

SOUTH AFRICA / JUDGMENT

S v Masilela (CC64/2023) [2024] ZAGPPHC 1041 (25 May 2024)

[2024] ZAGPPHC 1041

COURT

North Gauteng High Court, Pretoria

BEFORE

PD Phahlane

CASE / FILE NUMBER

CC64/2023

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: CC64/2023

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

DATE

25-05-2024

SIGNATURE

PD. PHAHLANE

In

the matter between: THE
STATE
And
EULANDRE
MIKAYLA MASILELA
ACCUSED

JUDGMENT

PHAHLANE, J

- [1] On 21 February 2024, the accused was charged with one (1) count of Murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the Act”) in that upon or about 10 April 2023 and at or near house number 4[...], S[...] Avenue, Eersterust, in the district of Pretoria, the accused did unlawfully and intentionally kill ELI ALEX MASILELA, a male child of about one year old. The State alleged that the murder was pre-meditated.
- [2] The accused is legally represented, and she pleaded guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (“the CPA”) and the State accepted the plea. It appeared from the reading of section 112(2) statement that a guilty plea tendered was not in terms of section 51(1) of the Act because the accused specifically excluded the applicability of section 51(1) in that the aspect of pre-meditation was lacking. Accordingly, the issue to be decided by this court was whether the averments or facts placed before the court by the State justifies a conviction of the accused in terms of the provisions of section 51(1) or 51(2) of the Act.
- [3] The State relied on the summary of substantial facts as provided for in terms of section 144(3)(a) of the CPA as its basis in asking for a conviction in terms of section 51(1) of the Act. The following is noted on the summary of facts:

“The deceased was the child of the accused. On 10 April 2023 the accused and the deceased were at home. The deceased started to cry and when he did not stop crying, the accused assaulted him by strangling him. The deceased passed away on the scene. According to the post-mortem report, the cause of death of the deceased is indicated as: ASPHYXIAL-TYPE DUE TO LIGATURE STRANGULATION”.

- [4] The explanation given by the accused in her section 112 statement is as follows:

“The incident took place after I had bathed the child (the deceased) and put him on the bed and he started crying. I tried to calm him down from crying and/or stop him from crying. He continued crying until I got frustrated, snapped and choked him with both hands until he passed on”.

[5] Having heard arguments and submissions by the State and the defence, I was of the view that the facts of the case did not support the State's decision to proceed in terms of section 51(1) of the Act. I accordingly held that the murder did not fall under the purview of that section, primarily because pre-meditation was not

proven. Consequently, the accused was found guilty and convicted in terms of the provisions of section 51(2) of the Act which prescribes

a minimum sentence of 15 years imprisonment for a first offender in the event of a conviction.

[6] The matter was postponed to the 3rd of May 2024 for a pre-sentence report to be compiled on behalf of the accused. However, on that day the report was not ready, and a further postponement was sought for that purpose. A Psycho-social report, and an affidavit of Ms Htekani Tryphina Shivambo from the Department of Social Development were finally obtained but the court was left with more questions than answers. These were handed in as exhibits and in terms of section 186 of the CPA, the court caused Ms Shivambu to be subpoenaed as the court was of the view that the evidence of this witness would be essential as it would assist the court in arriving at a just decision.

6.1 Having regard to the evidence of this witness, (which I will refer to later in the judgment), the court also ordered that the accused be submitted for evaluation by a clinical psychologist and an addiction medicine physician or addiction psychiatrist.

6.2 The State informed the court that the office of the Director of Public Prosecutions was not willing to assist the accused because it was somehow out of their scope to assist the accused person. The court was further informed that Legal Aid South Africa, as the office which provided the accused with a legal representative, was also dragging its feet to assist because Mr Moja appearing on behalf of accused was informed by an employee of the Legal Aid – who is the secretary to the high court unit manager - that the procedure which counsel had to follow was for him to pay for the services of the required experts out of his own pocket and will be reimbursed at a later date.

6.2.1 I found this response inconceivable and shocking, and Mr Moja was as such given another opportunity to speak directly to the high court unit manager. He was informed that the process was going to take a long time and ultimately given the names of three doctors which he finally got in touch with to assist. None of the experts were available to assist at the time because of formalities involving the “red tape”.

6.2.2 With each growing concern of not having someone to come to the assistance of the accused, and having regard to time elapsed since the accused was convicted, both parties submitted that it would be in the interest of justice if this matter is finalised and for the court to give a direction on how the accused can be assisted in the facility where she will be housed when serving her sentence.

6.2.3 I agree with the submission because to date, the accused has not been evaluated. The wheels of justice cannot be seen to be moving slowly while it is imperative that the accused knows her fate. In the circumstances, it is also my considered view that it would not be in the interests of justice to have this matter dragged for longer than is necessary.

- [7] With regards to the evidence of Ms Htekani Tryphina Shivambu (Ms Shivambu), she investigated the psycho-social circumstances of the accused and compiled a report on behalf of the accused as stated above. I will refer to some of the aspects noted in her report, which in my view, are relevant:
- (a) It was reported to her that on the day of the incident when the accused was asked what happened, she became very emotional and struggled to elaborate about the incident. It was further reported that the accused went through a lot in her life because she had a miscarriage at home prior to the birth of the deceased and was taken to the hospital while holding the fetus because both the mother and the fetus were attached by the umbilical cord.
 - (b) The accused was taken to a psychologist for assessment after the miscarriage, but did not attend all sessions and therefore did not finish the process of evaluation. She started using drugs at the age of 19 and is reported to have been abusing substances such as weed, cocaine and cat. She was in a love relationship with the father of the deceased who also confirmed that they were abusing drugs.
 - (c) It is noted that the mother of the accused did not approve of this relationship because she knew the pair was using substance together. An interview with the aunt of the accused revealed that the accused had a very good relationship with her biological father who passed away in 2022. That gap was however closed by her stepfather who also had a good relationship with the accused.
 - (d) The accused's life changed after her mother separated with her stepfather, and this breakup did not sit well with the accused and affected her life negatively. The probation officer specifically noted in her report that the breakup between the stepfather and the accused mother seemed to be the main cause of disruption on the accused's life where she resorted to substance abuse.
 - (e) It is further noted that the environment where the accused stayed had an influence on her behavior, coupled with the fact that she was spending time with people who used drugs, and thus exacerbating the problem of drug abuse even further which impacted her life.
 - (f) The reports reflect the accused as someone who does not want to accept full responsibility for her unlawful conduct, and that she wants to apportion the blame to her mother who was not even present when the crime was committed.

- (g) The accused mentioned that she was overwhelmed, and her mind was all over the place, and indicated that her mother made her feel like she is a useless mother who is incapable to care for her child, and that she is worthless and useless for being a mother to her child. The accused therefore felt like she was a burden to her mother because she is the sole breadwinner and was caught between choosing her mother and the father of her child.
 - (h) She was admitted at Weskoppies hospital for a period of 14 days and was diagnosed with bipolar and depression but is currently taking medication.
 - (i) The accused informed the probation officer that she does not know what led her to commit the offence but had verbally mentioned that she is remorseful. She also noted that her observation of the accused during the three sessions she had with the accused, the accused displayed multiple behaviors because she would sometimes be overwhelmed, and her state of mind was not well. Sometimes she would appear to be calm and become emotional at the same time.
- [8] Despite what appears to be a history of someone who had a troubled life, Ms Shivambu concluded her report with some harsh words and stated in her report as follows: “It remains questionable that the accused conceived twice and both children are dead. She should have learnt a lesson from the alleged

miscarriage that she is not fit to be a parent, and yet continued having unprotected sex that led to the birth of the deceased child. She must be punished accordingly to curb other innocent souls suffer under her hands”. (sic)

8.1 She further noted that the “everyone has the right to life and the accused had no right whatsoever to kill the victim”.

- [9] Ms Shivambu gave viva voce evidence and testified that the accused had a traumatic experience when she had a miscarriage with her first child. She further testified that the accused is not psychologically stable and needs help, and that it is prudent that she gets help because of her behavioural problems. She stated that because the accused has been having a problem with drugs for such a long period of time, it is not surprising because it is well known in her office – which deals with people taking drugs, that the area where the accused resided is a hotspot for drugs. She further confirmed that the accused has bipolar, which is a serious problem that needs to be attended to.
- [10] She testified that having gone through her report after it was sent to the defence and the State, she realised that her conclusion was too harsh and judgmental and appreciates that the accused went through a lot in her life and that the court should consider working around her circumstances and not give a harsh sentence. She stated that the accused was on drugs at the time of the death of the deceased and recommended that a partial custodial sentence and correctional supervision should be given.

10.1 Responding to the question of what motivated her conclusion, she stated that she was angry that the court asked her to have a consultation with the accused and compile a report within a specified period.

10.2 It should be noted that it took four months for the pre-sentence report to be compiled, while it should have taken only six weeks to be completed, and it had to take the court to intervene. What could not be understood was why Ms Shivambu would decide to ignore the request to compile a report and upon enquiry by the court, she told the court that she was busy compiling three other reports which she received after she was instructed to compile a report for the accused, and that she will thereafter make time to go and see the accused.

10.3 It is really disturbing, to say the least, that Ms Shivambu, a professional social worker who deals with critical cases such as the case of the accused, would be angry when being requested to do her job by the court, and have the audacity to boldly state that she was angry, and then take out her frustrations on the accused when it was apparent that she was not just dealing with a regular case, but a case that had to be treated with sensitivity and objectivity.

10.4 I will now turn to deal with the applicable principles in respect of sentence.

[11] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court. It involves a very delicate balancing act which often requires more thought and consideration than is traditionally given to this very difficult process. A balanced approach must always be adopted with reference to the specific facts of each case. It is therefore imperative that in the exercise of my sentencing discretion, I must strive to achieve a judicious balance between all relevant factors in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others.

[12] In determining an appropriate sentence, the court should be mindful of the foundational sentencing principle that ‘punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy[1]. In addition to that, the court must also consider the main purposes of punishment, which are deterrence; prevention; rehabilitation and retribution[2], and have regard to the “triad” factors pertaining to sentence namely: – the nature and seriousness of the crimes

committed by the accused including the gravity and extent thereof, the personal circumstances of the accused, and the interests of society[3].

[13] Since the accused has been convicted in terms of section 51(2) of the Act, she must satisfy the court that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the prescribed minimum sentence of 15 years imprisonment – because the court is enjoined with the powers in terms of section 51(3)(a) of the Act, to deviate from imposing the prescribed minimum sentence. The court in *S v Malgas*[4] set out how the court should deal with substantial and compelling circumstances. In essence, a court can only depart from the prescribed sentence if imposing such sentence would be unjust.

[14] The accused elected not to testify in mitigation of sentence and her counsel addressed the court from the Bar. It is worth noting that an accused has the right to remain silent and not testify, which can be exercised throughout the proceedings[5]. She is 28 years of age, and not married. In respect of her educational background, she passed Grade 12 and registered for a course in Journalism with Damelin College, which she did not finalise. From 2014 to 2015, she worked as a waitress in a restaurant in Pretoria.

[15] It was argued on behalf of the accused that the court should take into consideration that the accused is not a hardened offender who should be given a severe punishment because prior to tendering a plea of guilty, it was established that the accused had a history of drug abuse, which necessitated the need to assess and explore the impact of drug use before, during and after the commission of the offence.

15.1 It was further argued that if regard is had to the evidence of Ms Shivambu who acknowledged that the accused is emotionally unstable and needs help because the use of drugs had an impact on her, and the commission of the offence, and given the fact that the accused comes from Eesterust which is regarded as a drug hotspot, it is undeniable that the accused experienced some disturbing and traumatic youth. Counsel submitted that the long use of drugs led to a risky and abnormal behaviour.

[16] As indicated supra, it was reported that the accused is short tempered and has anger issues. In this regard, Mr Moja submitted that the court should take into account that the court has witnessed some emotional outburst from the accused which clearly shows that given what is noted in Ms Shivambu's report as well as her evidence, the court should consider all the circumstances of the accused as constituting substantial and compelling circumstances that should persuade the court to deviate from imposing the prescribed

sentence of fifteen (15) years imprisonment.

[17] The State on the other hand argued that 'the accused did not adduce any substantial and compelling circumstances', and that the court should take into consideration that Ms Shivambu noted in her report that the accused did not want to accept full responsibility of her unlawful conduct. It was submitted that the aggravating factors present in this case far outweighs mitigating factors, and that the court should exercise its discretion not to deviate from imposing the prescribed sentence.

[18] I do not agree with the State because the offence committed by the accused cannot be taken in isolation to the exclusion of all the other surrounding circumstances. The evidence and Ms Shivambu and her report clearly highlights what one might regard as a disturbing traumatic background which should be a cause for concern which must

be addressed.

- [19] Mr Moja was quite correct in stating that the court has witnessed some emotional outburst from the accused. This court is alive to the fact that the accused did in fact, display an episode which raises a concern that if it is not properly addressed, the system and the court would be seen to have failed the accused. I say this being mindful that, contrary to what the State submitted, the sentence to be imposed should not be used as a sledgehammer.
- [20] In line with the foundational principles that the sentence to be imposed should fit the crime as well as the criminal, and be fair to society, the court should in achieving the right balance, consider the principle of restorative justice in the sentencing process. In *S v Maluleke*[6], Bertelsmann J, emphasized the need for reparation, healing, and rehabilitation rather than harsher sentences, longer terms of imprisonment, adding to overcrowding in jails and creating greater risk of recidivism.
- [21] The probation officer stated in her report that the accused displayed multiple behaviors; that she was diagnosed with bipolar and depression; and that she is from drug hotspot area where the environment played a part in influencing the accused because she was spending time with people who used drugs. In light of these circumstances, I am of the view that the depressive disorder and the emotional instability of the accused, coupled with her drug usage which started when she was 19 years old, are factors which serves as a reminder that the cumulative circumstances of the accused are deserving of the mercy of the court. Thus, the court should sentence the accused with a full appreciation for human frailties, and the accused's circumstances at the time when the offence was committed.
- [22] Having regard to what I stated in the preceding paragraph, it should be noted that the accused stated in her guilty plea that she got frustrated and snapped when the child could not stop crying. In my view, this behaviour clearly reflects the emotional state of the accused at the time when she strangled her child.
- [23] With regards to the question whether the accused is remorseful for having killed the deceased, the State contends that the accused did not take the court into her confidence by taking a stand and verbalizing her remorsefulness if any, but instead took a back seat and expected a social worker and her legal representative to speak on her behalf. It was submitted that the conduct of the accused is not consistent with someone who is remorseful.
- [24] The State's submission in my view is misplaced. What the State seems to ignore is the fact that the accused is entitled in terms of Section 35(3)(h) of the constitution to exercise her right to remain

silent and not testify, which can be exercised throughout the proceedings as stated above. Having said that, the probation officer

indicated in her report that the accused has verbalized her remorsefulness. It is not in dispute that the accused wrote a few letters of apology to the deceased's father, the family of deceased's father, and to the court, as submitted by her

counsel. Be that as it may, remorse is one of the factors to be considered during the sentencing process, but it is not a substantial

and compelling circumstance. In my view, the accused has demonstrated that she is remorseful and can therefore be rehabilitated.

[25] With regards to the pre-sentence detention, it is common cause that the accused was arrested on 10 April 2023 and has been in custody for one year and five months awaiting finalisation of her case. The principle laid down by the SCA in *S v Radebe*[7] is whether the effective sentence proposed is proportionate to the crime committed: whether the sentence in all the circumstances, including the period spent in detention, prior to conviction and sentencing, is a just one.

[26] In my view, the period spent by the accused in custody awaiting trial, and having regard to the circumstances surrounding the delay, and the period of imprisonment to be imposed – do justify such a departure. Nonetheless, the court still has to consider whether all the circumstances of this case taken cumulatively constitutes substantial and compelling circumstance. On the same token, the court has to impose a sentence which must have due regard to the interest of society and be blended with a measure of mercy.

[27] Having considered all the circumstances of this case, and the question whether substantial and compelling circumstances exist which call for the imposition of a lesser sentence than the prescribed minimum sentence, I have taken due regard to the personal circumstances of the accused and in particular, (a) The age of the accused (b) the fact that the accused is the first offender; (c) that she has pleaded guilty; (d) that she is remorseful; (e) the fact that the accused has been abusing drugs for nine years; (f) that the accused is capable of being rehabilitated, especially having regard to the fact that there was once an attempt (g) that she has spent 1 year and five months in custody awaiting finalisation of her case.

27.1 One of the aspects which this court had to consider was what Mr Moja described as the traumatic experience and the effect of the

drugs which cannot be denied that they could have played a part on the mental and emotional status of the accused, coupled with the observation and assessment made by the probation officer which specifically relate to the fact that when the accused had a

miscarriage and was taken to the hospital while holding the foetus still attached to the umbilical cord, that experience affected her psychologically and had to be taken for assessment thereafter.

27.2 I take judicial notice that the use of drugs, especially over a long period time usually leads to risky and abnormal behaviour.

27.3 I have already indicated that the accused had an outburst which to my mind, is a huge cause for concern because clearly, the psycho-social report speak volumes.

- [28] Having regard to the above, I therefore find that the above-mentioned factors constitute substantial and compelling circumstances which justify a deviation from the imposition of the prescribed sentence.
- [29] It is my considered view that sending the accused to serve a long term of imprisonment will be a serious travesty of justice. Accordingly, the interest of society would not be best served by sentencing the accused to a term of fifteen (15) years imprisonment.
- [30] I already indicated that in achieving the right balance, the court must consider the principle of restorative justice in the sentencing process where there is need for healing, and rehabilitation of the offender. In the circumstances, it will be prudent if the accused undergo programmes that will assist her to find her feet when she is released.
- [31] Having considered the submissions made on behalf of the State and the accused, and taking into consideration all factors, as well as the totality of all the evidence before this court, the following sentence is imposed:

1. The accused is sentenced to 10 years imprisonment, 5 years of which

is suspended for a period of 5 years – with a condition that the accused should not be found guilty of murder, or culpable

homicide during the period of suspension.

2. It is ordered that the accused undergo Drug Rehabilitation and Anger Management programmes at the correctional centre where she will be placed.

PD. PHAHLANE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

For the State : Adv. M. Masilo Instructed by : Director of Public Prosecutions, Pretoria For

Accused 1 : Adv. A. Moja Instructed by : Legal Aid South Africa Heard

: 19-21 February; 2 & 16 May 2024

Judgment

Delivered : 25 September 2024

- [1] Per Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 862G-H; See also: *Moswathupa v S* (168/2011) [2011] ZASCA 172 (29 September

2011) at para 4.

- [2] *S v Banda* 1991 (2) SA 352 (BG) at 354E-G.

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- [3] See: S v Zinn 1969 (2) SA 537 (A)
- [4] 2001 (1) SACR 469 (SCA).
- [5] Section 35(3)(h) of Constitution, Act 108 of 1996.
- [6] 2008 (1) SACR 49 (T) at [26].
- [7] 2013 (2) SACR 165 (SCA) at para 14.
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