

SOUTH AFRICA / JUDGMENT

S v Molefe (A240/12) [2012] ZAGPPHC 52; 2012 (2) SACR 574 (GNP) (3 April 2012) [2012] ZAGPPHC 52

COURT

North Gauteng High Court, Pretoria

BEFORE

C.P. Rabie, E. Jordaan

CASE / FILE NUMBER

A240/12

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG DIVISION: PRETORIA)

Case

No: A240/12

High

Court Ref no:988

Magistrate's

Serial No: special Review (Bloemhof)

Review

case no: A63/2011

DATE:03/04/2012

In

the matter between:

THE
STATE
and
DITHAHO
MOLEFE
REVIEW

JUDGEMENT

RABIE J :

1. The accused, an adult female, was convicted in the Magistrates' Court of Bloemhof on a charge of contravention of section 113
 - (1) read with section 113 (2) and (3) of the General Law Amendment Act 46 of 1935 in that she had unlawfully and with the intent to conceal the fact of the birth of a child, attempted to dispose of the body of the said child.
2. The accused pleaded guilty and in a statement in terms of section 112
 - (2) of the Criminal Procedure Act, the accused stated the following:
 1. I am voluntarily pleading guilty to the charge to me attempt to conceal birth, Act 46 of 1935.
 2. On or about 3-4 October 2009 at Bloemhof, district Bloemhof, I unlawfully with intent to attempt to conceal the fact of the birth of a child denied to a sister at the clinic that I had given birth to a dead child. I had not yet disposed of the dead child's body and when I was confronted by the police I went to show the police the body in a bucket at my house. The child was prematurely born and was dead at birth.
 3. I know my actions were wrong and unlawful. I have remorse for my actions."
3. Before convicting the accused the Magistrate enquired from the prosecutor whether the Director of Public Prosecutions had authorised

the prosecution in writing as required by section 113(3) of the General Law Amendment Act, Act 46 of 1935 ("the Act"). The matter stood down and was then postponed and on resumption the prosecutor informed the court that no written authorisation existed but that the Director of Public Prosecutions had given verbal permission for the prosecution to proceed. The prosecutor submitted that verbal permission constitute compliance with section 113 (3) of the Act. The Magistrate thereupon found the accused guilty but also referred the matter for special review regarding the issue as to whether the permission to prosecute can be verbal or whether it should be writing. The Magistrate was not convinced of the validity of the prosecution.

2. Senior State Advocate A.J. Fourie wrote an opinion with which Deputy Director of Public Prosecutions, Advocate M van Vuuren, concurred. I am indebted to these advocates for their assistance and since I agree with their opinion, I shall repeat much of what is contained in the opinion.
3. Section 113 of the Act provides as follows: "Concealment of birth of newly born child

- (1) Any person who, without a lawful burial order, disposes of the body of any newly born child with intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.
- (2) A person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of.
- (3) The institution of a prosecution under this section must be authorised in writing by the Director of Public Prosecutions having

jurisdiction. (my underlining)

4. The State Advocates were of the view that given the unequivocal requirement that the authorisation must be in writing, the mandatory

prerequisite for the prosecution was not adhered to in casu. It was submitted that although it might be argued that failure to obtain written authorisation prior to a prosecution can be (or was in this instance) ratified by the Director of Public Prosecutions, the conviction ought nevertheless to be set aside not only as a result of the procedural omission but also for other reasons.

5. Regarding the issue of written authorisation it does not appear, even if it were to be possible, that there had, in casu, been a written authorisation ratifying the institution of the prosecution prior to conviction. Consequently the accused could not have been prosecuted and the conviction should be set aside.
6. Regarding the aforesaid other reasons why the conviction should be set aside, the following may be referred to: Firstly, section 113 (1) of the Act makes it an offence to "... dispose of the body of a child..." with the intent to thereby conceal the birth of a child. According to the plea explanation quoted above, the accused, however, only admitted that she lied to a sister at the clinic about the fact that she gave birth. She specifically stated that "I had not yet disposed of the dead child's body and when I was confronted by the police, I went to show the police the body in a bucket at my house."
7. It was submitted that the essence of the offence is the "disposal" or "attempted disposal" of the body of a child. In casu there was no admission by the accused that she either disposed or attempted to dispose of the body. The Magistrate could therefore not have been satisfied that the accused admitted all the essential elements of the offence. In this regard it was submitted that the act of "disposing" calls for some act or measure of permanence and not just placement for all to see. In *R v Dema* 1947(1) SA 599 (E) Pittman JP found on the issue as follows:

"Now, the provision of the law, sec. 113 of the General Law Amendment Act 46 of 1935, which defines the crime with which accused stands charged, uses the word 'disposes' to describe the act constituting it. And when it speaks of 'disposing' of the body we think it means an act involving some measure of permanence. Merely to place a body on the floor or on a table or bed is not in

the requisite sense to 'dispose' of it. The body to be 'disposed of must be put or placed in some place where it is intended by the party placing or putting it there that it should remain. Here the evidence shows that accused put the child's dead body in the box; we are satisfied that she did, but it, the evidence, does not convince us that doing so she meant the body to remain there for any time. The box was fully exposed to view. Anyone entering the room would see it, as the witness Nokampi did, and seeing it would in the circumstances be led to open it. The act relied upon as a disposition of the body is not in our view a

disposition

in the sense intended by the legislature. In the case relied upon by the Crown of *Rex v Smith* {1918 CPD 260} the facts went far more strongly to establish a disposition of the body. Here we are not satisfied that there was a disposition on accused's part and we find her not guilty."

8. It was submitted by the State Advocates that the admission by the accused that she had lied to the sister at the clinic does not allow for the inference that she thereby attempted to dispose of the body. Reference was made to *S v D* 1967(2) SA 537 (W) wherein it was remarked that it is notorious that many mothers of newly born children are under considerable physical and mental stress and are unable to act with the calm and balanced judgement which the circumstances require.
9. I agree with all of the aforesaid but it goes further. The evidence before the court, which only consisted of the admissions by the accused, does not prove a disposal of the body nor of an attempt to do so. The accused may have formed an intention to dispose of the body of the child but her actions to that point do not constitute a disposal or an attempt to do so. The lie which she told to the sister at the clinic does not, by itself, constitute a disposal of the body or an attempt to do so.
10. The second reason why the State Advocates do not support the conviction is based on the fact that in order for a conviction to follow, there must be evidence, which includes admissions in terms of section 112 (2) of the Criminal Procedure Act, that the child (fetus) have the potential of being born alive, in other words, being a viable child. See *S v Jasi* 1994(1) SACR 568 (ZH). That matter related to an intra-uterine stillbirth fetus. In a well-researched judgement Adam J came to the conclusion that A 'child' for the purposes of section 2 of the Concealment of Birth Act [Chapter 57] which applied in that case, and which is similar to its South African counterpart, is one that has reached a stage of development, irrespective of the duration of the pregnancy, which makes the child capable of being born alive, i.e., after separation from its mother the child is able to breathe independently, either naturally or with the aid of a ventilator. As such the court could not find that a fetus younger than 28 weeks was a viable child for purposes of the section.
11. In *S v MANNGO* 1980 (3) SA 1041 (V) van Rhyn CJ was concerned with an offence of concealment of birth in contravention of s 113 of Act 46 of 1935. The accused testified that she had been three months pregnant when she "gave birth to the child". Van Rhyn CJ agreed

with the statement in Milton and Fuller South African Criminal Law and Procedure vol 111 at 271, and the authorities cited by the learned authors, that the offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been born a living child. He found that in that instance it was clear that the foetus could not have been considered a child in terms of the provisions of the Act and consequently set aside the conviction and sentence.

12. In *S v MADOMBWE* 1977 (3) SA 1008 (R) Whitaker J with whom Goldin J concurred, found that for the purpose of an offence under the Concealment of Birth Act, Chapter 57 (R), a child must be regarded as one whose birth is required to be registered in terms of the Births and Deaths Registration Act, Chapter 30 (R). It was further found that a foetus of less than 28 weeks should not be regarded as a child within the provisions of the Concealment of Birth Act.
13. It was submitted by the State Advocates that in casu there was no evidence, nor was it admitted, that the fetus found by the police was indeed older than 28 weeks and thus a viable child. Consequently, so it was submitted, the conviction can for this reason also not be sustained.
14. I agree with this submission. The Act refers to the disposal of the body of a newly born "child". Consequently, in order to sustain a conviction, there has to be evidence before the court that the fetus had arrived at that stage of maturity at the time of birth that it might have been born a living child. In casu there was no evidence regarding the duration of the pregnancy nor of the viability of the fetus/child. All that is known is that the "child" was in fact born prematurely and was dead at birth. For this reason alone it could not be found that the accused disposed of the body of a child and consequently the conviction and sentence should be set aside.
15. In the result the following order is made:
 1. The conviction of the accused is set aside.

C.P.RABIE

JUDGE OF THE HIGH COURT

I agree

E. JORDAAN

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