

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CRIMINAL TRIAL NO 108/06

In the matter between:

HLALISILE THWALA

Vs

REX

CORAM: MONAGENG, J

FOR CROWN: MR. STANLEY DLAMINI

FOR ACCUSED: MR. BEN SIMELANE

ACCUSED: PRESENT

**JUDGMENT
17 JUNE 2008**

[1] The accused person, one Hlalisiwe Thwala stands accused of the criminal offence of murder.

[2] The brief facts of the case are that, up to the 29th September 2005, she had been pregnant, and that on this date, she gave birth to a male baby. After giving birth she concealed the baby in a pit latrine. These are the facts that were agreed to by the prosecution and the defence. Both parties further, by agreement, tendered for admission, a report prepared by a Psychiatrist, Doctor Ndlangamandla (Exh. PI), and a medical examination report compiled by Dr. Kamal (Exhibit P2). These were admitted and form part of the evidence, and pursuant to **Section 221 (1) of the Criminal Law and Procedure Act**, the reports *prima facie* evidence of the matter stated therein.

[3] The prosecution then called one Doctor Reddy, a Police Pathologist who performed a post mortem on the body of the baby. Dr. Reddy, a qualified medical doctor with specialization in forensic medicine, confirmed performing the post mortem on the body of a full term baby boy, with a 51 cm height and noted the following injuries:

1. Cut wound over front of neck middle to left side present 5.7x1 cms trachea deep. It involved muscles, trachea, oesophagus, vessels, nerves with scratches 4.2 cms area, intermingled at right of wound. The edges were clean cut and angle sharp.
2. The doctor was emphatic that the injuries were ante mortem in nature, that is that they were made whilst the baby was still alive. The doctor also observed that meconium was present at the end of the large intestine.

[4] The doctor further observed that a few areas of the body were bloody and muddy. His conclusion was that the injuries he observed were caused by someone else. The multiple scratches, he says, show that there was an effort to cut and ultimately cutting, which was the cause of death of the baby.

[5] The psychiatrist Dr. Ndlangamandla in his report dated 29th March 2006 observed that:

- (i) The accused denied killing the baby and actually said it was a stillbirth i.e. born dead.
- (ii) She claimed she was well except for the abdominal pains and that she gave no history suggestive of any mental illness at the time.
- (iii) Further that the impression made is that she was mentally stable at the time of the crime and she is fit to stand trial.

A certain Dr. Kamal in his medical examination report dated 30th September 2005 observed as follows:

- (i) The accused looked fit and not in pains or distress.
- (ii) The uterus was bulky about 18 to 20 weeks in size with bleeding from the vagina.
- (iii) The doctor also observed that the accused's last menstrual period (LMP) was in June 2005.

[6] As indicated earlier, the psychiatrist's report and that of the

doctor (Kamal) were admitted. At the close of the State's case, the accused elected to give sworn evidence. She confirmed having been pregnant up to the 29th September 2005. She further said that on this date she was seven months pregnant. On this night, she says that at about 11pm she went to bed and at midnight she felt stomach pains. She left the house and went outside next to a pit latrine. The pains continued and she ultimately called out to her grandmother to come to her, and then called out to her again and told her not to come. She says she wanted her grandmother to come and assist her. She says that the baby came out but it was already dead. She put the- naked body of the baby into a sack and put the sack into the pit latrine, and went back into the house.

[7] In the morning, her grandmother went to another homestead. A certain Manoyiza asked the accused what was in the pit latrine, and she told him that she was going to the pit latrine. Manoyiza left, and afterwards, her grandmother came back home and she asked her grandmother what she should do with the baby, that is whether she should take it out of the toilet. Her grandmother told her to do as she pleased. She says that she then used a hook which had a wire at the front to fish the baby out and she buried it in a shallow hole. The police later came to the homestead. She says that the injuries that Doctor Reddy described, which she herself did not see, were caused when she fished the baby out of the latrine with the hook. She denies deliberately causing the injuries, and in fact says they were caused post mortem, that is after the baby had died when she fished it out of the latrine.

At this stage, I wish to state that when an accused person pleads not guilty to a criminal charge, the burden of proving the case against the accused is placed on the prosecution. The burden is an onerous one which should be discharged beyond

all reasonable doubt.

[8] In this case, the prosecution has to prove that the accused person unlawfully caused the death of the deceased, either intending to do so or recklessly not caring whether or not she does kill him see ***Dlamini, Doctor v R 1987 - 1995 (3) SLR page 221***. The accused should have intended to kill or foreseen the real possibility of killing and proceeded regardless - See ***R V Gwebu Marwick 19871995 (3) SLR - page 336***.

[9] I wish to observe that there are a few areas of divergence between the observations of Doctors Reddy and Kamal and I will deal with these first. Doctor Kamal on examining the accused's empty uterus observed that it was about 18 to 20 weeks in size. Under these circumstances, this would suggest that it had been carrying a foetus of about 18 to 20 weeks old. Doctor Reddy on the other hand says that the baby was born full term, and that he determined this because it was 51 cms in height, which is the height of a full term baby, who would be 9 to 10 months old.

[10] Doctor Reddy also said that the presence of meconium at the end of the large intestine also indicated that the baby was full term. Doctor Kamal also observed that the accused's last menstrual period was in June 2005. All things being equal, this would place the baby or foetus who/which was delivered at the end of September 2005, at about 12 weeks old. This observation brings into question the reliability of either the information that was given to Doctor Kamal by the accused, regarding her last menstrual period, or the reliability of Doctor Kamal's estimation of the age of the foetus, that was carried in the then empty uterus or both.

[11] It will also be recalled that when she gave evidence, the

accused said that on the 29th September 2005 her pregnancy was 7 months old, which also introduces another dimension in the sense that 18 to 20 weeks translates to a maximum pregnancy of 5 months.

[12] I am aware to the fact that the accused person need only give the Court a reasonably plausible explanation, but this does not entitle the accused to giving a palpably untrue explanation. I am aware that Doctor Kamal's report was admitted but I find that it does not assist the Court in any way, especially since a proper reading indicates that it is at variance with what the accused herself says and what she told Doctor Kamal on examination. In any case, the age of the foetus or baby is not such a critical issue in this particular case, and in my view does not take the case any further.

[13] The accused in her defence and rather belated, brought in a defence, a defence that was not put to the most critical witness, Doctor Reddy. This is that the injury was caused to the baby when it was already dead or post mortem, when she used a hook to fish it out of the pit toilet. Dr. Reddy says that the injury was caused deliberately by someone after the baby was born, and that in fact the baby died due to the cut injury over the neck.

In this case, there is no direct evidence that the State is relying on and it appears to me that this is a case where the State relies on circumstantial evidence. The case of **Rex v Blom 1939 AD 188**, at pages 202-3 quoted in **R v Kimbera**, a Swazi High Court Judgment delivered on the 13 May 1983 states the requirement of the law thus:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (i) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (ii) The proved facts should be such that they exclude every reasonable inference from them, save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct".

I am required to decide whether or not the baby was born alive and whether or not the injuries that were found on his neck were inflicted before it died or afterwards, by the accused mother. Dr. Reddy said that the wound on the neck of the baby was clean cut and angle sharp and that it was made ante mortem or before the baby died. Further that the cut was made by someone else. He further said that since there was blood on the wound, this means that the wound or injury was inflicted while the baby was still alive. Doctor Reddy further informed the Court that had the injury been caused after the baby had died the wound would not have had blood on it.

[16] I now wish to consider the accused's evidence. This is a woman who was aware that she was pregnant, she develops stomach pains, goes to the toilet, realizes that she is delivering a baby, calls out to her grandmother to help her, gives birth and immediately calls out to her grandmother not to come to her assistance. The reason, she says, is that the baby had already come out and that, since her grandmother had slept late, she decided not to disturb her.

[17] I need to consider whether or not the accused's explanation is reasonably plausible. It is my considered view that the accused's behaviour, when she realized that she had given birth, of asking her grandmother not to come to her assistance, when she was faced with a life changing event like child birth, is highly suspect. Moreover, this was not her first child, and logic dictates that she appreciated the seriousness of the event and this works against her. I totally disbelieve and reject her defence and the only inference that I draw is that she kept her grandmother away, in order to execute the elaborate plan of killing the baby and disposing of its body.

[18] This conclusion is backed by Dr. Reddy's findings that the injury to the baby's neck was caused ante mortem or before the baby died. I have found no reason to fault or disbelieve Dr. Reddy. Moreover, the accused's version that the injury was caused by the hook collapses in the face of medical evidence, to the effect that a wound caused after death would not ooze blood. Whichever way I look at it, I reach only one conclusion that the baby's injuries were caused ante mortem, that is while the baby was alive, and I believe that the baby was born alive. From the evidence of the accused herself, she was alone, having asked her grandmother not to come to her, and therefore she is the only person who could have caused the injuries and the death of the baby.

[19] Following these actions, the accused further put the body in a sack and threw it into the toilet and casually went back to the room she was sharing with her grandmother, until morning when the body was discovered in the toilet. All her actions lead to only one conclusion and this is that she killed the baby, by administering the injuries described graphically by Dr. Reddy,

who also proved that the injuries could not have been caused after the baby died. In my view her defence collapses.

The accused's attorney has referred me to **Section 296 (1) of the Criminal Law and Procedure Act** particularly the first proviso, which deals with punishment and which reads: "*Sentence of death by hanging shall be passed by the High Court upon an offender convicted before or by it of murder, and sentence of death by hanging may be passed by such court upon an offender convicted before or by it of treason:*

Provided that where a woman by any willful act or omission causes the death of her child under the age of twelve months, but at the time of such act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to such child or by reason of the effect of lactation consequent upon the birth of such child, then, notwithstanding that the circumstances were such that but for this proviso the offence would have amounted to murder, she shall be guilty of culpable homicide and may be dealt with and punished accordingly:

Provided further that it shall not be lawful for sentence of death to be pronounced on or recorded against any person convicted of an offence punishable by death if in the opinion of the court such person was at the time of the commission of such offence under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during His Majesty's pleasure, and if so sentenced he shall be detained in such place and under such conditions as His Majesty may direct, and whilst so detained shall he deemed to be in lawful custody; and,

Provided also that where a court in convicting any person of murder is of the opinion that there are extenuating circumstances it may impose any sentence other than the

death sentence. (Amended P. 6/1956; PA7/1959; L.N. 38/1967.)"

As correctly submitted by Counsel for the Crown, this Section does not come into play.

[20] On the 14th April 2008, I ordered that the accused should be taken for a psychiatrist evaluation, to determine her mental state when she allegedly committed this offence. I also asked for a social welfare report. The Court has since received an evaluation report from the psychiatrist at the National Psychiatrist Hospital, Dr. Walter Mangezi. The doctor confirms that she was of a sound mind at the time of the commission of this offence. This confirms the observations that were made by Dr. Ndlangamandla. The Social Welfare Officer's report also reveals a girl who was troubled, unloved and who had no parental guidance. But considering the totality of the circumstances in this case, I find that the accused intended killing her newly born baby and did kill her. She knew that this was unlawful as demonstrated by her actions. I find, therefore that the Crown has proved its case against her beyond reasonable doubt. I find her guilty of the offence of murder and she is accordingly convicted.

[21] In the interest of justice and pursuant to **Section 296 (1) of the Criminal Law and Procedure Act**, I ordered that a proper pointed and full mental assessment of the accused, at the time of the commission of this offence, be carried out to assist the Court determine a proper sentence. The accused was referred to a hospital for this to be done. The report similarly confirmed that she was mentally sound at the time of the commission of the offence. **State Counsel:** She is a first offender.

[22] **Mitigation:**

Before the Court there is evidence from both reports that when the accused committed this offence she was 19 years old and she had

not attained adulthood. The Court is now in possession of evidence which brings forth her background. She first got pregnant at 18 years and both reports show that contrary to what she said when she testified she has not been to formal school, nor formally employed. She was rejected by her boyfriend and family and this resulted in a state where she was helpless.

[23] I am asking this honourable Court to look at the present circumstances of a teenager who is unloved, who has no love nor support. The second pregnancy complicated matters for her. She could hardly fend for her 5 year old. The question that comes to mind is why pregnant? It looks like she and her boyfriend had agreed on the pregnancy but he reneged. I ask the Court to back date the sentence to 10th October 2005 when she was incarcerated. At the end of the day she has served her sentence.

[24] She can be rehabilitated and the Court should consider if a prison rehabilitation can offer the solution we want. We submit that it cannot. She does not stand to benefit - gaol is not a solution to first time offenders. She was forced by economic circumstances to be where she is. I ask the Court to consider her older child who needs her. The interests of this child, who is growing without his mother, should be considered.

[25] **SENTENCE:**

In this case, the accused person Hlalisile Thwala was charged with and convicted of murder of her newborn baby boy. Several reports from specialist psychiatrists, psychologists and a social welfare officer were lodged in Court, some at the instance of the prosecution and others at the instance of the Court. The aim was to undertake a fuller investigation into her mental state at the time she committed this offence. Unfortunately, basically all the medical investigations

and reports were done long after the commission of the offence and as such they have not been very helpful to the Court.

[26] I would direct that in future, in similar cases, the accused women/girls should be referred to such specialists when the events are still fresh, for Courts to make informed decisions. I have taken all her mitigation into account. I have anxiously considered her social background, which in my view could have partly led her to committing this offence. It is also a medical fact that when women have given birth they are prone to puerperal insanity or insanity caused by child birth and/or lactation, during the first twelve months, hence the Criminal Law and Procedure Act Section 296 (1), first proviso recognizes this. I am of the view that this medical fact although not proved and her social background are enough grounds to find extenuating circumstances and I so find.

[27] One other observation I want to make is that, the legislature, because of the possible existence of puerperal insanity in such cases, should consider enacting a criminal offence called infanticide for these type of cases. This will comply with international trends and standards and also with the Criminal Law and Procedure Evidence Act to some extent. Given the totality of the above, I will sentence her to two (2) years eight months in prison, this is the period she has spent in gaol from 10th October 2005 when she was first incarcerated. Remission will not apply and she should be liberated immediately.

S.M. MONAGENG
JUDGE