

THE PURPOSE AND AMBIT OF THE OFFENCE OF CONCEALMENT OF BIRTH

S v Molefe 2012 (2) SACR 574 (GNP)

1 Introduction

The statutory offence of concealment of birth inevitably attracts controversy. It has been argued in the 2008 Canadian case of *R v Levkovic* (2008 CarswellOnt 5744, 235 CCC (3d) 417, 178 CRR (2d) 285, 79 WCD (2d) 493, heard in the Ontario Superior Court of Justice) that it is clear from the history of this offence that its purpose was to stigmatize socially and punish criminally women who bore illegitimate or “bastard” children – “an objective entirely offensive in modern society to liberty and security of the person” (par 2). Moreover, in the *Memorandum on the Objects of the Judicial Matters Amendment Bill* 2008 (B48-2008) (hereinafter “*Memorandum*”), the precursor of the South African statute which amended this offence, the criticism of the Women’s Legal Centre recorded that the provisions of section 113 of the General Law Amendment Act 46 of 1935 (which sets out the offence) are “overly broad, lacking in definition, archaic and their constitutional validity is questionable, often impinging on the right to dignity of women charged under it”.

The purpose of this note is to examine these criticisms, assessing both the substantive aspects and constitutional aspects of the offence, in the course of an appraisal of the recent case of *S v Molefe* (2012 (2) SACR 574 (GNP)). The case of *Levkovic* will provide a useful comparative reference point for the inquiry into the constitutionality of the offence. First, however, it is necessary to place the offence in its historical context.

2 Historical development of the offence

Although it appears that the Roman-Dutch common law recognized the exposure and abandonment of children as criminal offences, it seems that it did not recognize the disposal of a child’s body to conceal its birth as an offence (*R v Oliphant* 1950 1 SA 48 (O) 50; Hoctor (ed) *SA Criminal Law and Procedure Vol III: Specific Offences* 2ed (loose-leaf; 1988– revision service 16 (2006)) D2-5 fn 1 referring to Huber’s lamentation about the absence of such a crime (*Heedendaegse Rechtsgeleertheyt* 5ed (1768) 6.13.33)). The crime of disposing of a child’s body to conceal its birth was introduced into South African law by various statutes from 1845 onwards. All these statutes were based on the corresponding English legislation.

The first English statute dealing directly with the concealment of birth was 21 Jac I c 27 (1623):

“WHEREAS many lewd Women that have been delivered of Bastard Children, to avoid their Shame, and to escape Punishment, do secretly bury or conceal the Death of their Children, and after, if the Child be found dead, the said Women do alledge, that the said Child was born dead; whereas it falleth out sometimes (although hardly it is to be proved) that the said Child or Children were murdered by the said Women, their lewd Mothers, or by their Assent or Procurement: II. For the Preventing therefore of this great Mischief ... That if any Woman be delivered of any Issue of her Body, Male or Female, which being born alive, should by the Laws of this Realm be a Bastard, and that the endeavour privately, either by drowning or secret burying thereof, or any other Way, either by herself or the procuring of others, so to conceal the Death thereof, as that it may not come to Light, whether it were born alive or not, but be concealed: In every such case the said Mother so offending shall suffer Death as in case of Murder, except such Mother can make Proof by One Witness at the least, that the Child (whose Death was by her so intended to be concealed) was born dead.”

The Act was “framed contrary to the principle of innocence” as the *onus* for an acquittal was on the mother to prove that the child was born dead (Radzinowicz *A History of English Criminal Law* Vol I (1948) 431; and Davies “Child-killing in English Law” 1937 1(3) *Modern LR* 203 213). Although the offence was punishable by death, the courts construed the statute in favour of the accused birth mother and took great precautions before convicting the accused, using numerous loopholes to acquit her (Radzinowicz *A History of English Criminal Law* 434; Jackson “The trial of Harriet Vooght: Continuity and Change in the History of Infanticide” in Jackson (ed) *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000* (2002) 4; and Rabin “Bodies of Evidence, States of Mind: Infanticide, Emotion and Sensibility in Eighteenth-century England” in Jackson (ed) *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000* (2002) 77). Radzinowicz notes that the courts acquitted the mother if there was evidence that she called for help, confessed or was found in possession of any child bed linen or similar articles. In addition, she was acquitted if the child was born prematurely. Moreover, in many cases, the court required some evidence that the child was born alive, making a conviction difficult (Radzinowicz *A History of English Criminal Law* 434).

Notwithstanding these practical anomalies, the House of Commons rejected the repeal of this statute in 1770 (Radzinowicz *A History of English Criminal Law* 430; and Davies 1937 1(3) *Modern LR* 214). The statute was amended in 1803 by the Malicious Shooting or Stabbing Act 1803 (43 Geo III c 58) to bring it into line with the general principles of English criminal jurisprudence: the *onus* rested on the prosecution to prove a live birth (Radzinowicz *A History of English Criminal Law* 436). The crime was, however, made a competent verdict on a murder/infanticide charge.

The 1803 version was in turn replaced by the Offences against the Person Act 1828 (9 Geo IV c 31 s 14). This Act extended the offence to all mothers, married or unmarried (Davies 1937 1(3) *Modern LR* 214). Because of the difficulty at the time of obtaining evidence whether the child was born alive or not, the Act provided that it was not necessary to prove whether the child died “before, at or after birth” (Davies 1937 1(3) *Modern LR* 215).

The 1828 statute was repealed by the Offences against the Person Act 1861 (24 & 25 Vic c 100 s 60) which extended the offence to include male as

well as female offenders (Jackson in Jackson (ed) *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000* 7-8).

In South Africa, the offence was introduced in stages through Ordinance 10 of 1845 (Cape); Ordinance 22 of 1846 (Natal) which adopted the Cape Ordinance; Ordinance 1 of 1868 (Orange Free State) and later Chapter 141 of the Wetboek (Orange Free State); the Transkeian Territories Penal Code Act 24 of 1886 (s 149) and finally Law 4 of 1892 (Transvaal).

The South African statutory provisions were similar in many respects. The *actus reus* of the crime was described as the secret burial or otherwise disposing of the body of a dead child. The crime could under most statutes only be committed by the birth mother. There were two exceptions: in the Transvaal the offender could only be an unmarried or deserted birth mother; but under the Transkeian Code the crime could be committed by any person.

In all but one statute, it was legislated that it was not necessary to prove whether the child died before, during or after birth. The original Orange Free State ordinance did not include this provision, although it was contained in the later Wetboek.

These statutes were finally consolidated in section 113 of the General Law Amendment Act 46 of 1935:

- “(1) Any person who disposes of the body of any 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 not exceeding one hundred pounds or to imprisonment for a period not exceeding three years.
- (2) Whenever a person disposes of the body of any such child which was recently born, otherwise than under a lawful burial order, he shall be deemed to have disposed of such body with intent to conceal the fact of the child’s birth, unless it is proved that he had no such intent.
- (3) 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.”

This section departed from the usual presumption of innocence principle as the accused bore the *onus* to prove the lack of intent to conceal the child’s birth (in terms of s 113(2)). Both Hoctor (*SA Criminal Law and Procedure Vol III* D2-10) and Snyman (*Criminal Law* 5ed (2008) 440) have argued that this shifting of the *onus* was unconstitutional. In this regard it was argued that “[g]iven that the presumption of innocence is infringed whenever there is a possibility of a conviction despite the existence of a reasonable doubt; any reverse *onus* provision is likely to be held to unjustifiably limit the constitutional right to be presumed innocent” (Hoctor *SA Criminal Law and Procedure Vol III* D2-10).

The section was amended in 2008 by deleting the offending provision, ensuring constitutionality. The current section reads as follows (s 113 of the General Law Amendment Act 46 of 1935 as amended by section 1 of the Judicial Matters Amendment Act 66 of 2008):

- “113(1) Any person who, without a lawful burial order, disposes of the body of any newly born child with the intention 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 had not been proven 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."

In addition, section 239(2) of the Criminal Procedure Act 51 of 1977 provides that in the trial of a person charged with the concealment of the birth of a child, it is not necessary to prove whether the child died before, at, or after its birth.

The elements of the offence (which have not been altered by the amendment) are: that the accused (i) disposed of (ii) the dead body of (iii) a child, and (iv) intention.

The *Molefe* decision constitutes the first reported prosecution in South Africa for concealment of birth since the amendment of section 113.

3 The nature and ambit of the offence

3.1 *S v Molefe and the substantive aspects of the offence*

The issue, brought to the High Court as a special review from the Magistrates' Court of Bloemhof, was the conviction of the accused for the concealment of the birth of a newborn child in terms of section 113(1) (as read with s 113(2) and (3)) of the General Law Amendment Act 46 of 1935 (par 1).

The accused, an adult female, pleaded guilty and *inter alia* stated the following:

"I unlawfully with the intent 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 in my house. The child was prematurely born and was dead at birth" (par 1-2).

Although the magistrate enquired whether the Director of Public Prosecutions (DPP) authorized the prosecution in writing as required by section 113(3) of the Act, the argument by the prosecutor that verbal permission would constitute compliance was accepted and the accused was found guilty as charged (par 3).

On appeal, the court set the conviction aside based on the following arguments:

First, that the mandatory requirement of written permission by the DPP had not been met. Although it could be argued that failure to obtain such written permission prior to prosecution may be ratified by the DPP, *in casu* there was no ratification, and thus this procedural omission was fatal and the conviction could not be supported (par 6–7).

Second, the facts (and the admissions by the accused) did not support a finding that the accused "disposed" of the body as required by section 113(1), as all the essential elements of the crime had not been admitted. The court referred with approval to the finding in the case of *S v Dema* (1947

(1) SA 599 (E)) that “disposal” involved a measure of permanence and that it should be placed in the place where it was intended to remain – and not where it was likely to be discovered. Thus, it had been held, concealment of a body in a box placed in a room used by many people, where such body might easily be discovered, did not constitute a permanent disposition (*S v Dema supra*). It has, however, been held that such disposition had taken place where the body was placed in a suitcase, and then in an outside shed (*R v Smith* 1918 CPD 260), where the body was placed in a sanitary bucket (*R v Emma Madimetse* 1919 TPD 59), and where the body was simply abandoned in the open veld (*R v Carelse* (1890) 7 Cape LJ 259).

In casu the accused stated that she had not yet disposed of the body and that it was in a bucket at her house. There was no admission on the part of the accused that she either disposed of the body of the child, or attempted to do so (par 8–9). The court noted that one could not draw an inference that she attempted to dispose of the body from the fact that she lied about the birth (para 10) as many mothers of newly born babies were “unable to act with calm and balanced judgment” (par 10 with reference to *S v D* 1967 (2) SA 537 (W)). Moreover, even though she might have formed the intention to dispose of the body, her actions at the time of apprehension did not constitute disposal of the body or an attempt to do so (par 11).

Third, the facts did not support the requirement that, for a conviction to follow there had to be evidence that the child had been viable, *id est* that it had the potential to be born alive. In this regard the court referred to the Zimbabwean/Rhodesian judgments of *S v Jasi* (1994 (1) SACR 568 (ZH)) and *S v Madombe* (1977 (3) SA 1008 (R)) and the judgment of the Venda Supreme Court in *S v Manngo* (1980 (3) SA 1041 (V)) in support of the view that a foetus younger than 28 weeks could not be regarded as a viable child for purposes of this section (par 12–14). *In casu* there was no evidence that the foetus found was older than 28 weeks and consequently it was held that the conviction could not be sustained (par 15–16).

The lack of definition as to what constitutes a “child” for the purposes of this offence has given rise to some debate in this regard. Given that this offence is derived from English antecedents, it is notable that the approach in this jurisdiction (interpreting s 60 of the Offences against the Person Act 1861) is to draw the distinction between a “child” and the unformed subject of a premature miscarriage (Lord Hailsham of St Marylebone (ed) *Halsbury’s Laws of England Vol 11(1)* 4ed (reissue) (1990) par 467; and *R v Hewitt and Smith* (1866) 4 F&F 1101) on the basis that “the child must be so far developed that in the ordinary course of events it would have a fair chance of life when born” (following *R v Berriman* (1854) 6 Cox CC 388). Thus, it is not necessary that the child should have been born alive, but “it must have reached a period when, but for some accidental circumstances, such as disease ... it might have been born alive” (*R v Berriman supra* 390).

Apart from the dissenting view of De Wet and Swanepoel (*Strafreg* 2ed (1960) 447 fn 78) the South African authorities on the point appear to take a somewhat different approach. In *R v Matthews* (1943 CPD 8 9) it was held, following Gardiner and Lansdown (for discussion in last edition see Lansdown, Hoal and Lansdown *Gardiner & Lansdown’s South African Criminal Law and Procedure Vol II Specific Offences* 6ed (1957) 1602) that a

foetus should not be regarded as a child for the purpose of this provision “unless it has reached a stage of development sufficient to have rendered its separate existence apart from its mother a reasonable probability”. The court in *S v Manngo* (*supra*), which took the same approach, held that the offence could only be committed where the level of development of the child was such that “it might have been born a living child”. The cited statements from *Matthews* and *Manngo* were entirely in accordance with the English approach. However, in *Matthews* the court went further, linking this question with the duty to certify and report the birth of a stillborn child in the Births, Marriages and Deaths Act 17 of 1923. Davis J noted that the Act defined a stillborn child as a foetus of over six months of intrauterine existence, before concluding (9): “I cannot think that there has been any concealment of birth of a foetus where the law imposes no necessity in regard to reporting it.”

Milton and Fuller (*South African Criminal Law and Procedure Vol III Statutory Offences* (1971) 271, cited with approval in *S v Manngo supra*) adopted this view, arguing that given the close relationship between the matter of registration of births and the offence, the best approach would be to regard as a child, for the purposes of the offence, any being whose birth required registration in terms of the legislation governing registration of births (the same submission was made in the most recent edition of this work – Hoctor *SA Criminal Law and Procedure Vol III* D2-9). To place this submission in the current context – the precepts of the Births and Deaths Registration Act 51 of 1992 – a stillborn child is defined as one who has had at least 26 weeks of intra-uterine existence but showed no life after complete birth (s 1). Thus, in order to constitute the offence, this approach not only requires the child to be viable, but sets a standard of viability which accords with the statutory definition of a stillborn child.

It is instructive to examine the way in which this matter has been dealt with in Zimbabwe. In the Rhodesian case of *S v Madombwe* (1977 (3) SA 1008 (R)) the approach adopted in *R v Matthews* (*supra*), further supported by Milton and Fuller, was approved by the court, which duly defined “child” for the purposes of the offence as a foetus of not less than 28 weeks (in accordance with definition of “still-birth” in the Births and Deaths Registration Act, Chapter 30 (R), s 2). However, in *S v Jasi* (*supra*) the court explicitly did not approve of the approach adopted in the *Madombwe* case. Adam J, holding that the legislative history of the offence militated against any close connection with the matter of registration of births (570D–E), concluded that for the purposes of the offence a child was one who

“has reached a stage of development irrespective of the duration of the pregnancy which makes the child capable of being born alive, that is to say, after separation from its mother the child breathes independently either naturally or with the aid of a ventilator” (574A–B).

The conflicting approaches in the *Madombwe* and *Jasi* cases were carefully considered by Sibanda J in *S v Muguti* ([1998] JOL 2684 (ZH)). After examining these decisions (along with other related cases dealing with this question) Sibanda J remarked that “there are two distinct, inconsistent and mutually destructive schools of thought as to the meaning of the word ‘child’”: that the foetus ought to have been conceived for a period of not less than 28 weeks prior to birth or expulsion, and that the foetus must be

capable of a separate independent existence from its mother either naturally or with the aid of a ventilator (12–13). These differing approaches are then both praised by the court as “highly commendable”, although the court unequivocally plumped for the *Madombwe* line (consistent with the South African sources cited above) over the *Jasi* line (consistent with the English law). The court justified its choice (13–14) on the basis of the limited technical and human resources available to conduct an inquiry into the age of the foetus, pointing out that the “separate independent existence” approach favoured in *Jasi* would require levels of medical and technical development simply not available in small towns and rural areas in Zimbabwe, and this in the context of a crime typically only detected after a lapse of time after the concealment of the body, which would have made enforcement of the offence inordinately difficult.

“In my opinion, the nature of the crime, the secretive manner of its commission, the time lag (sic) that lapses before the crime is detected and the body exhumed for the post mortem to be conducted, the vast geographical area over which the limited logistics and human resources are to be deployed for the purpose, militate against the adoption of the separate existence approach. If adopted it may in the end undermine the administration of justice in regard to the enforcement of the provisions of the Act, as obviously guilty accused may escape conviction on technical grounds.” (14)

On the other hand, the court held, the “28 weeks age” approach commended itself for the ease with which the crucial evidence might be obtained, and the fact that this approach harmonised the terminology of the concealment offence with that of the legislation on the registration of births and deaths, providing a single meaning for “child” and creating legal certainty (15).

The approach adopted by the court in *Muguti* is thus consistent with the preferred view in South Africa, and, it is submitted, should be supported.

In concluding discussion on this point, it may be noted that unfortunately the judgment in *Molefe* does not add any clarity to the South African legal position. Whilst the reference to *Manngo* which indicated the court’s support for the prevailing approach in South African law, whereby the definition of “child” was inextricably linked with the registration of birth provisions, is to be welcomed, the court’s use of the Zimbabwean/Rhodesian case law only serves to render the legal position much less clear. This is because, as explained earlier, the two cases cited, *Jasi* and *Madombwe*, adopted antithetical approaches to the question of what a “child” should be for the purposes of the offence. In *Madombwe* the court simply applied the “28 weeks age” approach, with reference to the relevant provision in the Births and Deaths Registration Act, and consequently held that the 24-week-old foetus could not be regarded as a “child” for the purposes of the offence (the court in *Molefe* correctly summarized this case in par 14). However, in *Jasi* the court was at pains to disassociate itself from this approach in favour of an assessment of the viability of the foetus in question in terms of its development, irrespective of the duration of the pregnancy. The finding that the foetus was not a “child”, and the consequent acquittal, was on the basis of lack of evidence of viability, rather than on the age of the child. Thus the following interpretation of the *Jasi* decision by the court in *Molefe* was unfortunately incorrect and misleading: “As such the court could not find that

a fetus younger than 28 weeks was a viable child for the purposes of the section” (par 12). The court in *Jasi* would certainly have been prepared to do so, but simply lacked evidence to establish viability.

A further problem with the court’s reference to these Zimbabwean/Rhodesian decisions is that the court proceeded to transpose the Zimbabwean legal position onto that of South Africa. As indicated above, the Zimbabwean legislation on registration of births defines a stillborn child as one who has passed the age of 28 weeks. However, in the South African legislation governing registration of births, the stillborn child is defined as one who has had at least 26 weeks of intra-uterine existence (s 1 of the Births and Deaths Registration Act 51 of 1992). Nevertheless, the court in *Molefe* concluded (par 15–16, our emphasis):

“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. I agree with this submission.”

Although it is submitted that the court’s *approach* cannot be faulted, the fallacy of this conclusion is manifest.

The remaining elements of the offence of concealment of birth (other than “disposal” and “child” which were considered in *Molefe* and discussed above) fall to be briefly noted. The disposal must be of a *dead* body, and thus the disposal of the body of a living child which later expires does not constitute the offence (*R v Arends* 1913 CPD 194; *R v Verrooi* 1913 CPD 864 865; *R v Lequila* 1946 EDL 8 9; *R v Oliphant supra* 51; the same requirement applies to the English crime (Ormerod *Smith and Hogan’s Criminal Law* 13ed (2011) 582; Hailsham par 467) but *cf* the Zimbabwean provision, where this is not required: *S v Kademaunga* [2003] JOL 12295 (ZH)). Finally the disposal must be carried out intentionally, that is, requiring at least foresight on the part of the accused that the disposal would conceal the fact that a child had been born (Hoctor *SA Criminal Law and Procedure Vol III* D2-10; and Snyman *Criminal Law* 440).

It is submitted that it is evident from the above discussion that, whatever difficulties may have been encountered in Zimbabwean law and despite the lack of clarity in *Molefe*, the South African offence of concealment of birth does not appear to be susceptible to any particular difficulties of application or interpretation.

3.2 *S v Levkovic and the constitutional aspects of the concealment offence*

The concealment offence has yet to be subjected to constitutional scrutiny in a South African court. In so far as the question of constitutional validity is concerned, it is therefore instructive to advert to the position in Canadian law, where the offence of concealment of birth, also originally based on English law (*R v Levkovic supra* par 8–50; and *R v Piche* 1879 CarswellOnt 169, 30 UCCP 409), is set out in section 243 of the Canadian Criminal Code:

“243. Every person who in any manner disposes of the dead body of a child, with the intent to conceal the fact that the mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment not exceeding two years.”

The offence is gender-neutral and the essential element of the crime is the intentional disposal of the dead body of the child to conceal the birth. The constitutionality of section 143 was challenged in *R v Levkovic* (*supra*) based on section 7 of the Canadian Charter of Rights and Freedom which refers to the “right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”. The applicant argued (i) that the sole legislative purpose of section 243 is to “socially stigmatize and criminally punish” women who bore illegitimate children; and (ii) that section 243 is overbroad in its effects “because of vagueness of language ... or because any identifiable purpose in enacting the crime overshoots legitimate objectives for criminal legislation” (par 2).

With regard to the first argument, the applicant contended that the offence was based on the “odious principle of discriminatory, demeaning and paternalistic treatment of women” (par 69), that the concealment offence remained an offence concerned with “a course of conduct of concealing a pregnancy” (par 71) and that the original legislative purpose for the offence was “to authorize state interference with a women’s personal autonomy and ‘reproductive rights’” (par 72). It was argued that the offence exposed women who had miscarried at home without medical intervention, and women who had aborted the foetus with the express purpose of concealing pregnancy, to prosecution, despite the fact that the foetus had no legal rights and that a woman had a right to terminate a pregnancy (par 73–74).

In terms of the second argument, it was argued that section 243 was vague and overbroad, in that there were no definitions of “child” or “birth”. The applicant contended that in the light of the original purpose of creating the offence – control over the female body – the constitutionality of the section was not saved by the fact that the modern version of the offence served the purpose of facilitating the investigation of a new-born’s death (par 77). Even if such new purpose was legitimate, it was further contended, the section 243 provision was still overbroad as it “encompasses a wider prohibition that the state is entitled to give that animating purpose considering that the section criminalizes the secret disposition of a *still-born* child with intent to conceal its birth” (par 78).

The Crown countered these contentions by first denying that the focus of the offence was the concealment of pregnancy or that personal autonomy issues relating to abortion arose in the context of the section (par 80), arguing that section 243 “in no way interferes with a woman’s decision whether to continue or terminate pregnancy” (par 85). Moreover, it was argued, whatever the original purpose underlying the offence, such purpose could change over time, with the initial purpose “being eclipsed by another objective as society changes” (par 81). In any event, the principal objective of section 243 (the Crown contended) was the “prevention of frustration of the investigation of the circumstances of baby deaths” in that living infant children were a vulnerable group deserving of protection from murder at the

hands of others, including their mothers, and that scrutiny of the circumstances of their deaths therefore constituted a “pressing and significant state interest” (par 82). Wrongful death may be “covered-up” by the hiding of a child’s body, indeed the question arises why the child’s body would be disposed of with intent to conceal its birth except in circumstances of suspicion? Thus it was the hiding of the body which gave rise to suspicion rather than the pregnancy of an unwed or single woman (par 82). Furthermore, it was contended, a mother might not be in the best position to know whether her child was alive or dead, and thus she should not have been allowed to make the decision whether to discard the new-born child (par 83). Finally, the Crown argued that the section protected the dignity of children by ensuring the civilized, regulated disposition of a child’s body (par 86).

In assessing the issue of unconstitutionality, the court held that with regard to the question of overbreadth of legislation with penal consequences, a provision could be found to be arbitrary or disproportionate where such provision could be described as “overshooting or sweeping too broadly in relation to its animating purpose” (par 104). In each case the court was required to “compare the purpose of the law with its effects” (par 104). In respect of the related notion of vagueness the test to be applied was set out in these terms: “a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate” (par 106(27)).

Having noted that the purpose underlying a particular provision could indeed change legitimately over a period of time (par 111–112), the court held that the *actus reus* of the offence was the disposal of the dead body of a child after birth or delivery, and *not*, as contended by the applicant, the concealment of the pregnancy itself (par 119). The court further distinguished the concealment offence from abortion by holding that the ambit of the offence did not include “compelled child-birth through the expulsion or extraction of an embryo or fetus from its mother at any stage of gestation by an induced abortion” (par 125). As regards the *mens rea* of the offence, it was held that this consisted of the intent to conceal the fact of birth, and *not*, as contended by the applicant, an intention to hide or conceal the pregnancy itself (par 127). The court then proceeded to engage in an examination of the possible objectives of the legislation, holding that these included the protection of unborn children (par 130–138), and the effective investigation of suspicious infant death (par 139–146). Holding the latter objective to be of prime importance, the court concluded that the concealment offence set out in section 243 was neither “arbitrary, irrational [n]or unconnected to its purposes” (par 152), nor overbroad, in that it captured conduct beyond that strictly necessary to achieve its purposes (par 155–156).

With regard to the issue of vagueness, the court noted the applicant’s focus on the ambiguity of the word “child”, and in particular in circumstances other than a live-birth, and posed the question: “[I]s there a discernible meaning to the term giving fair notice to an ordinary person of the scope or risk of liability while avoiding the potential for arbitrary enforcement discretion?” (par 158). Having investigated various standards (par 174–197), the court noted the lack of consensus as to the identifiable point of viability

measured in weeks of gestational age, along with the movement of such point of viability towards the point of conception (par 199–200). Given that uncertainty as to the legal standard could give rise to a finding that a statutory proscription is unconstitutionally vague (par 198), and that the court was unable to establish “a coherent, unambiguous meaning of ‘child’ in the context of death before birth” (par 212), it was held that the offence was indeed unconstitutionally vague in this respect, and that to remedy this defect the word “before” should be excised from the provision (par 214–215).

The Crown appealed the decision to the Ontario Court of Appeal. On appeal (*R v Levkovic* 264 C.C.C. (3d) 423; 2010 ONCA 830) the finding by the court *a quo* based on vagueness was set aside. It was confirmed by the appeal court that vague laws violated the principle of fundamental justice because they did not provide fair notice of what was prohibited and did not provide clear standards for law enforcement (par 86–88). In doing so, where such vague law caused or amounted to a deprivation of a person’s life, liberty or security of person, it offended section 7 of the Canadian Charter of Rights and Freedoms. The court referred to the relevant principles which had crystallized from the authorities, *inter alia* that a broad and far-reaching statute was not necessarily vague – as long as the provision could be given a sensible meaning (par 89). Further, even if the wording was subject to debate with conflicting views, it still could withstand a challenge as long as the area of risk and terms of the debate had been sufficiently delineated by the legislature, such that “legal debate can occur about the application of the provision to the peculiar circumstances of an individual case” (par 91–92). The court noted that statutes were by nature drafted to cover “myriad sets of circumstances” and the test for vagueness could not be very exacting (paras 94–96). It confirmed that neither the Charter nor the vagueness doctrine demanded absolute statutory certainty (par 118). Although the court considered the various meanings of the word “child”, it found that the *Berriman* principles (derived from the 1854 English decision discussed above) – whereby “a foetus becomes a child when it reaches a stage in its development from which it might grow into a human being, given proper care” (par 114) – applied within its legislative context, gave fair notice to persons of the boundaries of criminal liability and limited the discretion of the enforcement agencies (par 120). The court concluded:

“We must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objects, by requiring a law to ascend to a level of precision to which its subject-matter fails to lend itself” (par 120).

Holding that the provision was neither unconstitutionally vague (par 122) nor overbroad (par 123), the court declared the section constitutionally valid and ordered a new trial (par 125).

4 Conclusion

The following conclusions may be drawn from our consideration of the concealment offence, the judgment in *Molefe*, and the Canadian case of *Levkovic*:

First, the written permission required from the DPP in terms of section 113(3) is mandatory and although ratification is possible prior to the hearing, non-adherence hereto is fatal.

Second, the elements of the offence are clear, and are confirmed by both the relevant case law as well as academic opinion. It is submitted that the criticisms in the *Memorandum* that the crime is “overly broad” and “lacking in definition” are at odds with the structure and functioning of the offence. Unfortunately the discussion of the question of what constitutes a “child” for the purposes of the offence in *Molefe* is less than clear, and should consequently preferably be disregarded as a useful authority on the point.

It should be noted that the concealment of a child’s body is also a violation of the Births and Deaths Registration Act 51 of 1992. It makes no difference whether the child is alive at birth as the Act makes provision for criminal liability for both a failure to register live births (s 9(1)) and still-births (s 18). Glanville Williams points out that the concealment offence is not required to secure public notification of births, since this is regulated by other legislation (*Textbook of Criminal Law 2ed* (1983) 292).

However, it is submitted that the existence of such parallel offences (which interestingly allow for a higher maximum prison sentence than s 113 – five years as opposed to three years) does not undermine the need for a concealment offence, which has as its specific primary purpose the facilitation of state investigation of infant death and which operates to preserve crucial evidence:

“Concealment of the dead body impedes, in some cases prevents, timely forensic examination of the body. In turn, timely forensic examination of the dead body helps to determine when and how death occurred. A determination of how and when death occurred often assists in establishing whether the death attracts criminal liability. Concealment of the dead body of a child rends the nexus or link between child and mother. The ineluctable effect of such a severance is the elimination of a valuable source of information about the circumstances in which death occurred, thereby whether criminal liability will attach and to whom” (*R v Levkovic* (2010) *supra* par 109–110).

Such purpose, which indicates the necessity for such an offence, militates against the objection in the *Memorandum* that the offence is “archaic”. It is submitted that, as was accepted in *Levkovic* (see earlier discussion), whatever the original purpose of the provision, the fact that a legitimate purpose underlies the current offence suffices to justify its existence.

The criticism (in the *Memorandum*) that the constitutional validity of the offence is questionable may be met with the reasoning of the Court of Appeal in *Levkovic*. Although, as stated earlier, the amended section 113 no longer infringes the right to be presumed innocent (s 35(3)(h) of the Constitution, 1996), it could be argued, as was the case in *Levkovic*, that given that the consequences of conviction may be imprisonment, the vagueness and overbreadth of the concealment offence may result in an unjustifiable infringement of the accused’s right to freedom and security of the person (s 12(1)(a) of the Constitution, 1996). However it is submitted that a South African court considering these issues would follow a similar approach to that of the Court of Appeal in *Levkovic*, and find that section 113

does not transgress issues of vagueness or overbreadth so as to infringe constitutionality.

No doubt this offence will retain a measure of controversy. Glanville Williams's comment that it is of "doubtful justice", because "a woman who has given birth to an illegitimate child, which dies soon after, may wish to conceal its birth for reasons that do not indicate her responsibility for its death" (292), is noteworthy, and the context within which concealment of birth typically occurs should receive the careful consideration of the court. Nevertheless, given that (as argued above) section 113 provides fair warning of criminal liability, that it is constitutionally sound, and that it is founded upon the significant need to properly investigate the death of a vulnerable group in society, newborn children, it is submitted that despite the criticism of this offence, it plays a necessary and important role in regulating these matters. Recognition of, and empathy for, the circumstances of the accused (invariably the child's mother) should, as has historically been true of cases of concealment of birth, be taken account of in sentencing.

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