

SOUTH AFRICA / JUDGMENT

S v Masukunya (Sentence) (CC82/2023)

[2024] ZAGPPHC 1043 (14 October 2024)

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COURT

North Gauteng High Court, Pretoria

BEFORE

Strijdom

CASE / FILE NUMBER

CC82/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(Gauteng Division, Pretoria)

Case no: CC82/2023

Heard on: 13 September 2024

Judgment

handed down: 14 October 2024

In the matter between:

The State

Versus

Tshepo Thapedi Masukunya

Accused

JUDGMENT:

Sentence

STRIJDOM, J

- The accused was arraigned on the following charge:
 - Murder read with the provisions of section 51(1) of Act 105 of 1997.

2. The accused pleaded "not guilty" to the charge of murder, but "guilty" to culpable homicide. The State did not accept the plea of "guilty" on culpable homicide. The accused was subsequently found guilty of murder with *dolus eventualis* as the form of intent.
3. In considering an appropriate sentence, the Court is mindful of the foundational sentencing principles that the punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy. In addition to that, the Court also considers the main purposes of punishment being retribution, deterrence, prevention and rehabilitation.
4. In determining a sentence that is just and fair, I have regard to the triad of factors that have to be considered as set out in the case of *S v Zinn* 1969 (2) SA 537 (A), that is the gravity of the offence, the personal circumstances of the offender and the interests of society. The Court must also consider the interests of the victims.
5. The following personal circumstances and/or mitigating factors were placed on record by the accused.
 - 5.1 The accused is 40 years old and is single.
 - 5.2 He is a first offender.
 - 5.3 The deceased was his only child.
 - 5.4 He was self employed as a builder and was earning an income of R1500,00 to R2 000,00 per week.
 - 5.5 He is heartbroken because of the death of his son.
 - 5.6 He was supporting five of his siblings who are unemployed and staying at his parental home.
 - 5.7 He was arrested on 13 October 2022 and is still in custody. He spent two years in custody awaiting trial.
 - 5.8 He immediately handed himself over to the police and is remorseful for what he has done.
 - 5.9 He has pleaded guilty on culpable homicide.
 - 5.10 The accused was under the influence of liquor.
6. The Court finds the following as aggravating circumstances:
 - 6.1 The deceased was a defenseless 9-year-old boy with a mass of 23 kg.
 - 6.2 The assault on the deceased was vicious, resulting in the serious injuries the deceased sustained.
 - 6.3 Dr Soul conducted a post mortem examination on the body of the deceased. She notes injuries from paragraphs 4.3 of the report, and she numbered them alphabetically A to N which are 14 injuries mainly sustained on the deceased's head.

6.4 The deceased was still a minor. His constitutional right to life as stipulated under section 11 of the Constitution was violated.

7. I will now turn to the second factor to be considered being the gravity of the offence. Murder is a very serious offence. It is the most heinous of crimes.
8. The evidence led by the State revealed that you assaulted the deceased by hitting him with open hands and kicking him several times on his head. He sustained 14 injuries on his head.
9. The interests of society must be taken into consideration by the Courts. The Courts must protect the dignity and freedom of all children.

10. Section 12 of the Constitution provided that:

"Everyone has the right to be free from all violence and not to be treated in a cruel, inhumane and degrading way and every child has a right to be protected from maltreatment, neglect abuse or degradation as per section 28 of the Constitution."

11. The finding of guilty on murder activates the application of section 51(1) of Part 1 of Schedule 2 of the Criminal Law Amendment At 105 of 1997 for a minimum sentence of life imprisonment which is applicable upon conviction of murder of a minor.
12. The Court can only deviate from imposing the minimum sentence if there are substantial and compelling circumstances which will justify a lessor sentence.
13. In *S v Malgas* 2001 (1) SACR 469 (SCA) the Court held that a Court has a duty to implement these sentences, unless there are truly convincing reasons from departing from it.
14. In determining whether there are substantial and compelling circumstances the Court considers mitigating as opposed to aggravating circumstances and considers the cumulative effect thereof.
15. It was argued by counsel for the accused that the personal circumstances of the accused and the mitigating factors are substantial and compelling circumstances to deviate from the minimum prescribed sentence.
16. It was submitted by the State that there are no substantial and/or compelling circumstances to impose a lessor sentence.
17. On a conspectus of all the evidence placed before me, I am of the view that the following factors are compelling and substantial circumstances to deviate from the minimum prescribed sentence.

17.1 The accused is a first offender.

17.2 The accused spent two years in prison awaiting trial. Pre-sentence detention is a factor to be taken into account when considering the presence or absence of substantial and compelling circumstances. It must be weighed as a mitigating factor together with all the other mitigating and aggravating factors.

17.3 The accused was under the influence of liquor at the time of the offence.

17.4 The accused did report the incident immediately to the police.

17.5 The accused has pleaded guilty on culpable homicide.

17.6 The Court found the accused guilty of murder with *dolus eventualis* as the form of intent. The evidence does not establish that the accused had the direct intent to cause the death of the deceased.

18. I conclude that under the circumstances life imprisonment would be disproportionate to the crime, the offender and the interests of society.

19. The Court finds that the appropriate sentence is as follows: On count

(1) murder, you are sentenced to 25 (twenty-five) years imprisonment.

20. In terms of section 103(1) of Act 60 of 2000 there were no reasons advanced for the Court to consider the possibility of determining otherwise. You are automatically declared unfit to possess a firearm.

JJ STRIJDOM

JUDGE OF THE HIGH COURT OF

SOUTH-AFRICA, GAUTENG DIVISION

APPEARANCES:

For the accused: Adv LA Van Wyk Instructed by: Legal Aid Board For the State: Adv L Swidzho
Instructed by: Director of Public Prosecutions

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