

**IN HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**ESTHER KAULINGE**

**CORAM: MULLER, J**

Heard on: 17 April 2007

Delivered on: 18 April 2007

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**JUDGMENT**

**MULLER, J.:** [1] The accused was charged with two charges, both relating to the death of a baby that she gave birth to. She pleaded not guilty to the first charge murder of the newborn child and guilty to the second charge, namely a contravention of s 7(1) of Ordinance 13 of 1962, namely concealment of birth.

[2] She was represented by Mr Bondai, instructed by the Directorate of Legal Aid, and Ms Jacobs acted on behalf of the State. Mr Bondai handed in a written list of admissions by the accused in terms of s220 of the Criminal Procedure Act, No 51 of 1977 (CPA). Because the charges were closely related to the same incident the contents of this document which was read into the

record and admitted by the accused, also referred to second charge to which she pleaded guilty.

[3] The Court questioned the accused in terms of s112(1)(b), of the CPA in respect of the second charge and was satisfied that her answers, together with the admissions relating to that charge, that were contained in the document handed in it referred to before, constitute her guilt to that, charge. The State had also accepted that plea. The accused was consequently convicted of committing the offence contained in charge 2.

[4] The State thereupon called two witnesses in respect of charge 1, namely the murder charge to which the accused had pleaded not guilty and made certain written admissions in terms of s220 of the CPA. In addition the State handed in a warning statement made by the accused on 28 August 2003 to the police as well as a sketch plan and key drafted by the Investigating Officer, Constable Aihuki. Both documents were handed in without objection by the defence.

[5] Dr José Mendes performed the *post mortem* examination on the body of the accused's newborn baby and completed the form in respect of the *post mortem* examination. He identified the form and read out his findings as completed therein. He testified that the baby was alive when born and this was proved by the well-known test of fluctuating the lungs of the infant in water. He further found a head wound of the infant's skull with bleeding, as well as a wound to its face. Further important findings were that the mouth, throat and trachea of the infant were impacted with sand. The cause of death was severe head injury and asphyxia. He also indicated the wounds on the skull and face in sketches in his form and noted further that the umbilical cord was "cut" approximately 8 cm from the body of the baby.

[6] During cross-examination it was put to the doctor by Mr Bondai that the accused will testify that she gave birth to the baby while standing and that the baby dropped to the ground on its head. He asked whether the head injury could have been caused under those circumstances. The doctor conceded that it is possible that the head injury could be caused in that manner. The doctor was questioned in respect of asphyxia, namely whether it could have been if the infant was covered with sand and the doctor again agreed that such possibility cannot be excluded. According to the doctor the

length of the umbilical cord that he found would not prevent the baby from falling to the ground and he did not mean it was clinically cut, but merely separated or severed.

[7] Constable Aihuki testified that she found the body of the baby in a shallow grave near a tree in a Muhongoland near the homestead where the accused stayed. She also found blood on a spot where the accused apparently gave birth to the child. Another woman indicated the points to her. She was not cross-examined.

[8] After the State closed its case, the defence called the accused to testify. My distinct impression of her is that she did not show any emotion and that her counsel had to draw the details of what happened from her. An example is that she just described that she gave birth while standing and only after pertinent questions were put to her of how the child was born, what part of the child came out first and how the injuries that the doctor found could have been caused, did she give any detailed explanation. She testified that she felt a pain in her stomach and ran out of the house, because she thought it was a normal bowel movement, she wanted to relieve herself. Only then she started giving birth in a standing position. She did not testify about her pregnancy and whether that caused any alarm or that nobody knew about it. She only said that it was her first child and that she was still a learner at school. Eventually she testified that the baby, when born, fell on the ground. She vehemently denied that she caused the head injury to the child and remained adamant that the baby did not cry or move and she believed it was dead. Because of that she carried the baby to a tree 94 paces away, according to the sketch plan, where she buried it. She also denied that she had any object with her to cut the umbilical cord and said she did not know how it became severed. In respect of the burial she buried the baby on its stomach face down and covered it partly with sand. That concluded the defence case.

[9] I find the accused's story not plausible. For an innocent girl with such a traumatic experience, namely to give birth to a first born under circumstances where she wanted to keep everything quiet, she seemed very unemotional and calm in Court. She denied that she had the intention to kill the baby and remained adamant that the baby was dead and therefore she buried, what she believed, was a dead body. Without the concessions made by the doctor, who conducted the *post mortem*, and only relying on her evidence, I would not be persuaded to believe her version. However, she was the only person present who could relate what occurred the night of 21 or 22 August 2003. Her version as is corroborated to a large extent by concessions

made by the doctor during cross-examination. Although he found a head injury to the baby at the *post mortem* examination, he conceded the possibility that this injury could have been caused when a baby drops from a standing woman at childbirth to the ground. This coincides with what the accused said. The doctor also conceded that the baby may have given its first breath and was consequently alive, as he found, before the head injury. In the light of the expert evidence, which to a large extent corroborates that of the accused, I cannot find that she had the intention to kill of the baby, i.e. that *dolus directus* was proved. That is not the end of the matter. The next grey issue is the "cut" of the umbilical cord. Although the doctor initially observed and noted on the back of the form that the umbilical cord was "cut", he later said it was not clinically "cut" as in a hospital, but severed. This cord would also not have prevented the infant from falling on its head. With regard to the prevention of air to the lungs by the clotting of the airways by sand, the doctor conceded this was possible with the covering of the baby with sand. I enquired from the doctor about the trachea and throat which he found clotted with sand, even if there was sand in the baby's mouth, but the doctor said in such a small baby the distance between the mouth and trachea is so small, that it does not play a role. It can also not be excluded that the baby being buried in that position with its face down might still have inhaled sand causing the asphyxiation. Again I believe that intention had not been proved in respect of the asphyxiation.

[10] The question is now whether the State has proved that the accused was responsible for the death of the baby. Ms Jacobs suggested that if I cannot find that intent to commit the crime of murder had been proved, the accused was still guilty of culpable homicide, in that she negligently caused

the death of the baby.

[11] It seems common cause that the baby was alive when born. Although the accused seems to deny it, it is clear that Mr Bondai accepted it as proved by the questions put to the doctor and the fact that he did not dispute the doctor's evidence that the baby was alive when born when the lungs fluctuated in water. However, Mr Bondai's argument was that the baby was born head first and then breathed. The doctor conceded that possibility. Then the baby fell to the ground and the head injury which might have caused its death occurred. I believe that the accused was negligent. She apparently kept her pregnancy quiet. She might have had a motive for that, but she did not take the Court into her confidence in that regard. With the incident of the birth as described by the accused, namely that the baby was unexpectedly born and fell on its head, I cannot believe that any reasonable person, or mother for that matter, would not immediately pick up the baby and run to her aunt to solicit help. She has no medical experience and was certainly not equipped to determine that the baby was dead. She was negligent not to obtain medical or other assistance. She then decided to bury the baby which she believed had died, but could possibly have saved its life. The baby also died of asphyxia and must have been alive at that stage. She was negligent also in this conduct.

[12] When I view the accused's conduct against the elements of the offence of culpable homicide, I have no doubt that the State proved the accused has committed this offence. The elements of this offence are the negligent killing of another person. When applying the test of a reasonable man, or in this instance a reasonable pregnant female, the conduct of the accused falls far short. I have no doubt that, on the evidence before me, the accused ought to have foreseen that her conduct could cause the death of her baby and that she should have taken measures to guard against it.

[13] In the circumstances the state has proved beyond reasonable doubt that the accused is guilty of culpable homicide and she is convicted of that offence on the first count.

[14] The accused has already been convicted on the second count, namely concealment of birth.

**MULLER, J**

CASE NO.: CC 14/2007

**On behalf of the State:**

**Ms H. Jacobs**

**Instructed By:**

**Office of the Prosecutor-General**

**On behalf of the Defence:  
Bondai**

**Mr G.**

**Instructed By:**

**Directorate of Legal Aid**

**IN HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**ESTHER KAULINGE**

**CORAM:** **MULLER, J**

Heard on: 18 April 2007

Delivered on: 19 April 2007

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**SENTENCE**

**MULLER, J.:** [1] The accused was convicted of culpable homicide on count 1, for the negligent killing of her newborn baby and on the second count for concealment of birth.

[2] The accused does not have any previous convictions and Mr Bondai made submissions from the bar in respect of mitigation. He submitted that the personal circumstances of the accused should be considered and listed them as follows:

- She has a clean record;
- She was only 20 at the time of the offence;
- She has been arrested on the same day, namely 22 August 2003 and was held in custody for approximately 4 months;
- She was previously a scholar at Namcol and is presently a waitress earning N\$350.00 per month;
- She is part of 13 children and contributes to the support of 5 children from her salary;
- It is an offence that will not be repeated, because she has learned a lesson from it.

[3] Mr Bondai also made certain submissions in respect of the second conviction, namely the concealment of birth and indicated that it was irrational and not pre-meditated conduct that was bound to be exposed. He suggested that the accused should be sentenced to a short term custodial



sentence of approximately 18 months, of which a part should be suspended. With regard to the second conviction he suggested that it being the result of one culpable homicide incident, it should be taken together with the sentence on the first conviction for the purpose of sentence.

[4] Ms Jacobs on behalf of the State reminded the Court that although the accused was only convicted of culpable homicide on the first count, it is still a serious offence and that the life of a human being was ended through the conduct of the accused. She further pointed out that the Court should not only have regard to the personal circumstances of the accused, who did not show any sign of remorse, but that the interest of the community should not be forgotten. She requested the Court to impose a sentence that would send a message to the community that this type of offence would not be tolerated. An appropriate sentence would be one of 3 years of imprisonment, of which the Court may suspend part of it. With regard to the taking together of the two convictions for the purpose of sentence, she agreed with Mr Bondai that it would be appropriate under the circumstances.

[5] In considering what an appropriate sentence for the accused should be, the Court considers the elements of retribution, prevention, deterrence and reformation or rehabilitation and attempts to incorporate a combination thereof in the sentence to be imposed. Furthermore, a balance of circumstances relating to the accused, the crime and society, coupled with a blend of mercy, is the aim that should be achieved by an appropriate sentence. (*S v Zinn* 1969 (2) SA 537 (A) and *S v Rabie* 1975 (4) SA 855(A)).

[6] I have considered the personal circumstances of the accused, as well as the seriousness of the offences and the interest of the community. It must never be forgotten that the accused was convicted of the negligent killing of a human being. Although the accused was young at the time, and even when all her personal circumstances are accepted, her culpable homicide conduct prevented a human being, that was alive, to grow up and live his life. I cannot believe that society would tolerate this kind of conduct and would expect this Court to express its indignation of such a deed through its sentence. The sentence that I intend to impose would be a balanced result of all these interests.

[7] I have no doubts that a balanced sentence for this type of conduct of which the accused have been convicted on count 1 would entail a custodial sentence. Although the length may differ with what has been suggested, even Mr Bondai agreed that the accused should be imprisoned. I also agree that the second conviction should run concurrently with the sentence on

count 1's conviction.

[8] The accused is sentenced as follows for the two convictions:

a) Conviction on culpable homicide:

“The accused is sentenced to 5 years imprisonment of which 2 years are conditionally suspended for a period of 5 years, namely that the accused is not convicted of the offence of murder or culpable homicide within the period of suspension.”

b) Conviction on concealing the birth of a child in terms of section 7 (1) of Ordinance 13 of 1962, as amended:

“The accused is sentenced to a period of imprisonment of 6 months, which sentence will run concurrently with the sentence imposed for culpable homicide.”

**MULLER, J**

**ON BEHALF OF THE STATE:**

**MS H. JACOBS**

**INSTRUCTED BY:  
GENERAL**

**OFFICE OF THE PROSECUTOR-**

**ON BEHALF OF THE DEFENCE:  
BONDAI**

**MR G.**

**INSTRUCTED BY:  
AID**

**DIRECTORATE OF LEGAL**