ASSESSING THE INTERPRETATION OF THE ELEMENTS OF "DISPOSE" AND "CHILD" FOR PURPOSES OF ESTABLISHING THE OFFENCE OF CONCEALMENT OF BIRTH – *S v Molefe* 2012 (2) SACR 574 (GNP)

1 Introduction

> "The woman went to Tembisa Hospital on Tuesday as she was bleeding … a nurse questioned her about whether she had an illegal abortion, but she claimed that she did not … police searched her house and found the foetus wrapped up in a jersey in the bath … the woman was arrested and detained in Tembisa cells" (News24 of 2008-09-03 http://www.news24.com (accessed 2012-02-14).

The abovementioned passage sets the stage for the decision under discussion dealing with the crime of concealment of birth. The crime of concealment of birth was unknown in our common law but has, however, been an offence since 1845 when it was criminalized in terms of section 1 of Ordinance 10 of 1845 (Snyman *Strafreg* (2012) 458; Snyman *Criminal Law* (2008) 439; and see also Hoctor and Carnelley "The Purpose and Ambit of the Offence of Concealment of Birth – *S v Molefe* 2012 (2) SACR 574 (GNP)" 2012 33(3) *Obiter* 732–744). Currently the offence of concealment of births is regulated in terms of section 113 of the General Law Amendment Act 46 of 1935 (the "Act") which provides that "(1) Any person who, without a lawful burial order, disposes of the body of any newly born child with the 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" (see also s 1 of the Judicial Matters Amendment Act 66 of 2008 that amended s 113 to the extent of removing the onus placed on an accused to prove lack of intention to conceal the child's birth; and Hoctor and Carnelley 2012 33(3) *Obiter* 734). In order to incur criminal liability in terms of this offence, it is essential for the prosecution to prove all the elements of the offence which are that the accused had the intention to "dispose" of the dead body of the newly born "child" with the intention of concealing the fact of its birth. The problematic aspect in terms of the essential elements of the offence, relates to the fact that "dispose" and "body of a child", are not defined in the Act. The case under discussion elucidates the meaning of these concepts and provides guidance as to the interpretation of these two elements.

2 Facts

The salient facts of the decision appear from the judgment delivered by Rabie J: "The accused, an adult female, was convicted in the Magistrate's Court of Bloemhof on a charge of contravention of section 113(1), read with section 113(2) and (3) of the Act 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 "(par 1). The accused pleaded guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 and in her plea she stated that on or about 3 or 4 October 2009 she had denied to a sister at a clinic that she had given birth to a stillborn child.

She stated in her plea that at that stage she had not yet disposed of the dead child's body and when she had been confronted by the police, she showed them the body of the child in a bucket at her house. It transpired that the child had been prematurely born and was dead at the time of its birth (see par 2 of the judgment). It further transpired that the written authorization from the Director of Public Prosecutions had also not been obtained prior to prosecuting the accused for the crime. Only verbal permission was obtained. The Magistrate convicted the accused, but nevertheless referred the matter for special review regarding the issue whether verbal permission to prosecute was sufficient for purposes of section 113(3) of the Act. On review it was argued by the state advocates that the conviction should be set aside as the mandatory prerequisite for prosecution in terms of section 113(2), namely that the authorization should be in writing, was not adhered to.

3 Judgment

In delivering judgment, Rabie J held that the required written authorization as required in terms of the Act was not granted and that the conviction had to be set aside. It was, however, held that the conviction could also not be sustained for various other reasons specifically with reference to the essential elements of the offence of concealment of birth.

In respect of the element of "dispose of …", it was held that the accused had only admitted in her plea explanation that she had lied to a sister at a clinic about the fact that she had given birth (par 8). It was held that the essence of the offence of concealment of birth, is the "disposal" or "attempted disposal" of the body of a child and accordingly that there had not been compliance with this element of the offence (par 9). As such the accused had not admitted to an essential element of the offence. It was held, in addition, that "disposing" required some act or measure of *permanence*, and not merely the placement of the body of the child for all to view (par 9).

Rabie J elucidated the latter by referring to the judgment by Pittman JP in *R v Dema* (1947 (1) SA 599 (E) 600) where it was held:

> "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" must be put or placed in some place where it is intended by the party placing or putting it there that it should remain."

It was held that the evidence did not disclose a disposal or attempted disposal of the body of the child (par 11).

Rabie J, in addition, reflected on another reason as to why the conviction had to be set aside. This related to the question of when a foetus will be regarded as a "child" for purposes of section 113 of the Act. It was held that in order to be convicted in terms of section 113, there must be evidence indicating that the foetus had the potential of being born alive and as such being a viable child (par 12). It was held with reference to the judgment in *S v Jasi* (1994 (1) SACR 568 (Z)), that a "child" is one who has reached a stage of development, irrespective of the duration of pregnancy, which renders the child capable of being born alive and that after separation from its mother the child is able to breathe independently whether naturally or by means of a ventilator (par 12). Rabie J accordingly held (par 16):

> *"*The Act refers to the disposal of the body of a newborn "child". Consequently, in order to sustain a conviction, there has to be evidence before the court that the foetus 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 the viability of the foetus/child. All that is known is that a "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.*"*

4 Assessment

From a substantive criminal law perspective, the judgment by Rabie J is to be welcomed as it provides elucidation on the essential elements of "dispose" and to large extent "child" for purposes of establishing the offence of concealment of birth. It is notable that this decision is the first reported judgment on this offence since 1980 which renders the judgment topical and relevant both within the academic arena as well as for practitioners. In terms of the element of "dispose of …", the judgment affirms that in order to comply with this element of the offence, there has to be a degree of "permanence". Placing the body of a child, for example, in a bag next to a rubbish bin in a public street will thus not amount to "dispose" for purposes of section 113 of the Act, as it could be argued there would not be a measure of permanence involved. Other examples where the required permanence will be lacking will for example be where the mother of the child leaves the body of the child next to the road or at the entrance of a hospital or in a public toilet where the public has easy access to and the body can be found easily. In *S v Jasi* (*supra*), for example, the accused used unknown herbal medicine in order to procure an abortion. She eventually gave birth and it was unknown whether the child was dead or not during delivery. She consequently placed the dead body in a pink plastic bag and threw it in a toilet pit. There was thus clearly a measure of *permanence* involved during disposal from which an intent to conceal the fact of the birth could be inferred. The facts of the decision under discussion could also be

distinguished from the decision in *S v Smith* (1918 CPD 260), which was decided in terms of the forerunner to the Act, where the accused, a domestic servant, after giving birth to a child in her mistress's home, concealed the dead body of the child in a suitcase which she removed to a wood-house in the yard and thereafter on the same day removed it to her home and informed her mother of the birth of the child. As such it was held that the transportation of the body in the suitcase from the one location to another amounted to "disposal" of the body. The evidence in *Smith* also revealed that the accused cleaned the floor of her room and also hid the body of the child when her mistress enquired as to why she failed to attend to her work. The decision under discussion accordingly sheds light on the concept of "dispose" as such requiring an intention to conceal the fact of the child's birth permanently. It remains an undeniable reality that proving the latter intention could become difficult and will often have to be inferred from the accused's actions and circumstances of the case, yet the mere placement of the body of a child where it can be found easily or viewed by others, will not suffice for purposes of establishing "disposed of" and thus not satisfy this element of section 113.

Insofar as the element of "child" is concerned, it was held by Rabie J that the foetus or child had to have reached a stage of development rendering its existence separate from its mother a reasonable possibility. The latter affirms the *dictum* in *S v Manngo* (1980 (3) SA 1041 (V) 1041), where Van Rhyn CJ held that the offence of concealment of births 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". Similarly Davis J held in the decision of *R v Matthews* (1943 CPD 8 9) that a foetus is not a child for the purpose of the statute unless "it has reached a stage of development sufficient to have rendered its separate existence apart from its mother a reasonable probability" (see also *S v Madombwe* 1977 (3) SA 1008 (R)). It is of interest to note that in *R v Berriman* ((1854) 6 Cox CC 388), Erle J held as follows in respect of the crime of concealment of births:

> "this offence cannot be committed unless the child has arrived at that stage of maturity at the time of birth that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself, or of its mother, it would have been born alive. If she had miscarried at a time when the foetus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may perhaps, be safely assumed that, under seven months, the great probability is that the child would not be born alive".

Hoctor and Carnelley note that the judgment in the decision under discussion to an extent added to the confusion in respect of the approach to be followed with reference to the element of "child" (Hoctor and Carnelley 2012 33(3) *Obiter* 738). In delivering judgment, Rabie J refers to the Zimbabwean authority on the point with specific reference to the *Jasi* and *Madombwe* decisions, where contradicting views were followed in respect of the element of a "child". In *Jasi* as stated, reliance was placed heavily on the viability of the foetus, whereas in *Madombwe* a "child" for purposes of this offence was a foetus of not fewer than 28 weeks do. Hoctor and Carnelley,

in addition, points out the current anomaly which exists as to whether a "child" for purposes of this offence should be assessed according to the duration of pregnancy, or in terms of its viability. It is notable that the Births and Deaths Registration Act 51 of 1992 defines a stillborn child as one who existed for at least 26 weeks *intra uterine* (s 1; and see also Hoctor and Carnelley 2012 33(3) *Obiter* 737). Hoctor and Carnelley submit that due to the close proximity between registration of births and the offence under discussion, the most practical solution would be to regard as a child for purposes the offence under discussion, any being whose birth required registration in terms of legislation governing the registration of births (Hoctor and Carnelley 2012 33(3) *Obiter* 737). It is submitted that the latter could very well provide a practical solution to the debate as to element of "child" for purposes of this offence bringing it in line with the legislation governing registration of births. It should, however, also be borne in mind that the authorities referred to in the judgment under discussion are all old authorities. With the advancements in medical sciences, foetuses of a shorter duration could very well still prove to be viable, should the viability approach be favoured. As the learned judge correctly points out, there are no specific guidelines as to the precise period of pregnancy after which a foetus will be regarded as a "child" for purposes of the offence of concealment of births. The general trend, however, indicates that a foetus below 28 weeks will not qualify as a "child" for purposes of this section (see also, eg, *Rance v Mid-Downs Health Authority* (1991) 1 All ER 801 (QBD) 817–819, where Brooke J observed that "Parliament created the rebuttable presumption that a child of over 28 weeks gestation was capable of being born alive …"; see also *C v S* (1987) 1 All ER 1230 1242; and *S v Jasi supra* 574a–b). With the ever-evolving medical sciences, the period of pregnancy could very well differ in future in terms of proving that a foetus below 28 weeks could have been born alive. At this stage it seems trite that the foetus must at least have reached a stage of development which would have rendered its existence separate from its mother, capable of breathing independently or with the use of a ventilator, a reasonable possibility (see also *S v Madombwe supra*). The decision under discussion accordingly provides guidelines in terms of assessing the essential elements for purposes of establishing the offence of concealment of births which could be valuable in practice whenever the offence of concealment of birth falls to be assessed. It also opened the door for further debate pertaining to specifically the element of "child" for purposes of establishing the offence. From a procedural perspective it is also evident that the written authorization of the Director of Public Prosecutions remains a prerequisite before any prosecution in terms of section 113 can be effected.

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