

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: SS89/2017

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

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In the matter between

**STATE**

**And**

**MARILEE HIBBERS**

**ACCUSED 1**

**ENLYN PILLAY**

**ACCUSED 2**

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**SUMMARY**

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[1] Accused 1 and 2 were charged with unlawfully and intentionally abusing or deliberately neglecting a minor as well as murder. The minor in question, R, was the son and stepson of accused 1 and 2 respectively.

[2] The post-mortem report revealed that R had suffered blunt force injuries to the head and chest as well as extensive burn wounds at the time of death. According to the Forensic Pathologist who performed the autopsy, any of these three classes of injuries could have caused the death of R. Additionally, the autopsy revealed injuries that R had sustained several months prior to his death. These injuries included, amongst others, a fractured elbow and a fractured femur. The medical practitioner who examined R when he was admitted to hospital for the femur fracture confirmed these injuries and further testified that during her examination of R, she discovered that he had bruises under his eyes as well as injuries to his ribcage. In her expert opinion, these bruises were not sustained when R fractured his femur as they appeared to be a few days old.

[3] With regards to R's elbow injury, accused 1 testified that in February 2016 she was inside her home when she heard R crying. Upon inspection, she found accused 2 comforting R outside. Accused 2 informed her that R had fallen off his bicycle. After consulting a doctor, accused 1 was informed that R had broken his elbow and required surgery. In respect of R's femur fracture, accused 1 testified that in March 2016 she was asleep in her bedroom when accused 2 woke her and informed her that R had fallen from a tree. Accused 2 had accompanied R to the hospital where he was informed that R had fractured his femur. With regards to the other bruises and injuries noted by the examining medical practitioner, accused 1 testified that accused 2 had informed her that R had run into a sliding door, two days before he had broken his femur, whilst she was at work. Regarding the events leading up to R's death, accused 1 testified that on 24 June 2016 she returned home from work to find R sleeping on the couch. She claimed that accused 2 told her, in respect of R, that he had "f\*\*\*\*\* him up for good this time." She immediately woke R up and noticed a red mark on the side of R's face which accused 2 claimed he had sustained as a result of sleeping on his left side. She testified that she did not notice any other injuries as R was fully dressed. She was woken the following morning by accused 2 who was shouting R's name. Upon trying to assist R, she noticed that his lips were blue and that he was not breathing. Additionally, he had injuries which were not present the night before. She, and a number of other people, attempted to perform CPR before the paramedics arrived. R was declared dead by the paramedics 15 minutes later.

[4] With regards to R's elbow and femur injuries, accused 2 testified that he had been busy both times when he heard R fall and had immediately tried to assist. He further confirmed that he had informed accused 1 and the medical practitioner that R had run into a sliding door two days before he broke his femur which was the cause of the other bruises on R's body. Regarding the events leading to R's death, accused 2 testified that on 24 June 2016 he was supervising R's bath. He opened both taps but claims that he only opened the hot water tap a little. He left the bathroom briefly and heard a banging noise and the sound of something falling into water. He immediately returned to the bathroom and found R in the bathtub. He testified that he grabbed R out of the bath and realised the water was very hot and that the cold water tap was closed. He dried R with a towel and applied ointment for the burns all over his body. Accused 2 testified that he woke the next morning to find that R was unresponsive. He immediately attempted CPR but to no avail. Accused 2 denied having caused R's blunt force injuries but claimed that R would often bump himself and not complain. Furthermore, accused 2 testified that R had not complained of pain at any stage after he fell into the bath.

[5] With regards to the injuries R sustained at the time of death, the Forensic Pathologist testified that blunt force trauma of that nature could only be caused by excessive force and that it was unlikely that R could have sustained these injuries by falling into a bathtub. It was clear from the autopsy that R had received several blunt force injuries to the head which was likely caused by extreme force similar to persons who experience a head collision during a car accident. Furthermore, the head injuries combined with the blunt force injuries to R's body could not possibly be caused by a single incident of falling into the bath. With regards to the burns sustained by R, the Forensic Pathologist testified that the autopsy revealed that R had been severely burned on his back and that certain parts of R's body, based on the severity of the wounds, were exposed to the hot water for a longer period of time than others. She testified that R's burn injuries were consistent with a child being held down under hot water. She further testified that burns of this severity would have been excruciatingly painful and that it was improbable that a person would be unable to see those burns. Furthermore, it is likely that the child would be crying hysterically.

[6] In respect of the elbow injury previously sustained by R, the Forensic Pathologist testified that a fracture of this nature was likely caused by the grabbing and twisting of R's arm. Furthermore, she testified that the bones of a young child are fairly pliable and it would take a moderate amount of force to inflict such a fracture. With regards to R's femur injury both the Forensic Pathologist and the medical practitioner who examined R confirmed that it would take a large amount of force to fracture the femur of a child. Importantly, the medical

practitioner testified that there were no associate injuries when she assessed R's femur. She testified that if R had really fallen from a tree, he would have sustained a number of other bruises or abrasions around that area and elsewhere. He had only a single fracture. Furthermore, R had no bruising on his hands which is to be expected when one is trying to protect themselves from a fall. In her expert opinion, this fracture, combined with the bruises R had sustained two days earlier, was consistent with non-accidental injury.

[7] In determining the outcome of the case the court noted that, “[p]roof beyond reasonable doubt does not involve proof to an absolute certainty. It is not proof beyond any doubt, nor is it an imaginary or frivolous doubt. This is the standard that must be met by the State’s evidence in criminal prosecution. No other logical and reasonable explanation can be derived from the facts, except that the accused committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty”. The court also relied on the case of *R v De Villiers* 1944 AD 493 in which it was held that a court should not consider each circumstance in isolation and draw inferences on each single circumstance. The onus on the State is not to prove that each separate item of evidence is inconsistent with the innocence of the accused, but that taken as a whole, the evidence is beyond a reasonable doubt inconsistent with such innocence.

[8] Based on the totality of evidence presented, the court rejected the version of accused 2 that R accidentally fell into the bath and also hurt his head and body due to this fall. The court relied on the expert evidence of the Forensic Pathologist who found that some injuries on R were more than 24 to 48 hours old, meaning that R was assaulted on the days prior to his death. The elbow and femur injuries of R also proved that he was being constantly assaulted. Given the evidence, the court found that the only likely inference it could draw was that accused 2 had inflicted these injuries on R and that he had burned R by holding him under hot water. Furthermore, the court found that the evidence clearly showed that R was abused consistently during his lifetime.

[9] With regards to accused 1’s involvement, the court found that there was no evidence that she had directly participated in the abuse or the killing of R, or that she could have subjectively foreseen that accused 2 was capable of causing R’s death. However, the court found that accused 1 must have been aware of what was happening to R. Furthermore, the court held that, as a parent, she deliberately neglected to give R any proper care despite the fact that she was aware he was being abused. On the day that R was burnt it was unlikely, based on the medical evidence, that accused 1 did not notice the extent of R’s injuries, yet she failed to act.

[10] The court concluded that the accused's version of events could not reasonably be true. Accused 1 was found guilty of two counts of contravening the provisions of section 305(3)(a) of the Children's Act 38 of 2005 on the basis that she had deliberately neglected R. The court found accused 2 guilty of contravening the provisions of section 305(3)(a) of the Act and murder.