THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 948/12

NOT REPORTABLE

In the matter between:

ZAIBONISHA HERMAN **Appellant**

AND

THE STATE **Respondent**

Neutral citation: *Herman v The State* (948/2012) [2013] ZASCA 193 (29 November 2013)

Coram: Lewis, Tshiqi and Theron JJA

Heard: **25 November 2013**

Delivered: **29 November 2013**

Summary: Appeal against convictions - the evidence of the State and the accused to be considered - no basis to interfere with the conviction - appeal dismissed.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Willis J and Randera AJ sitting as a court of appeal):

The appeal is dismissed.

JUDGMENT

Tshiqi JA (Lewis and Theron JJA concurring):

[1] On the evening of 18 January 2006 around 20h00, T… H…. (T…), an adopted 21 month old child was brought by her parents, the appellant and her husband, Mr Herman, to the Garden City Hospital. Upon arrival nurse L Van der Linde, who admitted her, and later, Dr Moosa, who attended to her, observed that T… was very ill; she was extremely pale, anaemic, cold to the touch, dehydrated, had a poor pulse, a dry tongue and had difficulty breathing. She had bruises on various parts of her body.

[2] Despite attempts by doctors and staff at Garden City Hospital to save her life, she sadly died following surgery to repair her ruptured liver on 21 January 2006. On 23 January 2006, Dr Kevin Fourie, a state forensic pathologist performed an autopsy and found the following injuries:

(i) An old elbow fracture;

(ii) Fresh bruising of the scalp on the left parietal region on the left upper part of the head;

(iii) Fresh bruising of the brain corresponding with the bruised scalp;

(iv) Several healing and fresh fractures of ribs on both sides of the chest; and

(v) A large sub-capsular haematoma of the liver.

[3] Dr Fourie attributed the cause of death to ‘a blunt force of injury of the liver with hypovolaemic shock’. In his opinion severe force must have been visited upon T….

[4] On 18 October 2006, the appellant was arrested and charged with three counts of assault with intent to do grievous bodily harm, alternatively ill-treatment of a child, and a further count of murder, alternatively culpable homicide. The first count related to an unspecified date in October 2004, it being alleged that she caused fractures to the left elbow and/or the proximal shaft of the shaft of the left arm of T…., then a seven month old baby; the second count related to the period between December 2005 to January 2006, it being alleged that she caused fractures to the ribs of T…, then a 21 month old toddler; the third count related to an unspecified date in January 2006, it being alleged that she caused bruises to the then 21 month old toddler on her neck, arm, forehead and spine, fractures to the ribs and haemorrhage in the parietal region of the scalp and/or cortical contusion of her brain. The fourth count concerned the child's death, it being alleged that the appellant unlawfully and intentionally killed her alternatively, that she unlawfully and negligently caused her death.

[5] The appellant pleaded not guilty to all the charges and tendered no s 115 plea explanation.[1] She was convicted on all three main counts of assault with intent to cause grievous bodily harm and on count four, of the alternative count of culpable homicide. On each of the three counts of assault with intent to do grievous bodily harm she was sentenced to five years' imprisonment, all these sentences to run concurrently and on count 4, to ten years' imprisonment. She was, therefore, effectively sentenced to a term of 15 years' imprisonment.

[6] She appealed to the South Gauteng High Court, with the leave of the trial court. Willis J (Randera AJ concurring) upheld the appeal in part and set aside the convictions in respect of counts 2 and 3 but dismissed the appeal in respect of counts 1 and 4 and set aside the sentences imposed and remitted the matter to the trial court to reconsider the imposition of an appropriate sentence with regard to those remaining counts. This appeal is with the leave of this court against the convictions on counts 1 (the assault committed in October 2004 when T… was seven months old) and 4 (the culpable homicide). We were informed by counsel from the Bar that the trial court, before the appeal against conviction was heard, had already dealt with the sentence and the appellant was sentenced to an effective term of 12 years' imprisonment.

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[1] Section 115 of the Criminal Procedure Act 51 of 1977.

[7] As is apparent from the charge sheet, the injuries sustained by T… occurred over a period of time, the first when she was seven months old. During October 2004, when the first offence charged was committed, it was the appellant, then on maternity leave, who was the primary caregiver. She was at times assisted by her husband. When the fourth offence charged was committed the appellant and her husband were assisted by their domestic helper Ms Franscina Makara. She took care of the child during the day until the appellant and her husband came back from work in the early evenings after which she would again leave her in their care until the following day.

[8] The injuries forming the basis of the first count consisted of a fractured elbow and would, according to the medical evidence, have been excruciatingly painful for T…. According to the appellant she did not observe the injuries. The appellant's brother noticed that T… could not move her arm. The appellant herself claimed not to have noticed this despite the fact that she said she bathed and dressed the child daily. T… was taken to a doctor by her father. Since no mention was made of any incident that could have given rise to a fractured elbow, the doctor did not suspect a fracture and prescribed medication. When T… still showed signs of discomfort her father took her to a surgeon who detected the fracture. The injury could not have been caused by anything but force inflicted on the baby, then seven months old: she was not mobile, there was no evidence that she had fallen from a height, such as a bed, when unsupervised and there was no suggestion of any incident where she had fallen when in the presence of either parent. Yet the appellant did nothing about the pain that must have manifested itself. It follows that her evidence that she did not notice any discomfort was correctly rejected by the trial court. She was the only person who could have inflicted the injury on T…, and there is no basis to interfere with the conviction on count 1.

[9] Regarding the fourth count, the State led the medical evidence on the probable cause of the injuries sustained by the child and the cause of death and also the evidence of Ms Makara. The appellant argued on appeal that the State had not proved beyond reasonable doubt that it

was the appellant who had caused the injuries that led to the death of T…. The argument was essentially that the State had not excluded Mr Herman and Ms Makara as suspects.

[10] It was not in dispute that when Ms Makara left T… on 18 October 2006, she left her in the care of the appellant's husband. There is no evidence that there was anything visibly wrong with the child at that stage. According to the evidence of the appellant her husband must have been with the child for approximately 15 minutes from the time Ms Makara left until she came home.

[11] On any of the appellant's versions (they changed during the course of evidence in chief and under cross-examination), there was nothing wrong with T… when she came home that evening other than that she seemed slow. If either of her husband or Ms Makara had inflicted the injuries on T… that presented when she was admitted to hospital (severe bruising, broken ribs, and, above all, a ruptured liver) the appellant would have noticed the pain and discomfort that the child must have suffered and would have said so. Yet she claimed no more than that T… seemed slow - a version given only when cross-examined. Moreover, she did not attempt to suggest that either her husband or Ms Makara inflicted the injuries on T… and did not, after T… died, and before the trial, ask Ms Makara what had happened. The obvious inference is that she did not suspect Ms Makara of anything and knew precisely what had happened to T… because she was responsible for it. Indeed, it was never put to Ms Makara when she was cross examined that she was responsible for any of the injuries.

[12] Thus the principal argument on appeal that the State did not prove beyond reasonable doubt that the appellant was guilty of inflicting those injuries, and that either Mr Herman or Ms Makara, who were not charged, could have been responsible for them, falls to be rejected.

[13] The appellant's version of what transpired on the evening that T… was admitted to

hospital is as follows:

'When I came home after 17:00 I found my husband with my baby. They were sitting in the lounge watching TV. He was up and down and she was walking after him and I noted that and I just made myself comfortable to make myself ready to cook and he said he came from training and he was going to run again and they were sitting in the lounge and she was like crying and I told my husband not to go and run he said he had to go. I said to him the baby, she wants you to stay, but he went. I took my baby to the kitchen where I started to cook and she was fiddling with my legs and playing there and I picked her up and I put her on the surface of my unit, the kitchen unit and I was going to cook. When I was done with the cooking I dished up for her. I did not wash her at that time. I dished up for her in her own bakkie and in my plate. We were then to go and sit in front of the TV and she ate from my plate as well. I fed her from my plate and then all of a sudden there was a loud burp....

And then she burped and she vomited and it was quite loud because it was all over the table. I was in shock myself. I just looked at her and I grabbed her and I ran to the shower and I went in with one foot....'

[14] Her evidence in that regard suggested that the child who had been playing happily suddenly became ill. During cross-examination, probably realising the difficulties with her earlier version and seemingly in order to align this version with the medical evidence, she changed her version and suggested that when she arrived the child was slow but not critically ill. She attempted to explain the injuries by saying that when she took T… into the shower to clean her after vomiting, T… fell in the shower.

[15] Much of the evidence on the cause of the injuries to T… related to the appellant's version of what happened in the shower. I shall not deal with it in any detail since it has been more than adequately traversed in the judgments of the regional court and the full bench. Suffice it to say that the appellant's explanation of why T… was cold when she was admitted to hospital was that she had taken her into the shower to clean off the vomit. Somehow T… had fallen when in the shower, thus sustaining various injuries. However, the appellant made no mention

of any fall at all to the hospital staff when T… was admitted. She testified also that she did not tell her husband about the fall either, and that he was angry with her for not doing so. Tellingly, when asked in cross-examination why she did not mention that T… had fallen in the shower, she said: 'At that moment I was very scared knowing that she is a healthy child.' And 'Knowing that she is a healthy child and everything would face me.' And 'Everything would face myself. Everything would point to me to say that I was negligent.'

[16] Moreover, her version of how the fall occurred differed at various stages. A statement made by her some months after the death of T… to an Inspector Johnson, admitted into evidence, gave one version. In evidence in chief she gave another. And when cross-examined yet another. Her version, in the light of the other evidence, was neither credible nor consistent. It was plainly a fabrication to give an apparently innocent explanation of the injuries that were inflicted on T… in the period between her husband's departure from the house and his return some two hours later. Most sadly, the doctors testified that had they been told of the fall when T… was admitted to hospital, and thus had reason to suspect fractures and a ruptured liver, they would have treated her differently and could have saved her life.

[17] Of the appellant's version the court below correctly stated:

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

Although Dr Fourie conceded that the injury to the liver could have been caused several hours before the time of the alleged shower or even a day before, he was adamant that the child would have manifested obvious symptoms of severe distress beforehand. Similar evidence was given by Dr Banieghbal, a paediatric surgeon, also a witness called by the state. Dr Banieghbal was explicit that T.H would have been in severe pain which should have been obvious. These symptoms, the appellant, on

her own version, did not see.

Professor Gert Saayman, head of Forensic Medicine at the University of Pretoria, testified in the defence of the appellant. He was forced to concede that no matter how many hours beforehand the fatal injury had been inflicted, symptoms would have been manifest at the critical time, i.e. when the appellant was with T… when she came home on 18th January 2008. He attempted, however, to minimise the extent to which they would have been apparent to a lay person such as the appellant. Although the appellant's version at another stage was that her child was not well when she (the appellant) came home on the fateful day, she says the child ate supper from her own plate and the appellant's plate as well. Although Dr Banieghbal conceded that symptoms such as lethargy and nausea (described by the appellant) could be consistent with liver injury, his firm opinion was that the child, having the kind of liver injury in question, would not have been able to eat. Moreover, as mentioned earlier, the child would have been in severe pain which should have been obvious.

When asked to describe how the child appeared when she came home on 18th January, the appellant said she was "sulky", had a runny nose and was "just very slow that day". The appellant made no mention of any injuries to the child's eye or lip. Furthermore, as the learned magistrate observed, there are contradictions and discrepancies in her evidence relating to her encounters with Drs Bhutt and Moosajee [the doctors who attended to the fractured arm].'

[18] For the reasons stated by the court below the appellant's version on how the child sustained the injuries is not reasonably possibly true and stands to be rejected. The medical evidence presented by the State, and the facts that are not in dispute as to who had charge of T… when she was injured, on the other hand, point only to one conclusion, ie that it was the appellant who caused the injuries to the child. Counsel for the appellant submitted that the improbabilities in the version of the appellant should be ignored because it is the State that bears the onus of proving the guilt of the accused beyond any reasonable doubt. However, she was constrained to concede that the conclusion that a court reaches must take into account all the evidence presented. Once the State has made a prima facie case against an accused, that accused must also proffer a reasonably possible version to meet that case. As Nugent JA stated in S *v Van der Meyden* 1999 (1) SACR 447 (W) at 448F-H:

The *onus* of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383). These

are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives.'

Further at 449I-B he stated that:

The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[19] In the light of the medical evidence and the evidence about the events of the evening when T… was injured; the inconsistencies in the appellant's evidence and the improbability of her version of what happened, her version cannot be reasonably possibly true. It follows that the appeal must fail on both counts.

[20] I accordingly make the following order:

The appeal is dismissed.

ZLL TSHIQI

JUDGE OF APPEAL

APPEARANCES:

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