

Case No 59/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOHANNES PETRUS VENTER

Appellant

and

THE STATE

Respondent

Coram: NESTADT, HARMS et SCHUTZ JJA

Date heard: 29 February 1996

Date delivered: 28 March 1996

J U D G M E N TNESTADT, JA:

During 1992, the appellant, a 23 year-old policeman and a Miss Cindy Verrall, had a relationship with each other. She had a child (by someone else). He was a boy aged two. On the night

of 28 December 1992 the three of them were together at the appellant's home in Kempton Park. Shortly before 7 pm she decided to take a bath. The appellant and the child were to shower. The bathroom and the room containing the shower adjoined each other. Verrall ("the mother") ran the hot water of the bath. Before putting in any cold water, she momentarily returned to the bedroom. The appellant and the child entered the bathroom. The appellant took hold of the child and placed him in the hot water. The child was badly burned. He was taken to hospital but died early on the following morning as a result of his injuries.

These events gave rise to the prosecution in the Witwatersrand Local Division of the appellant (as accused 2) and the mother (as accused 1) on a charge of murder of the child. The State

case against the appellant was that he knew that the water was hot and by placing the child in it intended to kill him. Against the mother, the case (as eventually argued) was that she was an accessory after the fact to murder. The matter came before Southwood J sitting with assessors. The mother was acquitted. However, the appellant, despite his denial that he knew that the water was hot or that he intended to harm the child, was convicted as charged. A sentence of fifteen years imprisonment was imposed. He appeals now against both his conviction and sentence. (I should add that both the appellant and the mother were also charged with having, over a period of approximately a year prior to his death, assaulted the child. But they were found not guilty on this charge.)

The issue is whether the State proved that the appellant,

in placing the child in the hot water, intended to kill him.

Differently put, the question is whether the appellant's evidence that in placing the child in the water he was only playing with him and that he was unaware of the temperature of the water, could reasonably be true. If so, then plainly the appellant lacked the requisite mens rea to sustain a conviction of murder.

As I have indicated, the trial court rejected the appellant's defence. It found (i) that he was not seeking to amuse the child; (ii) that he so placed and held the child in the water that not only most of his body, but also his head and face were immersed in it for a number of seconds; and (iii) that in doing so, he was aware that the water was dangerously hot. In the light of these findings, the court came to the following conclusion:

"Finally, the inference that we draw from the proved facts is that accused 2 had the intention of killing the deceased when he put him into the water. In drawing this inference we have considered the fact that no motive for killing the deceased has been established, and that the accused had very little time in which to form the intention to kill the accused. He heard accused 1 run the water into the bath, he saw her go past the shower door to the bedroom, and he must have then decided to kill the deceased.

While these are important considerations, in our view they do not outweigh the other factors which have already been referred to in this judgment. We therefore find that accused 2 had a direct intention to kill the deceased and that he is guilty of murder."

In my opinion, no fault can be found with the rejection of the appellant's evidence that he was only playing with the child ((i) above). It is true that at the outset of his consideration of the case against the appellant, Southwood J said:

"Can accused 2 be believed when he says that he did not have the intention to kill the deceased? We are of the view that we should be extremely careful about accepting anything that

accused 2 says which is not corroborated by other reliable evidence."

Whilst perhaps unfortunately worded, it is, however, clear from the judgment as a whole that the learned judge did not place any onus on the appellant or, in considering his guilt, apply anything but the correct test, viz whether the appellant's version was reasonably possibly true. The appellant was obviously an untruthful witness.

The finding of the court a quo that "he told lies whenever he perceived it to be in his interest to do so" is fully justified. As will appear, he made a number of extra-curial, exculpatory statements advancing an admittedly false version of events. His evidence that he was having fun with the child is improbable. The appellant was in a hurry to watch television. Why then should he, as he testified, decide to bath (with the child) instead of showering? At the least,

it was an inopportune time to engage in games with the child. It involved the appellant picking him up by the right arm and leg, holding him horizontally over the bath water and then, whilst pretending that he was a submarine ("duikbootjie"), putting him into the water. But under cross-examination the appellant conceded that the concept of a submarine "'n redelike ingewikkelde begrip vir 'n kind van twee jaar oud (is).....Ek glo nie hy het eintlik verstaan dat ek verwys na 'n duikbootjie nie." I find it difficult to conceive of the child enjoying this type of tomfoolery or of the appellant thinking that he would. The child had an aversion to, if not a fear of, being bathed. The appellant knew this. He admitted that whilst in the shower room, he discovered that the child had wet himself. One is driven to the conclusion that this irritated the appellant who, knowing

that there was water in the bath, decided to punish the child by ducking him in the bath water. The appellant denied that he was annoyed but there can be no other explanation for what happened. Particularly is this so if the appellant submerged the child's head in the water. To this matter I now turn.

The appellant's evidence was that he did not put the child's head under the water; in his words "sy kop (was) glad nie onder die water nie.....Ek glo nie dat ek sou 'n kind se kop van daardie ouderdom onder die water gedruk het nie". The question is whether the trial court's finding to the contrary ((ii) above) was justified. In favour of a negative answer is the fact that the State pathologist who performed the post-mortem examination on the body of the child supported the appellant's denial. His opinion was that

the child's head was not submerged in the water. The trial court, however, refused to accept that this was so. This was a bold approach. One does not lightly depart from the uncontroverted views of an impartial, well-qualified and experienced expert. But I am persuaded that in the present matter it was warranted. The reasons given by Southwood J for rejecting the doctor's evidence are weighty. Consider the following. The photographs clearly show that the child sustained burn injuries to his head and face; the condition of the inner lining of the windpipe was consistent with the swallowing of hot water; the lungs contained fluid; and there is the singular, undisputed feature that despite the injuries having been immediately painful (intensely so, I would have thought), the child did not cry out or scream. The cumulative effect of what has been

referred to supports the trial court's finding that the appellant "plunged (the child) into the water and that his head was immersed for a number of seconds" and that there was therefore no chance for the child to cry out.

Confirmation that the child's head was submerged in the water comes from the appellant himself. In his evidence in support of a bail application (made to a magistrate soon after his arrest in August 1993), he, under cross-examination by the State, said:

"Hoe lank het u die kind onder die water gehou? -- Vyf/ses sekondes.

Watter gedeeltes van sy liggaam het u onder die water gehou? -- Ek dink dit is die regterkant of die linkerkant wat ek onder die water gehou het.

Ja, maar wat? 'n Voet, 'n vinger of 'n toon? -- Die helfte van sy lyf was onder die water.

Wat alles? Sê vir die hof wat alles het u onder die water gehou? -- Sy kop die een kant; die een kant van sy bors.

Sy hele kop? -- Ja.

.....

Vyf tot ses sekondes. Het u hom deur die water gesleep of net daar ondergehou? -- Nee, ek het hom deur die water gesleep. Hoekom is sy kop onder die water gedruk? -- Sy kop het vanself ondergegaan.

Ekskuus. -- Sy koppie het vanself onder die water ingegaan. Vanself onder die water ingegaan? -- Soos ek hom laat sak het, het sy kop ondergegaan."

The State tendered this evidence at the trial. Despite objection, it

was held admissible and taken into account against him. Southwood

I reasoned that the appellant (who was represented in the application)

must be taken to have waived his right against self-incrimination.

The learned judge furthermore rejected an argument that a trial within

the trial should have been held to determine the admissibility of the

evidence. And an attempt by the appellant in his evidence before

the trial court to explain why in the bail application he had given

what he alleged was false evidence, also failed. Before us, it was

submitted on behalf of the appellant that the evidence was wrongly admitted. I disagree. I am not sure that the privilege against self-incrimination applied to the situation at all. But even if it did, the evidence was correctly admitted. The appellant had in his evidence-in-chief given his version of what happened in the bathroom. The State was entitled to test it by cross-examination. Before us, a further argument was raised, viz that the appellant had been improperly compelled by the State to bring the application for bail. But in the court a quo there was no evidence in support of this. S vs Botha and Others (2) 1995(2) SACR 605(W) is distinguishable. The facts of our matter are different. It is true (as appears from the record of the argument before the judge a quo) that during the course of the bail application when cross-examination of the appellant was

objected to, the magistrate expressed the view that what the appellant was being asked could not be used against him in the subsequent trial. But this cannot avail the appellant. At the time the appellant's attorney disagreed with what the magistrate said. So nobody was misled. And the point has not been relied on now.

This brings me to the correctness of the finding that the appellant was aware of the high temperature of the water ((iii) above). This is a crucial issue. If, as he says, the appellant did not know that only hot water was in the bath, the substratum of the conviction for murder must obviously fall away. It was never the State case that the appellant was intent on drowning the child. The finding in question rests primarily on the evidence of the mother (given in her defence). It was that there was steam in the bathroom;

that there was condensation on the two mirrors there (from the steam); and that as she left the bathroom she called out to the appellant (in the shower room) that there was only hot water in the bath. All of this the appellant denied. But the trial court accepted this evidence. And it formed an important part of its reasons for finding that the appellant knew that the water was hot.

It seems to me, however, that her credibility should have been regarded as suspect. She was a single witness and, of course, a co-accused. Moreover, the trial court acknowledged that she was an unsatisfactory witness on the assault charge. But it considered that her evidence about the events of 28 December 1992 was "coherent, consistent and fairly comprehensive" and that "she did not contradict herself on any material respect". I am unable to agree.

She told a Ms Purcell, that she, the appellant and the child had been showering. This was a lie. Initially she was adamant (and repeatedly insisted) that on her return to the bathroom and having supplemented the hot water with cold, she climbed into the bath.

But under cross-examination a different picture emerges. At first she watered down her evidence to a "I can't remember (whether I got into the bath)". Eventually she conceded that she never got into the bath at all. This was a material contradiction.

There are other weaknesses in the evidence under consideration. The mother conceded that the appellant might not have heard what she said. In her statement to a magistrate made shortly after the night in question, she did not mention having told the appellant that there was only hot water in the bath. And there

was no reference to the steam or the condensation. The learned judge seems to have regarded these omissions as matters of detail.

This may be so, but they were important detail. Nor is her evidence probable. She had no reason to think that the hot water posed a danger to the child. He would not himself have got into it. He was not to bath. Why then warn the appellant (especially if there was steam and condensation)? It is said in the judgment that the presence of steam is "consistent with ordinary human experience".

Perhaps this is so in winter but I am not sure that what amounts to some judicial noticing is warranted when the weather is warm (as in December). Two of the appellant's neighbours, Ms Campbell and Mr Hall, entered the bathroom soon afterwards. Neither saw, or could recall seeing, any steam there. In the circumstances, expert

evidence was needed. What was produced, ie that of Lt. Westraat was equivocal. It depended on the bathroom windows being closed at the time. This was not proved. Nor, I should add, was the question of whether a person in the position of the appellant would necessarily have felt the heat of the water as he approached it, investigated.

A factor against the appellant is, of course, his untruthfulness. This involves not only his performance in the witness-box but also his lying extra-judicial explanations of what occurred. Immediately afterwards he quickly took the child back into the shower. He then pretended to the mother that the child had been burned there when, on her return to the bathroom, she put the cold water tap of the bath on thus (according to the appellant)

causing a sudden increase in the temperature of the shower water.

In other words, he led her to believe that he was blameless. The following day he repeated the lie in a detailed written statement to the child protection unit of the police and later to a neighbour.

Southwood J, in his careful consideration of the matter, rightly took these false explanations into account in determining whether the appellant had the necessary intent. There is ample authority in support of this approach. On the appellant's version (as subsequently advanced) what happened was an accident. There was therefore no need to fear the "truth". It was a simple story to tell. Why then fabricate a complicated one? The fact that he did points to a realisation of guilt (on a charge of murder). Certainly it was not the reaction of one who is blameless or innocent.

I am not convinced that, even if the appellant knew of the temperature of the water, he was correctly convicted of murder on the basis of dolus directus. It may be that despite holding the child under the water for five to six seconds, there was only dolus eventualis. It is, however, unnecessary to pursue the point. This is because I have, after anxious consideration, come to the conclusion that on neither basis can a conviction of murder stand. As I have said, the mother's evidence was (even making allowance for her low intelligence) not of the quality that justified reliance on it. It follows that on the vital aspect of whether the appellant knew that the water was hot, the State was compelled to rely on inference. Too much weight cannot be given to the appellant's untruthfulness. It could have been due to a fear that the truth would have resulted in his guilt

on the basis of negligence (which was in fact his explanation). The trial judge was alive to this. Thus it was held that "(t)he fact that accused 2 is a witness who had lied in the past about the incident and in the witness-box, should not play a dominant role in the reasoning of the court and is simply another piece of evidence to be considered with all the other evidence before the court". This serves to emphasise the limited application of the factor under consideration.

There are, moreover, aspects which signify an absence of the necessary mens rea. To begin with, the appellant having been acquitted on the assault charge, the matter must be approached on the basis that he was not ill-disposed towards the child. Indeed, there was evidence that, if not fond of the child, he was (at least at times) concerned for his welfare. He gave him toys and he complained to

the mother that the grandparents were maltreating him. Whilst there was a desire to punish, no motive to kill the child was, as the trial court observed, established. Naturally, this was not necessary. But where, as here, an accused's state of mind is sought to be determined by inference, the absence of motive is a significant feature. There was no evidence of any threat by the appellant against the child or of any angry words. Had there been, the mother, so she conceded, would have heard. Obviously, the intent to kill, if it existed, arose suddenly. This is possible but, in the ordinary course, one would have envisaged a more forceful spur to its formation than the child wetting himself. Scalding the child to death was likely to have exposed the appellant as the culprit; he would, therefore, hardly have knowingly attempted to do so. The manner in which he (says he)

held the child is perhaps indicative of a realisation on his part that the water was hot. On the other hand, if his intent was to kill, why not entirely submerge the child in the water and let it drown?

Finally, the appellant's subsequent conduct and emotional state must be borne in mind. The court a quo seems to have held it against the appellant that at the hospital and later at the funeral service, the appellant was seemingly callous. I would rather look to his behaviour soon after the incident. Contrary to what was found, two State witnesses who arrived at the scene within minutes described the appellant as "very upset" and "distraught". According to the mother, the appellant tried to revive the child. Perhaps these actions were a charade but it cannot be accepted that they were.

The matter is not an easy one. However, on a

conspectus of what has been stated, I have come to the conclusion that the inference that the appellant realised the water was hot and that he therefore intended to kill the child, is not the only reasonable one. He should, accordingly, not have been convicted of murder.

It was not in dispute that the appellant should, before placing the child in the water, have ensured that it was not too hot and that in failing to do this, he was negligent. He knew that the geyser in his house produced water having an extremely high temperature. Plainly, he was not entitled to assume that the water was, so to speak, safe (either because the mother had run only cold water or because the hot water had cooled done). Also, he ought reasonably to have foreseen that the injuries which would be sustained by the child could cause his death. This aspect was dealt

with in cross-examination of the appellant. The evidence reads:

"Ernstige graad brandwonde kan dood veroorsaak, u is bewus daarvan? -- Dit is korrek." The appellant is guilty of culpable homicide

Sentence must be imposed afresh. The punishment of negligence has given rise to controversy (Hunt: South African Criminal Law and Procedure, vol II revised 2nd ed by Milton, 423-424). Nevertheless, it is accepted that in appropriate cases, having regard to the interests of the community (including its indignation) and the need for retribution (R vs Karg 1961(1) SA 231(A) at 236A), a lengthy term of imprisonment, though not usual, may be a proper sentence for culpable homicide. Of course, as Schreiner JA said in Karg's case (at 236C) righteous anger should not becloud judgment.

But the need to emphasise the sanctity of human life may require a severe punishment. In a given case, the results of an accused person's negligence should not be ignored (S vs Kilian 1964(1) SA 188(T) at 191C). Ours is such a case. In favour of the appellant is his comparative youth and that he is, in effect, a first offender. On the other hand, his handling of the child deviated markedly from what was reasonably to be expected. The results of his negligence were tragic. He showed no remorse. An unsuspended sentence of eight years imprisonment is called for.

The following order is made:

- (1) The appeal against the conviction of murder (count 2) is allowed.
- (2) The conviction and sentence are set aside. The following is

substituted:

"(a) The accused is found guilty of culpable homicide.

(b) A sentence of eight years imprisonment is imposed".

H H Nestadt
Judge of Appeal

Harms, JA)
)
Schutz, JA) Concur