

SOUTH AFRICA / JUDGMENT

S v Mncube (JUDGMENT ON SENTENCE) (CCP42/2021) [2023] ZAKZPHC 16 (17 February 2023)

[2023] ZAKZPHC 16

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mossop

CASE / FILE NUMBER

CCP42/2021

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FLYNOTES:

UBUNTU
AND MURDER SENTENCE
CRIMINAL –
Sentencing – Ubuntu – Murder conviction –
Counsel asking for ubuntu to be incorporated
in sentence –
Minimum sentencing – Accused found to be dangerous and
calculating and not showing any remorse
– No substantial or
compelling circumstances to allow sentence less than the
prescribed minimum sentence – 20
years imprisonment.

IN
THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
DIVISION, PIETERMARITZBURG,
NORTH
WESTERN CIRCUIT

Case
No: CCP42/2021
In

the matter between:

THE
STATE
And
MBUSO
MNCUBE
ACCUSED

JUDGMENT

ON SENTENCE

MOSSOP J:

[1] Yesterday, while hearing argument on the question of sentence, your counsel, Mr Madida, urged me to incorporate the principles of ubuntu into the sentence that I am required to pass on you. Ubuntu can loosely be defined as a fundamental African value embracing dignity, human interdependence, respect, neighbourly love and concern. In *S v Mankwanyane*,^[1] the Constitutional Court recognised the African customary principle of ubuntu as one of the values underpinning the Constitution when dealing with the question of criminal punishment. The Interim Constitution also incorporated the concept of ubuntu from traditional

jurisprudence. In *Mankwanyane*,^[2] six of eleven judges identified ubuntu as being a key constitutional value that:

‘ . . . places some emphasis on communality and on the independence and on the interdependence of the members of a community. It recognises a person’s status as a human being entitled to unconditional respect, dignity value and acceptance . . . The person has a corresponding duty to give the same. . . ’

[2] The Constitutional Court has made several allusions to ubuntu being one of the core constitutional values of human dignity, equality and freedom. Though ubuntu is not specifically mentioned in the final Constitution, it remains part of our jurisprudence.

In *Port Elizabeth Municipality v Various Occupiers*,^[3] Sachs J said:

‘The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the needs for human interdependence, respect and concern.’

[3] I am an enthusiastic proponent of the concept of ubuntu and I shall attempt to ensure that it is reflected in the sentence I now impose and in my reasons for that sentence. However, making reference to ubuntu and considering its foundational principles and philosophies also has the startling effect of bringing home to me how very far you have fallen from that very philosophy and how lacking in compassion and mercy your conduct in this matter is. You seek compassion and mercy from this court, but you showed none of that to the deceased. Nonetheless, I proceed on the basis that we are all human beings, none of us is perfect and errors are made by all of us. It appears, however, that you make more errors than most people and do not appear to learn from the errors that you do make.

[4] You will agree with me that the crime that you committed is extremely serious. It is difficult to conceive of a more serious offence than the murder of another citizen. As Mr Sokhela stated in his argument, in the not-too-distant past -it was possible for a sentence of death to be imposed upon someone found guilty of the murder of another citizen. That demonstrates to you how serious this offence is regarded by the law. Thankfully, we no longer have the death penalty and so another form of sentence needs to take

its place. It is my duty to assess what that sentence should be.

[5] I am guided in this task by legislation passed by the National Assembly which requires certain minimum sentences to be imposed for certain offences. You acknowledged at the commencement of this trial that you were aware of the existence of such minimum sentences. The offence for which you have been convicted falls within the second part of schedule 2 to the piece of legislation that is known as the Criminal Law Amendment Act 105 of 1997 (the Act). Section 51(2) of the Act prescribes that offences that fall within the second part of schedule 2 shall attract a minimum sentence of 15 years imprisonment. The State urges me to impose that sentence, plus an additional five years' imprisonment. Your counsel seeks a sentence less than 15 years.

[6] I am not compelled to impose the minimum sentence referred to by the Act. I can impose a lesser sentence if I am satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. As Mr Madida correctly pointed out, the Act does not define what 'substantial and compelling' circumstances are. This is left to the courts to determine.

[7] Other courts have over the years considered what 'substantial and compelling circumstances' may mean. A leading case that is often referred to when it comes to minimum sentences is the matter of *S v Malgas*.^[4] Indeed, it was referred to by both Mr Sokhela and Mr Madida when they addressed me on sentence yesterday. The Judge who delivered the judgment in *Malgas*, Appeal Judge Marais, said that it is incorrect to hold the view that for circumstances to qualify as substantial and compelling they must be 'exceptional' in the sense of being seldom encountered or rarely encountered. He said that whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified minimum sentences are not to be departed from lightly and for flimsy reasons which cannot withstand scrutiny. Speculative theories favourable to the accused person, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy of minimum sentences, and like considerations are obviously not intended to qualify as substantial and compelling

circumstances. But there is no reason to conclude that the legislature intended a court to exclude from consideration, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders.

- [8] That same Judge, however, went on to state that courts are required to approach the imposition of sentence conscious of the fact that the Legislature has ordained the particular prescribed period of imprisonment as being the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- [9] In my view, it is important when considering the appropriateness of the sentence to be imposed upon you not to start with the mindset that the minimum sentence is a just sentence. All the circumstances of the case must be identified, considered and evaluated and then it should be considered whether the sentence is disproportionate to the crime, the offence and the legitimate needs of the community. That will require the court to consider what a just sentence would be in all the circumstances of the case. If a just sentence falls materially below the prescribed sentence there will be substantial and compelling circumstances to depart from the prescribed sentence.[5]
- [10] I have considered the facts of the case. Your conduct was reprehensible in committing the crime. Your demeanour in court is scarcely any better. You have singlehandedly through your conduct inflicted severe wounds on two families. Firstly, to your own family. You have lied about their conduct and have unfairly sought to blame those family members who helped you. Secondly, to the deceased's family. Ms Buthelezi, who raised the deceased from the age of 9 months, was reduced to anguished, racking sobs when she testified in aggravation of sentence, explaining what your conduct has done to their family. It was most distressing to observe. It did not appear to affect you in the slightest.
- [11] There can be no doubt that you are only motivated by your own interests and that you will do anything, and say anything, to preserve those interests. You appear to have a rather distorted view of your own importance. You at one stage in your evidence equated yourself to Jesus Christ.
- [12] Mr Madida submitted that you are youthful and immature. I do not find you to be either. I find you to be dangerous and calculating. You have not demonstrated a single iota of remorse for your conduct. Mr Sokhela referred me to the matter of *S v Matyityi*[6] during his address on sentence. In that matter, Appeal Judge Ponnan had the following to say on this issue of remorse:

‘There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration,

the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.’ (Footnotes omitted)

[13] I have no idea what motivated you to commit the offence for which you have been convicted. You have not taken the court into your confidence in this regard. On this score, Mr Madida submitted that you ‘appreciate’ the consequences of the offence for which you have been convicted and that you ‘appreciate’ the trauma that the deceased’s family have been put to. That does not cut the mustard when it comes to remorse and contrition. You are not a fool: you, of course know what happens to people who kill other people and get caught and what happens to the grieving family of the deceased person. The fact that you intellectually ‘appreciate’ those consequences does not in any way establish any remorse on your part for being the cause of those consequences.

[14] I have considered your personal circumstances. You have not had a privileged upbringing and you do not have an impressive or lengthy educational record. You are the father of a young child. It is ironic that the mother, who you branded as an unmitigated liar, has raised your son and will presumably have to continue to do so as a consequence of the sentence now to be imposed upon you. In my book, it takes a special type of person to call his mother a liar in a public forum, such as in a court. You are that type of person. I am unpersuaded that there are any substantial or compelling circumstances that will allow me to impose a sentence less than the prescribed minimum sentence.

[15] You have not learned from your previous brushes with the law. You must, unfortunately, now be made to learn. Given the seriousness of the offence, a long term of imprisonment is the only realistic sentence in the circumstances. The only issue is the length of the sentence. The State has called for a sentence of 20 years. I ordinarily would have thought that was a bit light in the circumstances, given the enormity of your crime. Certainly, a sentence that falls below the minimum sentence or the minimum sentence itself would not be a just sentence considering the facts of this matter. I would have thought that 25 years would be the appropriate sentence. But, upon reflection, it appears to me that 20 years’

imprisonment might be adequate when cognisance is taken of the fact that you have been in custody since 4 August 2020, a period of 2,5 years.

[16] In the circumstances, after consideration of the competing interests in the matter, I sentence you as follows:

1. You are sentenced to 20 years imprisonment on count 7;
2. I make no determination in terms of section 103(1) of the Firearms Control Act 60 of 2000. You are therefore declared unfit to possess a firearm.

MOSSOP J

APPEARANCES

Counsel for the State: Mr. S Sokhela

Instructed by: : Director of Public Prosecutions

Pietermaritzburg

Counsel for the accused : Mr P. M. Madida

Instructed by : Legal Aid

Newcastle

Dates of Hearing : 17 to 20 January 2023; 23 to 27 January 2023;

30 to 3 February 2023; 6 February to 10 February 2023;

13 February 2023; 16 February 2023

Date of Judgment : 17 February 2023

[1] 1995

(3) SA 391 (CC).

[2] Para 224.

[3]

[2004] ZACC 7; 2005

(1) SA 217 (CC) para 30.

[4] S v Malgas 2001 (2) SA 1222 (SCA).

[5] S v GK 2013 (2) SACR 505 (WCC) para 14.

[6] S v Matyityi 2011

(1) SACR 40 (SCA).

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Prepared on 8 October 2026 · Esheria