

THE STATE  
versus  
ESTHER MOTSI

HIGH COURT OF ZIMBABWE  
MUZOFA J  
HARARE, 22 April 2021

### **Criminal review**

MUZOFA J: The accused was convicted in the Magistrates' court for exposing an infant in contravention of s 108 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] (The Criminal Code). A sentence of 6 months imprisonment which was wholly suspended on the usual conditions of good behavior was imposed.

The scrutinizing magistrate raised a query with the trial magistrate that the sentence was lenient in the circumstances. The accused had exposed the child to the vagaries of the weather and wild animals. The death of the child was intended by the accused. The trial magistrate stuck to her guns. On referral for review two issues were raised for consideration, the appropriateness of the sentence and whether a second charge under s 108 (2) (a) of the Criminal Code should have been preferred.

#### The facts

The facts set out in the state outline and admitted by the accused can be summarized as follows. On the 15<sup>th</sup> of October 2020 one Christopher Mubayiwa 'Christopher' was about his business collecting manure in Mvere Village, Chief Zvimba. He saw a baby nearby a hill. He alerted Alice Chirau 'Alice' who immediately rushed to the scene. At the scene, to her surprise indeed a child had been left near an anthill confirming Christopher's observations. She identified a girl child about one week old wrapped in a yellow and brown blanket. Fortunately she was still alive. The baby was obviously abandoned. Alice reported the case to the headman and subsequently to the police. The baby was taken to Zvimba Clinic. Investigations lead to the accused's arrest.

### The Charge

I set out in full the relevant section in question since both queries relate to it. It provides

#### **‘108 Exposing an infant**

(1) Any person who intentionally abandons an infant in such a place or in such circumstances that death may result from the exposure shall be guilty of exposing an infant and liable to a fine not exceeding level ten or imprisonment for a period not exceeding five years or both.

(2) Where the abandonment of an infant as described in subsection (1)

(a) results in or was intended to cause the death of the infant, the person who abandoned the infant shall be charged with murder or attempted murder or infanticide or attempted infanticide, as the case may be, whether or not concurrently with exposing an infant in contravention of subsection (1);

(b) does not result in and was not intended to cause the death of the infant, the person who abandoned the infant may be charged concurrently or alternatively under subsection (1) of section 7 of the Children’s Act [*Chapter 5:06*].

(3) When assessing the sentence to be imposed upon a person accused of exposing an infant who is the mother of the infant, regard shall be had to any pressure or stress from which she suffered arising out of any one or more of the following circumstances or considerations

(a) the effects which the birth had, or which she believed it would have, on her social, financial or marital situation;

(b) the difficulties which were created, or which she believed would be created, in caring for the infant in the social, financial or marital situation in which the infant was born;

(c) the difficulties which she had, or which she believed she would have, in caring for the infant due to her inexperience or incapacity;

(d) any other relevant circumstance or consideration’

It is trite law that the prosecution has the unfettered discretion to prefer a charge against an accused person which it can prove beyond a reasonable doubt before a court. The court presiding over a criminal matter can only inquire on the appropriateness of the charge. Otherwise its real role as a court is to deliver judgment on the guilt or otherwise of an accused person.

A reading of the section creating the offence shows that, it is competent to charge an accused in terms of both s108 (1) and or proceed in terms of subsection (2) thereof depending on the circumstances. Subsection 2 does not create an offence it only provides an option on the alternative charges that the accused maybe charged with. In the alternative charges provided for, the only constraint or limitation maybe the danger of splitting of charges where the charges are preferred concurrently as opposed to where they are taken in the alternative. The same conduct can also be charged under another statute See *Sv Kademaunga* 2003 (2) ZLR 128 (H). In this case the relevant statute is the Children’s Act. I do not read the section to allow for splitting of charges,

instead the prosecution should prefer a charge that best suits the facts revealed in the case. Usually the State prefers a charge that provides for a stiffer sentence but this is not the rule.

The accused could have been charged under section 47 or 48 as read with section 189 of the Criminal Code for attempted infanticide or attempted murder. The circumstances of this case precludes a charge of attempted murder. Section 48 makes it an offence for a woman to kill her child within six months of its birth. The maximum sentence is five years imprisonment. There is no provision for a fine. Since the maximum penalty under s108 (1) and s48 of the Criminal Code is 5 years there can be no serious misdirection where either of the charges is preferred against an accused person. In the result, I find no misdirection that can vitiate the proceedings in respect of the charge.

What is strikingly similar though, from both charges are the issues that should be taken into consideration in sentencing an accused charged under section 48 or section 108 (1) of the Criminal Code. This takes me to the second issue on the appropriateness of the sentence.

It is now common cause that a judicial officer has a wide discretion when it comes to sentencing. The discretion should always be exercised judiciously in order to arrive at a sentence that fits the offender as well as the offence, is fair to society and also blended with mercy. It is imperative and required of a judicial officer to make a deliberate effort to gather the necessary information to assist him or her to arrive at a just sentence. There is no excuse in proceeding to sentence an accused without such information.

Subsection 3 of section 108 makes it mandatory for a court sentencing an accused convicted under the section to consider the pressure or stress that the accused might have suffered as a result of one or more of the following ,

- ‘ (a) the effects which the birth had, or which she believed it would have, on her social, financial or marital situation;
- (b) the difficulties which were created, or which she believed would be created, in caring for the infant in the social, financial or marital situation in which the infant was born;
- (c) the difficulties which she had, or which she believed she would have, in caring for the infant due to her inexperience or incapacity;
- (d) any other relevant circumstance or consideration’

The language used in the section is peremptory. It therefore leaves no room for a court to proceed and impose a sentence without canvassing the issues. Failure to comply with the provisions is a serious misdirection. A court must establish these circumstances either by way of asking the accused in mitigation or referring the accused to a social worker for such assessment. Resources permitting, a medical report is necessary from a psychologist or a medical doctor to establish the true nature of the effects of child birth on the accused.

In *casu*, the trial court recorded the usual mitigation, that the accused had 2 children, not employed, 26 years old, no money in person, no savings and no assets. No questions were asked to establish the circumstances under subsection (3) of section 108.

The court's reasoning can be deciphered from the reasons for sentence. After setting out the mitigatory factors, I must say without any aggravating factors, the court noted,

"The court had decided to give her community service but then she is still fresh from giving birth. The court will order that she gets a wholly suspended sentence so as to deter her from committing the same offence in future. A custodial sentence maybe too harsh as she may be suffering from postpartum depression"

Obviously the reasoning was not based on any factual basis. The fact of her being 'fresh from giving birth' had no medical evidence to shed light on her condition as a result. The court disregarded a prison term on the assumption that she may be suffering from postpartum depression. There was no evidence to confirm this conclusion, this was pure conjecture. Postpartum depression is a medical condition. Its effects vary from person to person. The court could not comment on it in the absence of medical evidence relating to the extent of its effects on the accused. The consideration was not properly taken.

This is one offence that the legislature saw it fit and as a matter of necessity to take into consideration the accused's personal medical, socio and economic conditions whether perceived or real emanating from childbirth. An appropriate sentence should not only consider the usual mitigation.

There was no effort to establish the accused's circumstances but the trial court was still inclined to treat the accused with some leniency. This is evident from her response after the scrutinizing Magistrate's query. Her response was that 'the accused was in hospital for 7 days after her initial appearance. She was not yet fit to perform community service'. Nobody knows on what basis the trial court was of the view that accused could not perform community service. The

accused was not referred to a community service officer for assessment. At least there is no such referral in the record before us. This was a gross misdirection. This could have been addressed by referring the accused to a community service officer for recommendations than to take an armchair approach.

In light of the inadequate pre-sentencing information it becomes difficult for this court to make a value judgment on the appropriateness of the sentence. The paucity of the information may have led to an unsuitable sentence. The failure to canvass the necessary information is a misdirection . As a result the sentence cannot be confirmed to be in accordance with real and substantial justice. I therefore withhold my certificate.