

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Review No.: 1368/2004

In the review of:

THE STATE

versus

SEGOMOTSO SEEKOEI

CORAM: VAN DER MERWE J

JUDGMENT: VAN DER MERWE J

DELIVERED ON: 7 OCTOBER 2004

[1] The accused in this matter was convicted of assaulting, with the intent to do grievous bodily harm, his 18 month old son T., by stabbing him with a sharp iron rod. On 7 June 2004 the accused was sentenced to a fine of R3 000,00 or 18 months imprisonment of which R2 000,00 or 12 months imprisonment was suspended for a period of three years on condition that the accused is not convicted of assault

committed during the period of suspension. Reasons for conviction requested on 20 August 2004, reached the office of the Registrar only on 28 September 2004.

[2] Already in his statement in terms of section 115 of the Criminal Procedure Act, No 51 of 1977, the accused specifically stated that T. was injured accidentally and that he did not have the intention to injure. This then, was the essential question for determination at the trial.

[3] The wife of the accused, to whom he had been married for a period of 11 years, testified on behalf of the State as did two other witnesses that did not contribute much to the case. The accused testified in his own defence. The trial magistrate, correctly in my view, did not reject the evidence of the accused. From the judgment at the time as well as the additional reasons supplied by the magistrate, it appears that the accused was convicted on his own evidence.

[4] The accused testified that on the evening in question,

namely 26 December 2003, both his wife and himself were under the influence of liquor. His wife was in possession of a sharpened iron rod and apparently wished to leave the house in order to join a scuffle outside down the road. This the accused did not want her to do. Whilst in their bedroom, they were struggling over this iron rod in the sense that the accused tried to pull it from the hands of his wife who was holding on to it. Whilst this was going on, T. was asleep on the bed wrapped in a blanket. Apparently as a result of a reflex movement when the iron rod was forcibly freed from the grip of the accused's wife, it connected with the blanket on the bed. Immediately Thabo started crying. It was later ascertained that in the process T. was injured on his back by the iron rod. Apparently the sharpened iron rod penetrated through the blanket and the clothing of T., causing a one centimetre laceration on his back. This fortunately healed within a week or so. The wife of the accused left the house, so the accused handed T. to an older child and went to sleep as he was under the influence of liquor. By that time he did not realise that T. was injured.

[5] It is clear in my view, as the State prosecutor also accepted in the address on the merits, that no direct intention to injure was proved on the part of the accused. The question therefore is whether the accused had intent in the form of *dolus eventualis*. It is trite law that this requires proof thereof that the accused actually did foresee (not should have foreseen) the possibility of injury to T. and that he recklessly continued his actions. On the evidence of the accused such findings cannot be made beyond reasonable doubt. The magistrate seems to have deduced from the alleged conduct of the accused after the incident, that he had the necessary intent. In this regard, in my judgment, the magistrate erred. The subsequent conduct of the accused must be seen in the light thereof that he was unaware thereof that T. had been injured. There is no reason to believe that the accused was not a loving father. The evidence in respect of the relative positions of the accused, his wife and T. at the time, is also too vague to form the basis of any finding in this regard. Although there is much to be said for the view that the

accused was negligent in the sense that he should have foreseen injury to the child in the circumstances, that, as I have pointed out, is not the test that must be applied.

[6] It must be said that in my view this conclusion must be reached even on the evidence of the State. The wife of the accused testified that the accused was in possession of the iron rod, that she grabbed it and that when the accused managed to pull the rod from her grip, she heard T. crying and she fled. She does not know, so she testified, how the iron rod made contact with the child.

[7] In my judgment, it is at least a reasonable possibility that T. was injured accidentally and that the accused did not have the required intention to injure. It follows that the conviction cannot stand.

[8] The conviction and sentence are set aside.

C.H.G. VAN DER MERWE, J
/sp
