

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

LOIDE JOSEF KATOFI SHANINGWA

Accused

CORAM: DAMASEB, JP

Heard on: 20 April 2006

Delivered on: 21 April 2006

SENTENCE

[1] **DAMASEB, JP:** On your own pleas of guilty I found you guilty of murder, and concealment of birth, of your new-born child. It is now my duty to pass sentence on you.

[2] I have had regard to your personal circumstances which are the following: You are now only 23 years old and at the time of the commission of the offences you were only 21 years old. This was your second child – the first one having been born on 22nd September 2001 (now 5 years old) and still alive, living with you. The father of your first child, according to you, was also the father of the child whose death you intentionally brought about. You confided in the Court that he denied responsibility for your second pregnancy

and that this occasioned your angst – which was exacerbated by the fact that when you gave birth to the first child you were rejected by your family who even wanted you to leave the family home so that you can fend for yourself and your first child. You still remain in the family home though.

[3] You are a first offender and pleaded guilty to the offences charged. You have shown remorse for your evil deeds. You are not employed and so is your father who still lives with you. Your mother does domestic work and appears not to take any interest in you, or indeed, the rest of the family. You and the baby are cared for by your grandmother who is also unemployed. It is your grandmother in whose care you left the child when you came to attend your trial. It is quite evident to me that you do not get a great deal of sympathy for what you did from your most immediate family. They are not even in Court to give you support. Your personal circumstances are therefore heart-rending; and I must have regard to them when imposing an appropriate sentence.

[4] After submissions by the Counsel of the accused and before I heard the submissions of Counsel for the State, I sought to establish from the Regional Court Magistrate, Oshakati, the types of sentences meted out for this kind of offences in his division. Having thus spoken to him, I resolved to call a prosecutor from the area to give evidence on this in open Court. I did this in the exercise of my power under s186 of the CPA which provides as follows:

The Court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the Court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the Court essential to the just decision of the case.”

As to the circumstances in which this power ought to be exercised, see *S v Van den Berg 1993 NR 23*)

[5] In the exercise of my discretion under s186 and in order to do substantial justice in the matter, I called Mr Lucious Swenyeho Matota who is the Regional Court Magistrate for the Oshakati division. He is stationed here in Oshakati since April 2003 and was able to give statistics and summaries about cases involving murder and concealment of birth of new-born babies in his division. His evidence was very instructive: He testified that between April 2003 to date, 8 such cases were finalized in his Division while 8 are pending. Of the finalized cases, not all ended in conviction in respect of the main count of murder. His statistics did not include cases that had not yet been transferred to the Regional Court. In one case the accused received a sentence of 12 years of which 2 years were suspended on conditions: She had a previous conviction for the same offence(s). In cases where the alternative count of concealment only were proven, or where a competent verdict of exposing an infant was established, fines were imposed. In one case where the accused was found guilty of the alternative count of

attempted murder, 3 years were imposed of which half was suspended. In cases where the accused were convicted of lesser crimes than murder, and they had another newborn baby at the time of trial, a wholly suspended sentence was preferred.

[6] From the evidence led through Mr Matota, one is struck both by the triviality and selfishness of the explanations given for the commission of the offences, and the methods employed: cruelty to the newborn baby is the common denominator. Mrs Miller for the State, in her submissions, did not seem to take the view that these are serious offences. That is to be regretted, because these offences are quite serious and should be treated as such. However young the victims may be, they are human beings with an existence independent of the mother who had given birth to them. They also do not seem to be isolated cases.

[7] Ms Kishi, Counsel for the defence, has urged me to impose a wholly suspended sentence. Both Counsel have not been able to refer me to comparable decisions of this Court, or any other Namibian Court. The only case referred to in argument was *S v Glaco* 1993 NR 141. In that case a young unsophisticated girl who killed her premature baby was sentenced to be detained until the rising of the Court. I have carefully considered the *Glaco* case. The peculiar facts of that case, I dare say, are such that it is to be confined to its facts. Also, it is distinguishable from the present on the

facts. In *Glaco* the accused was found guilty of the murder of her newborn baby, with extenuating circumstances (at 148G-H). In *Glaco* there was medical evidence the accused, who was 4-5 months pregnant at the time and already had a two-year old child whom she had come to see in hospital, was depressed when she killed her premature baby.

[8] The offences of which I have found you guilty are serious. The Court must not send a wrong message to other young girls like you that they will get away with this kind of conduct. New-born babies have just as much right as others to protection of life.

[9] In everything you said I did not find a single word of what measures you took to avoid a second pregnancy after your sad experience with the first. With all the public campaigns, targeted especially at the youth, about unwanted pregnancies and incurable diseases, you surely ought to know that the best way to avoid pregnancy is to take contraceptives. Since your first experience was traumatic one would have expected that “*once bitten*” you would be “*twice shy*”. Clearly you had not learnt a lesson from your first experience.

[10] I have come to the conclusion that a custodial sentence, albeit tempered with mercy, is unavoidable. It is no exaggeration that this is one of the most difficult sentencing decisions I have had to take, in view of your

personal circumstances. It is the Court's duty, however, to ensure that the murder of new-born babies and concealment of birth are nibbed in the bud.

[11] I am quite conscious that the sentence I impose on you will serve as guidance to the Lower Courts before whom these kind of offences ordinarily appear; and all the more reason why a wrong message should not be sent. In deserving cases custodial sentences must be considered for these offences. Only where there is compelling medical evidence that the accused's mental state had deteriorated as a result of the pregnancy or birth, or there are other circumstances of such compelling nature as to reduce the moral blameworthiness of the accused, should non-custodial sentences be considered in case of an offence involving the murder of a new-born child.

[12] I sentence you as follows:

Count 1: Murder:

Three (3) years imprisonment, of which thirty (30) months are suspended for a period of 5 years on condition you are not found guilty of murder during the period of suspension.

Count 2: Contravening Section 7(1) read with Section 7(2) of Ordinance 13 of 1962 as amended: Concealment of Birth:

Six (6) months imprisonment to run concurrently with the sentence on count 1.

DAMASEB, JP

ON BEHALF OF THE STATE:

Ms S Miller

Instructed By:
General

Office of the Prosecutor-

ON BEHALF OF THE ACCUSED:

Ms F Kishi

Instructed By:
Aid

Directorate of Legal