

CRB Magunje 195/02

THE STATE
versus
SIBONGILE KADEMAUNGA

HIGH COURT OF ZIMBABWE
SMITH J
HARARE, 27 August 2003

Review Judgment

SMITH J: The accused was charged with contravening s 2 of the Concealment of Birth Act [*Chapter 9:04*] (hereinafter referred to as “Chapter 9:04”). She was convicted and sentenced to 12 months imprisonment, half of which was suspended for 5 years on condition she did not, during that period, commit any offence involving concealment of birth or infanticide for which she was sentenced to imprisonment without the option of a fine and the other half was suspended on condition she did 210 hours of community service. The facts of the case are as follows. On 31 December 2001 she secretly gave birth to a full-term baby. She concealed it in a hole in an anthill. When her husband came back from the fields he noticed that she was no longer showing signs of pregnancy so he called members of the Neighbourhood Watch to interrogate her. Apparently, she was three-months pregnant when she married her husband and she did not tell him. When she gave birth she did not want him to know that she had delivered a full term baby. She told the members of the Neighbourhood Watch where she had hidden the baby and they retrieved it. The baby was still alive. When it was examined at the hospital on 3 January 202 it had septic wounds on its abdomen and a septic ulcer on its right thigh.

The Regional Magistrate who scrutinized the record queried whether the charge that was put to the accused was appropriate. He felt that the case involved a child, not the body of a child. The child was, and still is, alive and so the accused had abandoned her baby. He felt that contravening s 7(1) of the Children’s Protection and Adoption Act [*Chapter 5:06*] would have been a more appropriate charge. The trial magistrate agreed that that would have been a more appropriate charge but said that, in his view, the charge of contravening s 2 of Chapter 9:04 was not improper.

The Regional Magistrate has submitted the record for review.

Paragraph (e) of s 7 of the Children's Protection and Adoption Act [Chapter 5:06] makes it an offence for any parent who -

"in the case of an infant, left that infant unattended in circumstances which were likely to cause the infant physical or mental distress or harm".

There is no doubt that the accused contravened para (e) above. Leaving her baby in a hole in an anthill must have caused it physical distress or harm, considering that it would have had no food and that it had developed septic wounds and ulcers by the time it was saved. Furthermore, a charge of attempted infanticide would also have been appropriate.

Section 2 of Chapter 9:04 provides as follows -

"2. Penalty for concealment of birth

Any woman who is delivered of a child shall be guilty of the crime of concealing the birth of her child if she, by secret burial or other disposal of the body of the child, endeavours to conceal the birth thereof, and shall be liable to imprisonment for a period not exceeding five years."

Chapter 9:04 initially came into the Statute Law of this country as Ordinance 10 of 1845 and the date it came into operation was 10 June 1891. It was part of the laws of the Cape Colony which were adopted as the initial statutory law in this country. The only amendment that has been made to Ordinance 10 of 1845 was effected by Act 12 of 1969.

In the 1939 Revised Edition of the Statute Law of Southern Rhodesia, Ordinance 10 of 1845 appeared as the Concealment of Birth Act [Chapter 32]. Section 2 thereof read as follows -

"2. Any woman who is delivered of a child shall be deemed to be guilty of concealing the birth of her child, if she by secret burial or other disposal of the dead body of the said child endeavours to conceal the birth thereof, and shall be liable to imprisonment for a period not exceeding five years."

In the 1963 Revised Edition of the Statute Laws of Rhodesia, Ordinance 10 of 1845 appeared as Chapter 29. Section 2 of Chapter 29 of 1963 was identical to s 2 of the Chapter 32 of 1939.

The Criminal Law Amendment Act, 1969 (No. 12 of 1969) amended s 2 of Chapter 29 of 1963 by deleting the word "dead" and that is why, when the Revised Edition of the Laws was produced in 1974, the Concealment of Birth Act [Chapter 57] was identical in wording to the present Chapter

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9:04.

The amendment made by Act No. 12 of 1969 shows a clear intention to extend the ambit of the offence originally created by Ordinance 10 of 1845. Whereas it originally covered cases where a dead body was disposed of, since 1969 the offence is committed whether the body disposed of was dead or alive at the time of disposal. One can see the reason for the amendment. When the offence covered only the disposal of dead bodies, it meant that the State would have to establish that at the time the body was disposed of the baby was in fact dead. If the baby was alive at the time of the disposal but died thereafter, the woman would not have been guilty of the offence. The effect of the amendment is that if the woman disposes of the body in an endeavour to conceal the birth, whether the baby is dead or alive at the time, she has committed the offence. It would be illogical to hold that the woman is not guilty if the baby survives, but if it does not then she is guilty.

For the reasons set out above, I consider that the charge preferred against the accused was proper and that her conviction is in order. On the other hand, a charge of attempting to contravene s 2 of the Infanticide Act [*Chapter 9:12*] or of contravening s 7(e) of the Children's Protection and Adoption Act [*Chapter 9:04*] would have been equally competent.

GILLESPIE J, in *S v Chingodya* 1996 (1) ZLR 521 (H), set out what he considered to be the relevant factors to be taken into account in determining an appropriate sentence where a woman is convicted of contravening s 2 of Chapter 9:04. The sentence imposed complies with the views expressed by GILLESPIE J.

The conviction and sentence are confirmed.