"Reportable"

CASE NO.: CA 117/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

MARIA AKWENYE **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: LIEBENBERG, J *et* TOMMASI, J.

Heard on: 01.04.2011
Delivered on: 08.04.2011

APPEAL JUDGMENT

LIEBENBERG, J.: [1] The appellant was arraigned in the Regional Court, Ondangwa on charges of murder, alternatively contravening s 7 (1) of Ordinance 13 of 1962, concealment of birth. Despite pleading not guilty to both charges, she was

convicted on the main count and sentenced to fifteen (15) years' imprisonment, five (5) years suspended on the usual conditions of good behaviour. Appellant's appeal lies against sentence only.

[2] The Notice of Appeal contains five grounds, three of which were pursued in argument, forming the basis of this appeal. These grounds are the following: That the magistrate over-emphasised the 'heinousness, seriousness and brutality' of the crime and public interest, thereby failing to strike a balance with the appellant's personal circumstances; that the young age of the appellant was not given sufficient consideration; and, that the sentence imposed, is not uniform with sentences imposed by other courts in similar cases.

[3] In summary, the facts on which appellant was convicted and sentenced are the following: On the 8th of October 2003 the appellant, aged sixteen (16) years, lived with her parents at Ehafo Eheke village near Ondangwa. She was no longer attending school, for she dropped out after failing grade eight in 2001 and according to the appellant, her parents were to enrol her again the following year (2004). Appellant testified that she was impregnated by an adult person who attended confirmation school with her and who called her one day into his room where he raped her. She did not mention this incident to anyone, neither the fact that she fell pregnant as a result thereof. The reason for this, she explained, was because she was afraid of her parents and the father of her child – despite her thereafter having no further contact with that person. Her family thus, was unaware of her pregnancy.

On the day of the incident she had remained behind alone at their village home, whilst her siblings were at school and per parents working in the fields elsewhere. She said she was going about her usual chores at home when she went into labour. She delivered a baby boy and appellant's evidence, pertaining to her observations made on the baby and her subsequent conduct, is contradicting. Although appellant, in her plea explanation, stated that she was unable to tell whether the baby was alive when she cut him on the neck with a panga, not knowing what she was doing, she gave conflicting answers under cross-examination. First, by denying having looked at the baby to see whether it was alive and then saying that the baby did not move or make any sound; hence, her not knowing whether it was born alive. Secondly, that she was unable to explain 'what came to (her) mind to do such thing'. (Supposedly, these explanations led to the appellant being referred for psychiatric observation in terms of ss 77 and 78 of the Criminal Procedure Act, 1977; but she was found fit to stand trial.) The report does not form part of the appeal record.

It is common cause that appellant used a panga and, except for a thin strip of flesh on the back of the neck, severed the head from the body. This, according to the evidence of Dr. Vasin, who performed an autopsy on the body, was the cause of death. Appellant thereafter placed the body in a rucksack hanging from the roof inside one of the huts and continued with her chores. After the parents returned home appellant collapsed and was taken to hospital where, upon a medical examination, it was discovered that she had delivered. Upon being questioned, appellant explained what had happened; whereafter the police were summoned and the corpse subsequently found inside the rucksack.

[4] From the evidence given by Dr. Vasin there was sufficient medical proof that the baby was alive at birth and only died subsequently as a result of the chop wound on the neck. I am satisfied that the conviction of the court *a quo* on the charge of murder is consistent with the proven facts.

[5] The magistrate, in his *ex tempore* judgment on sentence, referred to the triad of factors to be considered when sentencing namely, the personal circumstances of the appellant, the offence committed and the interests of society. He was mindful of appellant's young age and that she should be punished as such. Also that she was a first offender. He expressed his dissatisfaction with the time lapse between the commission of the offence and appellant's case being tried – a period of five years – but failed to inquire into the cause thereof. Regard was had to the seriousness of the offence; its brutality where a panga was used; the prevalence of this crime in that court's jurisdiction, and throughout the country. In respect of sentences imposed by other courts in similar cases, the court *a quo* found these to be lenient and concluded that, in order to deter the prevalence of these offences, stiffer sentences were called for.

[6] In his additional reasons filed in response to appellant's notice of appeal, the magistrate confirmed his earlier reasons – also that the court must follow precedent, but held the view that each case must be considered on its own merits.

[7] Mr. *Wamambo*, appearing for the respondent, and with reference to the sentences imposed in *The State v Muzanima*[1]*; S v Shaningwa*[2]*; The State v Kaulinge*[3], submitted

[1] 2006 NAHC 15 – Case No. CC 12/06

that although the circumstances of the instant case, where a panga was used to sever the baby's head, were more brutal than the above cited cases, the sentence, with regard to the appellant's age and personal circumstances, was indeed excessive and not in line with sentences imposed in similar cases and hence, should be reduced by this Court, on appeal.

[8] Appellant relies on the above cited cases in support of its contention that the trial court misdirected itself by failing to follow the norm set by this Court when sentencing in cases of this nature. If at all it can be said that a norm has been set by this Court regarding sentences imposed in similar cases, it seems to me necessary to refer to these cases in some detail.

[9] In *Muzanima (supra)* the accused was twenty-one years of age and convicted on her plea of guilty of murdering her new-born child, and concealment of birth. She was a first offender, unemployed and without dependants. Regard was particularly had to the accused having been in custody awaiting trial for 'a considerable length of time'. What this period was is unfortunately not mentioned in the judgment on sentence. Having taken both counts together for sentence, the accused was sentenced to three years imprisonment, wholly suspended on the usual conditions of good behaviour.

[10] In the *Shaningwa* case the accused, a twenty-three year old mother of one five year old child, was convicted of murdering her new-born baby, and concealment of birth. From the judgment it is evident that considerable weight was given to the

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[2] 2006 (2) NR 522 (HC)
[3] 2007 NAHC 30 – Case No. CC 14/07

circumstances the accused found herself in at the time of killing her baby i.e. that after her first child, her own family rejected her; that the father of her second child (also the father of the first child) denied responsibility for the second pregnancy; she being a first offender and unemployed. Both charges were taken as one for sentence and the accused was sentenced to thirty-six months' (36) imprisonment, of which thirty (30) months suspended on condition of good behaviour.

[11] In *Kaulinga* the accused, at the end of the trial, was convicted of culpable homicide and concealment of birth, of her new-born baby. She was a first offender; twenty years of age and five of her siblings dependent on her monthly income as waitress. She has been in custody awaiting trial for approximately four months. Despite a conviction on culpable homicide and the accused's personal circumstances, the Court was satisfied that a custodial sentence was inescapable and imposed a sentence of five (5) years' imprisonment of which two (2) years suspended on condition of good behaviour; and a further six (6) months imprisonment for the concealment of birth, ordered to run concurrently.

From the latter sentence it is evident that there has been a notable increase since *Muzanima* in the term of imprisonment imposed in cases of infanticide; particularly where the accused in *Kaulinga*, was not convicted of murder, but culpable homicide, an offence considered by the courts to be less serious than murder, as the accused lacked intention to kill.

[12] The Court in all the above mention cases found that a custodial sentence was suitable and varied the sentences by either suspending the sentence *in toto* or partly. The terms of imprisonment imposed in each of these cases however, are substantially

less than what ordinarily would be imposed by this Court for murder committed under different circumstances, by either men or women. This is clear from the remarks made by Damaseb, JP in *Muzanima* and *Shaningwa*, respectively, where it was said: *"One inclines to leniency in these sort of matters but this offence (especially the killing of newborn babies) are very serious and do not seem to be isolated events in this division"*[4] and *"It is no exaggeration that this is one of the most difficult sentencing decisions I have to take, in view of your personal circumstances*[5]*"*.

[13] When the appeal was argued before us the Court posed the question to counsel, why sentencing courts were generally inclined to leniency, as the unlawful killing of a new-born baby should not detract from the seriousness of the offence of murder, a crime considered by the courts as serious and for which lengthy custodial sentences are usually meted out. Ms. *Kishi*, appearing on behalf of the appellant, submitted that the Court most probably looks at the motive behind the killing and the state of mind of the accused at the time of committing the crime. Mr. *Wamambo* in turn, submitted that it would appear that this Court has as yet not clearly expressed itself, explaining its inclination to leniency when it comes to sentencing in cases of this nature. These submissions, in my view, are not without merit.

[14] There can be no doubt that the unlawful killing of infants is no less serious than that of other (older) children and adults; and a new-born baby, equally, has the same right to life and protection under the Constitution as any other person on Namibian soil would have. See: Article 6[6] and 15[7] of the Constitution defining the protection of

[4] p 1 para [1]
[5] p 3 para [10]
[6] "The right to life shall be respected and protected."

life and children's rights, respectively. The courts, prior to independence and still today, have always been under the duty to uphold law and order, and protect the rights of others in society through its decisions and sentences – especially where the vulnerable such as the elder, women and children have fallen prey to unscrupulous criminals. The courts have repeatedly stated that it would not shy away from its duty by sending accused, guilty of serious crime such as murder, rape and robbery, to prison for considerably long periods when it involves crimes committed against those vulnerable in society. Murder has always been viewed by the courts in a serious light and usually, only in exceptional circumstances, would this offence not attract a lengthy custodial sentence. This much is evident from the remarks made in *Shaningwa,* where Damaseb, JP stated the following:

> *"…these offences are quite serious and should be treated as such. However young the victims may be, they are human beings with an existence independent of the mother who had given birth to them"* (para [6])

Also at para [8]:

> *"The Court must not send a wrong message to other young girls like you that they will get away with this kind of conduct. Newborn babies have just as much right as others to protection of life"*
>
> *"It is the Court's duty, however, to ensure that the murder of newborn babies and concealment of birth are nipped in the bud."* (para [10])

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[7] (1) "Children shall have the right <u>from birth</u> to a name, … as far as possible the right to know and be cared for <u>by their parents</u>."

[15] Regarding the interests of society, I did not find in any of the cases that I have read dealing with sentencing of accused found guilty of infanticide, that the Court held society to have any different view to murder in cases of this nature. It is clear that the Court in the above mentioned cases, without qualification, applied the general principles applicable to sentencing, as referred to in *S v Khumalo and Others*[8], endorsed by this Court[9] in numerous judgments; and in *Kaulinge* at p.3 para [6] Muller, J, on the interests of society, said the following:

> *"I cannot believe that society would tolerate this kind of conduct, and would expect this Court to express its indignation of such a deed through its sentence."*

There can be no doubt that society has a direct interest in the sentences imposed by the courts in cases of this nature – more so, where society in recent times appears to have adopted a more protective role of the vulnerable in its midst such as women and children – and generally has come out strongly where crimes were committed against persons falling in this category. Society has become the voice of those unable to speak for themselves as a result of age or having been silenced by their assailants. Sentencing courts, therefore, must also accord sufficient weight to the interests of society and uphold and protect the trust society has shown in the courts by imposing appropriate sentences; which, in deserving cases, may require that mothers who murder their new-born children, be sentenced to lengthy custodial sentences.

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[8] 1984 (4) SA 327 (A)
[9] *S v Van Wyk* 1993 NR 426 (HC)

[16] In *S v Mayekiso*[10], where the accused was convicted of murdering her new-born child, Zietsman J, at 239b-d stated the following:

> *"When it comes to the passing of sentence various factors have to be taken into account. An important consideration always is the interests of society. Society demands that adequate sentences should be imposed where serious crimes against society are committed. Proper sentences also provide a necessary deterrent, to deter both the accused and other persons from committing similar offences in future. A further factor which is important to consider is the personal circumstances of the accused. It has been stated repeatedly that care must be taken not to over-emphasise or under-emphasise any of the factors I have mentioned."*

[17] Pertaining to the question earlier raised by this Court namely, if the same principles to sentencing apply, why then are substantially more lenient sentences imposed in cases of infanticide, compared to 'ordinary' murder cases? It seems to me, the answer to this question lies in the fact that in these cases, considerable weight is given to the *circumstances under which the murder was committed* and *the personal circumstances of the accused.* Although the courts are enjoined to consider these two factors when considering sentence, it is clear that in cases such as the present, these two factors are emphasised at the expense of the others i.e. the seriousness of the crime and the interests of society. (See: *S v Van Wyk (supra)* 448D-E).

[18] In *S v Rufaro,*[11] a Rhodesian Appeal Court case, a sentence of seven years' imprisonment for the murder of a new-born child was reduced on appeal to four

[10] 1990 (2) SACR 238 (E)

years' imprisonment. The Appeal Court, after looking at the sentences imposed by the High Court in several dozens of cases over the years for this particular offence, observed that there is a wide discrepancy between the sentences which have been imposed – varying from sentences of under a year to sentences of as high as ten years' imprisonment with hard labour. On appeal the sentence was reduced to four (4) years' imprisonment with hard labour.

[19] I pause here to observe that the situation in this jurisdiction is no different, where sentences, imposed for murder of new-born babies, vary from detention until the rising of Court[12] to custodial sentences of as high as twelve years' imprisonment on a second conviction. It must however be noted that Damaseb, JP in *Shaningwa* stated that the facts of *Glaco (supra)* are so peculiar that it is to be confined to its facts. The learned Judge President furthermore, through the evidence of the Control Prosecutor, obtained information pertaining to the prevalence of, and sentences imposed for, offences of murder and concealment of birth of new-born babies. From the evidence and statistics adduced it became apparent that infanticide and concealment of birth are quite prevalent in this region (Far North); for which varying sentences were imposed by the Regional Court. Sentences for murder ranged from twelve years (referred to above for a second offence), to a wholly suspended sentence, where the accused had another new-born baby at the time of the trial. In a case where the mother was convicted of attempted murder, a sentence of three years' imprisonment, half of which suspended, was imposed.

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[11] 1975 (2) SA 387 (RA)
[12] *S v Glaco* 1993 (2) SACR 299 (Nm)

[20] In *Rufaro* the Court concluded that there seemed to be no general pattern of sentences imposed for this particular offence; hence, it decided to give some guidance pertaining to the factors a court ought to consider when assessing sentence for mothers who are guilty of murdering their new-born babies. I can do no better than quote (at some length) from this judgment, where these guidelines are quite clearly stated by Beadle CJ at 388A-H:

> *"The most important factor to take into account is the emotional state of the mother at the time when she kills the child. The emotional state of the mother might vary very considerably depending on a variety of circumstances. She may be so distressed, in such an unbalanced emotional state of mind, that she might hardly know what she is doing. If that is the state of her mind the sentence will, of course, be a lenient one. At the other end of the scale her emotional stress may be very little indeed and virtually have no bearing on the killing. The murder may be a carefully premeditated one and committed entirely in the interests of the mother herself because she feels it is in her own interest that it should not be known that she has given birth to a child. A carefully premeditated killing in these circumstances is little different from many other cases of murder and, if that is the state of mind of the accused when the murder is committed, a substantial sentence of imprisonment would be justified.*
>
> *There are various factors which should be looked to by the trial Court in deciding what was the emotional state of the accused when she committed the offence. It should not be assumed simply because a new born child has been killed that the emotional state of the mother must necessarily have been unbalanced or was substantially the reason for the murder. There are many factors which must be taken into account and, depending on the facts of each particular case, the Court will place the weight on each one of these factors as the merits of the case demand. First of all,*

> *there is the age of the mother. If the mother is only a young girl, 15 or 16 years of age, she is much more likely to be emotionally upset than if the mother is a mature woman. The number of previous births is another factor which can be usefully considered. It is a well-known fact that the first child birth is usually more difficult than subsequent ones so a mother is more likely to be upset by her first child birth than she would be if she had had a number of easy and successful child births before the birth of the child that she murdered. The motive for the killing is another factor which may be taken into account, especially in deciding to what extent the killing was a premeditated one. The manner of the killing is another factor. The manner of the killing will often indicate the extent to which the mother had succumbed to her emotions. If the killing amounted to simply wrapping the umbilical cord around the child's throat or simply pushing the child away and leaving the child exposed that might not be as serious as if the mother, having appreciated that the child is alive, deliberately and brutally murders the child, say, by beating its head against a stone or cutting its throat. And then finally a factor which is often taken into account in assessing sentence is: has the accused shown contrition? If she is obviously sorry and contrite for what she has done, that is a mitigating factor."* (Emphasis provided)

I respectfully consider the approach enunciated by the Appeal Court in this judgment to be most helpful, and fully endorse the guidelines set out therein.

[21] Turning to the present case, the appellant's uncontroverted evidence is that her pregnancy came as a result of her having been raped; that she was afraid of informing her parents about both the incident of rape and subsequent pregnancy; and, that she was unable to say why she acted in the manner she did when killing her new-born baby. Unfortunately in this case, these are the only circumstances the court could look at in deciding what the emotional state of the appellant was when she committed

the offence. Appellant did not elaborate on what she meant when saying that she did not know what brought her to killing her child. Besides raising the cause of her pregnancy and the belief that her parents, and the father of her child, would be angry with her, there is nothing on record explaining the emotional state the appellant was in at the relevant time. According to her parents – who, up to the time of appellant being hospitalised after giving birth, were still unaware of the pregnancy – the appellant acted normal around the house whilst doing the usual chores. The evidence relating to the appellant's background is that, although she was brought up in a house where her parents were strict and the children disciplined, there is nothing to show that appellant would have been rejected by her parents once they discovered that she had been raped and was pregnant as a result thereof. On the contrary, from the evidence of both parents, one tends to gain the impression that they would have been supportive. That, however, is not the point, for it is important to know what the state of mind of the appellant was, and what she perceived at the time of killing her new-born baby. On the other hand, appellant's perceptions and believes cannot be grabbed from nowhere; thus, in order to be a meaningful indicator of the emotional state of mind of the appellant at the time, it must be based on facts and reliable evidence placed before the sentencing court.

[22] On the strength of the appellant's evidence the court *a quo* was required to determine the emotional state of the offender's mind i.e. whether she was so unbalanced that she hardly knew what she was doing, or whether it was a carefully premeditated murder. On this point I find it apposite to refer to the remarks made in *Shaningwa* where the Court in paragraph [6] said: *"... one is struck both by the triviality and selfishness of the explanations given for the commission of the offences,*

and the methods employed: cruelty to the newborn baby is the common denominator." Although the court below in its *ex tempore* judgment on sentence referred to the appellant's personal circumstances and more specifically her young age, there is nothing on record showing that any regard was had to the motive for the killing, or the state of mind appellant was in at the time of committing the crime. These are the two most important factors for consideration when it comes to offences of this nature; and to ignore same, or accord insufficient weight thereto – as in the present case – would amount to an irregularity, vitiating the sentence.

[23] The appellant was legally represented at the trial and in the circumstances of this case more could have been done to assist the court in having before it, sufficient evidence on which the court would have been in a better position to determine the appellant's state of mind. I am mindful of the difficulty the appellant, being young and unsophisticated, experienced in expressing herself pertaining to her emotions and state of mind – this much is borne out by the record where appellant gave conflicting evidence on her emotions immediately after giving birth. This underscores the need to provide counselling for the accused as soon as possible after the commission of the crime; where the accused person is assisted and guided to confront the emotions experienced at the time of committing the offence; and to convert these into words. Not only would the accused person be in a better position to explain her state of mind (at the relevant time) to the court, but would also be able to lead expert evidence on this crucial aspect before sentence.

[24] The difficult situation an accused may find herself in, in a case of this nature, is aptly described in the case of *S v Matlhola*[13] where Kotze, AJA of the Bophuthatswana Appellate Division, stated the following at 404b-d:

> *"The state of emotion of a mother who is driven to the desperate act of taking the life of her newly born child is an extremely difficult factor to gauge. It is something which is inescapable of objective determination – it is one of the things which only a mother who has experienced pregnancy and subsequent birth can understand and appreciate. Yet it may not be an easy matter for a young mother to convey to others, least of all a Court considering the degree of her culpability, the state of the turmoil of her mind at the relevant time. It is for this reason that judicial nescience must not be stretched to the extreme length of requiring from her a vivid description of her emotional state and despair."*

Where an accused is afforded the opportunity of explaining her mind and emotions (at the relevant time) under different circumstances, this might assist her in court when required to explain her emotions and conduct at the stage of committing the offence. In addition thereto expert evidence may be led to have these emotions and conduct explained and assessed by the Court, in context.

[25] In my view, the time has come for the Ministry of Gender Equality and Child Welfare to explore all possible avenues to provide counselling as soon as it is reasonably possible to those mothers guilty of infanticide, simply because of the peculiarity of the offence. Not only would this be the first step taken to reform, but it would also be of huge assistance to the court when the matter goes on trial and an

[13] 1991 (1) SACR 402 (BA)

appropriate sentence needs to be determined. Sight should not be lost that punishment imposed on these persons hardly ever result in them being taken out of society for lengthy periods, and they are usually required to reform whilst outside of prison.

[26] As was stated hereinbefore, there are many factors that must be taken into account and the weight to be given to each one of these factors will depend on the merits of the case. In this case the young age of the appellant, who was a mere sixteen years when committing the offence, was of importance; because a person of that age was likely to be emotionally upset and most probably, less capable of effectively handling emotional problems compared to adults in the same situation. Although the court below had regard to the appellant's age, it did not express itself on the weight accorded thereto and the extent to which it impacted on the appellant's moral blameworthiness. The fact that appellant was twenty-two years of age when tried and sentenced, may have brought this omission about. However, appellant's emotional state of mind should be gauged at the time of the incident, when she was sixteen years old. To this end it cannot be ignored that appellant was very young and was still treated as a child in her parents' home.

[27] The next factor is the motive behind the killing and whether it was premeditated. In this case it is obvious that the appellant successfully hid her pregnancy up to the stage when she gave birth and thereafter killed her child and hid the body in a rucksack; probably to dispose of the body later on. Had it not been that she collapsed and was taken to hospital, there is a real likelihood that her pregnancy and killing of the baby would never have become known. It seems to me that this was

the motive behind the killing, for had it become known, her parents in all probability would have scolded her – something she dreaded.

However, I am not convinced that this in itself could reasonably have distracted her to the point where she did not know what she was doing because of her state of mind. Neither am I convinced that the father of her child had any emotional hold over her as she had no contact with him after the incident when she was raped. There is nothing showing that the murder was premeditated, but it would appear that she grabbed the opportunity to kill the child when the moment presented itself, in the absence of her family. This notwithstanding, the murder was committed entirely in the interest of the appellant herself, who from the outset, decided that it was in her own interest that her pregnancy and her giving birth should not be known to anyone.

[28] Another factor that must be taken into consideration when deciding what the emotional state of the appellant was at the relevant time, is the manner she employed to kill the child. In the present case, the appellant returned to the hut where she had left the baby earlier after giving birth carrying a panga and thereafter brutally killed her child by cutting its throat, almost completely severing the head. She has a clear memory of her fetching the panga, but not of the killing itself. In this regard, all she stated is that she does not know what made her do this. She could also recall that after the killing she stuffed the body in a rucksack, which hung from the roof inside the hut and where it was afterwards found by the police. In my view, the manner in which the murder was committed is indeed serious, for she realised that the child was alive at birth and then decided to kill it and hide the body; actions that can be described as wilful.

[29] From the magistrate's reasons it is clear that the court gave considerable weight to the manner in which the offence was committed, particularly the brutality thereof. The court *a quo* considered this aggravating factor substantially compelling to divert from the sentences imposed by other courts in similar cases; considering it to be too lenient. The court then continued to impose a sentence of fifteen years' imprisonment, partly suspended. Counsel are both of the opinion that the circumstances justified a custodial sentence, but contended, in the light of sentences imposed by this Court in similar cases, that the sentence was excessive and should be reduced.

[30] Although the court should always be mindful of the principle of uniformity in sentencing, a sentence imposed in one case must not be regarded too slavishly as a guide for a sentence to be imposed in another case where the facts are similar or almost identical. A general pattern of sentences imposed for a particular offence may have developed and be useful as guide, but, it must always be remembered that the approach to sentence is a subjective one and that the merits of each individual case would determine the sentence to be imposed. From the cases discussed above, I have come to the conclusion that, as far as it concerns sentences imposed for the killing of new-born babies in this jurisdiction, no general pattern of sentences imposed for offences which are very similar to each other exists, except that a custodial sentence is deemed to be appropriate. The terms of imprisonment imposed, however, differing markedly.

[31] A factor of importance in sentencing is the prevalence of the particular offence, a factor usually considered to be aggravating. In *Matlhola (supra)* the Court had regard to infanticide not being rife in Bophuthatswana (only two cases had been registered in the past), and held that the element of deterrence was accordingly not a factor of considerable importance when passing sentence. Regrettably, the situation in Namibia is quite different where there has been a notable increase of cases of infanticide being reported. The courts in this jurisdiction have taken notice thereof and in no uncertain terms through its judgments made it clear that deterrent sentences should be imposed *"to ensure that the murder of newborn babies and concealment of birth are nipped in the bud" (Shaningwa (supra)).* The court *a quo* was alive to the prevalence of the offence committed in his jurisdiction and rightly so, took that factor into account when sentencing.

[32] In my opinion too often is it reported in the media that new-born babies are either killed or abandoned after birth due to unwanted pregnancies; thereby creating the impression that the killing of new-born babies is less serious and in certain circumstances even justified, especially where the baby impedes on the interests of the mother. I am furthermore of the opinion that in order to bring an end to the commission of this heinous offence, the time has come for the courts to re-visit the objectives of punishment when sentencing in cases of this nature, and that the emphasis should now fall on deterrence. Although the accused person's circumstances and other important factors such as motive should never be ignored; the need to deter other expecting mothers, finding themselves in similar situations and entertaining the thought of taking the lives of their new-born babies instead of considering less drastic alternative solutions, has become compelling. One way of

achieving this is for the courts to impose deterrent sentences; thereby discouraging those who might consider the killing of their new-born babies as an option; and generally, to society, that the courts view this offence in a very serious light and would not allow it to go unpunished.

[33] Guidelines to the lower courts before whom these kinds of cases ordinarily appear; and all the more reason why the wrong message should not be sent out, is contained in paragraph [11] of the *Shaningwa* judgment where the following was said:

> *"In deserving cases custodial sentences must be considered for these offences. Only where there is compelling medical evidence that the accused's mental state had deteriorated as a result of the pregnancy or birth, or there are other circumstances of such compelling nature as to reduce the moral blameworthiness of the accused, should non-custodial sentence be considered in cases of offences involving the murder of a newborn child."*

I am in respectful agreement with these sentiments and wish to add, that all attempts should be made to get expert evidence before the court as far as it is reasonable possible, enabling the court, to objectively gauge the state of emotion of the accused.

[34] As mentioned, the present appeal against sentence is not aimed at the trial court having misdirected itself by imposing a custodial sentence, but that the sentence imposed, being excessive and inappropriate when regard is had to the sentences already imposed by this Court in other similar cases.

[35] After giving due consideration to the personal circumstances of the appellant; her evidence concerning the motive for killing her new-born child; and particularly her young age at the time of the committing the offence, I am satisfied that a sentence of fifteen years imprisonment is inappropriate in that it is too severe and ought to be reduced. This, notwithstanding the brutal killing of the baby and appellant's motive i.e. that she thought it to be in her own interest. However, I am of the view that the element of deterrence, as one of the objectives of punishment, individually and

generally, should come to the fore in the sentence to be imposed in this case; thereby serving as warning to other young girls that unwanted pregnancies which end up in the killing of new-born babies, would not go unpunished. The circumstances of this case dictate that part of the sentence be suspended.

[35] In the result, the Court makes the following order:

> The appeal against sentence is upheld as far as the sentence imposed is substituted with the following sentence:
>
> > Eight (8) years' imprisonment of which three (3) years' suspended for five (5) years on condition that the accused is not convicted of murder or culpable homicide involving an assault, committed during the period of suspension.

The sentence is antedated to 21 November 2008.

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LIEBENBERG, J

I concur.

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TOMMASI, J

ON BEHALF OF THE APPELLANT	**Ms. F. Kishi**
Instructed by:	**Kishi Legal Practitioners**
ON BEHALF OF THE RESPONDENT	**Mr. N.M. Wamambo**
Instructed by:	**Office of the Prosecutor-General**