

THE STATE
versus
CELIA TICHAGWA

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 10 March 2020

Criminal Review

ZISENGWE J: The accused was convicted in the Magistrates Court of the offence of concealing the birth of a child in contravention of s 106(1) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23] (The Criminal Code). The charge that was preferred against the accused reads as follows:-

“In that on the 12th of August, 2019 and at Ziware Village, Chief Charumbira, Celia Tichagwa buried or disposed the body of a child with the intention of concealing the fact of the birth.”

Upon the accused tendering a plea of guilty to the charge, she was questioned by the Magistrate in terms of s 271(2) (b) of the Criminal Procedure and Evidence Act [Chapter 9:07] wherein she admitted all the essential elements of the offence charged. She was convicted and subsequently sentenced to 14 months imprisonment which were suspended partly on condition of good behaviour and partly on condition of her rendering a certain number of hours of unpaid community service.

Two things immediately caught my attention upon a perusal of the record of proceedings when same was submitted for automatic review. The first was the appropriateness (or more correctly the inappropriateness) of the charge preferred in view of the facts availed before the Magistrates Court. The second was the question of the competence of the sentence imposed by the Magistrate in view of the charged preferred.

The Facts

The relevant facts contained in the State Outline and as candidly admitted by the accused during the proceedings can be summarised as follows: In the early morning hours of the 27th of August 2019, the accused gave birth to a baby boy. She was at home in what was described as a “bedroom hut”. A few hours later she wrapped the newly born baby in some clothes and proceeded with it to a neighbour’s pit latrine (the so called Blair toilet) and threw that baby into the pit of the latrine. The body of the baby was discovered some two days later by the owner of the homestead where the toilet is situated and the next day it was retrieved from the pit by the police.

The doctor who performed the post mortem examination observed that the body was in the early stages of decomposition and that its mouth and nostrils were covered in solid faecal material. Most significantly he concluded that death was due to *suffocation*.

The appropriateness of the charge

Quite clearly there was a failure by the prosecutor and the Magistrate to appreciate the salient legal concepts attendant to these facts. As is conveyed by the plain wording of the charge, the offence of concealing the birth of a child (contravening section 106(1) of the Criminal Code) is aimed at punishing the conduct of deliberately hiding (from the authorities) the birth of a child by burying, abandoning or the disposing of the body of a child. A reading of the section and the presumptions relating to the concealment of birth contained in s 107 of the Criminal Code clearly conveys that meaning.

Section 106 of the Criminal Code reads as follows:-

106 Concealing birth of child

- (1) *Any person who buries, abandons or disposes of the body of a child with the intention of concealing the fact of its birth, whether the child was still-born or died during or after its birth, shall be guilty of concealing the birth of a child and liable to a fine not exceeding level seven or imprisonment for a period not exceeding six months or both. (emphasis added)*

In the present case what the accused threw down the pit latrine was not the *body* of a child, but a living child. This much is borne out not only by the medical report but also by the implied admissions by the accused during her questioning by the Magistrate. Even the state outline refers to the deceased child as a “child” from the time of its birth and the time it was tossed into the pit latrine and only upon the discovery of its dead body two days later is it referred to as a “body”.

The clear implication from the facts when read in context is that the child was alive when the accused threw it into the pit latrine.

It is strange therefore that the State opted to charge the accused under s 106 of the Code and the Magistrate accepted same without question.

Because of the confusion that sometimes arises in these matter it is perhaps necessary to briefly discuss some of the main scenarios that may play out in relation to the abandonment, exposure or killing of newly born or young children.

Where any person intentionally abandons an infant in circumstances which may lead to the death of that infant but the infant does not in fact die as a result of such exposure or abandonment the appropriate charge would be contravening section 108(1) of the Criminal Code.

Where, as here, death ensues as a result of such exposure or abandonment of the infant s108 (2) of the Criminal Code stipulates what the appropriate charge should be. It provides as follows:-

108 Exposing an infant

- (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 (2)*

The facts of this case undoubtedly point towards infanticide as the appropriate charge. Section 48(1) of the Criminal Code provides as follows:-

48 Infanticide

- (1) *Any woman who, within six months of the birth of her child, causes its death*
(a) *intentionally; or*
(b) *by conduct which she realises involves a real risk to the child's life; at a time when the balance of her mind is disturbed as a result of giving birth to the child, shall be guilty of infanticide and liable to imprisonment for a period not exceeding five years.*

In stating that the appropriate charge should have been infanticide, I am alive to the provisions of s 106(2), as which states:

- “(2) *A person may be convicted of concealing the birth of a child even though it has not been proved that the child died before its body was buried, abandoned or disposed of.”*

In my view the provision is meant to address situations where the cause and/or stage of the child's death is indeterminate – see for instance *S v Moyo* 1994 (2) ZLR 24 (H) where it was held that in the absence of evidence that the accused had caused the death of the child, the appropriate charge is that of concealment of birth as opposed to infanticide.

It is however pertinent to point out that as far as evidence is concerned there are several provisions which may come to the aid of the state in the prosecution of a person charged with infanticide. It suffices for current purposes to refer to only two such provisions. S303 of the Criminal Procedure and Evidence Act [Chapter 9:07] creates a presumption regarding the death of a child where an accused is charged with infanticide. It provides as follows:-

303. Evidence on charge of infanticide or concealment of birth.

(1) On the trial of a person charged with infanticide... or murder or culpable homicide of a newly born child, the child in respect of which the offence was committed shall be deemed to have been born alive if it is proved to have breathed, whether or not it has had an independent circulation, and it shall not be necessary to prove that such child was at the time of its death entirely separated from the body of its mother.

Section 55 of the Criminal Code on the other hand addresses situations of killing while disposing of a victim's body. In terms of that section if any person attempts to kill someone and while laboring under the mistaken belief that the victim is dead when in fact he or she is not but the victim dies as a result of such disposal that person will be found guilty of murder or infanticide as the case may be.

In the present case the presiding Magistrate appears to have been cognizant that the facts point towards infanticide (implying that the child was alive when discarded into the pit latrine). In her reasons for sentence, the Magistrate remarked as follows:-

“It is against the morals of the society to end life even that of an infant and such behavior should be punished accordingly.”

Any decent questioning of the accused would no doubt have unraveled the true horror of what had transpired; namely the killing of the newly born baby by throwing it down the pit latrine (as opposed to merely concealing its birth by secretly disposing of its body as contemplated in s 106).

The unfortunate consequence of the failure to do so meant that accused was charged with and convicted of a far less serious offence than the one she was supposed to face.

By way of comparison, in *S v Mhungu* HB 11/05 the accused a 20 year old woman secretly gave birth to a child in a Blair toilet and threw it into the pit. The child was later rescued after someone heard the child crying out. However the baby succumbed to injuries sustained as a result of falling onto the hard surface of the toilet pit. She was correctly charged with infanticide.

Ultimately, however, the State remains *dominus litis* and it at liberty to prefer the charges it deems fit or the circumstances and save perhaps only to highlight the glaring anomaly above, no remedial action in respect of the charge is therefore proposed.

The Sentence

As with the case of *State v Moyo* (supra) the confusion of the exact nature of the offence which the accused was facing was carried over to the sentencing phase of the proceedings. When I posed a query to the trial Magistrate of the competence of a sentence of 14 months (albeit suspended on conditions) given that the maximum penalty provided for under s 106 is a fine not exceeding level seven or imprisonment for a period not exceeding six months or both, the Magistrate conceded that she had fallen into error as she had considered a penalty suitable for a contravention of Section 108(2) of the Criminal Code.

Therefore, the sentence imposed by the Magistrate being in excess of the maximum permissible for the offence for which the accused was convicted cannot be allowed to stand. Further, it is not necessary to remit the matter to the Magistrate's Court to impose a competent sentence. This court is in a position to take appropriate remedial action by imposing such competent sentence. To that end, a six months' prison terms suspended partly on condition of good behavior and partly on condition of community service (whose hours are to be commensurate with the suspended prison term) will be imposed.

In the result, the following order is hereby made:

1. The conviction is hereby confirmed.
2. The sentence imposed by the Magistrate in Case No. MSVP 135/20 is hereby set aside and substituted with the following :-

“Six months imprisonment of which 3 months imprisonment is suspended for 5 years on condition accused does not during that period commit any offence involving Concealment of birth in contravention of s 106(1) of Chapter 9:23 and for which upon conviction she is sentenced to imprisonment without the option of a fine. The remaining

3 months imprisonment is suspended on condition accused completes 105 hours of community service at Mhungidza Primary School.

The community service shall commence on 20th January, 2020 and it shall be performed every Monday to Friday which is not a public holiday between 8.00 am and 1.00 pm and from 2.00 pm to 4.00 pm. The community service must be performed to the satisfaction of the person in charge of that institution who may for good cause shown grant accused leave of absence but such leave of absence shall not form part of community service performed”.

3. The accused must be immediately (in any event not later than 1 week from receipt of this order) brought back to the Magistrates Court and informed of the alteration of the sentence.

WAMAMBO J agrees.....