

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

CASE NO: SS27/2021

DATE: 2023-03-27

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES:NO

REVISED

DATE: 20 October 2023

In the matter between

THE STATE

And

R[...] S[...]

Accused 1

M[...] N[...] B[...]

Accused 2

J U D G M E N T

YACOOB, J:

Mr S[...] and Ms B[...] stand accused of murder in accordance with section 51(2) of the Criminal Law Amendment Act 105 of 1997. They have been on bail during these proceedings. They are accused of the murder on 7 December 2020 of Ms B[...] 12-year-old daughter N[...] with whom Mr S[...] also had a *de facto*

relationship, having lived in the household as Ms B[...]’s partner since N[...] was four years old.

Both accused pleaded not guilty. They made formal admissions within their plea explanations. Mr S[...] admitted having assaulted N[...] with intent to commit grievous bodily harm and Ms B[...] has admitted to assault and to having been negligent in causing N[...]’s death.

Both accused were clearly traumatised by the fact that their child died as a result of their actions on 7 December but while the Court may have the utmost sympathy for them this is not relevant to whether they are guilty of the charges or maybe found guilty in a competent verdict.

The state called two witnesses, Dr Lebohang Banyane who carried out the autopsy on N[...] and T[...] B[...], N[...]’s elder brother. The two accused testified on their own behalf.

The facts in this matter are largely common cause. The only issue is what legal outcome the facts support.

Dr Banyane confirmed the autopsy report and testified that N[...] had marks of being beaten with a sjambok all over her body, including her head and her face. The cause of death was a brain injury, specifically blunt force injury to the head complicated by crush injury. He also testified that with the sjambok injuries the tissue that gets damaged is the muscle which releases a toxic chemical and damages the kidney. He testified that the body was damaged everywhere including the muscles and that the extensiveness of the injuries led him to infer that the assault of had happened over quite some time. Dr Banyane estimated N[...]’s age to be 14 or 15 years old showing that she was relatively physically mature.

T[...] B[...] testified that he heard the assault on N[...], but he did not see it. According to him he heard both the parents as well as N[...] shouting, and there was a lot of noise. He and his sister had both previously been disciplined with a sjambok but this had not happened for a while, however, when N[...] began dating at a young age Ms B[...] began disciplining her physically again. Mr S[...] as far as T[...] knew would only reprimand N[...], he would not discipline her physically. T[...] knew that there had been a lot of problems caused by N[...]’s dating. She was even staying at his mother’s friend’s house and elsewhere occasionally.

In addition to hearing the assault he heard Ms B[...] pouring water for a bath for N[...] and telling her to take a bath. He said he eventually saw N[...] when the two accused carried her into the bedroom where he was with his younger sister. N[...] was unable to walk so they both had to carry her. She had her arms over each of their shoulders and she was in an upright position. He said that he saw water and some white stuff coming out of her mouth and he called his parents. His mother came first in response to his call. At some point thereafter he and Mr S[...] carried N[...] to the car to take her to the hospital.

Mr S[...] testified that the problem with N[...] dating boys began in 2019 when she was 11 years old. He and Ms B[...] attempted to talk to her about the problem, they also involved elders and the pastor at the church they attended at the time to intervene and assist with this child but she would not change her behaviour. The two parents thought that they were perhaps not doing something right and that is why they sought assistance, however, there was nothing that they could do which yielded results. She was defiant in her body language and she apparently was not interested in amending her behaviour. According to him

Ms B[...] also suggested that they would consult social workers, however, this did not happen before the child died.

The friend of the mother, Tsholofelo, had a child who was also a friend of N[...], so N[...] would go and visit but at some point she also went to stay with them because there was an incident where N[...] dating an 18 year old boy who was rude to Ms B[...]. N[...] had also run away and gone to Tsholofelo's place. So Ms B[...] suggested the Tsholofelo take the child so that people could calm down. N[...] would still come the house for clothes and to eat and so on.

On the day of the incident Mr S[...], Ms B[...] and Tsholofelo had gone out for the whole day. They came back late, and he and Ms B[...] went to bed. At some point there was a knock on the door and it was Tsholofelo and she had N[...] with her. There was some kind of altercation he did not hear exactly what it was. He then heard further voices and went out to find that N[...] had run away. Tsholofelo then said that she had brought the child home because her, Tsholofelo's, partner said he did not want her in their home anymore because she was a bad influence on their child. This was because N[...] had been seen kissing a boy on the street in front of everyone earlier in the day.

Mr S[...] then went looking for her as did Ms B[...] and Tsholofelo. They searched for a while and eventually Tsholofelo went to her home and the two accused went to their home. As they entered their yard they were approached by a neighbour who told them that the child was with her, this was Mrs Shange who was another church elder.

They then went to Mrs Shange's house to fetch N[...]. Ms B[...] said to Mr S[...] that he should go to the other door because N[...] is clever and might run out that way. So as they

approached the property Mr S[...] went through a passage to reach the kitchen door and saw the deceased coming out of the passage. She ran out past him and he ran after her and she slipped and fell because the paving was wet. He then got hold of her.

Ms B[...] then caught up with him and the three of them then went to their home. As they were going in N[...] was crying and Ms B[...] went and got a cut piece of a branch or a stick. While they were walking back to their home Ms B[...] was talking to N[...] asking her what she was doing, why she was doing that, what she was not getting in her home and so on. N[...] did not provide any answers but kept apologising.

When Ms B[...] came into the house with the stick or branch, she began beating N[...], they were both standing at the time. Ms B[...] beat her until the branch broke and then she went into the bedroom. While she was in the bedroom Mr S[...] picked up the broken piece of branch and began beating N[...] with it. Ms B[...] then came back from the bedroom with a sjambok. Mr S[...] said he was surprised to see it because he did not know that they still had it in the house. The stick that had been used before it broke was about a meter long and a centimetre in diameter. It did not have twigs or leaves on it, it was a clean stick. When it broke, it broke into half approximately.

After Ms B[...] came back she began beating N[...] with the sjambok and at the same time reprimanding her orally and asking her why she was doing these things that she was doing. Mr S[...] demonstrated that Ms B[...] was lifting her hand up above her head in order to administer the beating. He testified that the beating was given everywhere on N[...]’s body and that he had also done the same. He thought that the beating lasted about 10 to 15 minutes before the stick broke and he confirmed that Ms

B[...] was angry at the time. In addition N[...] was not just standing still she was jumping around trying to avoid the beating.

Mr S[...] said that he was also very angry and was extremely disappointed. He started beating her with the stick after it had broken because he was trying to get her to mend her ways. It was the first time he had beaten her. According to him it took about 10 minutes before Ms B[...] came back and during that 10 minutes he was intermittently beating N[...] and talking to her.

N[...] kept saying she was sorry and that she was pushed into doing whatever it was she had done. He asked her who pushed her into it and she did not respond. When Ms B[...] came back he had already stopped and she then began reprimanding the child and beating her with the sjambok. At some point he got hit with the sjambok as well and he went and sat outside the house on a chair by the door facing inside, he saw everything.

He then testified that Ms B[...] eventually told N[...] to sit down. According to him the further beating with the sjambok had taken another approximately 15 minutes. Ms B[...] then went into the bathroom to fill the bathtub and then she came out while it was filling and sat with N[...]. He heard an explanation given to Ms B[...] by N[...] about the things she was pushed to do but he said he was confused about it. N[...] had calmed down by then.

Ms B[...] then told N[...] to go and bath and to sleep. Mr S[...] sat outside for a while, he then went inside to lie down. At some point Ms B[...] came and woke him up to tell him that there was a problem because the bathroom was very quiet, and she could not hear sounds of someone washing. He then heard Ms B[...] screaming for him to come and he went into the bathroom and saw the deceased lying in the bathtub and she was gasping and vomiting.

They eventually got her out of the bathroom and took her to the bedroom and Ms B[...] tried to do first aid. At some point Ms B[...] then said no we have to get her to the hospital. He could not find his car keys at first so Ms B[...] said she would get Tsholofelo. Eventually he found his car keys and he asked T[...] to help him. They got her to the car and took her to the hospital. He did not go inside the hospital, the nurses took the child in with her mother. At some point he heard Ms B[...] screaming and then later found that the child had died.

He conceded that there was no need to beat N[...] on her head and a person injured with a head injury could die. He said in cross-examination that he had told Ms B[...] at some time after she began the assault with the sjambok to stop because N[...] had had enough. He conceded that the behaviour of adolescents is usually problematic and that they need guidance and that they experiment in things. When it was put to him that it was the job of the parents to keep them in the right direction he said he was not sure. He did concede that there was no need for him to have joined in the assault.

However, Mr S[...] also that objectively he did not foresee that N[...] could have died from the assault. At the time he was not thinking about what was happening to her, he was thinking about why the child continued with her behaviour and why they were failing. His intention was simply to reprimand the child and try and get her back on track.

Ms B[...] then testified. She confirmed Mr S[...]’s evidence to a large extent. She also testified about her frustrations with how the child was behaving and the fact that they could not seem to get through to her to change her behaviour. She constantly tried to confront N[...] about the 18 year old boyfriend and her

behaviour of kissing boys and so on but N[...] would avoid her and try to leave. Ms B[...] was very frustrated with the behaviour.

When she found N[...] that night at Ms Shange's she was extremely frustrated and angry as they were walking back to their home. She was very angry and she decided that the only thing to do is to give her a hiding because the child runs away every time so she cannot punish her in any other way. She had previously decided not to physically reprimand the child anymore but she was very upset so as she was walking home she was looking for something to use because she did not want to use her hand. She saw the tree branch when she went outside to find something and she took it inside and used it. She confirmed that the child was jumping around trying to avoid being hit. The fact that the child not simply bend over and allow her to discipline her made her more angry. She wished that the child would just stand and let her do it and get it over with.

While the beating was happening she was asking N[...] questions but she would not answer and the same happened when Mr S[...] was beating the child while she was in the bedroom. At some point N[...] told her that she went with other girls on the street to the hostel to sleep with all the men and those girls had recruited her but Ms B[...] was really upset because N[...] would not tell her who those girls were.

She testified that she was away fetching the sjambok for about five minutes and at this time Mr S[...] was not continuously assaulting the child they were also sitting down and talking. According to her, her intention was to get the child to tell her everything because she wanted to know everything. The child would not answer her and that infuriated her. She confirmed that she beat the child with a sjambok for maybe 10 to 15 minutes but it was intermittent with talking to her and hitting her. The

explanations that she was getting were confusing and she thought they were lies and that made her more angry.

Eventually the assault ended because Mr S[...] told her to stop because it was enough. She then went to go and run a bath for the child and put Dettol in, the child did not want to because it would sting the scratches on her hands and feet but Ms B[...] insisted. Ms B[...] confirmed the evidence of Mr S[...] on eventually discovering the child and on the child's death. She also said that she never intended to kill her child. She would not want to kill her child. She was simply trying to discipline her and she was frustrated.

Under cross-examination she did not concede that the death could have been foreseeable, however, there was no dispute that in fact it was this assault that caused the death. She did not think of the fact that the child was already injured and that if she then went and got the sjambok she would simply injure her more. She was very, very angry and wanted to get answers out of the child.

As far as Mr S[...] is concerned he has already formally admitted committing assault with intent to cause grievous bodily harm. It is clear from the evidence that he did act in that manner.

The forensic evidence was that there were marks of sjambok tracks on the child's body and it appeared that the worst injury to the child occurred from sjambok not from the stick. It was also clear that Mr S[...] was only directly involved in physically beating the child for a very short time even though he did not stop Ms B[...] from assaulting the child until quite a lot of assault had taken place.

I am not satisfied that there is evidence that Mr S[...] intended in any way to cause the death of the child and I am also not satisfied that he ought to have foreseen that his part in the events could have caused her death.

I therefore find him not guilty of murder as charged. The competent verdicts for the charge are culpable homicide and assault with intent to cause grievous bodily harm.

I am satisfied that Mr S[...]’s involvement was such that he permitted and in fact facilitated the continued beating of the child in the sense that he orally reprimanded her while the beating was happening and he continued the beating while Ms B[...] went to find another implement with which to continue. It was clearly foreseeable that this extended and quite strong beating would have an effect on a child’s body and that she may die as a result.

I therefore find that he is guilty of culpable homicide.

As far as Ms B[...] is concerned, she has admitted the elements of culpable homicide, the question is whether her actions show that there must have been an objective intention, even if indirect, to cause the death of the child. As I have said it was her evidence that she was not thinking about what the effect of the beating on the child would be, she was thinking about the fact that she was angry, she needed to beat the child in order to punish her and she needed to get the information out of the child. The fact that both accused testified that the beating was not continuous but there would be pauses where there was talking and then there would be further beating, demonstrates that there was a definite intention to beat the child regardless of the effects on her.

This was more than simply negligence; it was more than a disregard for possible effects and therefore I find that indirect intention has been proven and Ms B[...] is guilty of murder as charged.

YACOOB, J
JUDGE OF THE HIGH COURT
DATE: 20 October 2023