

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: CC82/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 18 September 2024

In the matter between:

The State

Versus

Tshepo Thapedi Masukunya .

JUDGMENT

Strijdom J

[1] The accused was arraigned on the following charges:

(a) 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.

[3] The plea explanation was handed in as exhibit "A". In disclosing the basis of his defence in terms of S115 of the Criminal Procedure Act, 51 of 1977, he stated that he had assaulted the deceased by hitting him with open hands and kicking him. He further stated that he did not have the intent to kill the deceased and did not foresee that the deceased will pass away as a result of the assault.

[4] The following formal admissions were made by the accused in terms of S 220 of the Criminal procedure Act, 51 of 1977, and were handed in respectively as Exhibit "B" and "C".

4.1 That the deceased is the person mentioned in count 1 of the indictment, to wit K[...] A[...] N[...], a minor male and he was 9 years old at the time of his death.

4.2 That the deceased, K[...] A[...] N[...], died between 14 and 15 October 2022.

4.3 That the deceased, K[...] A[...] N[...], did not sustain any further injuries from the time he sustained the injuries until the Medico-legal postmortem examination was conducted.

4.4 That Dr Bathabile Soul conducted a Medico-legal postmortem examination on the body of the deceased K[...] A[...] N[...] on 15 October 2022 and recorded her findings on the form with DR no GP /02- 1753/2022 handed in as Exhibit "D".

4.5 That the facts and the findings of the Medico-legal postmortem examination of the deceased recorded on the postmortem report are correct.

4.6 That the cause of death of the deceased, was correctly recorded in the postmortem report as "Multiple Blunt Force Trauma Chiefly To The Head With Consequences Thereof".

4.7 A photograph album with LCRC no 228/10/2022 compiled by Constable PM Makota, depicting the scene of the crime and the deceased was handed in as Exhibit E1 and E2.

4.8 The accused admits that he assaulted the deceased by hitting him

with open hands and kicking him on 14 October 2022.

4.9 He admits that the deceased passed away as a result of the assault.

4.10 He admits that his actions were unlawful and there is no justification for his actions.

[5] The crisp issue in this matter is whether the accused acted with intent to kill the deceased or whether he acted negligently.

[6] The State called one witness Dr Bathabile Soul. Her evidence can be summarized as follows:

6.1 She testified that she conducted a postmortem examination on the body of the deceased. She notes injuries from paragraph 4.3 of the report and she numbered them alphabetically A to N which are 14 Injuries mainly sustained on the deceased's head.

6.2 She further testified that all injuries were caused by blunt-force trauma. The injuries were so severe that they caused haemorrhage to the scalp, brain swelling and bleeding. That condition caused the brain to die.

6.3 She differentiates, between cause of death and mechanism and concluded that the assault on the deceased caused the death since it caused the bleeding. She further concluded that the injuries on his mouth caused the decease to breath in blood and he was unable to breath and that resulted in his death.

6.4 No fractures were noted by DR Soul on the rib cage. She recorded that no bone fractures were observed during the postmortem, and that the force applied to the deceased did not lead to any bone fracture.

[7] The evidence tendered by the accused can be summarized as follows:

7.1 He testified that on the day in question, he returned home from a

visit to his friends. He had consumed liquor and was "drunk" as he was drinking from 4 to 5pm until 8 to 9pm. When he arrived at home, it was already dark. He found the deceased at his home who had hitched a ride on a private vehicle from Hammanskraal to the home of the accused. The accused was angered by the action of the deceased, as he was aware of children "being kidnapped"

7.2 The accused admitted to hitting the deceased with open hands, and kicking him wearing tekkies (or sneakers), while he was reprimanding the deceased. The accused admitted that he had in fact assaulted the deceased. After the assault, the accused and the deceased went to bed sleeping in the same bed. When accused woke, the following morning, he found that the deceased had passed away.

7.3 The accused testified that his intention had not been to kill his son, the deceased. He testified that he did not contemplate the physical condition of the deceased after he had assaulted him and that he had not thought to do so. He testified that he did not see the injuries on the deceased. It was only later that he had observed the injuries sustained by the deceased.

7.4 The accused admitted that what he had done was wrong and that he had excessively assaulted the deceased up to the child losing his life.

[8] It was submitted by the State that the version of the accused cannot be relied on. It was further submitted that the way the injuries were inflicted, the nature and seriousness of the injuries point to the direction that the accused had a direct intention to kill the deceased, alternatively, that the result of death was foreseeable.

[9] It was argued by the defence that the State failed to prove that the accused had the necessary intent to kill the deceased. It was submitted that the accused was negligent in not establishing the extent of the injuries suffered by the deceased, as a reasonable person would have done so.

[10] The accused did not impress me as a reliable witness. There are material contradictions in his evidence to cast doubt on his veracity concerning the actual incident.

[11] In his evidence in chief the accused testified that he was 'drunk' when he arrived at home. In his plea explanation he stated that he was under the influence of liquor but not to the extent that he did not know what he was doing.

[12] In his evidence in chief and in his plea explanation, the accused never mentioned the fact that while he was assaulting the deceased, the deceased fell twice and bumped his head twice against the wall. It was only during cross examination when the prosecutor questioned him about the laceration on the forehead of the deceased that the accused came up with this new version that the deceased fell twice and bumped his head against the wall. This version was not put to Dr Soul in cross examination.

[13] The accused testified that during the assault on the deceased, it was dark inside the house and he could not see the injuries or the blood. The accused answered to a question posed by the court, that the source of light in the house was a dim solar light. In his evidence in chief, the accused did not testify that there was a solar light in the house.

[14] In his evidence in chief, the accused did not testify that during the assault on the deceased, the deceased went outside the house onto the stoop and that he had to follow him and drag him back into the house. It was only during cross examination when he was confronted with the blood on the stoop that the accused gave this explanation.

[15] During cross examination, the accused was questioned about the blood on the bed, the floor, a T-shirt and on the stoop. The accused's explanation was that he was injured on his left arm and blood was dripping from his arm. He also explained that he used the T-shirt to wipe the blood on his arm. The

accused did not testify in his evidence in chief that he was injured on his left arm.

[16] There are also the following inherent improbabilities in the accused's version:

16.1 The accused testified that he could clearly see that he was assaulting the deceased and he could clearly see that the deceased fell twice and bumped his head twice against the wall. However, he testified that he could not see that the deceased was seriously injured and sustained 14 injuries which are mainly on the head. It is highly improbable that the accused could not see the injuries on the deceased and the blood under circumstances where they slept on the same bed after the assault on the deceased. It is also highly improbable that the accused was not aware that the deceased was seriously injured taking into consideration the nature of the assault on the deceased.

16.2 It is highly improbable that by hitting the deceased with open hands and kicking him several times on his head that the accused was unaware that the deceased was seriously injured.

16.3 The accused testified that the laceration on the forehead of the deceased was caused when the deceased fell against the wall. If the accused could see that the laceration was caused when the deceased bumped his head against the wall, he could see that the deceased was seriously injured.

[17] I reject the version of the accused that the deceased bumped his head twice against the wall and that the accused could not see or was aware of the fact that the deceased was seriously injured. This version is not reasonably possibly true.

[18] It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. It was stated in **S v Van Aswegen 2001(2) SACR**

97(SCA) that:

"A court does not base its conclusion, whether it be to convict or acquit on only part of the evidence. The conclusion, which it arrives at must account for all the evidence"

[19] What remains is to determine whether the accused is guilty of culpable homicide or murder with the direct form of intent or *dolus eventualis*.

[20] I am in respectful agreement with the following statement by the Namibian Supreme Court in **S v Van Wyk 1992(1) SACR 147(NMS) at 161 e- h:**

"The state is, from the nature of things, seldom able to offer direct evidence of the deceased's state of mind at the time of assaulting the deceased and must therefore rely on inferences to be drawn from the circumstances of the assault (including nature and duration), the nature of any weapons used and the nature, position and extent of the injuries inflicted. These must in turn be weighed up against any other circumstances (such as the consumption of drugs or alcohol) which may indicate that the accused did not foresee the consequences of his actions. All the relevant facts which bear on the accused's state of mind and intention must be cumulatively assessed and a conclusion reached as to whether an inference beyond reasonable doubt can be drawn from these facts that the accused actually considered it a reasonable possibility that the deceased could die from the assault but, reckless as to such possibility, embarked on or persisted with the assault".

[21] On the medical evidence, the injuries which caused death were the kicking to the head of the deceased. The court must look at the assault as a whole in order to determine what the accused's intention was.

[22] The deceased was a defenceless 9 year old boy with a mass of 23kg. Dr Soul describe his physique as petite. On the other hand, the accused was a 38year old man who was much larger than the deceased. The assault on the

deceased was vicious, resulting in the serious injuries the deceased sustained.

[23] The evidence does not establish that the accused had the direct intent to cause the death of the deceased. However, on a conspectus of all the evidence, I am satisfied that the accused subjectively foresaw the possibility of his conduct causing the death of the deceased and was plainly reckless as to such result ensuing.

[24] I find the accused guilty of murder with dolus eventualis as the form of intent.

Strijdom JJ
Judge of the High Court Of South Africa
Gauteng Division, Pretoria

Appearances

For the State	Adv L Sivhidzho
Instructed by:	OPP
For the Accused:	Adv LA Van Wyk
Instructed by:	Legal Aid