



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE

Reportable
CRIM. CASE NO. 436/13

In the matter between:

REX

v

NONTSETSELELO SIMELANE

Neutral citation: Rex v Nontsetselelo Simelane (436/13) [2014] SZHC 175 (7 AUGUST 2014)

Coram: Q.M. MABUZA J

Heard: 23/7/2014

Delivered: 07/8/2014

Summary: **Criminal Law and Procedure – Attempted murder of one day old child – Infanticide – No law governing infanticide promulgated in Swaziland – Proviso to section 296 (1) of Criminal Procedure and Evidence Act applicable – Non-availability of psychiatric and psychologist’s reports – Creating difficulty in formulating appropriate sentence – Accused given suspended sentence.**

JUDGMENT

MABUZA –J

- [1] The Accused stands charged with the offence of attempted murder it being alleged that upon or about 25th August 2013 at or near Nsuka area, in the Manzini Region, the said Accused person did unlawfully and with intent to kill, dump a newborn baby at the verge of a donga near a stream and did thereby commit the crime of attempted murder.
- [2] When the charge was put to the Accused she pleaded guilty and the Crown accepted the plea. A statement of agreed facts which had been signed by the Accused and the Crown was read into the record.
- [3] The statement of agreed facts recorded that on the 24th August 2013, the Accused was sleeping in the same room as her boyfriend, Mahlasela Dlamini whom she had visited at his homestead. Dlamini asked her if she was pregnant and she denied being pregnant well knowing that she was pregnant from a previous relationship. The following day on the 25th August 2013 she excused herself from Dlamini and pretended to go to the toilet. She however went to the forest where she gave birth to a baby girl, where she and the baby were found by Satiso Sigudla. It is alleged that when she was asked about the baby she denied any knowledge of the baby.

- [4] Later, Dlamini came to fetch water and Sigudla informed him about the baby. Dlamini called his mother who in turn called the community police who reported the matter to the Royal Swaziland Police.
- [5] The police came and took the Accused and the baby to the Dvokolwako Health Centre where they were both examined by a doctor who declared that they were both fine. The police charged her with the present crime.
- [6] The Accused admits that she intended to dump the child and foresaw that her conduct could result in the death of the baby.
- [7] After the statement of agreed facts was read into the record she agreed with its contents and it was handed in by consent as Exhibit A. The medical reports pertaining to her and the baby were handed in by consent as Exhibit B and C respectively.
- [8] The Accused was convicted and found guilty of the attempted murder of her newborn child upon her plea of guilty.

SENTENCE

- [9] When called upon to mitigate she stated that she was 20 years old when she fell pregnant and was now 21 years old. The man who had impregnated her had dumped her. She found him with another woman and when she confronted him he informed her that he was a man and was no longer interested in her. She says that she had told him about her pregnancy and he told her that he did not wish to have anything to do with her and the baby. Those are the reasons that made her want to dump the baby.
- [10] She says that she left school at Grade 6 when she was 16 years. At the time she met the baby's father she was employed at Matsapha. She did not know that there were other forms of contraception other than a condom which the baby's father did not wish to use.
- [11] The present case calls to mind the case of **Rex v Hlobisile M. Tfwala** case no. 128/07 (unreported) ZHC 47 wherein I discussed similar cases of **R v Hlalisile Thwala** and **R v Zanele Maziya**. **Hlalisile** gave birth in a pit latrine, cut her baby's throat put the baby in a sack and threw him into the pit latrine. **Zanele** gave birth in a rondavel which was adjacent to the main house and dumped the baby still alive in a pit latrine from where it was retrieved the following morning and taken to hospital where it died three

days later due to injuries it sustained when it was retrieved from the pit latrine. **Hlobisile** placed her 13 day old baby into a plastic bag while she was still alive and placed the plastic bag into a river where the current swept it downstream. The plastic with its gruesome contents was found some days later with the baby dead inside

[12] In the case of **Hlobisile** I made reference to the judgments of Monageng J and Masuku J in similar cases which I again refer to hereinunder. But first I wish to draw attention to the first proviso to section 296 (1) of the Criminal Procedure and Evidence Act No. 67/1938 which states:

“... 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...”

- [13] Unfortunately no medical examination was carried out on the Accused shortly after she committed the offence making it difficult to gauge her state of mind when she committed the offence.
- [14] The attention of the National Commissioner of Police is drawn to this proviso which clearly states that the child whose death is being investigated should be under the age of twelve months. Clearly the proviso recognizes that pregnancy has its attendant problems and the police department should be aware of that fact and hasten to have a new mother in these circumstances examined both by a psychiatrist and psychologist; such reports to await the trial date.
- [15] I repeat the sentiments of Monageng J in the case of **Rex v Hlalisile Thwala** criminal case no. 108/2006 (unreported) at paragraph 26 where the learned judge stated:

“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.”

[16] Again in **R v Hlalisile Thwala** it was stated:

“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.”

[17] In *casu* I too align myself to these worthy and noble calls to the Legislature to consider enacting a criminal offence called infanticide which will acknowledge the unique role of women in pregnancy, childbirth and childbearing in our society and the reality faced by women who may be young, poor, socially isolated or mentally ill and who find themselves in desperate circumstances such as the present case. See Isabel Grant: Desperate measures. Rationalizing the Crime of Infanticide.

[18] Infanticide or infant homicide is the intentional killing of infants. It is suggested that any proposed legislation should define infanticide as a distinct and lesser crime than murder. Under the terms of the proposed legislation if courts concluded that a mother’s “judgment was impaired as a result of the effects of giving birth or the effects of lactation following the

birth,” they would be allowed to convict her of the crime of infanticide, rather than murder.

[19] Since infanticide is often a response to an unwanted birth, preventing unwanted pregnancies through improved sex education (for both males and females) and increased contraceptive access are advocated as ways of preventing infanticide. Increased use of contraceptives and access to legal abortions have greatly reduced infanticide in the developed (first) world. Screening for psychiatric disorders or risk factors and providing assistance for those at risk may help prevent infanticide.

[20] In some countries baby hatches and safe places for a mother to anonymously leave an infant, are offered in part to reduce infanticide. The option of adoption should also be widely advertised in an effort to reduce infanticide.

[21] In passing sentence I am guided by the sentences meted out in the cases to which I have made reference to above. In the case of **R v Hlalisile Thwala** she was sentenced to 2 years 8 months imprisonment. In the case of **R v Zanele Maziya** she was sentenced to 18 months imprisonment. Both sentences were without the option of a fine. In the case of **R v Hlobsile Tfwala** she was sentenced to 2 years imprisonment without an option of a fine.

[22] The above cases demonstrate deep underlying psychological problems that affect these young women and that the courts are foraging in the unknown when they try such cases without medical and legislative assistance. Consequently justice cannot be properly carried out in such circumstances. However, a crime has been committed and the Accused must be punished accordingly.

[23] In the present case I do not have a psychiatric nor a psychologist's report which reports would have given me an idea as to the Accused's state of mind and personal circumstances at the time she committed the offence. The present case is however different from the cases of **Hlalisile, Zanele** and **Hlobsile** in the sense that the Accused's child did not die. In fact she was found sitting next to the newborn baby still contemplating her next moves. A fair sentence in the circumstances would be a sentence of one year imprisonment.

[24] In the event the Accused is sentenced to 1 year imprisonment without the option of a fine. The sentence is backdated to the 25th August 2013 on which date she was arrested and placed into lawful custody.

Q.M. MABUZA -J

JUDGE OF THE HIGH COURT

For the Crown : Miss B. Ndlela

For the Accused : In person