IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE No. A679/2009

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

ZAIBONISHA HERMAN Appellant

and

THE STATE Respondent

JUDGMENT

WILLIS J:

[1] This is an appeal against conviction. The appellant had been arraigned in the Regional Court in Johannesburg on three counts of assault with intent to commit grievous bodily harm (alternatively a contravention of section 50 (1) (a) of Act 74 of 1983. The fourth count was murder, alternatively culpable homicide. The appellant, who enjoyed the benefit of legal representation throughout her trial, was convicted, as charged, on the main count, on the first three counts and on the fourth count, on the alternative count of culpable homicide. She was sentenced to five years' imprisonment on each of the first three counts and 10 years' imprisonment on the count of culpable homicide. The sentences on the first three counts were ordered to run concurrently. The effective sentence was therefore 15 years' imprisonment. The learned magistrate, Mr L.J. Van der Schyff, granted the appellant leave to appeal against conviction only. The appellant was on bail, subject to certain fairly standard terms and conditions, from the time of her arrest. She was granted bail pending the appeal, although the amount of bail was increased from R10 000- to R20 000-. The alleged offences were committed over the period of

time from October 2004 to 18th January, 2006. She was convicted on 12th September 2008 and sentenced on 28th November, 2008.

[2] This has been a most harrowing case for all concerned. It involves the cruel and brutal treatment of baby by her adoptive mother. The judgments of our courts are replete with examples of how, especially since the advent of our new constitutional order, the courts are there to protect and defend the weakest and most vulnerable in our society. Who could be more vulnerable than a baby? This background will explain the high emotions that have permeated this case.

[3] The appellant was 46 years of age at the time of her conviction. She and her husband at the time of the alleged crimes had met during 1989 and were married on 26th April, 1996. Both the appellant and her husband had previously been divorced, each having one child by their previous marriages. These children appear to have grown up and do not form part of the unfolding picture.

[4] Although the appellant and her husband had wanted to have children together, this had not, for medical reasons, been possible. The reasons may have been related to her age. The appellant and her husband then decided to adopt a child. They had specifically had requested a daughter. The process took about three years. On 31st August, 2004, they adopted a child who had been born on the 24th March, 2004. They had first been shown the child when she was about three months old and received her child into their care on 7th July, 2004. The adoption was an "official" one recorded by the Department of Social Welfare by the Registrar of Adoptions in terms of the Child Care Act, No.74 of 1983. The appellant and her husband named this child "T". I shall refer to the child as T in this judgment.

[5] Some 16 witnesses testified on behalf of the State, including medical specialists, social workers and relatives of the family. The

appellant testified in her defence and also called and expert, Dr Gert Saayman, concerning the question of her guilt or otherwise. Upon conviction, she called Mr Jeremy Mostert, a counselling psychologist to testify in mitigation of sentence.

[6] The learned magistrate is to be commended for delivering a comprehensive and impressively analytical judgment. Accordingly, it is unnecessary for this court to repeat the exercise of summarising and analysing the evidence in fine detail.

[7] With the singular exception of Dr Wise, the expert evidence of eminent, highly qualified, and reputable medical specialists was not challenged by the defence. Dr Wise noted three areas of trauma not mentioned by any of the other witnesses but, as the learned magistrate correctly observed, nothing turns on this. There can be any number of explanations for this and the failure of others to mention these areas of trauma does not cast doubt on the salient aspects of the evidence. In other words, the fact that T may have sustained relatively minor injuries shown up in these other areas of trauma observed by Dr Wise does not, against the background of all the evidence, disturb a court's ability to place reliance on the essential accuracy of all the medical experts' general observations.

[8] I shall deal with the most serious count - that of culpable homicide - first. T was brought to the Garden City Clinic on the evening of 18th January, 2006 by the appellant and her husband and attended to, upon arrival, by Dr Moosa (also referred to as "Dr Moosajee"). He observed that the T was very ill indeed: she was extremely pale, anaemic, had a poor pulse, was cold to the touch, dehydrated, had a dry tongue and had difficulty breathing. She had bruises on various parts of her body.

[9] Desperate attempts by the doctors and staff of the Garden City Clinic to save the life of T failed. She died in the hospital on 21st January, 2006. Dr Kevin Fourie, a forensic pathologist, performed the autopsy on T on 23rd January, 2006. He found the following injuries:

(a) An old elbow fracture;
(b) Bruising of the scalp on the left parietal region on the left upper part of the head;
(c) Bruising of the brain corresponding with the bruised scalp and these were fresh injuries;
(d) Several old and fresher fractures of several ribs on both sides of the chest;
(e) A large sub-capsular haematoma of liver.

[10] Dr Fourie attributed the cause of death to "a blunt force injury of liver with hypo volaemic shock". In his opinion, severe force must have been visited upon T. Formal admissions were made by the appellant that there could have been no intervening cause, including medical negligence, of the death of T from the time she was admitted to the hospital until the time she died. There was, in other words, no *novus actus interveniens*. The suspicions aroused by the autopsy, together with the observations of other medical experts who had seen T, led to further investigations and the charges which the appellant faced in the court *a quo*.

[11] Dr Fourie conceded that the injury to the liver could, theoretically, have been up to 24 hours old at the time when the child was presented at hospital on 18th January, 2006. Dr Fourie was of the opinion that none of the injuries, apparent from the autopsy could have been sustained accidentally.

[12] In the trial and in the appeal the case with regard to the fourth count turns on one issue: whether the inference may be drawn, beyond reasonable doubt, that the appellant was the only person who could have delivered the injuries which resulted in the death of T?

[13] By the end of the trial, the appellant's version of events was that the injuries which the child sustained and resulted in her being admitted to hospital on 18th January, 2006 (and from which injuries she died) could have resulted from a fall in the shower by the child while her husband was absent, taking exercise. No one else was in the home at the critical time. The evidence of Dr Fourie is that the injury of the liver which resulted in T's death could, quite, simply not have been caused by a child of this age falling in a shower. Although the focus on the alleged fall in the shower seemed to shift with the passage of time, by the end of the trial, her version seemed to be: one simply does not know how the child sustained the fatal injuries to the liver (as well as other visible, non-fatal injuries such as bruises on her back, both eyelids and nose as well as superficial lacerations on her lip) on the 18th January, 2006. Put differently, her case was this: they could have been attributable to anyone or any other accidental cause.

[14] Although Dr Fourie conceded that the injury to the liver could have been caused several hours before the time of the alleged shower or even a day before, he was adamant that the child would have manifested obvious symptoms of severe distress beforehand. Similar evidence was given by Dr Banieghbal, a paediatric surgeon, also a called by the State. Dr Banieghbal was explicit that T would have been in severe pain which should have been obvious. These symptoms, the appellant, on her own version, did not see.

[15] Professor Gert Saayman, head of Forensic Medicine at the University of Pretoria, testified in the defence of the appellant. He was forced to concede that no matter how many hours beforehand the

fatal injury had been inflicted, symptoms would have been manifest at the critical time, i.e. when the appellant was with T when she came home on 18th January, 2008. He attempted, however, to minimise the extent to which they would have been apparent to a lay person such as the appellant. Although the appellant's version at another stage was that her child was not well when she (the appellant) came home on the fateful day, she says the child ate supper from her own plate and the appellant's plate as well. Although Dr Banieghbal conceded that symptoms such as lethargy and nausea (described by the appellant) could be consistent with liver injury, his firm opinion was that the child, having the kind of liver injury in question, would not have been able to eat. Moreover, as mentioned earlier, the child would have been in severe pain which should have been obvious. When asked to describe how her child appeared when she came home on 18th January, the appellant said she was "sulky", had a runny nose and was "just very slow that day". The appellant made no mention of any injuries to the child's eyes or lip. Furthermore, as the learned magistrate observed, there are contradictions and discrepancies in her evidence relating to her encounters with Drs Bhutt and Moosajee.

[16] To my mind, as far as the count of culpable homicide is concerned, the proven facts exclude every reasonable inference other than that the appellant inflicted the injuries from which T died. The cardinal rules of logic in *R v Blom*[1] have been satisfied. The "totality approach" of Nugent J, as he then was, in *S v Van der Meyden*[2] where he emphasises the importance of looking at the totality of the evidence, very much commends itself in a case such as this. That judgment of Nugent J has received the unanimous approval of five judges in the Supreme Court of Appeal. (See *S v Van Aswegen*[3].) (See

[1] 1939 AD 188 at 202-3.
[2] 1999 (2) SA 79 (W); 1999 (1) SACR 447 (W).
[3] 2001 (2) SACR 97 (HHA) at 101a-f.

also *R v Hlongwane*[4]; *S v Hlapezula & Others*;[5] *S v Khumalo & Others*[6].) Lest there be any suspicions about whether the appellant's husband was the culprit in inflicting the injuries, not only does a technical analysis of the evidence exclude the possibility but also there was reliable evidence, both direct and circumstantial, from various sources that he had a particularly close and "bonded relationship" with T. The "totality" approach furthermore makes it irrelevant that the appellant's husband was not called by the State. It should also be recorded that it is common cause that the State made the appellant's husband available to be called by the defence. I also wish to emphasis that the appellant has not been found guilty because she lied, although, obviously, her lies have not helped her. The totality of evidence points to her as the culprit. Her "explanations" failed to disturb the conclusions to be drawn.

[17] Insofar as the first count of assault with intent to commit grievous bodily harm is concerned, this relates to a fractured elbow which occurred in October 2004, when the child was six to seven months old. It is common cause that the child did indeed suffer from such a fractured elbow at the time, that the appellant was then maternity leave and that T was her constant care. The expert evidence was that such an injury would have been excruciatingly painful for the child. The appellant's version is that she did not notice anything wrong with the child at the time. This cannot be believed. I am unimpressed with Dr Saayman's evidence that any injury to the elbow is "almost like taking your pet to the vet because they cannot verbalise". As he was forced to concede, this injury would have been very painful. When a child so young was in the appellant's daily care at the time, the appellant would have had to have been aware of the child's considerable discomfort. Here again, the totality of the evidence points irresistibly to the appellant's guilt.

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[4] 1959 (3) SA 337 (A) at 340H-341B.
[5] 1965 (4) SA 439 (A) at 442F.
[6] 1991 (4) SA 310 (A) at 327H-I.

[18] The second count of assault with intent to commit grievous bodily harm related to fractured ribs which, it is common cause, the child experienced between December 2005 and January 2006. From the evidence of Rafika Hussein, the appellant's niece, the incident relating to these fractured ribs must have occurred on 11 January when the family were celebrating Eid. Rafika noticed that suddenly and inexplicably the child was experiencing pain on her left side. This evidence as to the date correlates exactly with the expert opinion of Dr Saayman. Rafika Hussein reported the incident to the appellant. It seems that the only caregivers for the child on that day were the appellant and Rafika Hussein. If Rafika Hussein did not cause the injury, one's suspicions lie with the appellant. Nevertheless, there was evidence that the child had fallen from a wall that day while playing. It is true that Rafika Hussein noticed T's discomfort *before* her fall from the wall but it does not follow that the discomfort necessarily related to the fractured ribs, although, of course, it is probable. Therefore, while the fall from the wall does not appear to have caused the fractured ribs, I do not think this can be excluded. Furthermore the child was in the company of many different people on that festive day and seemingly very active. One simply cannot be sufficiently certain precisely how or when the incident causing the fracture of the ribs occurred. The appellant must receive the benefit of the doubt.

[19] In so far as the third count of assault with intent to commit grievous bodily harm is concerned, this relates to the other injuries sustained by the child on the 18th January 2006 and not the fatal injury to the liver. The learned magistrate held, accordingly, that there was no unfair duplication of charges. In my opinion, the learned magistrate erred in this regard. The issue is one not free from intellectual difficulties. A decision in this regard has to be based not

only on sound reasoning but also a court's perception of fairness.[7] It should be borne in mind that, after all, in my experience, when a person at almost the same time, intentionally inflicts multiple injuries to another but the cause of death is attributable to one single blow, that person is normally charged with murder only and not both murder and assault. It is clear that the appellant, in a *single* fit of rage, depression, frustration or whatever assault severely assaulted T while her husband was out jogging. There was therefore a single criminal act.

[20] In all the circumstances, the conviction on the third count therefore cannot stand. I accept that, technically, the count relating to assault entails the element of intention and that culpable homicide normally entails negligence. Nevertheless, this is not always necessarily the case. In other words, when it comes to what lawyers commonly refer to as *mens rea*, intention is not always sufficient to justify a verdict of murder. Conversely, culpable homicide does not always entail the absence of intention. Although, ordinarily, the distinction between murder and culpable homicide is most commonly found in the difference between "intention" and "negligence" respectively, there are largely "hidden" or "obscure" elements that, from time to time, can render this distinction too simplistic. I attempted to deal with this issue in *S v Dougherty*.[8] In an important respect, the learned magistrate was aware of this subtlety. It influenced his finding of culpable homicide, rather than murder, on the fourth count. He found that it had not been proven, beyond reasonable doubt, that the appellant, when she had fatally injured T, had reconciled herself to the possibility of her death. The appellant may consider herself to have been fortunate to have been convicted of culpable homicide rather than murder in all the circumstances. As

[7] See, for example, *R v Kuzwayo* 1960 (1) SA 340 (A) at 344B; *S v Whitehead & Others* 2008 (1) SACR 431 (SCA) at paragraph [35];*S v Mabaso* 1989 (4) SA 800 (T) at 804G-H; *S v Davids* 1998 (2) SACR 313 (C) at 316d; *S v De Vries & Others* 2009 (1) SACR 613 (C) at paragraph [391].

[8] 2003 (2) SACR 36 (W) at paragraphs [31] to [37].

lawyers well know, the line between *culpa* and *dolus eventualis* is a fine one indeed. I think, however, that the learned magistrate returned the correct verdict in regard to the fourth count. Nevertheless, the conviction on the third count cannot stand. In regard to the verdict of culpable homicide, my line of reasoning would, however, have been ever-so-slightly different from that of the learned magistrate: there is so much that is uncertain about the appellant's actual state of mind at the time that one could not safely make a finding that she acted *dolo malo*.

[21] As recorded above, leave to appeal against sentence was not granted. Furthermore, the learned magistrate acted carefully in the matter and one cannot criticise him. As the sentences on counts two and three were ordered to run concurrently with the sentence on count one, one is tempted to conclude that this court's interference with the convictions on counts two and three should make no difference to the result on sentence. On the other hand, the learned magistrate seems, very sensibly, to have taken a view not only as to the cumulative effect of sentence but also the aggregate thereof in regard to the totality of convictions. For example, he could just as well have ordered the sentence on count three to run concurrently with that on count four and, in view of the concurrency of those counts, there would be a certain "logic" in doing so. On the other hand, one can quite understand why he ordered the sentence on count three to run concurrently with the sentence on count one in view of their similarity. As mentioned earlier, the learned magistrate seems to have taken the view that, having regard to the aggregate of the four convictions, it was appropriate to impose a sentence of 15 years' imprisonment. On what the learned magistrate had before him at the time (in terms not only of the actual convictions, but also the overall facts and circumstances and the evidence in mitigation) there would be no basis to interfere with the sentence which he imposed. On the other hand, counts two and three are hardly trivial counts. If

they fall away, if they are set aside, it would seem somewhat artificial to conclude that this should have no impact on sentence. Nevertheless, in view of the fact that one is unable to fault the magistrate's reasoning on sentence, it would seem unfair to him for this court to interfere with it and impose another sentence. Fairness to the learned magistrate, the appellant and the State suggest that the court *a quo* should have the opportunity to consider sentence afresh in the light of the outcome of the appeal. On the question of sentence, this is an exceptionally difficult case. It seems to me that one should proceed with the utmost carefulness in a difficult case such as this.. The question arises: can the court remit the matter back to the court *a quo* for a reconsideration of sentence in such circumstances?

[22] Section 304 (2) (v) of the Criminal Procedure Act, No 51 of 1977, as amended ("the Act") gives the court on review the power to remit a case back to the magistrate's court "with instructions to deal with any matter in such a manner as the provincial or local division may think fit". Nevertheless, this power only arises if the matter has come for review in the ordinary course in terms of section 302 of the Act or if the High Court acts in terms of section 304 (4) of the Act, in circumstances where the proceedings were "not in accordance with justice". Section 304 (4) of the Act is routinely invoked in this division where a court hearing an appeal considers that it is appropriate to intervene on some or other aspect which has not pertinently come before it directly in the appeal. The "classic" example is where there was more than one accused in a trail before the court *a* quo. The appeal of one shows that one or more of the co-accused who has not yet appealed should have been acquitted. The court will then intervene, even though the appeal of the co-accused has not, technically, been before it. One could perhaps reason that, as certain of the convictions are set aside that the proceedings are "not in accordance with justice". Nevertheless, it is the question of sentence that one is considering remitting for a reconsideration and, as has

been recorded above, one can hardly criticise the learned magistrate in this regard. Therefore, one can hardly find that his sentence was "not in accordance with justice". This court is thus faced with a knotty legal conundrum.

[23] In my opinion, the answer is to be found in the inherent jurisdiction of the High Court to exercise a review power. In *Union Government v West*[9] Solomon JA, with four judges of the Appellate Division concurring, proclaimed the inherent jurisdiction of the "Courts of Justice" to review other decisions of other tribunals in order not to "stultify ourselves" by taking an overly "technical" approach. In *Ex parte Millsite Investment Co (Pty) Ltd*[10] Vieyra J referred to the *Union Government v West* case and said:

> The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation.

[24] In a helpful review of the common law and various other cases, Findlay AJ, in *S v Shezi*,[11] referred to what was said by Vieyra J in the extract quoted immediately above with approval. In *S v April*[12] Findlay AJ sitting in another division, with Steenkamp J (as he then was) concurring, referred to the *Shezi* case and recorded that in the Northern Cape the practice was to adopt a similar approach in the inherent jurisdiction of the courts.[13] The idea of the inherent jurisdiction of the High Court being invoked in order to find practical solutions to ensure that justice is done has a respectable pedigree.

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[9] 1918 AD 556 at 572-3.
[10] 1965 (2) SA 582 (T) at 585H.
[11] 1984 (2) SA 577 (N) at 579A to 580D, especially at 580A.
[12] 1985 (1) SA 339 (NC) at 645I
[13] See, at p646E.

[25] It seems to me that, in order "to hold the scales of justice" in this case, the matter should be remitted to the court *a quo* to reconsider sentence. Although Mr *Classen*, who appeared for the appellant would have preferred that this court interfere with sentence and Mr *Mohamed*, who appeared for the State, that the court should not remit the matter for a reconsideration of sentence, both Mr *Classen* and Mr *Mohamed* had no difficulty with the principle of so doing. Both these gentlemen conceded that, alternatively to their main submissions succeeding, it would be fair to do so. It seems to me that all of society would benefit from such a course. In a dreadful case such as this, the advantages of a full enquiry are obvious. There can be no doubt that crimes such as these fill society with revulsion at the core of its being. We battle to understand why crimes that appear so profoundly to be "against nature" occur. We need to know how we can ensure the early detection of the risks and dangers of their occurrence in order that we can prevent them. We need to know how we can help when such appalling patterns of behaviour begin to occur. In this case, there is evidence that the appellant suffered from a bipolar disorder and depression, that she had serious emotional problems, that she was troubled by rumours that the child was that of her husband's by another woman. Justice must be done but this entails much more than that our anger at such crimes should require a "slow tread of years" by the appellant in prison.[14] The learned magistrate needs to be guided by expert opinion and advice, given in public, in open court. To this end, I would implore the legal representatives of both the State and the appellant to prepare thoroughly and to co-operate with each other.

[26] The following order is made:

(i) The appeal against conviction in respect of counts 1 and 4 is dismissed;

[14] See the judgment of Holmes JA in *S v V* 1972 (3) SA 611 (A) at 614H.

(ii) The appeal against conviction on counts 2 and 3 is upheld;

(iii) The convictions on counts 2 and 3 are set aside;

(iv) The sentences on counts 1 and 4 are set aside;

(v) The question of sentence on counts 1 and 4 is remitted to the court *a quo* for a reconsideration;

(vi) Both the appellant and the State may lead additional evidence before the court *a quo* in regard to an appropriate sentence;

(vii) In considering an appropriate sentence the learned magistrate is consider all previous evidence placed before the court and any additional evidence that may be led;

(viii) The court *a quo* is to impose an appropriate sentence in the light of the aforegoing;

(ix) The appellant is to report to Court 20, at the Johannesburg Regional Court, on 20th May, 2010 in order for a date for the further hearing on sentence to be set;

(x) Pending any further order by any court, the appellant's bail is extended on the same terms and conditions as applied pending the hearing of this appeal.

DATED AT JOHANNESBURG THIS 6th DAY OF MAY, 2010

N.P. WILLIS

JUDGE OF THE HIGH COURT

I agree.

M. RANDERA

ACTING JUDGE OF THE HIGH COURT

Counsel for the Appellant: E.S. Classen (Attorney certified in terms of section 4(2) of Act 62 of 1995)
Attorneys for the Appellant: David Botha, Du Plessis & Kruger Inc.
Counsel for the State: F. Mohamed

Date of hearing: 5th May, 2010
Date of judgment: 6th May, 2010