

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

and

JUSTINA NDESHIHAFELA VILHO

Accused

CORAM: Damaseb, JP

Heard on: 28 April 2006

Delivered on: 09 May 2006

JUDGMENT

DAMASEB. JP: [1] The accused faced one count of murder of her newborn child, and another of concealment of birth of that same child. She tendered a plea of guilty in respect of both in terms of s112(2) of the CPA. I was satisfied that the admissions made by her in respect of the court concerning the concealment of birth proved the elements of that offence, and accordingly convicted her on that count. In respect of the murder count she admitted to “unlawfully and intentionally” killing her newborn baby girl and added that during the evening in question, whilst asleep, she experienced birth pains and gave birth to a baby girl. She states that nobody, including

herself, knew she was pregnant and not knowing what to do and to prevent the baby from crying, she placed her hand over the newborn child's mouth, causing her to die. She admits that she "knew that the baby could suffocate to death."

[2] I did not consider this to be an unique vocal plea of guilty. I therefore questioned her following her s112(2) statement, and not satisfied that the necessary intent to murder was disclosed by her admissions and answers, entered a plea of not guilty on the murder count.

[3] The State then called Dr Yuri Vasin, the forensic pathologist to testify on his chief post-mortem findings. He testified that the newborn child died of asphyxiation. He stated that the dead child's stomach had no milk content in it - evidence it was not breast-fed after birth. He testified that the child was born alive as it had taken air into the lungs and that death occurred shortly after the baby was delivered. He testified that the head of the child was 30cm in circumference and less than 10cm in diameter and opined that in the process of placing a hand on the mouth the accused may have placed the hand on the nose of the child in this way have suffocated her. He, however, said that he cannot exclude the possibility, which he said was a high one, that the accused may have covered the mouth of the dead child while, unknown to her, the child's nostril was congested on account of

congenital anomalies in the nostril which, since the mouth is now covered, could have caused death through asphyxiation.

[3] The State having closed its case, Mr Basson asked for her discharge in terms of s174 in respect of the murder count in the indictment. I accordingly discharged the accused on the murder count. Mrs Miller for the State argued forcefully that the accused on the evidence, especially her admission in terms of s112(2) that she knew that her placing the hand on the mouth of the child could cause death, be convicted of culpable homicide, because she negligently caused the death of the child. She then closed the State's case.

[4] Mr Basson closed the defence case without calling the accused. Mrs Miller then in her submissions stated that the accused should be convicted of culpable homicide on the same basis she earlier mentioned. She argued that the accused had a duty to tell the Court what he intention was. She then relied on *S v Ncube* 1981 (3) SA 511 for the pro position that admissions by an accused person shall stand as proof and can be acted on by the State. She submitted that the accused's admitted that she knew that the baby could suffocate. Mrs Miller also relied for her argument in favour of conviction on the case of *S v Goitseman* 1997 (1) SACR 99. As far as is relevant, the headnote in that case reads as follows:

[5] On the strength of *Goitseman* Mrs Miller submits that absence of knowledge or appreciation that placing the hand over the mouth of the minor child could not cause death, only the accused could testify about as it is something peculiarly within her knowledge, and that the State had no means to prove her state of mind. Mrs Miller added that it was the duty of the accused to inform the Court of her state of mind and in the absence of such explanation, all the Court had left was the admission by the accused for which the inference must be drawn of her guilt.

DAMASEB, JP

ON BEHALF OF THE STATE:

Ms S Miller

Instructed By:
General

Office of the Prosecutor-

ON BEHALF OF THE ACCUSED:

Ms B Basson

Instructed By:
Aid

Directorate of Legal