Judgment No. HB 9/2004
Case No. HC 73/2004
CRB K 742/03

THE STATE

Versus

DUDUZILE NGWENYA

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 26 FEBRUARY 2004

Criminal Review

CHEDA J: Accused a girl aged 20 years gave birth to a live baby at Maphisa District Hospital on 5 November 2003. She was discharged from hospital on 9 November 2003 with the baby. On her way she strangled the baby to death using a T-shirt. Thereafter she buried the baby in a whole in the bush.

Following a tip-off she was arrested, arraigned before a magistrate. She pleaded guilty, was convicted and sentenced to 2 years imprisonment. In mitigation she stated that she is single and has 2 other minor children whose father passed away. She is an unemployed mother with no assets whatsoever. The man responsible for the pregnancy ran away to Botswana leaving her to look after this child alone. She lives with her grand mother.

Infanticide is indeed a very serious offence. The word infanticide can easily mislead as it presents a lukewarm picture of what the accused did. In a simple understanding, accused killed a human being. Having done so indeed she needs to be punished. The effect of punishment is an intentional infliction of suffering on the offender and an expression of society's disapproval of the offender. In doing so those who are charged with the imposition of punishment should in my view carefully weigh the consequential harm on the offender against the society's expectations.

It is therefore necessary that punishment is not only achieved by infliction of pain, hence the need to explore and encourage other non-custodial sentences. If, and only if a custodial sentence is to be imposed, it should be decided whether the desired effect will be served by a long or short-term imprisonment. In assessing a suitable sentence judicial officers should not loose sight of the fact that the fundamental policy of sentencing is that sentence should fit both the criminal and the crime. This principle was clearly stated in *S* v *Sparks* 1972 (3) SA 396 (A) at 410H HOLMES J stated,

> "Punishment should fit the criminal as well as the crime, be fair to the state and the accused and be blended with a measure of mercy."

It follows therefore, that there are certain considerations to be taken into account in the determination of sentence. Most importantly it is;

(a) Accused's motive which ultimately bears upon such moral guilt, see *S* v *Moyo* 1979 (4) SA 61 (RZA);

(b) Accused's character

Accused's previous convictions or the fact that he is a first offender can either be aggravating or mitigatory.

(c) Accused's age

The courts will usually lean in favour of youthful offenders. The reason being that, because of their age there is a tendency of easily falling into temptations due to failure to resist the otherwise resistible temptations.

Every society is composed of different classes. There are certain behaviours, conducts or practices which are quite common in for instance children which can

not be found in adults e.g. the tendency to play in the middle of the road. In the present case, accused is a 20 year old mother of two orphans. She is not employed and she lives with her grandmother in the rural areas. The man responsible for the pregnancy absconded leaving her to look after the expected baby. What this means is that she had an additional fatherless child to look after. Her motive to kill the child was to avoid looking after it single handedly. These courts do not take kindly to human lives being taken away in that manner. The sanctity of human life is to be upheld all the time.

It is becoming common for the courts to emphasise the seriousness of a crime while paying less attention to the personal circumstances of the accused which are otherwise mitigatory. Accused had just given birth and within 4 days she strangled the child. This type of behaviour in my view is very strange though not uncommon amongst women. It is my respectful view that the courts should cast its judicial net wider in their aim to find the underlying cause for this behaviour. In that search courts should consult medical and social scientists as well. This type of behaviour is a medical condition known as puerperal psychosis. Pomer and Selwood, *Criminal Law and Psychiatry* 1987 Kulwer Law Publishers page 140, describes it as a mental condition which occurs within three months of delivery. The learned authors state,

> "*Puerperal psychosis* is usually preceded by a lucid interval of three or four days after delivery. The on-set may be acute and accompanied by clouding of consciousness with delusional and/or hallucinatory experiences. A woman may kill her child in a state of *puerperal* depression or *schzophrenia* and have genuine amnesia for the material time of the child's death when the crime would be reduced from murder to manslaughter on the basis of the Infanticide Act 1938" (South African Act)

It is clear that the South African courts recognise this mental condition which can be described as temporary madness. It then reduces the moral blameworthiness of

the accused. In our legal system it is worth of note that although generally the killing of a human being, of which an infant is also one is murder, but this has been judicially defined as "infanticide". In my opinion it is reason enough to conclude that obviously the punishment can not and should not be as severe as in murder cases. That together with the acceptance of temporary insanity which normally occurs to some mothers together with the personal circumstances of the accused should heavily weigh in favour of the accused.

It is therefore desirable that the courts should try to have a full picture of the circumstances and put itself in the position of the accused. It is quite clear that accused is a rural woman who found herself faced with real social and financial problems. To send her to prison for such a long time, disregarding the plight of the orphaned children with their great-grand mother is to completely remove the courts from the ordinary day to day life of a communal person who is the poorest of the poor in our society. The courts can not completely remove itself from the society it serves as the courts do not exist in a vacuum.

In my view judicial officers must associate themselves with the community they serve and where possible temper justice with mercy. The concept of mercy has been subjected to judicial scrutiny and it will continue to do so. In *S* v *V* 1972 (3) SA 611 at 614(D) HOLMES JA stated'

> "The element of mercy, a hallmark of civilised and enlightened administration, should not be overlooked, lest the court be in danger of reducing itself to the plane of the criminal."

The same learned judge in *Sparks (supra)* at page 410G said:

"… the appellants must not be visited with punishments to the point of being "broken".

It is my view therefore that in imposing punishment mercy should not be lost sight of. It should therefore be blended with the personal circumstances of the accused. I am sure that society does not expect the 2 minor orphans to suffer again for the sins of their mother, particularly, where the legislature had tempered with the seriousness of this crime by re-defining the taking away of a life in this manner.

Having considered this case it is my opinion that there are more mitigatory features than aggravating ones, of which the accused must benefit. The conviction is therefore confirmed but the sentence is set aside and substituted with the following:

> "2 years imprisonment of which 20 months imprisonment is suspended for 5 years on the usual conditions. Effective sentence – 4 months imprisonment."

Ndou J ……. I agree