However, his own observation was that there was some water and some ashes which were there on the ground. The said gentleman said that it looked like there was blood and said that police should be called to come to the crime scene. He did not know the name of

the said gentleman but he could recognise him if he saw him. He was from his mother's side of the family.

[29] They were told to stop and they stopped and the police were called to the crime scene. Upon their arrival, the police asked them where they were coming from. They explained to the police that they were from the homestead that was burnt up. The community members enquired as to where they were when the burning of their homestead occurred. During this questioning they were called one by one with each person being called inside the house where the questioning took place. His brother, accused no.2 was called first and after they finished questioning him he was let go. He came out of the house and informed him that he was being called inside the house. He went in and he was then asked where he got the keys of the homestead in which they lived. He explained that their mother gave them directions to that homestead where they lived in Kromspruit and gave them the cellphone numbers of Mr Willima Kesa. They phoned Mr William Kesa who directed them to where the key was. Eventually Sinentlahla Kesa gave them the keys.

[30] He testified that before police arrived one Mr Sipotopoto Mbatyazwa asked him why did it look like he had blood stains on his hood strings. He answered him saying no, that was not blood but it was some water proofing membrane. The strings of his tracksuit top hood got it from a bucket that was on the ground. Apparently the bucket had membrane which had a maroon paint and the strings of his tracksuit top or hood would get dunked into the bucket. Every time he tried washing the strings the paint would not come off. The left side of the hood string would be dipped into the 5 litre container which he was carrying.

[31] He was instructed by Mr Mbatyazwa to take off the tracksuit top so that it could be taken for testing. He responded to him saying that Mr Mbatyazwa should rather take the tracksuit top string and not the whole tracksuit top but Mr Mbatyazwa refused. He then took off the tracksuit top and handed it to Mr Mbatyazwa. When the police arrived Mr Mbatyazwa handed over the tracksuit top to the police officers. He then saw Mr Mbatyazwa pointing at him while he was with the police after handing the tracksuit top to them. The police then approached him and asked him

where he stayed and he told them where he stayed. The police took the tracksuit top and put it inside the police van.

[32] They then took him and accused no.2 to their grandfather's homestead where they stayed at the time of the incident. He and accused no.2 opened the house and the police started searching in the wardrobes and under the bed. After the police had finished searching inside the house they proceeded to the toilets and searched there. One of the police officers yelled to the other police officer asking him to bring him a long stick. The said officer used his cellphone to illuminate inside the toilet and started stirring using the stick. In the process of stirring he came up with a tracksuit pants which was grey in colour. He looked at the waist of the pants and saw that it was written XXL which was its size which he understood it to be extra-extra large.

[33] He testified that he did not know whose tracksuit pants that was. When they explained to the police that they did not have knowledge about that tracksuit pants, Mr Mda took it and folded it and put it in the back of the police van where he had put his tracksuit top. They were taken to the police station where they were charged on suspicion of being involved in the murder of their parents. He was invited by his legal representative to comment on the DNA evidence led by warrant officer Francis-Pope that indicated that the blood that was found in his tracksuit top was the blood of one of the deceased. He testified that when he took off the tracksuit top on that day and gave it to Mr Mbatyazwa it did not have blood. He further testified that the tracksuit pants which was retrieved from the toilet pit was not his and he had no knowledge of it. He further testified that only the tracksuit top which he took off and gave to Mr Mbatyazwa was his.

[34] Under cross-examination by the prosecutor accused no.1 testified that the relations between himself and his parents were good and they never quarrelled. He never lodged a complaint against his parents at the magistrates' court in Sterkspruit. He never came to the magistrates' offices in Sterkspruit to discuss a complaint about the non-payment of money owed to him and accused no.2 by their parents. What brought them to the magistrates' court at that time was what was written in a document he had in his possession. They never came to lodge a complaint against

their parents. It was their father who had brought them there to inform them about what was written in the document in his possession. He explained that that issue involved a site which had a flat, a toilet and some running water. He testified that he heard Mr Njadu who said that they had come to the magistrates' offices to complain about money. However, his father had explained to Mr Njadu that they were there about the contents of that document. Their visit to Mr Njadu's office was about his site which he could possibly sell. The issue of a sum of R20 000.00 for building a structure in his homestead did not exist. He denied demanding money from their parents. He denied calling his mother evil or a witch or saying that they would see how they were going to get their money.

[35] He further testified that they got to know about the fact that their parents were burnt in the house when Mr William Kesa arrived at Kromspruit to inform them. They were never phoned and told about it. He confirmed that his parents, his younger sister and his sister's child who stayed with their mother all stayed at their home in Teenbank in July 2018. He further confirmed that they were all burnt in their homestead. He and accused no.2 were fetched from Kromspruit and caused to clean up the burnt place. He disputed Mr William Kesa's evidence and Mr Mda's evidence that they never participated in cleaning the place. He insisted that they were given two spades and told to clean up. They picked up twice using the spades and they were stopped. He did not notice who gave them the spade as the place was full. He could not recall who told them to clean the place but it was the elderly people that were there. Mr William Kesa had gone out to call the police and he saw him arriving with the police while he was in the house. He actually saw Mr William Kesa alighting from the police vehicle. But at the time they were cleaning he did not notice whether he was present or not. At that time nobody else was doing the cleaning, it was just himself and his brother, accused no.2.

[36] He did not see the people from the funeral parlour who, accordingly to Mr William Kesa, did the cleaning. He and accused no.2 did the cleaning until they were stopped. He could not remember who told them to stop cleaning. He testified that he never told his previous attorney and the current attorney about the name of Mr Sipotopoto Mbatyazwa and the role he played because they did not ask him. He later changed and said that he told his current attorney that he was told to take off

his tracksuit top but he did not say who said so. He merely told him that he was told to take off the tracksuit top. This was because he knew that he would narrate it when he was being asked about it. He denied that it was Mr Mda who saw blood stains on his tracksuit top and confiscated it. He maintained that it was Mr Mbatyazwa who saw what he thought was blood on the left hand side of his hood strings. When it was put to him that his legal representatives never put it to Mr Mda that he was given the tracksuit top by Mr Mbatyazwa, he testified that that was because he had not told his attorney about Mr Mbatyazwa's name but he knew that he would reveal it when he testified.

[37] He confirmed that at Kromspruit a tracksuit pants was found in the toilet pit but he did not know to whom it belonged. He disputed Sinentlahla's evidence that he had a grey tracksuit and that she saw him wearing it at her grandmother's funeral. He explained that he did not have a tracksuit of that size and also that he did not wear tracksuits in funerals. He added that he never attended the funeral Sinentlahla was referring to. When it was put to him that Sinentlahla's evidence about him being at the funeral was never challenged, he testified that his attorney knew about it. When it was put to him that his tracksuit top was found by the laboratory to have his mother's DNA profile, he testified that when he took it off it did not have any blood in it. He therefore did not know where it got into contact with his mother's blood. At the end of his evidence accused no.1 closed his case without calling any other witness.

The analysis.

[38] It was submitted by counsel for the State that the State relied on the evidence of a circumstantial nature. The approach to circumstantial evidence was restated in *Gcaza*¹ by the Supreme Court of Appeal as follows:

[23] The appellant's challenge to the evidence is in a piece-meal fashion. This court in *S v Reddy & Others* 1996(2) SACR 1(A) at 8C-D warned against this, where it stated as follows:

¹ *Gcaza v S* (1400/2016) [2017] ZASCA 92 (9 June 2017).

'In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in *R v Blom* 1939 AD 188 at 202-203, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn.'

[24] [T]he trial court's approach to the evaluation of the evidence was correct. It considered the totality of the evidence and, in that process weighed the evidence of the State's witnesses against that of the appellant. As appears above, the appellant's evidence was so riddled with contradictions, regarding whether or not he owned a hat, or whether he wore a hat or if it was in his bag. Distancing himself from the blue cooler bag, which he had removed a few hours prior to the disappearance of the deceased, clearly indicates that he was not taking the court into his confidence. The trial court in my view, rightfully rejected his evidence. He admitted that the deceased was known to him as one of the children from the neighbourhood.

[25] The sentiments expressed by this court in *S v Ntsele* 1998 (2) SACR 178 (SCA) are relevant, where it held that the onus rests upon the State in a criminal case to prove the guilt of the accused beyond reasonable doubt – not beyond all shadow of doubt. The court held further that when [it] was dealing with circumstantial evidence, as in the present matter, the court was not required to consider every fragment of evidence individually. It was the cumulative impression, which all the pieces of evidence made collectively, that had to be considered to determine whether the accused's guilt had been established beyond a reasonable doubt. Courts are warned to guard against the tendency to focus too intensely on separate and individual components of evidence and viewing each component in isolation."

[39] What is discernible from the evidence of the State in this matter is that the deceased did not die in a fire accidentally. I say so being fully mindful that nobody

saw when and how the fire started and there is no evidence of anybody or the accused being seen leaving that homestead shortly after the fire started. However, I will show below with reference to the evidence that they died through the deliberate actions of another person. The question before court is who that person is who intentionally caused the death of the deceased. In other words, the deceased were murdered, the question is who is responsible for their killing. Put differently, whether the State has established beyond reasonable doubt with reference to the evidence that the person responsible for the death of the deceased is the accused person, Mr Thobani Kesa.

[40] Briefly, the evidence of the State is that the relations between accused no.1 and 2 and their parents had become severely strained, to put it mildly. Things had become so bad between the two accused persons and their parents apparently about money for building a structure at their homestead that the issue resulted in a civil claim being instituted at the small claims court. At some stage even a protection order against the accused was sought and obtained by their parents. Mr William Kesa testified that he even sought to have the differences between the two accused persons and their parents resolved at home amicably according to tradition by the family and not in court. However, he was later told by his brother, the late Mqondisi Kesa who is the deceased in count 3 that he would be seeking a protection order against his own sons, accused no.1 and 2 as things had apparently gotten worse. It appeared that indeed he did so resulting in the accused having to leave their home and go and stay at their paternal uncle's homestead in Kromsprit sometime in July 2018.

[41] A lot of this evidence concerning the relations between the accused and their parents was not seriously and cogently disputed. It is common cause that the two accused were already staying in Kromsprit at the date of the incident, the 22 July 2018. It is further common cause that a protection order was obtained by the deceased in counts 3 and 4 against their sons. As a result, the accused were forced to leave their home and stay at their paternal uncle's homestead shortly before their parents' homestead from which they had been expelled went up in flames mysteriously. It is not in dispute that two days before the date of the incident, accused no.1 and his brother, accused no.2 together with their deceased parents

and sister were in the magistrates' court in Sterkspruit. The clear evidence of Mr Sakhele Njadu was that the accused were in his office about a small claims court civil claim in which they demanded to be paid about R20 000.00 for building a house at their homestead. When the matter was discussed in his office, Mr Njadu's evidence was that the discussions became so heated that he had to ask all of them to leave his office. However, before they left accused no.1 uttered words which Mr Njadu understood to be both rude and threatening to his mother. Those words were to the effect that they must be told if they would get their money so that if they were not going to get it they could devise other means of getting it. Mr Njadu testified that when accused no.1 uttered those words he was enraged and rude to his mother. Accused no.1 also said that his mother was difficult and had an evil heart, was cruel and a witch.

[42] While accused no.1 denied that the issue that was discussed in Mr Njadu's office was their demand for money, he did confirm that there was an issue of the protection order that his parents obtained against them. Most significantly, while accused no.1 disputed the reason for them to be in Mr Njadu's office and even that on that day, they were attended to by him, he gave new evidence about why they were at the magistrates' offices. He testified that they were there about an issue involving a site. This new evidence and the document accused no.1 sought to suggest that it was proof of their reason to be at the magistrates' office in Sterkspruit was never put to Mr Njadu. This is besides the fact that it contradicted his earlier version put to Mr Njadu that they were there about a protection order. What is clear from the evidence is that the relations between the two accused persons and their parents were very bad. This is a very important backdrop leading to the date on which the deceased were evidently murdered. Most importantly, the evidence showed accused no.1's propensity to lie and introduce new evidence as the case progressed, which he did very often.

[43] On the day of the incident, the two accused were at Kromspruit where they stayed alone. This is common cause. It is further common cause that a tracksuit pants was found in a toilet pit at Kromspruit by sergeant Mda. The evidence of the State is that the said tracksuit pants had blood stains. Warrant officer Francis-Pope testified that indeed those blood stains were blood of a male person. While Mr

Mqondisi Kesa's DNA sample could not be obtained for whatever reason, it is common cause that he was the only male person who died together with his wife, child and a female grandchild during that fire. The accused distanced themselves from any knowledge of that tracksuit pants which was found in a toilet pit in their place of residence where they were the only persons who stayed in that homestead.

[44] There is also the evidence of a tracksuit top which it is common cause that it belonged to accused no.1. He admits that he was asked to take it off. What he disputes is that it was sergeant Mda who saw blood stains in it and asked him to take it off and hand it to him. Very significantly, sergeant Mda was recalled for further cross examination at the instance of accused no.1's counsel, Mr Gxaba. Having been recalled, it was put to him that accused no.1 had been told by Mr William Kesa to clean the floor. As he was doing so, he, accused no.1, saw something that looked like blood. It was further put to sergeant Mda that if there was any blood in his clothing it might have gotten to it when he participated in the cleaning of the crime scene. So both on the evidence of the State and the version of the accused put to the State witness, Mr Mda there was blood that was found at the crime scene during the cleaning process.

[45] Accused no.1 himself in his own evidence said that a Mr Sipotopoto Mbatyazwa saw what he said was blood at the spot the accused were cleaning, as a result they were stopped from cleaning. Accused no.1 further testified that Mr Mbatyazwa saw what he said was blood stains in his track top. The evidence of warrant officer Francis-Pope was that some blood was found in some of the items that were found at the crime scene. It is hardly surprising that it could not be determined whose blood it was considering the water that was there. The significance of this lies in the fact that the deceased were so badly burnt that they were beyond recognition. Furthermore, the evidence of Dr Jwaqa was that if blood was found at the crime scene it would indicate another cause for the bleeding. This, he said was because burned bodies do not bleed, they do not lose blood, they lose fluid. Clearly, the blood that was found in the room in which the deceased burned to death points to those deceased persons or some of them having been caused to bleed before the place was set alight.

[46] It was further put to sergeant Mda that in fact what he saw in those tracksuit top hood strings was a maroon roof paint and not blood. Even during his testimony, accused no.1 pursued the maroon roof paint theory in those hood strings. What he did not deal with was his own version that had been put to Mr Mda that to the extent that blood was found in his clothing, it would have gotten to it when he, accused no.1 participated in cleaning the area where the deceased bodies were found. What accused no.1 was also unable to explain is that his tracksuit top was found by the laboratory, on the evidence of warrant officer Francis-Pope, to have the DNA profile of his mother, not roof paint. This put paid to the gobsmackingly farfetched maroon roof paint theory which was in any event an undisguised falsehood and utter fabrication.

[47] I must emphasize that at some point during his evidence, accused no.1's version changed to be that he was asked by Mr Sipotopoto Mbatyazwa to take off the tracksuit top after he saw what he thought was blood in it. This was never put to sergeant Mda and in fact Mr Mbatyazwa and the clearly significant role the accused said he played were mentioned for the very first time when he testified during his evidence in chief. It was therefore new evidence which was surprisingly never put to the relevant State witnesses, Mr William Kesa and Mr Mda. Accused no.1 proffered no version about how his mother's blood could have been found in his clothing on the day of her murder. The only version from him in that regard is the one his legal representative put to the State witness, Mr Mda that what is now known to be his mother's blood that was in his hood strings and the blood in his tracksuit pants would have gotten to his clothing when he participated in the cleaning. This begs the question, how did the accused's mother's blood got to be in his tracksuit top which he was wearing on the day of the incident after his family's gruesome death in that fire. Furthermore, how did the blood of an unidentified male person got to be in his tracksuit pants in the morning of his father's gruesome murder?

[48] The evidence of Sinentlahla Kesa is also very significant in some respects. First, it was her unchallenged evidence that the police came to her with a tracksuit asking her to identify it. She testified that at that time, it must have been a week since the accused had asked her for the key to her homestead in which no one stayed until the accused arrived. The evidence of Sinentlahla was that she saw

accused no.1 wearing the same tracksuit during the funeral of her grandmother which he attended. When accused no.1 testified, he again and for the umpteenth time, introduced new evidence. That evidence was that he did not even attend Sinentlahla's grandmother's funeral. The second new piece of his evidence in this regard was that he in any event never wears tracksuits in funerals. None of this evidence was put to Sinentlahla. The contradictions, new evidence, falsehoods and inconsistencies in accused no.1's evidence and versions were too many to chronicle all of them.

[49] That the cause of death of his parents, sister and niece was the actual fire cannot be questioned. It is also clear that some injuries may have been inflicted on his father and his mother, during that incident. Very significantly some of what is clearly his parents blood was found in accused no.1's clothing on the day of their death in that fire. Having said that, I do accept the evidence of the forensic pathologist that the cause of death was burns. The deceased's bodies were not only burnt beyond recognition, they were all badly burnt and charred. It clearly could not have been possible for the forensic pathologist to observe injuries of whatever nature save for the burns in those circumstances. The photo album compiled by the police shows badly burnt and charred skeletal remains and not bodies from which injuries could have been observed. The post mortem reports also made this much very clear. The State has therefore proved the cause of death of the deceased which is burns.

[50] It is clear from the evidence that not only did the accused have motive for killing their parents who to their knowledge, stayed with their sister and her child in the same structure or building. They also had an opportunity to plan and burn their homestead after they were forced to leave their home and stay at Kromspruit. It is quite clear that accused no.2 who was always with accused no.1 at all material times was involved in his families' brutal decimation. However, the evidence against accused no.2 was insufficient and weak at best hence his discharge in terms of section 174 of the Act. Some of the evidence suggests that the return date for the protection order obtained against them was the 27 July 2018. The dramatic events of the 20 July 2018 in Mr Njadu's office in which accused no.1 made threats are not without significance. Two days later on the 22 July 2018, the deceased were

roasted in a fire and their badly charred bodies which were burnt beyond recognition were found that fateful day.

[51] Significantly, some clothing item of accused no.1 was found at Kromspruit with what is presumably his father's blood on that very day of their death in a pit toilet. This is over and above the blood of his mother which was found in his tracksuit top which he was wearing on the very morning of her death. All the evidence taken together, including that of accused no.1 some of which corroborated that of the State leads to the only possible conclusion. That is that accused no.1 killed his mother and father, his sister and her child intentionally and sought to cover his tracks by dumping the blood stained tracksuit pants in a toilet pit in his place of residence. He obviously did not notice the blood stains in the hood strings of his tracksuit top which he was found wearing that very morning of these murders. He knew that his parents lived with his sister and her child. When he set the structure on fire in which they all lived, he intended that all of them should die there so that there would be no survivors to tell the story of his family's murder.

[52] The submission by the legal representative for accused no.1 that circumstantial evidence is to be treated in the same way as common purpose is rather novel as far as I know. It is either a complete misunderstanding of the principles applicable to common purpose and the need to specify it in the charge sheet or *ubambelela ngomcinga* (a sheer grasping at the straws). Or indeed it is a complete misunderstanding of circumstantial evidence and how our courts have dealt with it over many decades. The other possibility is a misapplication by defence counsel of sections 84 – 88 of the Criminal Procedure Act on which he sought to rely in making this rather strange submission. The submission seemed to be that because the State's intention to rely on circumstantial evidence was not stated in the charge sheet and that the charge sheet was not amended to reflect the intention of the State in this regard, the charges were therefore invalid and accused no.1 should be acquitted.

[53] Regardless of what was going on in the mind of the legal representative for accused no.1, what is clear is that he was also mired in serious confusion about the principles involved in the formulation of a charge sheet. Those who appear for the

accused are entitled and indeed have a duty to pursue the defence of their clients with all the determination they can muster. However, in doing so, they must be careful not to set the court on a wrong path for in doing so they risk misleading the court which is contrary to their time honoured obligation to observe ethical standards and professionalism even as they ardently pursue the defence of their client. I need not take this issue beyond this point. Suffice it to say that at best it is a misapplication of the well-known principles of our law which need not detain this Court. It is in any event irrelevant to the question of the guilt or innocence of accused no.1 and indeed the fairness of his trial.

[54] As I conclude, regard being had to the totality of all the evidence both by all the State witnesses and accused no.1 himself, I do need to restate what I regard as a profound analysis on inferential reasoning. In my view the case of *Mlambo*² which received the consideration of the Appellant Division, and the pronouncements made therein find apt resonance in this case. In *Mlambo* Malan JA expounded in some detail on the evaluation of circumstantial evidence and the assessment of all the evidence presented during a trial. I quote copiously from that judgment in which the learned Judge of Appeal said:

“It is obviously impossible to formulate the principle in language which will produce any measure of certainty and endeavours are made to afford more definite and reliable guidance to those engaged in the solution of tantalising problems by unravelling inferences from circumstantial evidence. The language employed in the more popular way of enunciating the principle does not appear to offer much relief. It is no more precise than, and it is exposed to the same dangers of misinterpretation and misapplication as, the form which at one time found almost universal favour and which has served the purpose so successfully for generations.

In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion

² *R v Mlambo* 1957 (4) SA 727 (A) at page 737 H-738A-E

that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.

Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so.

The logical result of the contrary view would be to place a premium upon false testimony and to afford protection to the cunning and ingenious criminal who could with impunity commit murders and, by destroying the body, defy detection of the cause of death and thus escape condign punishment. The danger of serious miscarriages of justice would be very real and if this line of reasoning had succeeded in the past many notorious murderers would have escaped the gallows. In the present case it would be unrealistic to have recourse to the realm of conjecture when there is ready at hand material which furnishes a perfectly sound, rational, common-sense solution to the problem."

Conclusion.

[55] The State witnesses gave evidence that was both reliable and trustworthy. None of them sought to exaggerate their knowledge of the facts about which they were giving evidence. Their evidence was not contradictory and it all pointed to the guilt of accused no.1 with a very high degree of reliability and consistency. This is not to say that all the State witnesses such as, Mr William Kesa, were perfect in their recollection of events. To the extent that there may have been a few inconsistencies in the evidence of the State, such inconsistencies may have been errors as against

an attempt to mislead the court. On the other hand, accused no.1 gave different versions and at numerous times he introduced new versions and new evidence all in an attempt to hide the truth by deliberately misleading the court and by lying through his teeth. His evidence was generally false and full of innumerable contradictions and often times his evidence was fabricated to reconstruct the events to suit what he sought to establish as a defence. This was all done clearly to escape criminal liability for the senseless annihilation of his parents and close family members. His evidence was not just improbable, it was clearly false, it was lies and lies that were concocted to mislead the court. This, he did to save his face from the consequences of the extreme cruelty with which he brutally and intentionally caused the death of his parents, sister and niece. The accused thought he had committed a perfect crime that would be impossible to prove as he had killed every person in that house but the trustworthiness and the credibility of the State witnesses exposed his lies for what they are. The State has therefore, on the proved facts, established the guilt of the accused beyond reasonable doubt.

[56] In the result:

1. Accused no.1 is found guilty of count 5, arson, the burning of his parents' homestead at Teenbank, Sterkspruit.

2. Accused no.1 is found guilty of counts 1, 2, 3, and 4 the murder of his sister Nobubele Hazel Kesa, his niece Hillary Kesa, his father Mqondisi Patric Kesa and his mother Thubakazi Victoria Mbatyazwa.

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: O.N. Mankanku

Instructed by: Legal Aid South Africa
Mthatha

Date heard: 18 January 2023

Date delivered: 13 February 2023