Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

HIGH COURT REF NO:	**1144/2003**
CASE No:	**D997/2002**
MAGISTRATE'S SERIAL No:	**105/2003**

In the matter of

THE STATE

and

SARA PRINS

REVIEW JUDGMENT DELIVERED : 29 AUGUST 2003

MOOSA, J:

Introduction:

1. The accused was convicted of two counts of contravening the provisions of the Child Care Act, No 74 of 1983 ("the Act"). The first count related to the contravention of Section 50(1)(b) in that she had abandoned her two children. The second count related to the contravention of Section 50(2) in that she had failed to maintain and/or provide for the children. The two counts were taken as one for the purpose of sentence. The court imposed a sentence of three years imprisonment, half of which was conditionally suspended for a period of five years.

2. Section 50 of the Act provides that:

> *"(1) Any parent or guardian of a child or any person having the custody of a child who –*
>
> *(a) ill-treats hat child or allows it to be ill-treated; or*
>
> *(b) abandons that child,*
>
> *shall be guilty of an offence.*
>
> *(2) Any person legally liable to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid, shall be guilty of an offence."*

3. The accused pleaded not guilty to both counts. She was unrepresented. In disclosing her defence, she denied that she ill-treated or abandoned the children and claimed that she had raised them on her own up to that stage. The only witness who testified for the State was a social welfare officer, Mrs Wiggedd. For the defence the accused and her brother, Mr Prins, testified. In convicting the accused, the court rejected the defence version as not reasonably possibly true.

4. After reading the record, I was troubled as to whether the proceedings were in accordance with justice. I requested from the presiding officer, certain information and reasons for the conviction and sentence. I also requested the Director of Public Prosecutions to give his comments and input on the various queries I had raised, both in respect of procedure and substance. The response of the presiding officer was curt and cryptic. The response of Adv **Marshall,** from the office of the Director of Public Prosecutions, was well researched and motivated. I thank them for their input and comments.

Issues:

5. There are two principal issues which underlie this review. The first is whether there has been a splitting of offences and a duplication of conviction. The second is whether the accused, who was unrepresented, had a fair trial. I will discuss these

issues *ad seriatim*.

Splitting of charges and duplication of conviction:

6. It is a rule of practice that splitting of charges and duplication of conviction should be avoided. The underlying ratio for the rule is to prevent multiple convictions arising from culpable facts which constitute one offence only. (See **S v Grobler en 'n Ander** 1966 (1) SA 507 (A) at 523B; **S v Tantsi** 1992 (2) SACR 333 (TK) at 334f; **S v Davids** 1998 (2) SA 313 (C) at 316B.) In the application of the rule, common sense and fairness should prevail. (**R v Kuzwayo** 1960 (1) SA 340 (A) at 344B.) Section 83 of the Criminal Procedure Act authorises the State to put to an accused as many charges as possible as may be justified by the facts, either in the form of main charges or in the form of main charges and alternatives thereto. It is the duty of the court to ensure that, at the end of the trial, there is no duplication of convictions. (**S v Grobler (supra)** at 513G.)

7. Our courts through the passage of time have developed two tests, as a practical guide, to determine whether there have been splitting of offences and duplication of convictions. The one test is commonly known as the "single intent test" as set out in **R v Sabuy** : 1905 TS 170. The other test is commonly known as the "evidence test" as set out in **R v Gordon** 1909 EDC 214. No general test has been

developed. **Curlewis, JP** in **R v Johannes** 1925 TPD 782, succinctly summarised the two tests. After discussing the tests laid down in **R v Sabuyi (supra)** and **R v Gordon (supra)**, he concludes:

> *"It seems to me that the court can safely lay down that under certain circumstances both these tests or the one or the other, may be applied, viz, the test of whether two acts are done with a single intent and constitute one continuous criminal transaction and the test as to whether the evidence necessary to establish one crime involves proving another crime."*

(See **Ex Parte Minister of Justice: In re Rex v Moseme** 1936 AD 52; **S v Grobler en 'n Ander (supra)** at 518A-F; **S v Wehr** 1998 (1) SACR 99 (C) at 100.)

8. *In casu* the accused was charged and convicted of abandoning the children in contravention of Section 50(1)(b) of the Act and not maintaining and/or providing for the children in contravention of Section 50(2) of the Act. The question which arose for consideration, is whether it follows that a person who abandons her children as envisaged in Section 50(1)(b) at the same time does not provide for such children as envisaged in Section 50(2). In other words, whether the abandonment of the children constitutes a continuous criminal transaction which includes the failure to

provide the children with adequate food, cleaning, lodging and medical aid. If the answer to that question is in the affirmative, then with the application of the "single intent test", a splitting of charges and a duplication of convictions have occurred. If the answer is in the negative, no such splitting and duplication have occurred.

9. The Act does not define what is meant by "abandons". In terms of the golden rule of interpretation, it must be given its ordinary grammatical meaning. (**R v Kruger** 1943 OPD 111 at 112; **S v Mnyakama** 1992 (1) SACR 43 (C) at 45d-e.) The **Concise Oxford Dictionary** 10th revised edition, defines "abandon" as:

"1. Give up (an action or practice completely);

2. Desert or leave permanently."

The definition is not very helpful. The word in the context of the Act implies, in the ordinary grammatical connotation, a disregard of parental duty. In **R v Kruger (supra)** at 112, the learned judge opined:

*"However, I very much doubt whether the mere handing over of a child to a person willing to receive it does in fact amount to 'abandon' as used in the context. It would seem that here the word envisages a wilful omission to take charge of the child on the part of the person legally bound to do so (**R v White** LR 1 CCR 311) and that the surrender of a child to an adoptive parent, as an*

*act of prudence or necessity under the pressure of present inability to maintain it, will not be regarded as an abandonment (**Re O'Hara** [1900] 72 1 R 232-244)."*

10. The evidence is that the accused had left the children in the care of her brother, Mr Prins and his common law wife. They were staying in the accused's house. The accused in response to a question of Ms Wiggedd from the witness stand, confirmed that she had made arrangements with her brother and his wife to care for the children and paid them for such services. These arrangements have been confirmed under oath by the accused and her brother. This evidence was not countenanced by the state. I am not convinced that, on the facts of this case, the conduct of the accused constitutes a disregard of parental duty towards the children or a wilful omission to take charge or control of the children. It follows therefore that the accused cannot be said to have abandoned or deserted the children. The question whether the brother and his common law wife, who had assumed responsibility for the care of the children, can be held liable in terms of the Act, is a matter that does not concern the present enquiry.

11. I now turn to discuss the second charge in relation to the splitting of offences and duplication of convictions. In **S v Maree** 1990 (3) SA 365 (C) at 368F-369A-B,

Rose-Innes, J makes the following observation with regard to the offences created by Sections 50(1) and 50(2):

> *"It is sufficient for the purpose of this case to observe that the offence created by S 50(1) differs from that created by S 50(2) and that the category of persons penalised by the former differs from the category of person penalised by the latter. In some cases one and the same person may fall into both categories, but in other cases an accused may fall into one category and not the other, in which case the accused may be prosecuted and convicted only of the offence for which she qualifies as a person who can be held criminally responsible for the offence."*

12. Implicit in the concept "abandon" is the failure to comply with her parental duty. There is therefore a single intent which informs both the act of abandonment as envisaged under Section 50(1)(b) and the failure to comply with the parental duty as envisaged under Section 50(2). I therefore conclude that *in casu* there has been an undue splitting of charges and duplication of convictions. The convictions on both counts therefore fall to be set aside.

Fair trial:

13. In view of the conclusion I have reached, it is unnecessary for me to make a formal finding whether the accused had a fair trial or not. But because of the number of irregularities, I am impelled to make certain observations in the interest of the administration of justice. It is a prerequisite of a fair trial that all officers of the court, which include judicial officers, prosecutors and defence counsel, conduct themselves in such a manner as to promote and enhance the dignity, integrity and decorum of the court. It is a fundamental principal of our legal system that justice must not only be done, but must be seen to be done. (**S v Rall** 1982 (1) SA 828 (A) at 831H.)

14. Judicial officers should assist an undefended accused whenever he or she needs assistance in the presentation of his or her case. (**S v Hlongwane** 1982 (4) SA 321 (N) at 323C.) They should protect him or her from being cross-examined unfairly (**S v Gidi & Another** 1984 (4) SA 537 (C) at 541.) There is also a corresponding duty on prosecutors to avoid excesses when cross-examining the accused or defence witnesses. This is particularly so when the accused are unrepresented. The duty of prosecutors is to assist the court in arriving at a just decision. (**S v Hendricks** 1997 (1) SACR 174 (C) at 177f.)

15. In this matter, the State case was very poorly presented. The prosecutor called one

witness. She was a social worker. She could not testify where, how and under what circumstances the children were abandoned; where they were found and how the accused failed to maintain and/or provide for the children. Her only evidence that was central to the issue was that she found the younger boy at the police station, wearing only shorts. He was very hungry and had scars on his body. He was traumatised. The rest of her evidence was riddled with hearsay. The prosecutor, on the one hand, laid no legal basis for the admission of such hearsay evidence. The presiding officer, on the other hand, failed to protect the interest of the unrepresented accused by allowing inadmissible evidence that was highly prejudicial to the accused.

16. The presiding officer in her judgment relied on inadmissible evidence to convict the accused. Firstly, she stated in her judgment that *"the children had marks and sores on the body"*. The evidence was that only the boy had marks and sores. There is no evidence that the girl had marks and sores when found. The court stated further that according to them (the children) they were assaulted by the brother of the accused with whom she had left them. In the first place, there is no such evidence before the court. In the second place, it would be hearsay as the children were not called to testify. In the third place, the allegation was never put to the brother when he testified. Secondly, she stated in her judgment that: *"they were left there to fend*

for themselves and for that two week period there was nobody who lay claim or charge or any request made for police assistance in searching for the children". There is no direct evidence to this effect and it appears to be based on hearsay evidence. It is clear from the judgment that if the inadmissible evidence of Ms Wiggedd is excluded, then the State had made out no case against the accused.

17. The proceedings are permeated with so many irregularities, that, in my view, it goes to the heart of the verdict. I therefore have serious doubt whether the accused had a fair trial. I, however, do not have to make a formal finding in respect thereof in view of my earlier findings to the effect that the evidence does not disclose the commission of the crime insofar as the accused is concerned.

18. In the premises the conviction and sentence in respect of both counts are set aside. I have earlier ordered the release of the accused from prison.

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N C ERASMUS, J: I agree.

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