REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

SENTENCE

Case no: CC 08/2012

In the matter between:

THE STATE

and

SARA KAMUTUSHI **ACCUSED**

Neutral citation: *The State v Kamutushi* (CC 08/2012) [2013] NAHCNLD 41 (17 July 2013)

Coram: LIEBENBERG J
Heard: 05 July 2013
Delivered: 17 July 2013

Flynote: Criminal procedure – Sentence – Accused convicted on charges of murder and concealment of birth – Accused having acted with direct intent.

Sentence – Infanticide – Infants have as much right to protection of life as any other person – Accused committed premeditated murder acting with clear

mind – Murder committed found to be no different from other cases of murder – Substantial sentence of imprisonment justified.

Sentence – Infanticide – Accused's perceptions and beliefs must be based on facts to be meaningful indicator of her emotional state of mind – Accused committed murder for own selfish reasons.

Sentence – Accused's personal circumstances and other important factors not be underemphasised - Stage reached where courts have to revisit the objectives of punishment in cases involving infanticide – In deserving cases more emphasis to be placed on deterrence as sentencing objective – Serving as general deterrence to others.

Sentence – Concealment of birth – Penalty clause section 7 (1) of Ordinance 13 of 1962 providing for maximum fine of N$200 alternatively three years' imprisonment – Imprisonment only as alternative to fine – Fine ineffective and inappropriate not reflecting seriousness of crime – Particular crime usually goes hand in hand with infanticide – Legislature to consider amending penalty clause as matter of urgency.

Summary: The murder and concealment of infants are serious crimes and not uncommon. Accused in present case acted with direct intent and committed premeditated murder in circumstances where her emotional state of mind was not unbalanced. The court found the circumstances to be no different from other cases of murder and that a substantial sentence of imprisonment justified. In respect of the concealment of birth charge the court expressed its dissatisfaction with the outdated penalty of a maximum fine of N$200 alternatively three years' imprisonment and the need for the Legislature to increase the penalty or substitute the whole section by enacting new legislation reflecting the seriousness of the offence.

ORDER

The accused is sentenced as follows:

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – 20 years' imprisonment of which 5 years' imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of murder or culpable homicide, committed during the period of suspension.

Count 2: Concealment of Birth in contravention of s 7 (1) of Ordinance 13 of 1962 – N$200 or 6 months' imprisonment.

In addition, it is ordered that the Registrar bring to the attention of the Minister of Justice and the Prosecutor-General the remarks made in paragraphs 17 and 18 of the judgment.

SENTENCE

LIEBENBERG J:

[1] This court at the end of a trial convicted the accused on the 5th of July 2013 on charges of murder and concealment of birth, in contravention of s 7 (1) of Ordinance 13 of 1962, both charges read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. The accused now has to be sentenced.

[2] In sentencing, the court must determine in the circumstances of the case, what would be an appropriate sentence for the specific accused and a judicial officer is then required to consider factors such as the personal circumstances of the offender; the crime where regard is had to the seriousness thereof and

the circumstances under which it was committed; and the interests of society.[1] The sentencing court at the same time must endeavour to satisfy the objectives of punishment namely prevention, deterrence, retribution and rehabilitation. It is trite that these factors need not be given equal weight as the circumstances of a particular case may be such that more weight ought to be given to any one or more of these considerations at the expense of the others in order to create a well-balanced sentence.[2] By this is meant a sentence that reflects due consideration given to the interests of the offender as well as the legitimate interests of society without over- or under emphasising any one of these often competing factors.

[3] The facts on which the accused was convicted, in brief summary, are the following: On the 1st of December 2011 at Ohaushombo village, situated in the district of Oshakati, the accused in secrecy gave birth to a baby boy in the veld under a tree (with low hanging branches). She wrapped the baby, who was still alive, completely in a bed sheet (covering his head) and after laying him down on the ground, heaped some dry leaves on top of it and returned to her parents' home situated not far away. Some time later boys who had passed the place where the baby was and heard its cries, by chance came to the house of the accused and reported about the baby they had found. She accompanied them back and admitted that it was her child, but that she did not want him 'because he was ugly'. However, when they threatened to involve the police she dissuaded them saying she would keep the child, whereafter they left. The boys whilst on the way met with a teacher and made a report to him concerning the baby. They returned to the tree but there was no sign of mother and baby and then proceeded to the accused's home. Realising that the accused was not with her baby, they insisted to know its whereabouts and although at first hesitant to tell where the baby was, she led them to the same tree where she unearthed the body. It has been the accused's evidence throughout that she did not kill her child but that it had died in her arms after the boys had left and that she then buried the body under the tree in a shallow grave.

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[1] *S v Van Rooyen and Another* 1992 NR 165 (HC) at187C-G.
[2] *S v Van Wyk* 1993 NR 426 (SC) at 448B-F.

[4] The court, having rejected the accused's evidence that the baby died of natural causes, convicted the accused of murder and found that she had acted with direct intent when bringing about her child's death in an unknown manner when it died of asphyxia. Her evidence that she had left the baby at a spot next to or close to a footpath so that it could easily be found and looked after by someone, was equally rejected. She explained her behaviour at the time saying that it was because of her father's continued scolding and rage fits towards her that she decided not to keep her baby as it would have aggravated the already bad relationship between them. The court also did not believe her on this point. It is common cause that the accused kept quiet about her pregnancy as well as the fact that she had given birth, and the child's subsequent death and burial.

[5] The accused testified in mitigation and her personal circumstances amount to the following: She is currently 29 years of age, a first offender and the mother of a four year old daughter who is taken care of by her parents. She is not married and though unemployed, she is determined to find work in order to support her child. The accused further said she felt 'very bad' but persisted in her innocence and maintained her earlier stance that she did not 'throw her baby away' but had left it where it could be found by someone. Under cross-examination during her evidence in mitigation the accused made a turnabout from her earlier stance that her father was the sole reason why she could not bring her newborn baby home. On a question of the court why she never approached her parents and ask them whether they would also accept her second child, she said it never crossed her mind and that she was not accusing her father. Neither did she think about approaching anyone else who could possibly assist her. She also said that she is unable to explain her conduct when abandoning her child because she had earlier heard over the radio that it was wrong for mothers to dump their babies and that the Ministry of Gender and Child Welfare should be contacted if there were unwanted babies. When asked why she did not act on this advice, she explained that she was afraid her parents would either be arrested or accused, but was unable to explain how she had come to that conclusion.

[6] It was key to the defence case that the accused abandoned her baby because of her father's humiliating conduct towards her; however, in mitigation she said she did not leave the baby behind because she did not want it, but that she first went home to tell her parents about the baby but when reaching home, something just told her to keep quiet and not to inform anyone. This was her first time mentioning this and clearly contradicts her earlier evidence. Bearing in mind that the evidence established that the child was completely wrapped in a bed sheet and had dry leaves heaped onto the body, the accused's explanation is patently not true. It is clear from the accused's evidence that after she left the child under the tree she returned home and had no intention of returning, had it not been for the boys who turned up at her parents' home.

[7] As during the trial the accused again in mitigation mentioned that she does not know what had come over her for having acted in the manner she did, and she had been asking herself the question whether there was something wrong with her? Any doubt that might have existed in respect of the accused's criminal capacity was laid to rest during the trial by the handing in of a psychiatric report by Dr Mthoko from the Psychiatric Department of the Windhoek Central Hospital prepared in terms of s 79 of the Criminal Procedure Act. The report, as regards the accused's alleged lack of memory, reads that her immediate, recent and remote memory was not impaired. She was diagnosed to be not mentally ill at the time the crimes were committed; neither was she suffering from a mental illness and was therefore able to appreciate the wrongfulness of the crimes committed and to act in accordance with such appreciation. Her criminal capacity was therefore not diminished in any way.

[8] The offence of murder is undoubtedly serious and other than in exceptional circumstances, is likely to attract a custodial sentence. Newborn babies have the same right to life and deserve the same protection under the Constitution and 'However young the victims may be, they are human beings

with an existence independent of the mother who had given birth to them'.[3] In circumstances as the present where the life of a newborn baby has been discarded as being worthless, it appears to me that there is a compelling duty on society to speak on behalf of those who have been silenced and unable to speak for themselves. The courts by the imposition of sentence equally play an important role to bring an end to the unnecessary loss of life where newborn babies are either dumped or killed and, given the high prevalence of infanticide currently experienced in this country, it seems to me that the time has come for the courts, when sentencing in appropriate cases, to reconsider the punishment objectives in cases of this nature. What would constitute just punishment for the offender would obviously depend on the personal circumstances of the accused and the nature of the offence committed. However, society has a direct interest in the outcome of cases of this nature and more so in recent times where it has adopted a more protective role against the vulnerable in society, and where society looks up to the courts for protection, to restore the imbalances caused by crime in society through the sentences it imposes .

[9] In *Maria Akwenye v The State*[4] where the court took cognisance of sentences imposed in similar cases of infanticide in this jurisdiction and the divergence between the sentences imposed, I occasioned to remark as follows at p 10, para 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 ie the seriousness of the crime and the interests of society. (See: *S v Van Wyk (supra)* 448D-E).'

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[3] *S v Shaningwa* 2006 (2) NR 552 (HC) at 553I-J.
[4] Unreported Case NO CA 117/2010 delivered on 08.04.2011.

When looking at the sentences imposed by this court as well as the regional courts in this jurisdiction, it can be concluded that there seems to be no general pattern when sentencing in cases of infanticide. In view thereof, this court in the *Akwenya* case endorsed the guidelines laid down by the former Rhodesian Appeal Court as *per* Beadle CJ, in *S v Rufaro*[5] and it seems apposite, for a proper understanding what these guidelines are, to again quote the passage 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

[5] 1975 (2) SA 387 (RA).

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 mine)

[10] Turning to the present facts it clear that the accused, in the light of the conclusion reached by Dr Mthoko, the psychiatrist who examined the accused, was not in an unbalanced emotional state of mind to the extent that she did not know what she was doing; and there is no reason to find otherwise on the evidence placed before the court. The reasons originally advanced by the accused which compelled her to abandon her newborn child vanished during her evidence in mitigation. In the absence of evidence that might possibly explain the accused's behaviour at the time of committing the murder, it seems to me that the murder was carefully premeditated and committed entirely in the accused's own interest. That much is evident from her own evidence. The intentional killing of her newborn baby happening in circumstances where she decided that it should not be known that she was pregnant and had given birth to a baby, whilst there was no reason to believe that her parents would not assist her, as they did with her firstborn. She was informed as to where she could find help but chose not to do so. She had time to reflect when she later returned to the place where she had left the baby and found it alive but still did not come to her senses. Instead, she thereafter proceeded to physically kill her child.

[11] Though it might be reasoned that, that in itself, shows the accused was in an emotionally state of mind and could not think clear to see her way out of the predicament she found herself in. However, in the absence of evidence showing that there were external factors which were beyond her control or

impacted on her emotional state of mind, it would in my view be wrong for the court to simply assume the existence of these factors. The court can only draw inferences from proved facts and in the present case there is no evidence from which the court would be entitled to infer that the accused, at the time of committing the murder, was emotionally unbalanced. In *Akwenye* (*supra*) it was said at 14 para 21:

> 'On the other hand, appellant's perceptions and beliefs 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.'

[12] On the evidence before me I can come to no other conclusion that the accused killed her newborn child because of her own selfish reasons. She was about 28 years old and having already given birth to one child, knew what it was all about. No evidence about unfavourable external factors which impacted on her state of mind was led and the motive for killing her baby remains a mystery. The manner of the killing also does not suggest that the accused had succumbed to her emotions as she, after first abandoning the baby, later suffocated it. What her conduct clearly amounts to is that she did not want this baby and for no one to know about it, come what may.

[13] The accused has shown no contrition. When asked how she felt about the death of her child she said she felt bad because it was her child, but that she had not killed it and was not 'happy for coming to court' to be tried on a charge of murder. In view of this evidence I am unable to fully comprehend defence's counsel's submission that the accused was remorseful because she was 'thinking of her baby'. It is a well-established principle in our law that although penitence is a valid consideration in favour of the accused at the stage of sentencing, its value can only be adjudged if the accused takes the court fully into his or her confidence, enabling the court to find that the alleged contrition is genuine. Nothing said by the accused remotely suggests that she has remorse. On the contrary, she maintained her innocence up to the end

and seems to be more upset for having to come to court than the death of her child.

[14] In the light of what has been stated above, the premeditated killing of the accused's baby is little different from other cases of murder where the accused in this instance had acted with a clear mind. On the evidence there is simply nothing suggestive of an unbalanced emotional state of mind when she committed the crimes; a factor which obviously would have impacted on the sentence to be imposed and likely to have prompted the court to impose a (more) lenient sentence.

[15] Although the accused's personal circumstances and other important factors such as the motive behind the killing of her child should not be underemphasised, I believe we have reached the stage where the courts need to revisit the objectives of punishment when it comes to infanticide and, in deserving cases, to put more emphasis on deterrence as sentencing objective which could serve as general deterrence to others. One way of deterring expecting mothers who intend abandoning or even kill their young not to do so and rather consider alternative solutions, would be to impose (in appropriate cases) deterrent sentences. In my view, this is such case.

[16] When the court considers the mitigating factors as well as the aggravating factors present and due consideration given to the interests of society, I have come to the conclusion that in respect of both counts the accused's interests are outweighed and that the imposition of a lengthy custodial sentence in respect of count 1 is inevitable. Mindful of the accused's relatively young age and the prospects of rehabilitation, the court would be inclined to favourably consider a partly suspended sentence which would serve as incentive for reformation.

[17] On count 2 where the accused was convicted of concealment of birth, the penalty clause is a fine of [N$ 200] alternatively to imprisonment for a period not exceeding three years. It must be noted that a fine at all times must

be imposed as s 7 (1) of Ordinance 13 of 1962 only provides for imprisonment in the alternative.

[18] There can be no doubt that a maximum fine of N$200 for an offence as serious as the concealment of birth, in present times, is shockingly inappropriate, ineffective and untenable. The difference between the monetary value of R200 in 1962 and its value today, speaks for itself. There might even be a need to increase the alternative maximum term of imprisonment of three years in order to reflect the seriousness of the offence. The penalty clause as it now reads is nothing more than a slap on the wrist of the offender for a crime which goes hand in hand with the killing of unwanted newborn babies; a crime which have become prevalent throughout the country. Hence the need for the Legislature, as a matter of urgency, to either amend the penalty clause set out in s 7 (1) of Ordinance 13 of 1962 or substitute the whole section by enacting new legislation which would reflect the seriousness of the offence.

[19] In the present circumstances the court is obliged to impose a fine on count 2 even though it is clear that the accused is without means to pay any fine which means that she, in all likelihood would be serving the alternative term of imprisonment. In the past, imprisonment imposed as an alternative to a fine has been excluded from an order in terms of s 280 (2) of the Criminal Procedure Act directing it to be served concurrently with another sentence imposed by the court.[6] Although some courts in South Africa more recently found that alternative imprisonment is included under s 280 (2) and would be of assistance to the court in the present matter, I respectfully do not support the courts' reasoning in coming to the conclusion as it did in these cases.[7] The alternative imprisonment to be imposed on count 2 would obviously be disproportionate to the fine; however, this seems inevitable if regard is had to the seriousness of the offence of concealment of birth. Serving of the alternative sentence would fall away if the fine is ultimately paid.

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[6] *R v Rahme* 1933 TPD 5: *S v Bouwer* 1977 (2) SA 444 (O).
[7] *S v Lalsing* 1990 (1) SACR 443 (N); *S v Mngadi* 1991 (1) SA 313 (T);

[20] The court has further taken cognisance of the fact that both crimes must be read with the provisions of the Combating of Domestic Violence Act, 4 of 2003, which is a further aggravating factor.

[21] In the result, the accused is sentenced as follows:

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – 20 years' imprisonment of which 5 years' imprisonment is suspended for a period of 5 years on condition that the accused is not convicted of murder or culpable homicide, committed during the period of suspension.

Count 2: Concealment of Birth in contravention of s 7 (1) of Ordinance 13 of 1962, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – N$200 or 6 months' imprisonment.

[22] In addition, it is ordered that the Registrar bring to the attention of the Minister of Justice and the Prosecutor-General the remarks made in paragraphs 17 and 18 of the judgment.

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JC LIEBENBERG

JUDGE

APPEARANCES

STATE	D Lisulo Of the Office of the Prosecutor-General, Oshakati.
ACCUSED	T R Shapumba Instructed by Dr Weder, Kauta & Hoveka, Oshakati.