1. THE STATE CRB 1361/02
versus
MARTHA NGONDORE

2. THE STATE CRB 686/01
versus
ZIVAI MUDZINGWA

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE 14 June 2006

Criminal Review

CHINHENGO J: The records of proceedings in these two matters were placed before me on review. The first matter was heard at Masvingo whilst the second matter was head at Marondera.

The accused persons were both facing similar charges of infanticide. They pleaded guilty and were duly convicted. In the case of Martha Ngondore, she was sentenced by the magistrate's court. In the case of Zivai Mudzingwa sentence was to be passed by the High Court but when the matter came before me, I raised the question whether or not the conviction was proper. This is permissible in terms of s 227 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The Attorney-General, in a written opinion refused to support the conviction. I issued a warrant of liberation in respect of Zivai Mudzingwa because I was satisfied that the State had not proved its case beyond a reasonable doubt. Due to other commitments I was not able to prepare this judgment until now.

The facts in *Martha Ngondore's* case are that on 25 August 2002 and at Mupandawana Village, Gutu the accused gave birth to a baby girl. The baby was born alive. She dropped the baby to the ground and then placed the baby in between two rocks and covered it with leaves and small stones. The baby bled from the mouth. It was later picked up alive and taken to Gutu Mission Hospital where it died. The post-mortem report compiled by Doctor Mavesere of Masvingo indicates that the body of the child was "dirty with a lot of dirt around. Bleeding from the head. Lung floats". Dr Mavesere stated that the child died from "multiple injuries".

When the accused appeared before the magistrate's court she pleaded guilty to the charge of infanticide. She admitted that she had been nine months pregnant as at the time that she gave birth. She admitted that she dropped the baby to the ground "intentionally and unlawfully" and that as a result of this action the child bled from the mouth. She admitted that she did not assist the child in any way but instead she placed the child in between two rocks and covered it with leaves before she left it there. The trial magistrate then asked the following further questions:

"Q. The baby was discovered alive and died later at Gutu Mission Hospital?
A. Yes.

Q. Do you admit that the child died as a result of your dropping it and leaving it exposed and without any assistance?
A. Yes.

Q. <u>You admit that your mind was still disturbed as a result of giving birth at the mentioned time?</u>
A. Yes.

Q. Any right to do so?
A. None.

Q. Any defence to offer?
A. None."

I have underscored the question and answer which is relevant to the purpose of this judgement.

In mitigation the accused stated that she was 18 years old. She was not attending school. She was single and unemployed with no savings or any valuable assets. Her father was working in Gweru and her mother had died in 1989. She was living with a stepmother with whom she had a very good relationship. The man who had fathered the child was a self-employed cobbler residing in Masvingo. He had denied responsibility for the pregnancy. She also told the court that this had been her first pregnancy. Asked as to why she had given birth in the bush she said - "I did not want it known that I had given birth" and that she wanted to conceal the birth. She said that her father and stepmother had not known that she had been pregnant.

The magistrate sentenced her to three years imprisonment of which one and a half years were suspended for five years on condition that she did not commit any offence involving the contravention of s 2 of the Infanticide Act, s 3 of the Termination of Pregnancy Act, concealment of birth or abortion for which she is sentenced to imprisonment without the option of a fine.

The magistrate's reasons for sentence are worthy of recital. He said:

> "Your case is aggravated by the following:
>
> 1. Infanticide is an abhorrent crime that society does not easily accept. It involves the taking away of a baby's life.
>
> 2. Its clear this your act did not solely come about as a result that your mind was still disturbed as a result of having just given birth. Fact that you concealed the pregnancy from anybody's notice until the time you gave birth reveals premeditation and preparation to do away with the life of your would be baby. At a time when economic hardships are so sky-rocketing, mothers must not find killing their newly born babies as a get away road from the economic woes. Passing of stiffer sentences must curb this serious offence.
>
> Mitigating however is that you are a first offender. You pleaded guilty to the charge although the court has not also lost sight of the fact that there was very strong evidence against you to allow a denial of the charge. Such is evidence that the child was found bleeding from the mouth and that it died later at the hospital.
>
> It also mitigates that the responsible (person) father had denied responsibility. You are also very youthful i.e. 8 years old."

The magistrate was wrong to make much of the alleged "premeditation and preparation" because "premeditation and emotional disturbance due to overwhelming stress are not necessarily mutually exclusive" – *S v Jokasi infra* at 85D.

The facts in *Zivai Mudzingwa*'s case were that the accused was employed as a housemaid at a home in Ruvimbo Park, Marondera, with effect from January 2001. In April her employer suspected that she was pregnant and asked her about it. She denied that she was pregnant. On 9 May 2001 at about mid-night the accused was alone in the kitchen of her employer's house. She gave birth whilst standing with the result that the baby, on birth, fell down onto the floor. The accused picked up the newly born. She did not tie the umbilical cord but instead wrapped it in a "T-shirt" and placed it in a travelling bag. The following morning her employer saw signs that the accused had given birth and reported the matter to the police. With the accused's assistance the police recovered the baby's body. The doctor who examined the baby's body and compiled a post-mortem report made the following observations with regard to the cause of death:

> "The body of the baby sustained head injury, cord umbilical was not tied - results in loss of blood. This baby was born alive. After the piece of lung was placed under water and it floats. The baby died of head injury and loss of blood."

At her trial the accused pleaded guilty to the charge of infanticide. She admitted the following facts: that she gave birth to a live baby; that she caused the child's death by giving birth whilst in a standing position with the result that the baby fell down headlong onto the floor, that she did not tie the umbilical cord which resulted in the child bleeding profusely. She was asked whether she had any lawful right to act as she did or any other defence to the charge. Her response was obviously in the negative.

In mitigation of sentence the accused stated that she was nineteen years old, single and unemployed. She had no other children or savings or valuable property. She was then asked the following questions and gave the responses indicated:

> "Q. Why did you commit the offence?
> A. Poverty.
>
> Q. Where is the father of the child?
> A. The father left for Mberengwa."

The trial magistrate referred the matter to the Attorney-General's office for the purpose of having the matter of sentence determined by the High Court. At the hearing of the matter before me counsel for the accused and the accused herself were not present. The matter could not proceed. I however decided after consulting with the state counsel that I would deal with the matter as a review. Consequently I asked the Attorney-General for his views as to the propriety of the conviction. He did not support the conviction. As a result I issued a warrant for the release of the accused from custody.

I am not really concerned in both of these cases with the fact of conviction or sentence of the accused persons. The conviction and sentence in *Martha Ngondore's* case seems to me to be appropriate. The conviction in *Zivai Mudzingwa's* case was improper as conceded by the Attorney General and for the reasons which he gave I will set it aside. My main concern in this judgment is to examine the process by which a court will find an accused in a case of infanticide guilty of the offence charged and what should be done where on such a charge it is determined that the balance of the accused's mind was not disturbed as a result of the child's birth.

Section 2 of the Infanticide Act [*Chapter 9:12*] provides as follows;

> "(1) A woman who, within six months of the birth of her child, unlawfully and intentionally causes the child's death at a time when the balance of her mind is disturbed as a result of giving birth to the child shall be guilty of the offence of infanticide and liable to imprisonment for a period not exceeding five years.
>
> (2) Where a woman is charged with the offence of infanticide referred to in subsection (1) and it is proved that, within six months of the birth of her child, she unlawfully and intentionally caused the child's death, it shall be presumed, unless the contrary is proved that she did so at a time when the balance of her mind was disturbed as a result of giving birth to the child."

The Infanticide Act [*Chapter* 9:12] ("the Act") was enacted following upon the Supreme Court decision in *S v Jokasi* 1986 (2) ZLR 79. In that case the appellant had been convicted of the murder of her newly born infant. She was sentenced to 9 years imprisonment. McNALLY JA adopted and further developed the principle enunciated by BEADLE ACJ (as he then was) in *S v Rufaro* 1975 (1) RLR 97 (AD) in regard to the approach to sentencing of a woman who kills her baby soon after its birth. McNALLY JA at 82 A to C said of BEADLE ACJ's decision:

> "In that case BEADLE ACJ spoke of a wide range of sentences imposed in the past, ranging from one year to ten years. He said that the most important factor to take into account was the emotional state of the mother at the time when she killed the child. She might be "so distressed that she might hardly know what she is doing." Or the murder may be a carefully premeditated one and committed entirely in the interests of the mother herself because she feels that 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."

McNALLY JA then went on to suggest that we should have a separate offence of infanticide. In making this suggestion he reasoned thus at 83 H 84 A:

> "In this country infanticide is murder. There is simply the distinction that, in terms of s 314 of the Criminal Procedure and Evidence Act, the court "may impose any sentence other than the death sentence" and since the promulgation of Act 32 of 1985 on 21 March 1986, the court may suspend all or part of the sentence imposed. It is arguable that the gravity of the penalty for murder distorts the penalty sometimes imposed for infanticide. It might be better to treat them as different offences."

The learned JUDGE OF APPEAL examined the provisions of the English Infanticide Act of 1938 and recommended that we should adopt something similar to that English Act in coming up with our own. The essence of the new Act would be that the offence of infanticide would be committed when at the time of the act or omission, the balance of the woman's mind was disturbed by reason of the effect of giving birth or circumstances consequent upon that birth (at 85B-C).

The third suggestion which McNALLY JA made was with regard to the sentence to be imposed in respect of the proposed offence infanticide. The learned Judge of Appeal again examined in detail the sentences which had been imposed in this country for infanticide. He concluded this examination at 87C as follows:

> "It seems to me that these cases indicate a mean level of three to five years, with lower sentences for cases where there is a special reason for mitigation. Of the 56 cases, 29 fall into the three-five year category, with 15 lower and 11 higher."

The Legislature then enacted the Infanticide Act. I will now attempt an analysis of the provisions of the Act.

Section 2(1) of the Act creates the offence of infanticide. It provides that the offence of infanticide is committed by a woman who within six months of the birth of her child unlawfully and intentionally causes the child's death at a time when her mind is disturbed as a result of giving birth to the child. It also prescribes that on conviction a woman who commits the offence of infanticide shall be liable to imprisonment for a period not exceeding five years. The maximum period of imprisonment is therefore five years - *S v Difiri* 2001 (1) ZLR 411 at 413B and at F.

The essential elements of the offence of infanticide are similar to those of murder. They are "unlawful, intentional killing of a live human being" - *S v Rwodzi* 2001 (2) ZLR 127 (H) at 128 E. In my view, however, there is yet another essential element of infanticide as a separate offence which distinguishes it from murder. To prove infanticide the prosecution must in addition to proving the essential elements stated in *Rwodzi supra* also prove that at the time of the act or omission the woman's mind was disturbed as a result of giving birth to the child and that that disturbance occurred within six months of the birth of the child. This is what sets infanticide apart from murder and is the basis of its existence under statute law as a separate offence

Subsection (2) introduces a presumption that when a woman intentionally kills her child within six months of the birth of that child the balance of her mind is disturbed by the birth of the child. The word "presume" in its ordinary meaning implies a presumption which is rebuttable but in some cases and depending on the context it may imply a presumption which is irrebuttable - see *S v De Sa* 1981 (4) SA 395 (C) at 298C–400E and the same case as an appellate decision in 1982 (3) SA 941 (AD). The presumption in s 2(2) of the Act is clearly a rebuttable presumption i.e. a *presumptio iuris – De* S*a*'s case *supra* at 398C. This is so because the legislature used the words "unless the contrary is proved" after the word "presumed".

The question which immediately arises is: on whom does the responsibility of rebutting the presumption in favour of a woman charged with infanticide in terms of s 2 of the Act lie? Is it on the prosecution as is the case always or is it on the court? Ordinarily the responsibility is that of the prosecution. In terms of the Act however, it is not entirely clear that the court has no such responsibility. In *Difiri supra* SMITH J at 412G said that the court is required to have regard to the factors stated in s 4 of the Act in determining whether or not the woman's mind was disturbed.

The Act in my view requires it to be established as a fact that a woman's mind was disturbed as a result of giving birth to a child and that determination is for the court to make. This is the reason why s 4 of the Act is cast in the following terms:

> "For the purposes of this Act, in determining whether or not the balance of a woman's mind was disturbed as a result of giving birth to a child, regard shall be had to any pressures or stress from which she suffered arising out of any one or more of the following circumstances -
> (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 child in the social, financial or marital situation in which it was born;
> (c) The difficulties which she had or which she believed she would have, in caring for the child due to her inexperience or inability;
> (d) Any other relevant circumstance or consideration, whether based on psychological effects on the woman's mind arising from the birth itself or otherwise.

Section 4 of the Act indicates to me that it was not the legislature's intention that where a woman kills her newly born child within six months of that child's birth it shall, for that reason alone, be presumed that her mind was disturbed. The legislature was careful to ensure that an inquiry must be held into the woman's circumstances and mental state in order to establish as a fact that her mind was disturbed by the child's birth. Any other approach would have converted the clearly rebuttable presumption in s 2(2) of the Act into an irrebuttable presumption.

The position is put beyond doubt by s 3 of the Act which provides that where a woman is charged with the murder of her child within six months of that child's birth and it is proved that she caused the child's death at a time when the balance of her mind was disturbed as a result of giving birth to the child, she shall not be found guilty of murder but may be found guilty of infanticide referred to in s 2 of the Act. On a charge of murder in terms of s 3 of the Act the presumption of mental disturbance still applies but it must also be proved as a matter of fact. The same applies as I have said in the case of a charge in terms of s 2 of the Act.

The Act provides in s 5 for competent verdicts on a charge of infanticide and further provides that a woman found guilty on any of the competent charges shall not be liable to a greater punishment than that to which she would have been liable had she been convicted of the offence of infanticide.

In a number of cases of infanticide in terms s 2 of the Act which have come before me, the lower courts have approached the cases as if the presumption in favour of the offending woman is irrebuttable. The cases under review illustrate this point. In *Martha Ngondore's* case the nearest that the magistrate came to trying to establish the state of mind of the accused was the question which I have highlighted. It was a leading question no doubt and calculated to solicit a positive answer. In *Zivai Mudzingwa's* case the magistrate did not at all attempt to establish as a fact that the accused's mind was disturbed by the birth of the child. It seems to me that in the majority of cases, magistrates embark on some inquiry as to the accused's state of mind after conviction and at mitigation stage. That is what the magistrate in *Zivai*

Mudzingwa's case did. The inquiry must be at the stage before conviction so that the court is in a position to determine whether or not the balance of the woman's mind was disturbed by the birth of the child.

The approach which our lower courts have taken i.e. treating the presumption as irrebuttable and not carrying out an investigation to determine the woman's state of mind is perhaps understandable. The legislature did not provide for what should happen where a woman is charged with infanticide in terms of s 2 of the Act but it is determined that her mind was not disturbed by the birth of the child.

It is important, in my view, to determine what should happen where the presumption in s 2(2) of the Act is rebutted. The starting point is to recognise that the State will already have decided to charge the woman concerned with infanticide as opposed to murder and that the woman, as an accused person, will be aware that the charge she faces is one of infanticide and not one of murder - the former being an offence which, in terms of the Act, carries a maximum penalty of imprisonment for five years. Would there be any reason for the State to seek to rebut the presumption in s 2(2) after it has itself decided to charge the woman with a contravention of s 2(1) i.e. infanticide? And to what end would it seek, even if it was so minded, to rebut that presumption. I think I need to emphasise what the difficulties created by s 2(2) are. They are these: (1) Section 2(2) contemplates that the presumption contained therein may be rebutted. Section 4 requires the court to make a finding of fact as to the woman's state of mind before it returns a verdict of guilty of infanticide. How does the prosecution and the court go about dealing with the presumption? The prosecution which has preferred a charge of infanticide is unlikely to seek to rebut the presumption in s 2(2) because if that presumption is rebutted, the Act as presently framed, does not provide what is to be done. The court is then left in a lurch as to how and whether to make a determination as to the balance of the woman's mind. This is why in practice our courts do not determine the state of mind of a woman charged with infanticide and they instead accept, as if the presumption in s 2(2) was irrebuttable, that the woman's mind was disturbed. (2) It is the prosecution that should seek to rebut the presumption in s 2(2) of the Act by placing evidence before the court to show that the mind of a woman was not disturbed. It is a general principle of our law that a person charged with an offence cannot be convicted of a more serious offence even if the evidence proves that a more serious offence has been committed. In the case of a charge of infanticide it would not be possible for the woman charged with that offence to be convicted of murder where the evidence led has rebutted the presumption in s 2(2) of the Act.

What then was the intention of the Legislature in enacting s 2(2) and providing for a rebuttable presumption that the balance of the woman's mind charged with infanticide may be shown to have been undisturbed? It would seem to me that the Legislature may have reasoned along the following lines. Infanticide ordinarily means the killing of an infant. In terms of the Act however it is a specific offence in its own right. But since for its proof "intention" an "unlawful killing" are essential elements, just like for murder, then once the presumption in the woman's favour is rebutted that woman can be convicted of murder and not infanticide. Unfortunately it does not seem that the Legislature made this intention clear at all.

On a charge of murder in terms of s 3 of the Act, the onus of establishing that the balance of the woman's mind was disturbed falls on the defence. Section 3 of the Act in fact provides a defence to a charge of murder though that defence is akin to an extenuating circumstance because it would have been proved against her that she killed the child unlawfully and intentionally.

It seems to me that the conundrum created by the Act can be resolved. That conundrum is acknowledged by the authors of *Pregnancy and Childbirth – Joy and Despair* a publication by Women and Law in Southern Africa Research and Educational Trust ("the WILSA publication"). At p 31 the WILSA publication acknowledges that s 2 of the Act creates a rebuttable presumption "that if a woman kills her child within six months of its birth, she did so while the balance of her mind was disturbed". The publication refers to s 4 of the Act as setting out the factors which should be taken into account in making this determination. At p 33 it is then stated:

> "In any case, we should note that the practice generally is for the courts to simply assume that any woman who killed her baby within the first six months of its birth did so while the balance of her mind was affected in the manner envisaged in the Infanticide Act. No medical examination of the woman is undertaken before the trial to establish the existence or absence of such a mental condition which serves to highlight the lack of a genuine concern for the welfare of the women concerned, contrary to the spirit of the Act. In reality courts pay lip service to the need to establish the existence of the post-natal depression that is referred to in the Act. We are therefore left to wonder (and it is debatable) whether or not a strict adherence to the law, in the sense of requiring every infanticide perpetrator to undergo medical examination to establish whether the balance of her mind was disturbed at the time she committed the offence, would serve the interests of women concerned better than is the case currently. Surely there must be some women who might not be mentally disturbed as a result of the birth who nevertheless commit the offence – there is clearly a gap between the law and what happens in practice."
> (**emphasis added**)

I would not advocate the medical or psychiatric examination of a woman charged with infanticide as the suggestion goes. I would recognise that there must be women who kill their children intentionally and unlawfully within six months of birth and are charged and convicted of infanticide where they should really have been charged and convicted of murder. In apparently not providing for what should happen if the presumption in s 2(2) of the Act is rebutted, the law created a gap which must be filled. BEADLE ACJ in the passage referred by McNALLY JA above was concerned about women who carefully premeditate the murder of their children and said of them that they should receive "a substantial sentence of imprisonment". This concern was eloquently expressed by BECK JA in *Jokasi supra* when in his dissenting opinion with regard to prescribing a maximum sentence at 88F –90A he said:

"I do not agree with the suggestion that there should be a maximum sentence for infanticide, whether it be introduced by way of legislation or by way of a conscious avoidance by the courts of sentences in excess of a particular limit, regardless of the circumstances of any individual case.

No doubt it is seldom – as the collection of sentences listed in the judgment by McNALLY JA amply reveals – that infanticide cases do not contain circumstances of mitigation which render them considerably less serious than other forms of murder. Nevertheless I associate myself with the following observation in *Rufaro'*s case *supra* at p 98F-H:

> 'At the 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 interests 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.'

While the deliberate killing of a newly-born infant is: on one hand, attended by the features to which my brother GUBBAY JA has pointed which make it to some extent less distressing than "ordinary murder", it exhibits features, on the other hand, which seem to me gravely to aggravate the reprehensible nature of the offence. The victim is utterly vulnerable and helpless and is totally innocent of any wrong whatsoever towards its assailant. Moreover, a newly-born infant is, both by nature and by the most fundamental dictates of our culture, perculiarly dependant for its succour and its safety upon the very hands that destroy it. The offence is so unnatural and heartless that, when its commission is not attended by circumstances of great stress upon the mother, it should in my view be regarded as a form of murder that has perculiar features of reprehensibility and aggravation that offset those features to which GUBBAY JA has pointed, and which justify the comment in *Rufaro'*s case *supra* that in some instances infanticide "is little different from many other cases of murder".

Accordingly it is my opinion that the courts should not have their discretion fettered to impose, in an appropriate instance, upon an accused convicted of infanticide a sentence that falls within the range of prison sentences imposed for murder of a mature victim. While retaining that necessary discretion, however, the courts will and do, recognise that in the great majority of infanticide cases there are factors of stress to which the accused was subject which call for a sentence of considerably less severity; the Schedules

> that have been put before us amply bear this out and show that sentences of more than 5 years have been thought appropriate in only 15% of cases."

These sentiments and those expressed in the WILSA publication above led, in my view, to the enactment of the rebuttable presumption in s 2(2) of the Act. The Legislature did not intent, by creating a separate offence of infanticide, to give a licence to a woman to kill her infant within six months of its birth even where the balance of the woman's mind was not disturbed by the birth of the child. The creation of the offence of infanticide was intended, in my view, to cover only the genuine cases where the balance of a woman's mind was disturbed by the birth of a child and she killed that child within six months of its birth. Our courts must therefore strive to give effect to this clear intention of the Legislature.

In order to give effect to the intention of the Legislature the prosecuting authority should be specially careful that it prefers the correct charge. Where it prefers a charge of infanticide in terms of s 2(2) of the Act, it must be completely satisfied that, without any doubt, the offence allegedly committed is infanticide. If there is any doubt whatsoever, the prosecuting authority should charge a woman who kills her newly-born child intentionally and unlawfully with murder. In that event the defence will have the opportunity to establish, if it can, that the mind of the woman concerned was disturbed by the birth of the child in which case the woman will be found guilty of infanticide.

It is persuasive to think that when the Legislature enacted s 2(2) of the Act, it had in mind that where the presumption is rebutted, the woman concerned should be found guilty of murder and not of infanticide. This is so because in order to prove infanticide all the elements of "ordinary murder" will have been proved. As I have already mentioned unlawfulness and intentional killing are the main elements of the offence of infanticide. They are also the main elements of murder. One would be persuaded to the view that the Legislature must have intended that once the elements of "ordinary murder" have been proved there is nothing that would be wrong with a conviction for murder if it is established that the balance of the woman's mind was not disturbed by the birth of the child. This must have been the only reason for creating the presumption in s 2(2) of the Act otherwise the presumption serves no purpose. I refrain from concluding that this is the intention of the Legislature because unfortunately the Legislature did not make this intention clear in order to override the principle that a person charged with a lesser offence may not be convicted of a more serious offence even if the evidence shows that a more serious offence has been committed - see s 223 of the Criminal Procedure and Evidence Act, *S v Rautenback* 1982 (1) ZLR 131H and *S v Dzawo* 1999 (2) ZLR 303 (H). Section 224 of the Criminal procedure and Evidence Act would however, apply. See *S v Mutero* 1999 (2) ZLR 73 (H). In my view therefore the following can be said as an attempt at a solution to the problem until the Act is changed:

1. Where the prosecuting authority is uncertain that a woman who killed her child within six months of its birth did so while the balance of her mind was disturbed by the child's birth it must charge the woman concerned with murder. That, it seems, must be the case in the majority of cases. Section 3 of the Act will then enable the woman concerned to show that the balance of her mind was disturbed by the child's birth and that she is entitled to a verdict of guilty of infanticide. A charge of infanticide must be preferred only in the clearest of cases.

3. The case of *Peter Kuyeri v The State* SC 188/95 and to some extent the case of *S v Kachipare* 1998 (2) ZLR 271 (S) are sad indications of what can happen if the prosecuting authority charges a woman with infanticide and does not bother to rebut the presumption of mental disturbance. In *Peter Kuyeri*'s case the man (appellant) agreed with the female co-accused's proposal to kill a newly-born child, born of the two. He was sentenced to death whilst the co-accused was sentenced to three years imprisonment of which one year imprisonment was conditionally

suspended. This, in my view, was a typical case where if the State had sought to rebut the presumption of mental disturbance the co-accused could have been found guilty of murder also. The situation in *Peter* Kuyeri's case was postulated in the WILSA publication at pp 151-152 where it is stated:

> "The provisions of the Infanticide Act only cover a woman who kills her own child. It does not extent to others who might assist her in the act out of empathy because they are experiencing the same pressures, for example, a mother or grandmother who assists her daughter or granddaughter to dispose of the child because they are also likely to be criticized if the child is discovered.
>
> …. A mother might assist her daughter to commit infanticide. If that happened, … the mother … would be charged with murder because the charge of infanticide is a special charge that only applies to a mother who kills her own child. The consequence of being charged with murder is that the mother (or other person who assist in committing infanticide) could be sentenced to death. We recommend that the injustice of such a situation be looked into and addressed through legislation."

Until the legislation is changed, the current provisions of the law only serve to emphasis the need for the Attorney-General to choose the correct charge and as a general approach to charge the accused with murder in the first place leaving it to the court to determine that the balance of the woman's mind was disturbed thereby justify a verdict of infanticide.

3. If the presumption that a woman's mind was disturbed is rebutted, either at the instance of the prosecution or upon the determination of the court on the evidence placed before it in terms of s 4 of the Act, the presiding judicial officer will be constrained by s 224 of the Criminal Procedure and Evidence Act to enter a verdict of guilty to infanticide. That is so because once it is proved that the balance of the woman's mind was not disturbed by the birth of her child and that she killed the child unlawfully and intentionally and within six months of the child's birth, then the offence of murder will have been proved, although

in terms of section 224 of the Code the court can only return a verdict of guilty to infanticite. All this however renders purposeless the inquiry into the balance of the accused's mind.

4. The Legislature, it is recommended, should revisit the Act and clarify its intention. It may make the presumption in s 2(2) an irrebuttable one and place its faith in the prosecuting authority that the latter will charge a woman with infanticide in the clearest of cases only – otherwise it will charge her with murder. Alternatively the Legislature may depart from the general rule and provide specifically that where "ordinary murder" has been proved the fact that the woman concerned will have been charged with infanticide shall not be a bar to a verdict of guilty of murder.

To sum up: the Act as presently framed renders purposeless an inquiry in terms of s 4 of the Act because that inquiry would come to a dead end. Magistrates pay lip-service to the requirement to determine the state of mind of a woman charged with infanticide understandably because of lack of clarity in the Act. Even the WILSA publication had to express its displeasure at this by saying at p 150 that –

> "There is further concern that the uncritical application of the exemption (in s 2(2) of the Act) to these women means that some cynical child killers avoid prosecution and sentencing for murder. However, on balance it is probably preferable to leave the situation as it is – at least those women who are genuinely psychiatrically disturbed receive an automatic benefit of the doubt."

I do not think that judicial officers should neglect a duty, imposed by statute, to determine whether the balance of a woman's mind was disturbed by the birth of the child simply because by doing so some genuine cases are saved. Rather they should be concerned that justice is done in every case that comes before them.

The accused in *S v Martha Ngondore* committed the offence charged and despite the omission to determine the state of mind as the law is presently understood and implemented, I would confirm both the conviction and sentence. Any inquiry in all likelihood could only have worsened her position. The conviction of the accused in *S v Zivai Mudzingwa* is set aside and the sentence quashed for the reasons given by the Attorney-General in his response to my inquiry with which I am in complete agreement.

GARWE JP: In general I am in agreement with the sentiments of CHINHENGO J. There is a presumption in favour of an accused person, which is rebuttable, that the balance of her mind was disturbed as a result of giving birth to a child if such accused unlawfully and intentionally causes the death of the child within six months of the birth of the child. In terms of s 4 of the Act the court is required to undertake an inquiry to determine whether the balance of the mind of the woman was disturbed and for this purpose shall consider any one or more of the circumstances provided for in that section. It was never intended that once a woman kills a child within six months of its birth the presumption would automatically apply. The court has to consider the surrounding circumstances and determine whether on balance the mind of the woman was disturbed as a result of giving birth to a child.

The difficulty, as aptly described by CHINHENGO J, lies in the fact that the State, having decided to prefer the lesser charge of infanticide in the first instance (which would imply that the State had accepted that the balance of the mind of the woman was so disturbed), cannot be seen to challenge the presumption during the same trial. If the State were to do so, it would amount to the State seeking to prove that the woman is guilty of the more serious charge of murder. This is not permissible although in terms of s 54(1) of the Magistrates Court Act, [*Chapter 7:10*] the court, either *mero motu* or at the instance of the prosecution, can stop the proceedings and refer the matter to the Attorney General who may direct *inter alia* that the proceedings be converted into a preparatory examination pursuant to s 225 of the Criminal Code. The position however appears settled that it is wrong in principle for the State to use s 54(1), for example, to change its mind and bring a more serious charge against an accused when, on the same facts, it had previously decided to charge a lesser offence – *S v Moyo (2)* 1978 ZLR 499(G); *S v Collett (2)* 1978 RLR 288(G), 291.

I agree with CHINHENGO J that the Act as presently worded renders nugatory any attempt to establish the state of mind of an accused person. In short such an inquiry would make no difference, the State having decided, in the first instance, to charge the accused with infanticide.

As a corollary therefore the Attorney General and prosecutors in general must give careful consideration to matters such as the present when they come before them. Where the prosecuting authority is of the view that none of the circumstances mentioned in s 4 of the Act apply then an appropriate charge in such a case would be one of murder. During the trial an accused would be entitled to argue that the presumption in terms of s 4(2) of the Act applies but the State would also be entitled to show that the presumption is not applicable on the particular facts of the case. The court would at the end of the day make a determination on whether or not the presumption applies in the particular case.

I agree that the Act needs to be amended in order to clarify what should happen in a case where an accused is facing infanticide but none of the circumstances outlined in s 4 of the Act are found to exist.

This judgment had been misplaced following the resignation of CHINHENGO J and was only recently located. The consequent delay fortunately has not been prejudicial as in the case of Zivai Mudzingwa a warrant of liberation had already been issued. The judgment however raises an important point and I would accordingly suggest that copies of this judgment be forwarded urgently to the Attorney General, the Director of Public Prosecutions and the Chief Magistrate.