IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A119/2012

In the matter between:

MONICA HELM Applicant

And

THE STATE Respondent

JUDGMENT DELIVERED ON 17 SEPTEMBER 2014

GAMBLE, J:

INTRODUCTION

[1] The Appellant, Ms Monica Helm ("the Accused"), conducted a crèche business in Somerset West providing much needed homecare for infants and toddlers. The business came to an abrupt halt on 12 December 2007 when a contingent of local police officers descended on her home where she conducted the "*Kinderland*" Day Care Centre.

[2] The police raid, conducted in terms of a search warrant duly issued by the local Magistrate, followed upon allegations by the Accused's domestic worker – cum-crèche assistant (Angelina Carolus ("Carolus")) that the Accused had been administering noxious substances to the children in order that they would sleep during the day. The Accused, aged 61 at the time, was arrested and after her release on bail was eventually arraigned before the Regional Court, Somerset West, on 12 May 2009 on eight counts of assault with intent to do grievous bodily harm (counts 1-8) and one count of contravening section 30(2) of the erstwhile Childcare Act, 74 of 1983[1], in that she had taken up children in a place of care without the place being properly registered (count 9).

[3] In the alternative to each charge of assault with intent to do grievous bodily harm (assault GBH), the Accused was charged with a contravention of section 50(3) of the Childcare Act, namely that she had maltreated the child in question.

[4] The Accused pleaded not guilty to all the charges. In respect of counts 1 to 8 her defence was a bare denial that she had assaulted any of the named children by administering to them any unnecessary medication.[2] In respect of count 9 the Accused alleged that her facility was registered and if it was established that it was not so registered, that she lacked the necessary intention to commit the offence.

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[1] That Act has since been replaced with the Children's Act, 38 of 2005 which only came into effect in 2010.

[2] The charge sheet alleged in respect of each child that the Accused "*onnodige medikasie laat toedien en/of self toegedien het*".

[5] The trial was a protracted affair and eventually the Accused was convicted two years later on 16 May 2011 of the main count on charges 1- 8 as well as count 9. On 12 September 2011 the Accused was sentenced to five years direct imprisonment under section 276(1)(i) of the Criminal Procedure Act, 51 of 1977 ("the CPA") on counts 1-8, all of which were taken as one for purposes of sentence, and to a fine of R1 000.00 or six months imprisonment on count 9.

[6] The effect of the sentence on counts 1-8 was that the Accused would have had to spend a minimum of 10 months in jail before being considered for release on correctional supervision. An application for leave to appeal was turned down, there and then, but the Accused was released on bail pending a petition to this Court. That petition was granted in respect of both conviction and sentence on counts 1-8 only by this Court on 14 November 2011.

[7] On appeal before us the Accused was represented by Adv J A van der Merwe and the State by Adv E Kortje. We are indebted to Counsel for the helpful heads of argument and the frankness with which their respective submissions were advanced on appeal.

OVERVIEW OF THE EVIDENCE BEFORE THE REGIONAL COURT

[8] Of the 27 witnesses who testified for the State, the principal witness was Carolus. She explained how she had come to be employed by the Accused and her husband in October 2004 and went on to tell the court how her engagement originally as a domestic worker morphed into an assistant at Kinderland.

[9] Carolus was regarded by the State as a potential accomplice and she was accordingly warned in terms of section 204 of the CPA. The reason for this was because the gist of her evidence was that she had been regularly instructed by the Accused to orally administer a potion to the children which the Accused had prepared by grinding tablets with a spoon and dissolving them in water.

[10] Carolus explained how the Accused had become increasingly stressed and irritated with the children at the crèche, and how the almost daily administration of the potion to them had put them to sleep, thus enabling the Accused to get on with Bible study and other preferred activities at home.

[11] Then there was the testimony of several anxious parents who related to the Court *a quo* their lay observations regarding the health and welfare of their off-spring.

[12] The State also called several police officers who had participated in the raid on the Accused's home and purported to secure samples of substances found in the house for subsequent forensic analysis.

[13] Finally, there were a number of expert witnesses who testified regarding the pharmacological effects of certain of the supposed substances involved, the forensic analysis of the samples seized by the police, the calibration and accuracy of certain of the machines used in the analysis of the samples and the condition of certain of the children upon medical examination.

[14] The Accused testified in her own defence and adduced the expert testimony of the former head of the Department of Health's Forensic Laboratories in Pretoria.

[15] After the conclusion of argument, the Regional Magistrate decided to call two witnesses of her own, both of whom were required to testify on issues relating to the forensic testing of the samples allegedly procured by the police during the raid.

[16] In light of the view that I take of the matter, it is not necessary to comment on each and every witness, or the entirety of the technical evidence. I shall highlight certain limited issues which, in my view, are sufficient for a just decision in this matter on appeal.

ANGELINA CAROLUS

[17] Carolus said that she was recruited by the Accused at the former's hometown of Springbok in 2004. She testified how their working relationship slowly deteriorated over the years after a satisfactory start. The Accused, it seems, was obsessed with personal hygiene and security, and began to doubt Carolus' honesty, believing that items were disappearing from her wardrobe. Eventually the Accused resorted to locking her cupboards and wearing the keys therefor around her neck.

[18] Carolus testified how the Accused became increasingly nervous and how she resorted to placating the young children who increasingly became a source of irritation to her. Ordinarily, the children would be dropped off by their parents between 07h00 and 08h00 every day and fetched at around lunchtime, or early

afternoon. At around 09h00 to 10h00 the children were given a liquid mixture consisting of ground tablets and water, and then put down to rest in the garage adjacent to the house, which had been renovated to serve as a nursery. According to Carolus, this was a daily practice.

[19] Carolus said that she became increasingly concerned with what was happening, but felt powerless to do anything: as a live-in domestic worker whose family resided far away, she was reluctant to compromise her much sought-after employment.

[20] It seems as if an opportunity to unburden herself presented when Carolus bumped into Ms C at a nearby supermarket on Monday, 26 November 2007. Ms C is the mother of JC, the subject of charge 2. A discussion ensued in which Carolus revealed to Ms C what the Accused was allegedly up to. This discussion resulted in Ms C withdrawing her son from Kinderland immediately.

[21] Word seems to have spread fairly quickly and on Wednesday, 28 November 2007, Carolus went to the supermarket where she met up with Ms H, the mother of MH and the subject of charge 1. After hearing of the alleged administration of a secret potion by the Accused, Ms H took proactive steps to obtain certainty as to what was taking place.

[22] By arrangement with Carolus she put a pill bottle in her three year old son's school bag and asked Carolus to ensure that a sample of the potion was placed therein.

[23] Carolus evidently complied with the request the following day and as a consequence thereof, Ms H was able to take a sample to the local pathology laboratory (Pathcare) for analysis, together with a urine sample of her son. The results of this analysis gave Ms H cause for concern and on 3 December 2007 she reported the matter to the local police. This report led ultimately to the police raid the following week.

[24] On Monday, 10 December 2007, and by prior arrangement, Carolus handed a sample of the potion allegedly then in use to the erstwhile investigating officer in the matter, Inspector September.

[25] In her evidence-in-chief Carolus spoke about the breakdown of her employment relationship with Mr & Ms Helm. She said that matters came to a head on Monday, 26 November 2007, when she and the Helms discussed her complaint that she was not coping with her domestic duties and the day-care at the crèche, and her earlier request for a raise in light of the long and arduous hours she was required to work.

[26] In her evidence-in-chief Carolus testified that the upshot of this discussion was that she gave the Helms notice of her intention to leave her employment at the end of January 2008. Under cross-examination, however, a very different picture emerged. Carolus ultimately conceded that she had been confronted by her employers regarding certain alleged incidents which they regarded as unacceptable. These included:

26.1 accusations of theft;

26.2 the fact that she had purchased medication on the Helms pharmacy account without their authorisation;

26.3 a complaint that she had assaulted certain of the children; and

26.4 an allegation that she had sprayed down a toddler with a hose in the garden.

[27] Having initially denied that she was requested to acknowledge receipt of a written warning from her employers, Carolus eventually conceded the correctness of the allegation and said that this incident had angered her. She ultimately conceded, too, that she suffered from stress, that she had difficulty in handling children and that she was prone to outbursts of anger: on one occasion she had evidently flung a microwave proof plate across the kitchen.

[28] I agree with Mr Van der Merwe that Carolus' evidence was riddled with improbabilities. For example, she was unable to describe the colour of the tablets used in the potion, despite her regular involvement in the preparation and/or administration thereof. Then there is the fact that, notwithstanding her revelation to Ms C on 27 November 2007, she continued to administer the potion to the children. Further, she claimed that she had never had an opportunity to inform any of the parents of what the Accused was up to, while she conceded that the Accused often overslept and that it was she (Carolus) who then received the children from the parents at the front door of the house. And then, she testified that the Accused had

administered anything from five to 15 tablespoons (i.e. 75 - 225ml) of the mixture to each child.

[29] Carolus was unable to describe any adverse effects which the potion had on the children other than that they sometimes slept for several hours. Certainly, she confirmed that none of the children were obviously sick as a result of the ingestion thereof.

[30] A critical aspect of her evidence related to the day of the police raid, which occurred sometime around 10h00. Carolus testified that the children had already been dosed by that time and that the remainder of the potion had been left in a container which stood next to the microwave in the kitchen – its usual place. She was adamant that the children had been administered quantities of the liquid found in the container by the police.

[31] Yet, as will be seen more fully hereunder, when the contents of the so-called "*mayonnaise jar*" were later analysed by the forensic laboratories, it was striking that there was little, if any, correlation between the various compounds therein, and samples of the children's' urine and blood which had been gathered for comparative purposes.

[32] When her evidence is considered against that background it is quite likely that her meeting with Ms C at the supermarket on 27 November 2007 was not serendipitous, but rather by design, given that Carolus had been served with notice of termination of her employment the previous day.

[33] I agree with Mr Van der Merwe's criticism of the findings by the court *a quo* that Carolus' evidence passed muster in terms of section 204. In my view, she was not a satisfactory accomplice witness and the Magistrate's reliance on her evidence constituted a serious misdirection.

THE PARENTS

[34] Various of the parents testified some 18 months or more after the event about the medical condition of their respective children. That evidence demonstrated that many of the children had suffered from colds, flu and other relatively minor ailments for which they had been medicated at home with both prescription and over-the-counter medicines.

[35] The common theme that emerged from this evidence was that the parents were generally happy with the facilities at Kinderland and that in the main, none had detected any adverse medical signs in their children while they attended the crèche. Rather, it seems that when the publicity surrounding the police raid arose, there was an attempt at an *ex post facto* evaluation by many of them.

[36] In the course of cross-examination of the State witnesses, it was suggested by the attorney for the Accused, that she had administered a mixture of Paracetamol (e.g. Panado), honey and ginger to the children from time to time. While many of the parents indicated that they had no objection to their offspring being dosed with Panado from time to time without their express prior consent having been

obtained, their apparent displeasure at the combination of natural products such as honey and ginger therewith, is not persuasive.

[37] I agree with Mr Van der Merwe that the evidence of Mr JvR regarding his daughter CvR's health while at Kinderland over a three year period (in relation to count 4 against the Accused) was of significant importance. He summed her condition up as follows:

> "*Dit was glad nie sleg daar gewees nie. Sy het dit geniet. Sy het nooit so fisies na 'n nuwe skool toe of na iets begin huil en toe sy groter is ook begin loop het sy nooit gehuil nie, maar sy het baie, baie loopneusie gehad en borsies was – borsie was maar 'n bietjie – paar keer dokter to gegaan vir die bors, maar verder was dit alles 100%*".

[38] At the end of the day, however, there is nothing striking in the evidence of the parents which tends to corroborate Carolus and, in particular, her claim that the children had been given the large quantities of the potion already referred to. It must be borne in mind in that regard that 15 tablespoons (225 ml) is close to a standard cup (250ml) of liquid. It is extraordinary that children who had received quantities of the mixture measuring from one-third of a cup up to a near full cup, did not present with significant medical symptoms after the ingestion of such relatively large amounts.

THE RELEVANT LEGAL PRINCIPLES

[39] Before discussing the technical evidence of the analysts, it is necessary to look at the extent of the State's onus in proving the main counts of assault with intent to do grievous bodily harm.

[40] The leading judgment on the point is Marx[3] in which the accused was charged with common assault after he gave a seven year old girl and a five year old boy intoxicating liquor to consume. The matter came before the Full Court on review and was fully argued by both counsel for the State and an *amicus curiae*. After considering the common law Williamson JP (with Henning J concurring) came to the following conclusion at 853C *et seq*.:

> "*I have referred to such South African authorities as were quoted to us which might have some bearing on the question; I do not think that any statement therein negatives the view that in South Africa the administration of a noxious substance may amount to an assault. That it was considered to be an injuria in Roman and Roman-Dutch Law seems clear. … By accepted definition, assault requires that the aggression be forcible; but the force need not be directly applied by the person in charge; it may have been applied only indirectly. Examples of indirect force had been mentioned above; Rex v Jolly is one such example. No force was applied by the accused to the persons of those affected by*

[3] S v Marx 1962 (1) SA 848 (N).

> *the wreck of the train; they were affected because of their own voluntary act of travelling in a train on a line on which the accused had prepared a trap. If a person prepares a trap for an unwary drinker by placing stealthily in his drink some substance which will cause the drinker bodily harm, albeit internal harm instead of external harm, I can see no reason for saying that he has not indirectly by force invaded the integrity of the body of his victim. The fact that the direct application of the harm to the body was brought about by the voluntary act of the victim himself in drinking unwittingly from a glass with a noxious substance in it, does not in my view make the plotter's act any different from that of the accused who prepared a trap for the unwary travellers in Rex v Jolly. There would in such a case be an attack by the plotter upon the victim's body by a force indirectly applied from within the latter's body; he could in my opinion be charged with an assault and convicted thereof. For this view I am happy to find support in the judgment of the Chief Justice of the Federal Supreme Court, Sir John Clayden, in the case of R v Sophi, 1961 R & N 358 at p 361, where he said that 'the administration of poison to an unwitting victim is of course a physical assault'*".

[41] In A[4] Botha JA referred with approval to Marx. In that case certain police officers were charged with assault after causing detainees to, *inter alia*, drink

[4] S v A en 'n Ander 1993 (1) SACR 600 (A).

their own urine. The Court *a quo* had held that, however disgusting the act may have been, since the consumption of urine did not present any adverse consequences for the victim, the conduct of the police officers concerned did not constitute an assault.

[42] The Appellate Division found otherwise, holding that the mere act of forcing another to drink something (regardless of whether it was toxic or not) was sufficient to render that person guilty of an assault, subject only to the *de minimis* principle.

> "*Om iemand te dwing om iets te drink, is om inbreuk te maak op sy liggaamlike integriteit, en dit is onteenseglik so, al is die vloeistof wat hy gedwing word om in te neem onskadelik. [Die hof a quo] se sienswyse het klaarblyklik berus op die gedagte dat dit in bepaalde omstandighede onvanpas sou wees om in hierdie soort gevalle strafregtelike aanspreeklikheid te postuleer, soos byvoorbeeld waar een persoon 'n ander sou dwing om 'n slukkie water te drink. Maar as daar in die strafreg nie van sulke gedrag kennis geneem word nie, is dit nie omdat die 'slagoffer' se liggaamlike integriteit in beginsel nie daardeur aangetas word nie, maar wel omdat die strafhof hom nie besig hou met onbenullighede nie: de minimis non curat lex. … Daar bestaan in ons strafhowe 'n goed gevestigde en heilsame praktyk om, met die gebruik van die de minimis – reël, nie mense skuldig te bevind aan onbenullige aanrandings nie. Met die oog daarop behoort die Verhoorhof geen huiwering te gehad het om te*

> *bevind dat die gedwonge oplek van die urine in beginsel 'n aanranding uitgemaak het. En volgens die feite van hierdie saak kan daar vanselfsprekend geen sprake te wees van de minimis nie. Gevolglik het die Verhoorhof gefouteer deur die oplek van die urine nie as 'n aanrandingshandeling te beskou nie*".[5]

[43] Against that background the Regional Magistrate was required to consider whether the State had established beyond reasonable doubt, firstly, that the accused had forced the children to take the potion concerned without the consent of their parents, and, secondly whether the potion was toxic to the extent that it may have caused grievous bodily harm to the young victims. The Regional Magistrate did not deal with the law in respect of the alleged assaults and merely recorded her finding of guilt in respect of counts 1-8. I assume that she intended to convict the Accused of eight counts of assault GBH (which were the offences with which she was charged) and not common assault, which is a competent verdict on such a charge in terms of section 266(4)(a) of the CPA.

[44] That fact (that there is no finding by the Regional Magistrate in relation to the elements of the charge, in particular the intention to cause grievous bodily harm) presents problems on appeal insofar as this court does not know what the basis for the convictions on count 1- 8 was.

[45] However, in light of the extensive forensic and pharmacological evidence presented before the Court *a quo*, I consider it safe to assume that the State

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[5] 607d-g.

intended to establish that the substances administered to the eight children in question contained chemical agents which were potentially harmful to their health and that therefore assault GBH had been established.

THE SCIENTIFIC AND FORENSIC EVIDENCE

[46] When the police conducted their raid at Kinderland on 12 December 2007, they seized various quantifies of both scheduled and over-the-counter drugs. They also took possession of the liquid substance which Carolus alleged had been given to the children that morning and was standing near the microwave in the kitchen.

[47] The police evidence was anything but clear and unequivocal, but there was a suggestion that when the search party entered the kitchen the Accused rushed in and grabbed a container containing liquid which she tried to pour over a dish cooking in the oven. Just where that container came from, what exactly it contained and what was cooking in the oven was not entirely clear. However, it bears mention that the Accused admitted in evidence that she had poured a prepared sauce containing honey and mustard over a pork dish that was cooking in the oven. She denied any knowledge of the mixture referred to by Carolus.

[48] Evidently, the police attempted to decant some of the mixture into an old mayonnaise jar and to retain both that jar and the original container for forensic testing. Regrettably, the police evidence on this score is poor with numerous

contradictions. Accordingly, when the evidence regarding the analysis of items seized at the Accused's house is evaluated, one must proceed with extreme caution.

[49] The various parents were requested to arrange for blood and/or urine samples to be procured from their children. In some instances these samples were drawn at the local pathology laboratory in Somerset West and in others, the children were taken to their family doctors. Attempts were then made to analyse the chemical compounds in the liquid(s) found in the kitchen and the tablets found in the Accused's bedroom, and to compare those results with the analysis of the children's' blood and urine. Ideally, there would have been traces of the former in the latter.

[50] At an early stage of proceedings the defence asked the State to furnish it with certain raw data files relating to the forensic analysis performed by the State's principal laboratory analyst Ms Dinah Mokhutshwane ("Mokhutshwane"), attached to the Department of Health's Forensic Chemistry Laboratory in Woodstock, Cape Town. When the State refused to do so, the Accused asked the Regional Magistrate to direct the State to comply with its request and sought a postponement to enable this to take place. These requests were refused by the court. I shall revert to this later.

[51] Mokhutshwane was thoroughly cross-examined by the Accused's attorney and it soon became clear that she was hopelessly out of her depth. She was unable to testify regarding the functioning or accuracy of the gas chromatograph machine which she apparently used to analyse the blood and urine samples, nor could she testify regarding the calibration of the machine.

[52] At the end of the case (after both the State and the defence had concluded their closing arguments), the Regional Magistrate took it upon herself to call Mokhutshwane's senior, Ms Deidre Adams ("Adams"), purportedly to clarify critical issues relating to the analysis of the samples and the calibration of the laboratory machines. She gave no reasons for her decision to do so at the time, but in a detailed judgment, the Regional Magistrate expressed grave reservations about Mokhutshwane's ability, her lack of expertise and the factual basis for her evidence. The Court *a quo*, which was not prepared to accept the reliability of Mokhutshwane's laboratory analysis, effectively ignored her report which was exhibit C before that court, and for this reason decided to call Adams.

[53] I shall deal later with the appropriateness of the court *a quo*'s calling of this witness, but even on the assumption that it was in order, the scientific evidence before that court was not sufficient to warrant reliance thereon.

[54] The State laboratory tests were conducted on the blood and urine samples of five children – BB, CvR, WvM, WL and MS. The five samples of all the children were tested to detect the possible presence of three drugs *viz*. Amitriptyline (a schedule 5 drug for which a doctor's prescription is required); Chlorpheniramine (a schedule 2 drug which may be obtained without prescription) and Propoxyphene (also a schedule 5 drug).

[55] The substance that was seized by the police in the kitchen (the so-called "*mayonnaise jar mixture*") was sent for analysis to a different laboratory – the Police Forensic Laboratory attached to their local Narcotics Unit. That analysis was

performed by Supt. Casper Venter ("Venter"), a forensic analyst with more than 20 years' experience. Venter tested three samples in the Police Laboratory, being the substance in the mayonnaise jar (conveniently called "*mixture B*"), his own concoction made up from mixing various of the scheduled drugs seized in the Accused's bedroom with water ("*mixture C*") and a third substance which had been given by Carolus to September on Monday, 10 December 2007, just two days before the police raid ("*mixture A*").

[56] Venter had analysed mixture A before the raid and detected the presence of certain active chemical components therein. On the strength of that analysis he advised the police to obtain a search warrant for the Accused's premises and he was present throughout the raid.

[57] Venter testified about finding the substance in the kitchen which he decanted into the mayonnaise jar. Venter is an experienced and careful policeman. He was cautious in regard to the collection of samples and to the correct labelling thereof, so as to ensure the proper chain of events.

[58] Venter analysed mixtures A and B, both of which he described as green coloured liquids, and recorded his findings in an affidavit dated 8 February 2008. During his testimony, Venter regularly referred to that affidavit.

[59] During the raid a large variety of tablets were seized. This included branded forms of Paracetamol (e.g. Accurate and Disprin), tablets for the control of blood pressure (Prexum and Ecotrin), certain hormone supplements and tranquilizers.

In his affidavit Venter listed more than 15 separate quantities of these drugs, as also some empty packaging, found in the rubbish bin in the kitchen. One of the empty packages related to a drug called "*Accurate*" of which there were no quantities found on the premises.

[60] Venter said he procured a small quantity of "*Accurate*" tablets from a local pharmacy and used this in mixture C in an endeavour to establish (by way of comparison) what the possible components of mixtures A and B were. Venter said that he was fairly sure that it was the "*Accurate*" which gave mixtures A and B the green colour.

[61] Using so-called gas chromatographic-mass spectrometry (GC-MS) testing (an internationally acceptable analytical comparative technique which separates compounds into gases and characterises them), Venter found that the three mixtures contained the following chemical compounds:

61.1 mixture A – Caffeine, Doxylamine, Chlorpheniramine, Amitriptyline, Codeine and Diazepam;

61.2 mixture B – Paracetamol, Caffeine, Doxylamine, Amitriptyline, Oxazolam, Codeine, Diazepam and Zopiclone;

61.3 mixture C – Paracetamol, Caffeine, Doxylamine, Amitriptyline, Oxazolam, Codeine, Diazepam and Zopiclone.

[62] Venter said he came to the conclusion that it was possible that mixtures A and B could have been made up from the tablets which were found on the premises. He said that Paracetamol was a Schedule 1 drug and Codeine a Schedule 2 drug, i.e. they can be bought over-the-counter, while Caffeine, Chlorpheniramine and Doxylamine are not listed at all under the relevant legislation. The remaining substances found in mixtures A and B were Schedule 5 drugs and are obtainable only on prescription.

[63] Venter said that when the constituent substances in mixtures A and B were compared, it appeared that there were three substances present in the mixture seized by the police during the raid which were not in the sample given to Insp. September by Carolus on 10 December – Paracetamol, Oxazolam and Zopiclone. When mixture C is compared, it will be seen that there are three more substances present in C than those found in A - Paracetamol, Oxazolam and Zopiclone. Venter was therefore satisfied that mixtures B and C could have been concocted using the assortment of tablets found at the Accused's house by the police. He also mentioned that there were no tablets found which contained the Chlorpheniramine found in mixture A.

[64] In regard to the eight children who form the subject-matter of charges 1 to 8, two of them, JC (count 2) and TH (count 3) were not tested for either blood or urine, while the urine of MH (count 1) was tested by a private laboratory (Pathcare) in Cape Town. His sample was drawn by Dr Herbst, a general practitioner in Somerset West. The remaining five children's' samples (some blood, some urine and some of both) were all tested by Mokhutshwane.

[65] It appears as if Mokhutshwane tested for three substances – Amitriptyline, Propoxyphene and Chlorpheniramine. Her test results (to the extent that any reliance can be placed thereon in light of her limited qualifications and experience) show a number of interesting phenomena:

65.1 firstly, there were no chemical substances found in the blood of either of DB, CvR, WvM, WL and MS;

65.2 secondly, no Doxylamine was found in either the blood or urine of any of these children, notwithstanding its presence in mixtures A and B;

65.3 thirdly, quantities of Propoxyphene were found in the urine of CBR, WvM and WL, but not BB or MF. It will be observed that there was no Propoxyphene found in either mixtures A, B or C;

65.4 Amitriptyline was found in the urine of only CBR and WL. This substance was found to have been in mixtures A and B;

65.5 Chlorpheniramine was found in the urine samples of BB, CBR, WvM and WL, but not MS. The substance, not listed under any schedule, was present in mixture A but not mixture B, the substance which Carolus alleged was administered to the children on the Wednesday.

[66] In relation to this analysis the State presented the evidence of Dr Gert Muller, a specialist anaesthetist with more than 35 years chemical experience, who is the head of the Poison Information Centre at Tygerberg Hospital and is a specialist in Pharmacology. He commented firstly on the effects of three of the substances, *viz.* Amitriptyline, Chlorpheniramine and Propoxyphene. Dr Muller drew the court's attention to the fact that substances are metabolised in the human body by the liver. In analysing a urine sample, a scientist would expect to detect the so-called "*mother substance*" because this is excreted unchanged after metabolisation.

[67] Dr Muller said that Amitriptyline is a schedule 5 drug used in the management of depressive orders and is not recommended for use in children under six years of age. He expressed concern with Mokhutshwane's laboratory report which did not record the detection of any major metabolites of Amitriptyline. It is known that major metabolites reach higher concentrations in the human than in the parent compound.

[68] In regard to Propoxyphene (also a schedule 5 drug), Dr Muller explained that it is an opioid or morphine-like drug used in pain management but not generally in children. In regard to this drug Dr Muller held similar concerns regarding the absence of major metabolites in the urine.

[69] Finally, in regard to Chlorpheniramine (a Schedule 2 drug), Dr Muller explained that this was an antihistamine with known sedative properties. It was available in over the counter drugs such as Teejel and Dermazine which are suitable for use with young children.

[70] Under cross-examination Dr Muller was asked whether a drug such as Amitriptyline, which had been regularly ingested, would be expected to have been detected in the blood. He confirmed this. And, when referred to mixture B, it was pointed out to Dr Muller that of all the known substances relevant to this case, only Amitriptyline was detected upon analysis by Mokhutshwane. He agreed that this was strange.

[71] When asked with regard to the presence of Propoxyphene in the urine of three of the children tested by Mokhutshwane, Dr Muller acknowledged that this substance was not found in either mixture A or B. And when it was put to him that no drug containing that substance had been found by the police during the raid, he was unable to comment.

[72] Dr Muller was asked to comment on the analysis by Pathcare of the urine of NH, to which I will refer more fully later. He observed that the finding that an opiate was found in that sample denoted a fairly general term ranging from drugs such as Morphine to Heroine and Codeine. He regarded it as an oddity that the pathology report was unable to be more accurate with regard to the actual drug involved.

[73] In relation to mixture B, Dr Muller described it as "*horrendous*" in a "*potentially toxic*" combination. He said it surprised him that if the mixture was used on 12 December 2007, the children did not exhibit more serious side-effects. Finally, Dr Muller expressed serious reservations about the quality of the testing at the Department of Health's Laboratory in Woodstock.

[74] There is one further disturbing aspect arising from the evidence of Mokhutshwane and that relates to the samples from WL presented for testing. In para 2.4 of her report (exhibit C), Mokhutshwane records that on 14 December 2007 she received five sealed plastic envelopes from the police's FCS Unit at Khayelitsha. One of those envelopes was sealed with seal number FSB 537829, marked Somerset West CAS 42/12/07 and carried the victim, WL's name. The bag was found to contain three test tubes, one containing blood and two urine, as well as a further small plastic container marked "*WL*" containing urine.

[75] WL's mother testified that towards the end of November and at the beginning of December 2007 her son had experienced a runny tummy, followed by bronchitis. He had been treated for this with medication called "*Bronchiolitis*". On the morning of 12 December 2007, she was called by the police and asked to collect WL from Kinderland at about 10h00 and take him to the Vergelegen Medi-Clinic for tests.

[76] Ms L testified that blood and urine samples had then been drawn by an employee of the local pathology laboratory and packaged and sealed in her presence. The samples were left at the laboratory for collection by the police. She was later informed by the police that certain of the samples had tested positive.

[77] When Insp. September gave evidence, he confirmed that he had collected WL's blood and urine samples from Pathcare, Somerset West, on 12 December 2007 and sealed them in a forensic bag marked 537829. Under cross-examination, he confirmed receipt of a test tube and small bottle containing these items. When confronted with the evidence that at least three samples (two test tubes

and one bottle) were received by Mokhutshwane, the witness said he could not explain it.

[78] The State called Ms Minette van Viegen, the Pathcare employee who drew WL's sample, to testify. She was a registered nursing sister with 13 years' experience at the time. She said that she had handled one test tube containing blood and a urine sample in a bottle. She was aware of the fact that the police came and collected the samples, but did not go so far as to say that she handed them over personally. She was asked under cross-examination to comment on the fact that three containers with urine and a test tube containing blood had arrived at Woodstock as recorded by Mokhutshwane. She was unable to cast any light on the difference.

[79] As proof of the analysis of the urine sample in respect of MH (relating to count 1) which was analysed by Pathcare's Laboratories in Cape Town, the State produced *a pro forma* report by Dr Izak Loftus, a senior partner in the firm of pathologists involved. When the defence objected to the admission of the document, Dr Loftus was called to testify.

[80] The *viva voce* evidence of Dr Loftus was also objected to on the basis that it was hearsay. It was contended that the evidence, which was intended to place the initial laboratory report before the Court, was not the result of the witness's own evaluation of the sample. It was said that the only person who could testify about the test results was the person (a laboratory technician) who had actually conducted the tests.

[81] The Court *a quo* handled the objection by the defence in a most unusual manner. After hearing the defence's objection, she offered the State the opportunity to argue on the admissibility of the report. The prosecutor did not reply but simply said to Dr Loftus:

> *"Professor het nou die verdediging se beswaar gehoor. Kan u daarop antwoord asseblief?""*

[82] Dr Loftus then proceeded to explain, firstly, why the report was endorsed with the following disclaimers:

> *"1) Hierdie resultate is vir diagnostiese inligting alleenlik en kan nie vir medies – geregtelike doeleindes gebruik word nie.*
>
> *2) Bogenoemde analise is 'n kwalitatiewe sifting MBV immunochemie uitgevoer soos deur die "substance abuse and mental health services administration" aanbeveel.*
>
> *3) GC/MS tegnieke gee meer spesifieke en sensitiewe inligting (duur en tydrowend). Indien op hierdie monster benodig, skakel asb die laboratorium onmiddellik."*

Given the explicit disclaimer in para (1) of the report, it had no place in criminal proceedings such as those before the Court *a quo*. Clearly the testing was not

considered, by the laboratory itself, to be sufficiently conclusive to withstand the scrutiny required to establish guilt beyond reasonable doubt.

[83] This notwithstanding Dr Loftus considered it appropriate to embrace the test results and he proclaimed the integrity of the testing with respect to the general reputation of the laboratory and said, since it was impractical to call the various employees involved in the chain of evidence, as also the actual analysis thereof, he would assume exclusive responsibility for the accuracy of the report.

[84] Dr Loftus's answer only served to highlight the inadmissibility of the report, but rather than uphold the objection, the Magistrate simply allowed the witness to continue testifying. It was only upon enquiry from the defence that the Magistrate noted that she was overruling the objection: no reasons for the decision were furnished.

[85] Under cross-examination Dr Loftus confirmed that he had nothing to do with the testing of the sample which was performed by his staff, and confirmed further, that he had no knowledge of the chain of integrity in regard to the preservation of the sample. In my view, the evidence of Dr Loftus was manifestly hearsay and should not have been permitted by the Court *a quo.* In any event, as I have said, in light of the disclaimers referred to above, the reliability of the analysis is open to doubt.

[86] After the accused had testified, the defence called Dr C.C. Viljoen who was the former Head of the Department of Health's Forensic Laboratory in Pretoria

from 1985 to 2004. He was evidently a highly qualified and experienced scientist who now acts as a forensic consultant.

[87] In an endeavour to place Dr Viljoen in a position to assess and evaluate the analysis of Mokhutshwane, the defence sought the latter's raw data. As I said earlier, this was refused by the Court *a quo* thus placing the defence at a significant disadvantage.

[88] Dr Viljoen was briefed with a transcript of the relevant portions of the record and asked to comment on the evidence of Mokhutshwane. His trenchant criticism of her laboratory procedures and ultimately her test results dealt the State's case a devastating blow. It is not necessary to go into any detail in this regard because, as I have already shown, the Regional Magistrate declined to rely on Mokhutshwane's evidence.

[89] At the conclusion of the argument before her, the Regional Magistrate clearly realized that the State's case was severely compromised and that the integrity of the laboratory results was of little value. She said as much in her judgment later when she was highly critical of Mokhutshwane.

[90] On 2 August 2010, at the conclusion of argument on both sides, the Regional Magistrate postponed the matter for two months to enable her to deliver judgment on 15 October 2010. There is no transcript of the proceedings on the latter date but the Regional Magistrate's handwritten notes attached to the charge sheet record a postponement on that date to 21 January 2011. No reasons are recorded.

[91] The typed transcript resumes on 21 January 2011 and the Regional Magistrate is recorded as having informed those present of her decision to call two further witnesses pursuant to the provisions of sec 186 of the CPA. Due to their non-availability the case was postponed to 14 February 2011. The accused was informed of her right to "*rebut the evidence*" to be given by those witnesses, whereafter judgment would be delivered on 17 February 2011. The accused's attorney placed on record his client's concern that the Court was calling witnesses to bolster the State's case.

[92] When the matter continued on 14 February 2011 the Magistrate called two witnesses – Ms Patricia Cleary from the Pathcare Laboratory in Cape Town and Ms Deidre Adams, who had previously been employed as Mokhutshwane's superior. It is significant, I consider, that the former's name was not previously mentioned in the evidence and it is fair to conclude that the Regional Magistrate must therefore have made her own enquiries to establish her ability, and availability, to testify.

[93] The purpose of the evidence of Cleary, which the Regional Magistrate herself led, was to establish the calibration, accuracy and ordinary use of the GC/MS machines used by Pathcare. She had not handled the sample in question, nor did she have access to the raw data relevant to the analysis. Her evidence related, at best, to the usual standard procedures employed at that laboratory.

[94] Adams' name had been mentioned during the evidence of Mokhutshwane in the context of her seniority at the Woodstock Laboratory. In her case, too, the Regional Magistrate must have made enquiries of her own to enable

her to be satisfied that the witness could help the Court, and that her testimony would have evidentiary value in the context of the case.

[95] Adams testified that she had operated the relevant GC/MS machine and had analysed certain samples. She said that Mokhutshwane's roll was that she brought samples to her which she (Mokhutshwane) entered into a book with a description of the suspected compounds. This evidence flew in the face of Mokhutshwane's testimony which was to the effect that she had personally analysed the samples.

[96] The defence recalled Dr Viljoen after these witnesses to re-evaluate the laboratory procedures allegedly followed at Woodstock. Dr Viljoen remained unpersuaded and pointed out that Adams' evidence was incapable of verification in the absence of the raw data which the defence had requested all along. The cross-examination of this witness by the prosecutor was inconsequential and did not serve to cast any doubt over his expert opinion.

[97] It is significant, I consider, to note that the Regional Magistrate recognised the risks inherent in her decision to call witnesses which might prop up the State case after the conclusion of argument. To that extent she made the following remark in her judgment:

> *"Mr Gess, in his address to the Court, on instruction of the accused, uttered his disapproval, and disappointment, suggesting undue partisanship in favour of the State. This Court is*

> *adequately (sic) aware of the fact that where the Court calls a witness, at the conclusion of the State and Defence case, in circumstances where the record does not disclose that an offence has been committed, and convicts on the strength of that evidence, or the evidence of such a witness, a conviction may be set aside on appeal."*

With reliance on *dicta* in cases such as Hepworth and Von Molendorff [6] which are to the effect that a judicial officer is an administrator of justice and not merely an umpire in a criminal trial, and that her task was to see that justice was done in the quest for the truth in any given matter, the Regional Magistrate sought to justify her decision thus:

> *"This Court is of the strong view that the perception of partiality was not justified in the light of the overwhelming circumstantial evidence, which I have found to be damaging to the accused, thus duty bound to do so, as it is essential to the just decision of this case."*

[98] There can be little doubt that on a proper reading of this part of the judgment set in the context of the evaluation and criticism of other witnesses, in particular Mokhutshwane, that the Regional Magistrate believed that if she did not call those witnesses she would have to acquit the accused on the relevant charges (1 and 4-8).

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[6] R. v. Hepworth 1928 AD 265 at 277; S v Von Molendorff and Others 1987 (1) SA 135 (T)

[99] The power of a criminal Court to call witnesses *mero motu* is sourced in section 186 of the CPA which is to the following effect:

> *"The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case."*

In Gabaatlholwe [7] Heher AJA considered the import of the phrase "*essential to the just decision of the case*" and concluded that it:

> *"…means that the Court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result. That does not mean that a conviction or acquittal (as the case may be) will not follow but rather that such conviction or acquittal as will follow will have been arrived at without reliance on available evidence that would probably (not possibly) affect the result and there is no explanation before the Court which justifies the failure to call that witness. If the statement of the proposed witness is not unequivocal or is non-specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value."*

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[7] S v Gabaatlholwe and Another 2003 (1) SACR 313 (SCA) at 316-7

[100] In Gerbers [8] Marais JA referred to the obvious tension between the need to fullfil the roll of a judicial officer and the need to avoid conduct which was irregular and which could result in a failure of justice in the context of the exercise of the discretion by a judicial officer under sec 186 to call additional evidence. The Court stressed that it remained incumbent upon judicial officers to constantly bear in mind that the *bone fide* efforts to do justice could be misconstrued by one or other of the parties as undue partisanship and that the right balance had to be found between undue judicial passivism and undue judicial intervention:

> *"The recall by a court of an accused to the witness-box for further questioning after the conclusion of an argument is no doubt something which is relatively rare and which should not lightly be resorted to. The reasons are obvious: once lacunae or inadequacies in the State's case have been identified and relied upon in argument by counsel for an accused, steps taken mero motu by a court at that belated stage of the proceedings to fill the lacunae or to remedy the inadequacies are likely to be seen as indicative of undue partiality towards the cause of the State. Even if that perception is wrong, it is one which could genuinely arise in the mind of an accused. Plainly, that is to be avoided."*

[101] What is significant, in my view, in this case is that the additional evidence of the sec 186 witnesses really takes the State's case no further. And yet,

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[8] S v Gerbers 1997 (2) SACR 601 (SCA) at 609e-f

this notwithstanding, the Regional Magistrate sought to rely on that evidence in an obvious attempt to fill the gaps in the State's case. It is really that part of her finding (together with some further aspects to which I shall refer shortly) which expose the Court *a quo's* intervention in the proceedings for what in truth it was: undue intervention prompted by undue partiality towards the cause of the State.

[102] And when one considers the way in which the Court *a quo* precluded the defence from obtaining access to the raw data to enable Dr Viljoen to properly evaluate the test results relied on by the State, coupled with her failure to properly evaluate and consider the compelling testimony of Dr Viljoen, the perception is, most regrettably, confirmed.

[103] In any event, the expert evidence of the scientific witnesses adduced both by the State and the Regional Magistrate herself does not, when considered either individually or collectively, measure up to the requisite standard which our courts have, over the decades, demanded.

[104] In Mthimkulu [9], Corbett JA referred to the Third Edition of Wigmore on Evidence and held that in order to justify testimony based on scientific instruments or processes, professional testimony is required as to the trustworthiness of the process, or to the instrument, and in addition, to the correctness of the particular instrument. Recognizing that the doctrine of judicial notice may suffice in certain cases as to the trustworthiness of the process, the learned Judge of Appeal considered the circumstances in which a court will insist upon, or relax, the standards of proof which

[9] S v Mthimkulu 1975 (4) SA 759 (AD)

apply when assessing evidence involving the use of scientific instruments.[10] These will include the nature of the process and instrument involved in the particular case, the extent, if any, to which the evidence is challenged, the nature of the inquiry and the *facta probanda* in the case. But at the end of the day the learned Judge of Appeal reminds us that there is no hard and fast rule and that much will depend on the facts of each case.

[105] In Strydom [11] the Full Court (relying on Mthimkulu) found that judicial notice could not be taken of the accuracy of a gas chromatograph used to measure blood alcohol limits:

> *"In the present case, the machine itself is used to test its own accuracy. What is missing is proof that, if the machine gives a particular reading when tested with standard alcohol, it is reliable in that regard and is also sufficiently accurate to give a reliable reading when analysing blood. This proof would be by way of expert technical evidence to that effect by a person able to describe the process in the machine and to vouch for its reliability, or by testing the machine against another, unrelated method of analysis. Such method, if already the subject of judicial recognition, would not itself require proof of accuracy. (..Mthimkulu..at 365E..) Such evidence would be necessary until*

[10] These include the use of a scale for weighing, a tape for measuring and a watch for timing.
[11] S v Strydom 1978 (4) SA 748 (E) at 751F and 753A

general recognition of accuracy was accorded the machine.

The absence of such evidence, more particularly when there is reliable evidence that the result of the analysis of the Appellant's blood is out of keeping with the findings of the district surgeon on clinical examination and with the police constable's observations, raises a doubt as to the reliability of the analysis."

[106] That very evidence is absent in this matter too and the *facta probanda* necessary to verify the accuracy of the GCMS machine were not presented to the Court *a quo* nor made available to Dr Viljoen who expressly called into issue the accuracy and calibration of the machine used by Mokhutshwane.

[107] When the evidence of Carolus is considered she would have the Court *a quo* believe that significant volumes of mixture B were administered to the eight complainant children on the day in question. It is reasonable to infer then (and Dr Muller confirmed) that the chemical substances/compounds which made up that mixture (and which Supt. Venter was also able to closely mirror in mixture A – his own concoction based on the tablets found in the house) would have been found in the samples taken from the six children whose blood and/or urine samples were analysed.

[108] However, the scientific evidence, as flawed as it was, did not sustain this inference. Indeed, the only substance found in mixture B that was found by

Mokuthswane also in any of the six samples taken from the children was Amitriptyline, and then only in the samples of WL (count 5) and CvR (count 6). In addition, the generalised reference in the Pathcare report to "*Opiates*" is, in my view, not sufficiently accurate to include Amitriptyline.

[109] Further, there were quantities of Chlorpheniramine and Propoxyphene detected by Mokutshwane in the samples of WvM (count 4) WL (count 5) and CvR (count 6), while only the former substance was found in the sample of BB (count 7). Yet, these substances were not found to be present in mixture B, the potion allegedly administered that day.

[110] Finally, the urine sample of MS (count 8) which was allegedly also analysed by Mokuthshwane for the presence of Amitriptyline, Chlorpheniramine and Propoxyphene was found to be negative in all respects.

[111] These significant anomalies in the laboratory results cast a serious shadow of doubt over the evidence of both Carolus and Mokhutshwane. In regard to Carolus, one is driven to ask whether mixture B was indeed administered at all that day to any of the complainant children, or whether it simply was a concoction made up by her, with knowledge of the impending raid, in a crude attempt to implicate her employer in a string of serious offences.

[112] When assessing the testimony of Mokhutshwane (and later also Adams), one has to have serious doubt about the accuracy of the testing equipment,

the competence of the laboratory staff and the reliability of the analysis of the samples when reviewing the vast disparity in test results relating to a potion which was allegedly administered to all eight children. How could it be that some children had this, others that and another nothing at all?

[113] The anomalies and inconsistencies to which I have just referred are obvious when the scientific evidence is considered comparatively. Indeed, Dr Muller alluded thereto in his evidence and the defence also dealt therewith in argument, both before and after the Court *a quo* invoked sec 186. Yet, in a detailed *ex tempore* judgment which runs to some 110 pages of the record, the Regional Magistrate failed to appreciate the significance thereof and failed to evaluate the inconsistencies. Had she done so she would, like this Court, have had serious doubt about the State's case even after she had invoked sec 186.

[114] As I observed at the beginning of this judgment, the State bore the onus of establishing the administration of substances to these children which were considered to be noxious. In the context of the case, the administration of a mixture of ginger, honey and Panado (as alleged by the defence) was apparently done with the consent of the parents in some instances (specifically in regard to Panado). But, even if there was no such consent, in my view the Accused's conduct amounted to the administration of a substance to be regarded as falling within the ambit of the *de minimis* principle. I say so because of the generally held view by both parents and the medical witnesses that Panado was a relatively harmless over-the-counter drug generally available for administration to young children.

[115] I am therefore not persuaded that the State established beyond reasonable doubt either, that the alleged substance was administered to the eight children in question, or that it was a noxious substance.

[116] The judgment on the merits, instead of dealing with these concerns, contains a stinging attack on the accused. While it cannot be disputed that the accused was a poor witness, the Regional Magistrate, in my view, was unduly critical of her. However, in my view, the flaws in the defence case contribute nothing in the overall assessment of the case: a matter in which the State's case was fundamentally flawed from the outset.

CONCLUSION

[117] In my view therefore the appeal against the convictions on counts 1-8 is upheld and the convictions and subsequent sentences are hereby set aside.

……..
P.A.L. GAMBLE

I **concur**: **……..**
SMIT, AJ

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