

SOUTH AFRICA / JUDGMENT

Vries v S (A15/2016) [2019]

ZAFSHC 171 (19 September 2019)

[2019] ZAFSHC 171

COURT

Free State High Court, Bloemfontein

BEFORE

Opperman, Moeng

CASE / FILE NUMBER

A15/2016

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IN THE HIGH COURT OF
SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN
Appeal
No: A15/2016
In

the matter between: EMILY
 VRIES Appellant
 And
 THE
 STATE Respondent

CORAM: OPPERMAN, J et MOENG, AJ

JUDGMENT

BY: MOENG, AJ

HEARD ON: 29 JULY 2019

DELIVERED ON: 19 SEPTEMBER 2019

- [1] The appellant was convicted in the Bloemfontein Regional Court on one count of assault with intent to do grievous bodily harm of a two year old child and she was sentenced to five years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977. This appeal is against conviction only and is with leave of the trial court.

- [2] The appellant relied on several grounds of appeal. Relevant to us, are the grounds that the inference that the appellant caused the injuries to the child was not the only reasonable inference to be drawn from the facts. The appellant further contends that in case the State proved that this was the only reasonable inference, it failed to show that the appellant had the intention to commit the offence.
- [3] The allegations in the charge sheet were that the accused ‘assaulted a two year old child by burning him with hot water, failing to change his nappy, which resulted in serious nappy rash and vigorously washing the affected areas which resulted in/caused wounds/injuries with the intention to cause him/her grievous bodily harm’.
- [4] The following emerged from the evidence: On 12 September 2013 the child’s mother, “MBS”, took him to a crèche which he attended. She testified that she bathed the child, “OS”, that morning and he had no injuries. It is common cause that OS was left in the appellant’s care for the day. The appellant had been a teacher at the said crèche for approximately 26 years and OS was in her class.
- [5] The appellant testified that upon the child’s arrival, he went to play, had breakfast and she later gathered all children for their activities. OS never went out of her sight. She discovered that OS had soiled himself. She took him into the class to clean him up on a table. She discovered that he had burn wounds as will be described later in this judgment. She requested an employee to call the principal. She disputed having caused the injuries.
- [6] The principal testified that she was alerted of the child’s injuries by one of the crèche’s employees. She went to the appellant’s class. The appellant was busy cleaning the burns. She ordered her to stop since she was hurting him. The appellant informed her that she noticed the burns when she was cleaning him. She (the principal) in turn called the child’s parents. She testified that she cannot tell whether OS was burnt at home or at school even though she told the child’s mother that he was burnt at home.
- [7] MBS testified that the principal told her that OS was brought to school already injured and she decided to lay a charge against the appellant. She laid a charge against her as the child was left in her care.
- [8] It is common cause that the class concerned was fitted with a hand basin that had hot and cold water taps. The hand basin is not spacious enough to fit the whole body of a child. The principal testified that she conducted an inspection on the taps after the incident. The water temperature from the hot water tap was extremely high and they had to get a plumber to turn it down. She further testified that the hot water tap was on the right hand side of the basin. The J88 in turn reflected that OS sustained some of the burn wounds under the arm on the right lateral side of his back and on his chest.
- [9] Dr. Brits, who was called by the appellant after the state elected not to call her, examined OS on the same day at around 14h00. She observed the following injuries: superficial burn wounds below the right arm, burn wounds on the genitals, on the right side of the buttocks

and two burn spots on the chest. The burns on the buttocks, according to the J88, are close to the anus and the testicles. These burns were in the skin folds. This, Dr Brits testified, excluded the possibility of nappy rash. She testified that the burns were probably caused by hot water that was spilt on the child. She also believes that it could not have been accidental burns as the injuries on the genitals and the buttocks should have been caused when the child's nappy was off.

- [10] Dr. Brits indicated during cross examination that it is possible that the burns on the genitals and the buttocks could have been caused by the child having been placed in a hand basin and exposed to hot water. She testified that it was unlikely that these burns were the result of a short exposure to hot water since they were in the skin folds. She further testified that the burns underneath the right arm were probably caused when the child's arm was in an elevated position. The burns were fresh in the sense that they were inflicted within 24 hours of the examination. She testified that these burns would not have been visible when the child was dressed.
- [11] The regional magistrate acknowledged that there was no direct evidence linking the appellant to the commission of the offence and that inferential reasoning had to be applied. The only issue that the regional magistrate regarded as having been in dispute was whether the appellant caused the injuries that were sustained by OS.
- [12] The presence or lack of intention was admittedly not raised during the trial and was only raised by the appellant in her notice of appeal and in the heads of argument. It appears to have been a foregone conclusion in the mind of the regional magistrate that once he was satisfied that the appellant was responsible for the injuries the intention to assault and to do grievous bodily harm could be accepted.
- [13] The regional magistrate concluded that OS was handed to the appellant without injuries and that he was in her care from that stage until she discovered the injuries. He further concluded that the appellant's version that OS was brought to the crèche

injured was improbable. The fact that OS could play and have breakfast having such severe injuries was in the regional magistrate's view highly improbable. He concluded that the positioning of the hot water tap and the location of the injuries was consistent with the inference that the appellant caused the injuries. He was therefore convinced that this was the only reasonable inference to be drawn under the circumstances and convicted the appellant of having assaulted the complainant with the intention of causing him grievous bodily harm.

- [14] Advocate Strauss, counsel for the respondent, did not support the conviction. He supported the finding that the appellant caused the injuries that OS sustained in his heads of argument but sought to distance himself from this during the appeal deliberations. He conceded that the state failed to prove that the appellant intentionally caused the injuries and at most, so the argument went,

the appellant was negligent.

- [15] Mr. Reynecke for the appellant in turn contended that the appellant did not have a fair trial since the magistrate descended into the arena. This aspect was admittedly not raised in the notice of appeal and only came to light in his heads of argument and during the appeal deliberations. We do not believe that the magistrate's questions were such that it may be concluded that he descended into the arena. Mr. Reynecke further argued that the child should have been injured before he was brought to school.
- [16] This Court's powers to interfere on appeal with the findings of fact of a trial court are limited. See *R v Dhlumayo* 1948 (2) SA 677 (A). The trial court's findings are presumed to be correct in the absence of any misdirection in its conclusion, including its acceptance of the evidence presented by the State witnesses.
- [17] In order to succeed on appeal, the appellant must convince us on adequate grounds, that the trial court was wrong in accepting the State's evidence. It is only in exceptional cases that this Court will be entitled to interfere with a trial court's evaluation of oral testimony bearing in mind the advantage which it had of seeing, hearing and assessing the witnesses. See *S v Francis* 1991 (1) SACR 198 (A) at 204 D – E.
- [18] It was not in dispute that OS was burnt as aforementioned. The question was whether he was injured before or after he was brought to the crèche. The subsequent question was, if injured at the crèche, whether it was the appellant who caused the injuries. No one observed the appellant inflict the injuries that OS sustained. The prosecutor in the trial court elected not to call the witness that called the principal and indicated that she will not advance the case any further.
- [19] The question that the trial court sought to answer was whether, based on the totality of the evidence, the inference that the appellant caused the injuries was consistent with all the proven facts and that no other reasonable inference could be drawn from the evidence. (See *R v Blom* 1939 AD 188).
- [20] It is trite that the court, in applying inferential reasoning, must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of the facts together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have. (See *R v De Villiers* 1944 AD 493 508). Courts should likewise carefully distinguish facts from speculation or assumptions. One can only draw inferences if there are objective facts from which to infer such facts which are sought to be established.

- [21] It was put to the principal during cross examination and subsequently during the deliberations before judgment that OS could have been injured by any one of the staff members at the school or he could have been brought to the crèche in that condition. These were therefore the inferences which the appellant sought the court to draw from the evidence. The State in turn argued that the only inference to be drawn from the evidence was that the injuries were caused at the crèche by the appellant.
- [22] As indicated earlier, inferences are to be drawn from facts and not speculation. The question was therefore whether the inference that any staff member could have caused the injuries or that OS was already injured when he was brought to the crèche was reasonable inferences based on the evidence. I do not think so.
- [23] MBS testified that OS was handed to the appellant without any injuries. The appellant in turn testified in no uncertain terms that the injuries were not caused at the school. This she said was as a result of the fact that OS was at all times in her care as she never lost sight of him. She therefore excluded the inference that the child may have been injured at the school. The inference that the child was injured at school could justifiably therefore not be drawn as it was excluded by the direct evidence of the appellant.
- [24] The other inference which the appellant sought the trial court to draw was that OS was brought to the crèche injured. It is of importance to note that the evidence presented by MBS was that she bathed OS that morning and he did not have any injuries when he took him to the crèche.
- [25] The evidence of Dr Brits was in turn that the injuries were fresh and they were probably caused within 24 hours of the examination. Dr Brits could not exclude the possibility that the burns were caused before the child was brought to the crèche. Logic dictates that the possibility that the injuries were caused at the crèche could likewise not be excluded as OS had been there within the 24 hour period that the injuries were inflicted.
- [26] The testimony by MBS that OS had no injuries when he left home was not disputed during cross examination. She was not confronted about the inference that the appellant sought the court to draw that OS was brought to the crèche injured. The only question that was posed to her was that 'she was not at the crèche when the child was burned'. This question intimated that OS was injured at the crèche and not at home. It is therefore mind boggling that the appellant sought this inference to be drawn, if on her own version, the child was injured at the crèche.
- [27] It is trite that the failure to cross-examine a witness about an aspect of his evidence may have the result that the evidence not disputed may not be called into question later. It is likewise trite that a cross-examiner who intends to dispute what the witness says has a duty to give such a witness an opportunity to explain his evidence or to qualify it, or to properly reveal its basis to the court. MBS should logically have been confronted with the appellant's version that OS was burnt before he was brought to the crèche.

- [28] It would have been illogical to infer that OS was injured before he was brought to the crèche without the mother, who testified that OS was not injured when she brought him to the crèche, having been confronted about the issue. The regional magistrate could therefore not regard such inference as reasonable. This inference could justifiably also not be drawn.
- [29] The undisputed facts that emerged during the trial were that OS was handed to the appellant on the day of the alleged incident. As indicated above, the fact that OS was not injured when he was left with the appellant was not disputed. It can therefore be accepted that he was not injured when he was left with the appellant.
- [30] The appellant's evidence was that OS was under her care from the time that MBS handed him over to her until she discovered the injuries. She in turn confirmed that OS was never out of her sight during this period.
- [31] OS sustained burn wounds which Dr Brits described as superficial and probably caused by hot water which was spilled on him. When this statement is viewed in the context of her entire evidence, the spillage should have been under the arm as the doctor later testified under cross examination that the burns on the buttocks could not have been caused by a brief exposure to hot water. This was because the burns penetrated the skin folds. Dr Brits further testified, under cross examination, that the burns on the buttocks could have been as a result of the child having been placed in a hand basin containing hot water.
- [32] It was the appellant's undisputed evidence that OS soiled himself. His clothes were soiled and so was his body. This prompted her to clean him. It is common cause that the class room in which OS was cleaned had a hand basin with a hot and cold water tap. The undisputed evidence of the principal was that the water temperature from the hot water tap was excessively high.
- [33] The appellant, initially during her evidence in chief, testified that she took OS to the hand basin to wash him. She however later changed track and indicated that she cleaned him on the table, which was approximately three to four meters from the hand basin. She testified that she soaked the face cloth in the water and cleaned OS with it.
- [34] The regional magistrate inferred from these facts that the injuries that OS sustained were caused by the accused when she washed OS in the basin. He concluded that the injuries were consistent with the fact that OS was placed in the hand basin with his exposed buttocks while the water temperature was too high. He further concluded that based on the medical evidence, the burn under the arm should have been caused when the child's arm was lifted.
- [35] This conclusion cannot be faulted. Logic dictates that having soiled himself, the appellant wanted to wash the dirt from OS and used hot water that injured the child. The appellant's evidence that she soaked the face cloth in the basin and thereafter wiped OS with it is in my view simply untenable. Her testimony that she regulated the temperature of the water in the hand basin is likewise unsound since OS would not have sustained the burns if the water was lukewarm. OS would likewise not have sustained burns that the doctor described as

burns that were caused by a spillage of hot water and burns that penetrated into the skin folds if she only used a face cloth to wipe him.

- [36] The argument that the medical evidence is inconsistent with the inference that the regional magistrate sought to draw is in my view misplaced. The hot water tap was situated on the right hand side and the burns caused by the water spillage were located on the right chest and under the right arm, towards the side of the back. OS was only two years old and he could fit partially into the hand basin. Probabilities are, in my view, that the burns were caused when OS was placed in the hand basin and hot water spilled on his body to remove the dirt.
- [37] Dr Brits indicated under cross examination that it is possible that the burns on the genitals and the buttocks could have been caused when OS was placed in the hand basin and exposed to hot water. She testified that it was unlikely that these burns were the result of a short exposure to hot water since they were in the skin folds.
- [38] I am satisfied that the regional magistrate's reasoning cannot be faulted. The inference that was drawn was in my view not based on speculation but was supported by facts. His reasoning was in my view in line with the cardinal rules of logic as stated in *S v Blom*.
- [39] One can therefore accept that the water that the appellant spilled and dipped the child's buttocks and genitals into was hot and caused the superficial burn wounds. The allegation in the charge sheet that the appellant failed to change the child's nappy which resulted in serious nappy rash was rejected by the medical evidence. It is further not in dispute that the appellant wiped the burnt wounds on the buttocks and the principal had to stop her. The element of the impairment of the child's bodily integrity was therefore satisfied.
- [40] Having so concluded, the next question is whether the appellant had the requisite intention to assault OS and in addition whether she had the intention to cause him grievous bodily harm. The trial court did not consider this issue. As indicated earlier, the presence or lack of intention was not raised during the trial and was only raised by the appellant in her notice of appeal and in the heads of argument. It was therefore a foregone conclusion in the mind of the regional magistrate that once he was satisfied that the appellant was responsible for the injuries, the intention to assault and to do grievous bodily harm could be accepted. Nothing precludes us to consider this aspect on appeal.
- [41] According to CR Snyman Criminal Law 6th Edition at page 177, 'intention in the technical sense of the term can be defined as the will to commit the act or cause the result set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act or result unlawful'.
- [42] Without fear of stating the obvious, there are three forms of intention. These are, direct and indirect intention, as well as the

‘problematic’ *dolus eventualis*. It goes without saying that there is no evidence suggesting that the appellant had the direct or the indirect intention to injure the child. The question is whether she had the requisite intention in the form of *dolus eventualis*.

[43] The learned author, Snyman, aptly describes this form of intention as follows:

‘A person acts with intention in the form of *dolus eventualis* if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but he subjectively foresees the possibility of the result, and reconciles himself to this possibility’.

[44] The author states that a perpetrator acts with this form of intention if he directs his will towards a certain event, but foresees that if he achieves this event there is a possibility that another result, might ensue. However, he does not allow himself to be deterred by the foreseen possibility, and proceeds with his original plan, indifferent as to whether the result may ensue. In the course of committing the act, the result which he foresaw does in fact ensue. In the eyes of the law he then has intention in respect of the result which ensued.

[45] It is trite that intention in the form of *dolus eventualis* relates to circumstances or consequences which the actor does not plan or desire but which, in the light of human experience, can be expected to follow if the actor proceeds with a planned course of action. See CR Snyman *supra*.

[46] The test to determine intention is admittedly a subjective one. The question is whether the appellant, did, subjectively foresee the possibility that OS will sustain burn wounds and whether she reconciled herself to such possibility. The appellant maintained

throughout the trial that she did not cause the injuries. Her subjective state of mind was therefore never an issue. Experience has taught that accused persons will not readily admit having acted intentionally. It also becomes an insurmountable task for the

prosecution to prove the frame of mind of such an accused without the assistance of inferential reasoning.

[47] In *S v Sigwahla* 1967 (4) SA 566 (A) at 570D Holmes JA held as follows:

‘Subjective foresight, like any other factual issue, may be proved by inference. To constitute proof beyond reasonable doubt the inference must be the only one which can reasonably be drawn. It cannot be so drawn if there is a reasonable possibility that subjectively the accused did not foresee, even if he ought reasonably to have done so, and even if he probably did do so.’

[48] In deciding by way of inference what an accused thought or foresaw to infer intention, a court considers objective factors to come to a conclusion whether the accused subjectively foresaw the prohibited result. These factors are however merely aids employed in answering the ultimate question, namely whether the accused subjectively foresaw the possibility of the prohibited consequence and whether he reconciled himself to that possibility. They are not aimed at replacing the subjective test with an objective one. (See CR Snyman at page 186 and *S v Humphreys* 2013 (2) SACR 1 at para 13).

[49] In applying inferential reasoning, it can be reasoned that in particular circumstances the accused 'ought to have foreseen' the consequences and thus 'must have foreseen' and therefore, by inference, 'did foresee' them. As was stated in *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SA 317 (SCA) at paragraph 40:

'All of this was circumstantial evidence crucial to a decision on whether the accused, at the time he fired the fatal four shots, must have foreseen, and therefore did foresee, the potentially fatal consequences of his action'.

[50] What was said in *Humphreys* sums up the approach a court should follow:

'On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population'.

[51] I am alive to the fact that for the first component of *dolus eventualis*, it is not enough that the appellant should (objectively) have foreseen the possibility of injury to the child because the fictitious reasonable person in her position would have foreseen that consequence. That would constitute negligence and not *dolus* in any form. I am likewise alive to the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for *dolus* and negligence. See *Humphreys* *supra* at para 13.

[52] I also find what was said in *S v Beukes en 'n Ander* 1988

(1) SA 511 (A) at 522C as instructive:

'Daar is, sover ek kon nagaan, geen gewysde waarin pertinent beslis is dat 'n dader 'n gevolg voorsien het maar nie onverskillig teenoor die intrede daarvan gestaan het nie. Die rede is voor die hand liggend. Die kanse dat 'n beskuldigde sal erken, of dit uit ander direkte getuienis sal blyk, dat hy inderdaad 'n verwyderde gevolg voorsien het, is bitter skraal. 'n Hof maak dus 'n afleiding aangaande 'n beskuldigde se gemoed uit die feite wat daarop dui dat dit, objektief gesien, redelik moontlik was dat die gevolg sou intree. Indien so 'n moontlikheid nie bestaan nie, word eenvoudig aanvaar dat die dader nie die gevolg in sy bewussyn opgeneem het nie. Indien wel, word in die reël uit die blote feit dat hy handelend opgetree het, afgelei dat hy die gevolg op die koop toe geneem het'.

- [53] The above principles should be applied to the facts I found to have been proven. The question is whether the appellant, having directed her will towards cleaning the child, did foresee that if she cleans the child, there is a possibility that the child might be burned by the water. In addition, if she did foresee the possibility, whether she did not allow herself to be deterred by such foreseen possibility, and proceeded with her original plan to wash the child, indifferent as to whether the child may be burnt.
- [54] It has been established earlier in this judgment that the water temperature from the hot water tap was extremely high. The appellant did not dispute the principal's evidence in this regard. This tap was situated in the appellant's class. Had she not been aware of the hot water temperature in her class, she would have indicated likewise in cross examination. She failed to dispute this under cross examination. She ought to have been aware and was thus aware of the extreme high water temperature.
- [55] She however testified that the water was not too hot for the child to wash in and with her experience as a mother and grandmother, she would never use hot water to wash a child. The fact however remains, based on the evidence of the doctor, hot water caused the injuries to the child.
- [56] It boggles the mind how she could have spilled water on the child and dipped his buttocks into the basin containing hot water and yet not have realised that the water temperature was too high. Her version that the water was lukewarm can therefore be safely rejected. I am satisfied that the only reasonable inference to be drawn is that she was aware of the high water temperature.
- [57] As indicated earlier, OS had soiled himself. His body and clothes were soiled such that he had to be undressed and his clothes washed. Logic dictates that the dirt from his body was removed with the hot water which ultimately caused the wounds.
- [58] As was indicated in *Humpreys*, in accordance with common human experience, the possibility of OS sustaining burn wounds would have been obvious to any person of normal intelligence. In light of all the facts and circumstances of this case, there is no reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.
- [59] The burns on the genitals and the buttocks were caused when OS was placed in the hand basin and exposed to hot water. These burns were the result of a reasonable long exposure to hot water since they were in the skin folds. The appellant was clearly indifferent to the possibility that the hot water will injure OS. The appellant's indifference is further portrayed by the fact that she had to be ordered to stop by the principal from wiping the burnt areas on OS as she was hurting him. This, on itself was indicative of her intention. She was aware of the burns but proceeded to apply pressure on them.

- [60] As was stated in *Beukes* at 522C, ‘a court draws an inference concerning an accused's state of mind from the facts which point to it being reasonably possible, objectively seen, that the consequence would eventuate. If such a possibility exists, it is simply accepted that the actor did become conscious of the consequence and it is usually inferred from the mere fact of his taking action that he took the consequence into account. It therefore appears that the second element is normally satisfied if the actor foresaw, as a reasonable possibility, the consequence eventuating’.
- [61] Counsel for the State and the legal representative for the appellant, in my view, conflated the test of what is required to establish *dolus directus* with the assessment of *dolus eventualis*. The issue was not whether the appellant had as her direct objective to cause the injuries that OS sustained. What was required in considering the presence or absence of *dolus eventualis* was whether he had foreseen the possible injuries ensuing and reconciled herself with that event.
- [62] I am satisfied that the commission of the unlawful act or the causing of the unlawful result, which was in this case the injuries to OS, was not the appellant’s main aim, but she subjectively foresaw the possibility of such result. She, in my view, reconciled herself to this possibility by washing OS with hot water. I am satisfied that she had the requisite intention in the form of *dolus eventualis* to impair the bodily integrity of OS.
- [63] The next question is whether she had the requisite intention to cause OS grievous bodily harm. Whether she in fact had the intent to do grievous bodily harm is a factual question. There are in my view no facts to indicate an intention to do grievous bodily harm. The degree of violence and the nature of the injuries inflicted, in my view, do not warrant an inference that she had the requisite intention to do grievous bodily harm. The medical evidence suggested that the burns were superficial. These are therefore the least serious type of burn wounds. Dr Brits further indicated that OS would have sustained blisters had the water reached boiling point. This was admittedly not the case.
- [64] I am of the view that a conviction on assault with intent to grievous bodily harm cannot be sustained and that a verdict of common assault should have been pronounced by the regional magistrate. In the result the appeal succeeds to the extent that the conviction of assault with intent to grievous bodily harm is set aside and replaced with a conviction of common assault. The sentence that was imposed by the regional magistrate will as a result also have to be set aside.
- [65] I will in the result make the following order:
1. The conviction of assault with intent to grievous bodily harm is set aside and replaced with a conviction of common assault;

2. The sentence of five years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 is set aside and is replaced with a sentence of 12 months imprisonment, wholly suspended for a period of three years on condition that the accused is not convicted of assault, for which a term of imprisonment without the option of a fine is imposed, committed during the period of suspension.

L.B.J. MOENG, AJ

I concur.

M. OPPERMAN, J

On behalf of the appellant: JD Reinecke

Bloemfontein Justice Centre BLOEMFONTEIN

On behalf of the respondent: M Strauss

Director of Public Prosecutions: Free State BLOEMFONTEIN.

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