

SOUTH AFRICA / JUDGMENT

S v S.D (SS023-2023) [2024]

ZAGPJHC 1233 (28 November 2024)

[2024] ZAGPJHC 1233

COURT

South Gauteng High Court, Johannesburg

BEFORE

Yacoob

CASE / FILE NUMBER

SS023/2023

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: SS023/2023

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

In the matters between:

THE STATE

and

D[...] S[...]

Accused

JUDGMENT ON SENTENCE

YACOOB, J

Introduction

- [1] Ms D[...] was convicted on 13 November 2024 of murdering her twenty-eight-month-old son, S[...] L[...] D[...]. The basis of the conviction is contained in a separate judgment. The indictment included an allegation of premeditation but that was not proven. However, since the child was under 18 years old, the offence still falls within section 51(1) of the Criminal Law Amendment Act, 105 of 1997, read with Part 1 of Schedule 2 of that Act. The prescribed minimum sentence is life imprisonment.
- [2] Ms D[...] had attempted to enter a guilty plea, but the court was not satisfied that her statements and questioning in terms of s 112 of the Criminal Procedure Act, 51 of 1977, (“the CPA”), established the required intention. A plea of not guilty was therefore entered in accordance with s 113 of the CPA. After hearing all the evidence, I found her guilty.
- [3] The basic facts are that Ms D[...] was extremely upset after a family argument which traumatised her. She was sitting in the driver’s seat of her car in the yard of the family home crying. She did not have the keys of her car as her family had confiscated them. The child entered the car on the passenger side and started playing with the radio and dancing. He climbed over onto her side and stood in the footwell in front of her, playing with the steering wheel. She pulled him on her lap and hugged him. He pushed himself out of her arms and continued playing with the steering wheel. She put her hands around his neck and squeezed. She did not stop even though she felt him struggle. Then she realised he was not moving. She tried to wake him up and he would not wake. She tried unsuccessfully to call emergency services. She put him in the driver’s seat, left the property, got to the police station and confessed that she had killed her child.

Evidence on Sentence

- [4] The state proved no previous convictions and indicated that it was seeking the prescribed minimum sentence. It called one witness, Mr M[...] N[...], the father of the child, in aggravation of sentence. Mr N[...] was the only affected party who gave evidence with regard to sentence.
- [5] The defence called no witnesses in mitigation. Mr Chauke, who represented Ms D[...], elected rather to rely on the report and evidence of the psychological expert, Ms Hearne, who had testified for the defence during the trial. It is unfortunate that the election was not made known at the time the expert testified, as she was not questioned with regard to those parts of her evidence which are particularly relevant to sentencing. The court was requested nevertheless to simply take what was there. The defence submitted that taking all relevant circumstances into account, there were substantial and compelling circumstances which enable the court to deviate from the prescribed minimum sentence.

- [6] Mr N[...], the father of the child, after taking the oath and explaining who he was, read out his statement, as he stated that he would not otherwise be comfortable expressing himself openly in court. He was however also cross-examined and re-examined. Mr N[...] was clearly distressed and broke down more than once while reading his statement.
- [7] Mr N[...] is a radiation therapist. At the time of the incident he had just begun a new job in Pietermaritzburg. Before that he had been living in Parktown, although his family home is in Kwazulu-Natal. He received a call at about 23h00 on the evening of 4 February 2023 from Ms D[...]’s younger sister, insisting that he come to their home in Dobsonville Gardens, Soweto, as the
- child was “not fine”. She was hysterical and would not tell him anything else, other than he must come. He flew up the following morning, anxious that his son may be seriously ill, only to find that it was worse than that. He felt anguish and despair, especially that he himself had been unable to protect his son.
- [8] Since his son’s death, Mr N[...] says he and his family have been living in a nightmare. He loved his son and lived only for him. It is overwhelming to have lost his first born son. He feels tremendous heartbreak and an unfillable void. His mental health has been badly affected. His brain is numb, he has insomnia, is angry, has symptoms of depression and has decreased self-esteem. He cannot trust people and is afraid someone may break into his own home and strangle him. He has been undergoing therapy to try and deal with the trauma and the huge effect it has had on his life.
- [9] The trauma has also affected his ability to do his work, especially when there are paediatric patients. He has had to miss six weeks of work altogether, and he has had to be shuffled to less busy stations. It also meant his probationary period on the new job was extended.
- [10] There has been a great financial impact on the family too, because of having to travel to court, arrange the funeral and so on, which also included accommodation expenses in Gauteng, although he has family in the East Rand.
- [11] Mr N[...] expressed his view that he will be feeling the impact for years to come and that people should not be able to commit crimes like this and get away with it. Ms D[...] should be punished for doing something so horrendous that has left so many people devastated. On the one hand he left the sentence to the court, while on the other he urged for the imposition of the maximum possible sentence.
- [12] He thought that rather than killing the child Ms D[...] should have asked for help. He thought courts are too sympathetic to women who are perpetrators because they are often victims or play the victim. He believes that Ms D[...] is a danger to society, and does not deserve to “walk our streets, she deserves to rot in jail” because he will never see his son again. He also accused Ms D[...] of turning the music up in the car where the incident happened so that nobody would hear the child’s screams when she killed him. I pause to note that this was never the evidence. Mr N[...] finally submitted that Ms D[...] did not deserve

mercy because she had no mercy for the child.

[13] Under cross-examination he confirmed that he and Ms D[...] had had a short lived relationship and that he was very surprised to find out that she was pregnant. After she told him she was pregnant they tried to make the relationship work but it did not. He went to see the child with members of his family in December 2020, two months after the birth. He has consistently financially supported the child.

[14] Mr Chauke tried to make much of the fact that, in Zulu culture a son has to be taken to the clan home, and since that had not been done, Mr N[...] had not truly accepted or valued the child as his own. Mr N[...] disputed this, saying there was no prescribed age of the child for this to be done. However the child had visited Mr N[...] in Parktown numerous times, including alone. He had also taken Ms D[...] and the child Christmas shopping together.

[15] It was put to Mr N[...] that he decided not to communicate with Ms D[...] any more, but rather with her mother. He responded that there was a communication breakdown between himself and Ms D[...]. However that did not stop him from supporting the child, he communicated with her two sisters and they said they would raise it with family elders. There were allegations that she was using money irresponsibly and was not fine. He was told that she was going through a rough patch. It was agreed between him and the D[...]

family (excluding Ms D[...]) that he would pay the money to her mother until she “finds herself”.

[16] Mr Chauke then attempted to criticise him for not giving her (emotional) support knowing that she was going through a rough patch. On this question being objected to it was withdrawn. He was then asked about his social media posts after the death of the child, which vilified Ms D[...]. He acknowledged that he had expressed his feelings openly on social media, including his anger with her, and that he had said he would kill her if he met her. However that was an expression of his feelings and he would not actually murder someone. In re-examination he testified that he also posted many pictures of happy times he spent with the child and also

Ms D[...].

[17] The report on which Mr Chauke relies in mitigation establishes that Ms D[...] is psychologically unstable, or vulnerable. This of course is corroborated by Mr N[...]’s own version as well as the evidence in the main trial. She suffered a childhood head injury which may have led to the poor impulse control she demonstrates. She also once lost consciousness while at school as a child. Her father was physically abusive. She has a history of suicide attempts and self harm. Her last suicide attempt was in prison in 2023. There is evidence that her family interfered with her bonding with her child, going so far as to stop her breastfeeding

when they thought it had gone on too long and that she was too attached to doing it. She was diagnosed with tuberculosis ten years

ago. She has been diagnosed with Generalized Anxiety Disorder and Major Depressive Disorder in prison, and takes Quetiapine, a drug which is an anti-psychotic and also helps her sleep. Although she has this psychological history she has not had ongoing psychological

help. She did go for some therapy after her second suicide attempt but it was not ongoing. This mother's testimony during the main trial.

- [18] Ms D[...] is also intelligent, educated and articulate. She has had various jobs and had enrolled for a B.Com Law degree at Boston City Campus, just before she killed her child.
- [19] Ms Hearne concluded that Ms D[...] has symptoms of Schizoaffective Disorder, as well as Generalised Anxiety Disorder and Post Traumatic Stress Disorder. She identified profound insecurity and mistrust. She presents in a manner consistent with Narcissistic Personality Disorder. She would have trouble "regulating emotions, accurately perceiving the intentions of others, and maintaining a stable sense of self". Her internal suffering is genuine, even if it was exacerbated by her difficulties. She has trouble regulating not only her emotions but her behaviour.
- [20] Of particular significance was that Ms Hearne noted that a child of the age of Ms D[...]’s child still can be seen by the mother as an extension of herself, and harming the child an extension of the self harm. She noted that Ms D[...] was feeling trapped and desperate, under great pressure and also trying to manage a precarious mental state.
- [21] Ms Hearne suggested that the murder of the child was probably an impulsive act in highly charged emotional circumstances, and that Ms D[...] needs psychotherapy and psychiatric help. However, she knew what she was doing and at the time she did it, in that moment, intended to do it. She may have been detached from her knowledge of the consequences.
- [22] Ms Hearne reported that Ms D[...] told her that after the incident she panicked, wanted to get help, realised it was too late and decided to turn herself in. She definitely understood that what she had done was wrong.

Submissions and analysis

- [23] Mr Chauke referred the court to the classic "Zinn triad" to be applied in sentencing. Articulated in *S v Zinn* 1969 (2) SA 537 (A), the principle is that the court must, when sentencing, take into account the three elements of the crime itself, the circumstances of the person who committed it, and the interests of society. The three elements or factors must be balanced against one another to arrive at an appropriate sentence which is in the interests of justice.
- [24] Mr Chauke submitted further that, in addition to her precarious psychological state, it must be taken into account that she was not unaffected by her crime from the moment she committed it. She was crying and upset from the moment she realised what she had done and went straight to the police station. She is a person pursuing education and is still young, aged 32. She ought not to be condemned to permanent imprisonment. It must also be taken

into account that she attempted to plead guilty. There is therefore a basis to deviate from the minimum sentence.

- [25] Ms D[...] had applied for bail and it was refused. She has been in prison awaiting trial since February 2023, that is a year and ten months. He submitted that in those circumstances an appropriate and fair sentence would be ten years imprisonment.
- [26] Mr Mbaqa submitted for the state that, while the court has inherent powers to impose any appropriate sentence, it must be taken into account that there are more aggravating circumstances than mitigating circumstances. She killed her own defenceless child. She was less than frank with the court, and even her attempt to plead guilty was watered down.
- [27] He pointed out also that there is a chasm between regret and remorse, as held by the Supreme Court of Appeal in *S v Matyityi* 2011 (1) SACR 40, in which it was noted that there is a difference between remorse, being sorry that you have done what you have done for its effect on others, and feeling sorry for oneself. She has not even said she was sorry.
- [28] In my view there are in fact substantial and compelling circumstances to deviate from the prescribed minimum sentence. However, this is not a case in which Ms D[...] is going to get away with it, as suggested by Mr N[...].
- [29] Ms D[...] has had a difficult life which was exacerbated by her own personal traits. In that situation she had to deal with a family which, the evidence reveals, was not inclined to let her grow and develop, to some extent with good cause, as she had shown suicidal tendencies.
- [30] It is possible that this horrible murder is the result of a “perfect storm” – where Ms D[...]’s own vulnerabilities combined with the pressures of her family led her to a place where she acted impulsively and will always regret. She has to live with what she is done. But of course that is not enough.
- [31] The interests of society and the nature of the offence both militate towards a substantial sentence for Ms D[...]. Also she must realise that her actions can have permanent consequences which go beyond herself feeling sorry. Ms D[...]’s actions immediately on realising that the child was dead demonstrate concern for herself rather than the child. Her first instinct was not to go and get her mother and try and get help for the child. Her first instinct was to go and turn herself in. And to message her pastor expressing her regret. This shows self-interest, an attempt to salvage oneself.
- [32] In addition, it seems that Ms D[...] is getting the help in prison for her condition that she was unable to get on the outside. To the extent that rehabilitation is possible for her, in my view it seems more likely in prison. She has got psychological and psychiatric assistance and she can attempt to heal and realise what she has done without dealing with the pressures of the outside world.

- [33] Further, I am not satisfied that at this point Ms D[...] has shown remorse. Her actions and her evidence in court lead one to infer she is as concerned about the fact of what she has done and how it affected her, as she is about her son's suffering. The broader consequences are not of issue to her.
- [34] Nevertheless I agree that her whole life should not be forfeit just because the child's life is forfeit. Retribution is not the only function of sentence.
- [35] Taking everything into account, including the relatively long period spent awaiting trial, I am satisfied that a sentence of 12 years direct imprisonment is in the interests of justice.
- [36] Therefore. Ms D[...] is sentenced to 12 years direct imprisonment.

S YACOOB

JUDGE OF THE HIGH COURT

JOHANNESBURG

Prosecutor: Mr M M Mbaqa For the Accused: Mr SP Chauke (Attorney) Dates of Hearing: 7, 10, 17, 18, 28 October 2024, 04, 13, 21 November 2024 Date of Judgment: 28 November 2024

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