Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: A713/10

In the matter between:

FRANS MARNEWICK **Appellant**

And

THE STATE **Respondent**

JUDGMENT DELIVERED ON 12 MAY 2011

HENNEY, J:

INTRODUCTION

[1] The Appellant in this matter was arraigned before the Regional Court sitting at George on one count of culpable homicide and two alternative charges of contravening Section 50(1)(a) and Section 50(2) of the Child Care Act 74 of 1983.

The particulars of the main charge was that in and during 1997 near Waboomskraal in the regional division of the Western Cape, he had unlawfully assaulted Petrus Samson who was at that stage one year and nine months old; by refusing that he be given medical care and or by assaulting him in a manner unknown and thereby causing him to be injured, as a result of which his death was caused unlawfully and negligently.

The particulars of the first alternative charge is that on or about 23 December 1997 the Appellant being the parent or guardian of Petrus Samson, had unlawfully neglected or permitted this child to be neglected.

[2] Insofar as the second alternative charge is concerned, it is alleged that the Appellant and his co-accused being legally responsible for the maintenance of the child Petrus Samson, had unlawfully failed to provide this child with adequate food, clothing, shelter and medical treatment whilst they were in a position to do so.

The Appellant who appeared with the mother of the child, with whom he had lived together as husband and wife, was convicted on the main charge on 17 May 2010 and he was sentenced to fifteen (15) years imprisonment on 26 June 2010.

The Appellant now appeals against his conviction and sentence.

It has been argued by the Appellant that the circumstantial evidence upon which he was convicted was not enough to sustain a conviction.

[4] As to sentence, it was submitted that the sentence imposed induced a sense of shock due to the fact that the court *a quo* overemphasised the seriousness of the offence.

[5] **THE EVIDENCE**

COMMON CAUSE FACTS

(a) It is common cause that the deceased had died on 23 December 1997 and the cause of death was as a result of multiple injuries he had sustained due to blunt trauma.

(b) Furthermore, that the Appellant and the second accused, his girlfriend, the mother of the deceased were the care-givers of the deceased.

(c) On the day the child died, the Tuesday and the previous day, the Monday the Appellant who was a contract labourer on a farm, did not work due to the fact that he suffered from epilepsy.

[6] The witnesses who testified were Johanna Barnard, Katherine Botha, a nurse who operated a mobile clinic in the area, Dawid Lawerlot and Andries Lukas, Dr Hurst, a pathologist, the second accused and the Appellant.

[7] Johanna Barnard testified that the Appellant and the mother of the deceased worked with her on the farm. They had a young child. She had on

occasion noticed that the deceased did not have a bottle and then she would advise his mother to get him one. The deceased as well as other children went with their parents to the orchards whilst their parents were working there. She remembers an incident when the deceased was not with his mother while she was working. She was told that the deceased was with the Appellant. She went to the place where the Appellant was working. She started to look for the deceased and found him in a milk crate. The deceased was placed in a crate and another crate was placed on top of it and tied together with wire. On discovering this, she tried to open the crate to get the deceased out, but could not as the wires holding the crate were very tight. She went to look for someone who could open the crate with a pair of pliers. She came back later and discovered that the deceased was not there anymore.

[8] Katherine Botha was a nurse who operated a mobile clinic in the area and was in the service of the Eden District Municipality. She became aware of the deceased in this matter after she was alerted about his circumstances. On 24 September 1997, she had an occasion to medically examine the deceased. He was under weight and also, did not have his regular immunisation injections. He had sores, and scabs on his head. He was also suffering from middle ear infection. He was placed on a feeding scheme. Thereafter she saw him every fortnight. She also administered all the outstanding immunisations he was supposed to get. He reacted positively to the treatment and she was disappointed to find out that he had passed away in December 1997. She also testified that the condition of the deceased was not such that she had to intervene and take further steps.

[9] Dawid Lawerlot, testified 14 years after the incident. He was 10 years when the events happened. He also remembers the incident where the deceased was placed in the crate, he confirms the evidence of the previous witness who says another crate was placed on top of the crate in which the deceased was placed and that the two crates were tied or fastened together with the wire. He says this was done in order to prevent the deceased from getting out of the crate and walk around. Sometimes a blanket was thrown over the crate to keep the sun from shining on the deceased. There were some occasions when the deceased sat in the crate and cried, because he wanted to be with his mother.

[10] At the time when he stayed on the farm, they lived in a semi-detached house directly next to the Appellant and the second accused. He also remembers an incident on a Saturday when the Appellant had given the deceased wine to drink. He remembers that this incident had happened during the period September – December 1997. He testified about an incident on a Monday afternoon before the Tuesday, on which the deceased died. While he was in his room, he heard a child crying. Whilst the child cried he also heard some banging noises (*houe*) as if someone was banging something against the wall. He did not see what caused this. He went around investigating and he saw the Appellant holding the deceased on his hip. The deceased was still crying. The reason for the crying was unknown to him. He thereafter did not see the deceased again until he heard that he had passed away on the Tuesday.

[11] Andries Lukas is the brother of Dawid Lawerlot. He confirms the testimony of Lawerlot and Johanna Barnard about the incident or incidents where the Appellant placed the deceased in the crate. He confirms that the reason why this was done was because the Appellant did not want the deceased to climb out of the crate to walk to his mother. If the child did this, the Appellant would hit the child.

He also testifies about the incident where the Appellant had given the deceased a glass of wine. He says this happened on a Friday night and also on a Saturday. The Appellant used to give the deceased some wine which he poured in the deceased's baby bottle.

[12] A post-mortem was conducted by a pathologist, Dr Hurst who found numerous wounds, old and new on the body of the deceased. Some of the wounds were on his head, and they were old and small. Then there were injuries to the internal organs. These were a torn liver and lacerations to the liver, bruising of the heart, left aorta and bruising of the kidneys. There were other visible injuries to the stomach area and also on the buttocks.

She further stated that a child of that age and who had sustained such injuries could not have survived longer than one to one and a half days. The child would have been in severe pain. He could not have walked and eat or function properly.

Her conclusion was that the wounds were inflicted by blunt trauma.

[13] The other relevant witness was the mother of the deceased who is accused no.2. She denied that the child was abused and ill-treated. She further testified in an attempt to offer an explanation for the injuries the deceased had sustained, that on the Friday preceding his death, she was involved in an altercation with a person by the name of Ella. As a result of this, Ella went to fetch a piece of wood whilst she was holding the deceased. Ella took the piece of wood and aimed to hit her, but she managed to hit the child with this piece of wood in the stomach area. The deceased then started to cry. The deceased cried for about two hours. She thereafter tried to get medical assistance for the child, but they did not have any means of transport to get to a hospital or doctor.

[14] She also testified that her employer did want the ambulance or police on her property. She confirms that the Appellant was sick on the Monday and Tuesday and that the deceased was left in his care. On the Monday the deceased seemed to be fine and there was nothing wrong with him. On the Tuesday morning, the child was also fine. Later on the Tuesday after twelve, she was called and informed that there was something wrong with the deceased. She went home and the deceased was still alive. She picked him up to console him and he died in her arms. She cannot explain how the deceased sustained the injuries that led to his death except to suspect that it might have been due to the fact that he was accidentally hit by Ella on the Friday.

[15] In his evidence the Appellant denied that he ever assaulted the deceased or that he ever abused the deceased. He denied the evidence as presented by the

State that on some occasion he had placed the deceased in a crate and tied another crate on top of it in order to confine the deceased to the crate. His version was that he merely put the deceased in the crate and put another crate on top of it to make a canopy as if it was a pram. The child was put in the crate when he wanted to sleep.

[16] He confirms that he did not go to work on the Monday and the Tuesday, because he had an epileptic seizure. He says Dawid Lawerlot who he referred to as "China" was at home. China was at the house next door. He went outside. China was smoking dagga and burnt the deceased with a dagga cigarette. The deceased was with them outside, he went inside and then the deceased collapsed. He thereafter sent China to call the mother. He denies that he ever assaulted the deceased or that he was responsible for the injuries the deceased had sustained.

He is unable to explain how the child had sustained the injuries that the pathologist had observed during the post mortem examination. As a possible explanation, he said the child might have sustained the injuries in the way the mother explained how the child was hit by Ella.

[17] **EVALUATION**

The evidence of the State with regards to the main count is based on circumstantial evidence. There is no direct evidence that the Appellant assaulted the child whilst in his care.

The court *a quo* drew inferences from the following facts:

a) that the Appellant and the mother of the deceased had custody of the deceased and the deceased was under their direct control;

b) the deceased was in a general state of neglect and there was evidence of ill-treatment and malnutrition;

(c) that the deceased was left in the care of the Appellant on the Monday and Tuesday before he passed away;

(d) that on the Monday, whilst the deceased was alone in the care of the Appellant, a witness, Dawid Lawerlot, who stayed in a semi-detached house next to the house where the Appellant stayed, heard banging noises against the wall, coming from the house where the Appellant and the deceased were. Whilst this was happening, the deceased cried;

(e) the next day the deceased collapsed and later died;

(f) a post-mortem revealed that the deceased sustained multiple injuries that caused his death;

(g) the main injuries were:

(i) a torn liver and further lacerations thereto;

(ii) bruising of the heart and kidneys.

(h) the deceased would not have survived longer than a day or a day and a half at most after sustaining these injuries;

(i) he would have been in severe pain, unable to walk or eat, prior to his death.

[18] The court *a quo* rejected the denial of the Appellant as not being reasonably possibly true. It applied the circumstantial evidence test as set out in **R v Blom 1939 AD 188** and on the basis thereof, found that the Appellant was the one that inflicted the injuries to the child and because of his failure to reasonably foresee that they might lead to his death convicted the Appellant of culpable homicide.

The correct manner of approaching circumstantial evidence is set out in **R v Blom *supra*** at page 202 – 203:

> *"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.*
>
> *(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."*

[19] I am at the very least satisfied having regard to the evidence of the doctor regarding the condition of the deceased, that the Appellant should have been aware of the injuries and that they were fatal and required immediate medical attention.

[20] His failure to ensure that the child received immediate medical attention in the circumstances where a reasonable man in his position would have done so was negligent. In the circumstances, the Appellant's failure to provide medical care to the child led to his death.

In my view, the court *a quo* erred in finding that the Appellant was the one who inflicted or assaulted the child and of convicting him of culpable homicide on the basis that he ought to have foreseen that the injuries that he had inflicted could lead to the death of the child.

[21] The court *a quo* erred in drawing the inference that the Appellant was the only person who could have caused the injuries from which the child died. The conclusion that the Appellant is the one who inflicted injuries to the child is not the only reasonable inference that could be drawn.

It is, however, clear from the undisputed medical evidence that the injuries that the child sustained were not just minor injuries, they were fatal and their magnitude was such that the child would not have been able to behave normally. In the

circumstances the appellant's denial that he did not notice them or observe any abnormality in the child's behaviour immediately before his death is rejected as not being reasonably possibly true. He must have noticed the injuries or at least that the child was behaving abnormally.

In my view, the Appellant should have been convicted on culpable homicide, on the basis that he was aware that the child's injuries were fatal. A reasonable person in his position would have foreseen the reasonable possibility that unless they were attended to immediately they could lead to his death. Accordingly his failure to ensure that the child received immediate medical attention constituted negligence.

[22] The next question to consider is whether the sentence of 15 years imprisonment is appropriate in view of the fact that the conviction of the Appellant is now based on his failure to provide medical assistance. That naturally had an effect on his moral blameworthiness.

[23] The Appellant is an adult male of 53 years of age and not married. He is illiterate and is a seasonal farm worker. The dire and harsh socio-economic circumstances in which he found himself cannot be overlooked as a factor in determining his moral blameworthiness. This in itself played a considerable part in the commission of the offence.

[24] This, however, should not be understood to trivialise the seriousness of the offence. Offences against innocent and helpless children should be met with very

stern sentences, depending on the circumstances of the case.

[25] The sentence which the court *a quo* imposed, however, in my view was based on insufficient circumstantial evidence that the appellant had assaulted the deceased.

[26] In the light of the conclusion I have reached and having regard to the socio-economic background of the appellant, I am of the view that a sentence of direct imprisonment is appropriate, but a sentence of fifteen (15) years imprisonment is too harsh.

[27] In my view a sentence of eight (8) years imprisonment would be an appropriate sentence.

[28] In my view, the appeal against the conviction should fail but the appeal against sentence should succeed.

[29] **ORDER**

In the result, I would make the following order:

a) The appeal against conviction is dismissed;

b) The appeal against the sentence succeeds and the sentence of (fifteen) 15 years imprisonment is set aside and replaced with one of (eight) 8 years imprisonment.

HENNEY, J

I agree. It is so ordered.

ZONDI, J