

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION,

HELD AT OSHAKATI

JUDGMENT

Case no: CC 6/2022

In the matter between:

THE STATE

and

LONIA NDUYAPUNYE NAFIKA

ACCUSED

Neutral citation: *S v Nafika* (CC 6/2022) [2023] NAHCNLD 119 (6 November 2023)

Coram: SALIONGA, J

Heard: 3, 4, 5, 6, 7, 10, 11, 12, 13 and 14 July 2023 and 11 September 2023

Delivered: 3 November 2023

Reasons: 6 November 2023

Flynote: Criminal Procedure: Trial proceedings- Plea of not guilty- Statement by accused in terms of s115 of the CPA- Informal admissions contained therein- Stand on same footing as extra-curial admissions- Exculpatory statements therein must as a general rule be repeated under oath except possibly, when a defence is raised in such exculpatory part of statement, in which case State might have to negate such defence-

Summary: The accused in this case is indicted on a charge of murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003. Accused pleaded not guilty to the charge and submitted a detailed explanation in terms of s 115 of the Criminal Procedure Act, Act 51 of 1977 (CPA). Accused admitted that on the 29 December 2020 at or near Eenghango village in the district of Eenhana she gave birth to a baby boy. That she gave birth at home after she had gone into the field to answer nature's call. While there she felt severe abdominal pains and she could not make it back to the homestead as a result she gave birth without assistance. Sadly her baby never cried, nor did she show any signs of life as it was still born and was not born alive. These admissions were recorded in terms of s220 of the CPA.

Having realised that her baby was not alive she did not know what to do with the body. She placed it in a pit close to where she had given birth. She disputed to have thrown the body of her baby into a well. She understood that her actions and failure to alert the civic authorities of the birth as she is required to do was wrongful and therefore admits that in so doing she unlawfully concealed the birth of her still born baby. She also admitted that the concealment of birth is a criminal offence at law and that she could be convicted and punished on the basis of her admission without the State being required to prove the facts she admitted. From the evidence led in its totality it is not in dispute that accused was pregnant and she gave birth to a baby on the 29th December 2020. Even though the circumstances surrounding the baby's birth and death remain unknown to this court, from the admissions and circumstantial evidence, this court is satisfied that accused is guilty on a competent verdict of concealment of birth.

The court held that the state in order to succeed in its case, must first disprove the defence and then proceed to show that the accused is guilty beyond reasonable doubt.

The court further held that, there is no evidence to prove this baby found in the well was that of the accused as no link could be established and that accused threw it there with intent to defeat or attempt to defeat the course of justice it could not at the end be cogent to conclude that it was the accused who contaminated the water source.

The court held further that, the State failed to prove its case beyond reasonable doubt on count 1, 2 and 3 but accused is found guilty of contravening s 7 of the General Law Amendment Act, 1962 (Act 13 of 1962) and convicted accordingly.

ORDER

1. Count 1: Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003:- Not guilty and acquitted on a charge of murder read with the provisions of Combating the Domestic Violence Act 4 of 2003 but guilty on a competent verdict of contravening s 7 of the General Law Amendment Act 1962 (Act 13 of 1962) – disposing of the body of a child with intent to conceal the fact of its birth.
2. Count 2: Defeating or obstructing the course of justice: Not Guilty and acquitted.
3. Count 3: Contravening s 132(1) (h) read with s 1 and 132 (2) (b) of the Water Resources Management Act 24 of 2004 - Polluting a Water Resource: Not guilty and acquitted.

JUDGMENT

SALIONGA J:

Introduction

[1] Ms Lonia Nduyapunye Nafika (the accused) was arraigned in this Court on three charges namely:

- (a) Count 1: Murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003;
- (b) Count 2: Defeating or obstructing or attempting to defeat or obstruct the course of justice; and

(c) Count 3: Contravening s 132(1) (h) read with sections 1 and 132 (2) (b) of the Water Resources Management Act 24 of 2004 - Polluting a Water Resource.

[2] The brief summary of substantial facts in terms of s 144(3) (a) of the Criminal Procedure Act 51 of 1977(CPA) are that on the 29th December 2020 at Eenghango village in the district of Eenhana, the accused gave birth to a baby, she then killed her baby and threw the body in a well which was located at the same village she was residing. She then left Eenghango village on the 31st of December 2020 and informed Ndapandula Ngelapitu Lukolo that she gave birth and the baby died and that she had already buried this baby.

[3] Ms Khama appeared for the state and the accused was represented by Mr Shipila. The accused, pleaded not guilty on all three counts. In amplification of her plea on the charge of murder read with the provisions of Combating the Domestic Violence Act 4 of 2003, she stated that:

'5.1 I admit that on or about 29 December 2020 at or near Eenghango village in the district of Eenhana I gave birth to a boy.

5.2 I gave birth at home after I had gone into the field to answer nature's call.

5.3 While there, I started to feel severe abdominal pains.

5.4 I could not make it back to the homestead as a result I gave birth on my own without assistance in the field.

5.5 Sadly my baby never cried, nor did she show any signs of life. He was still born and was not born alive.

5.6 Having realised that my baby was not alive, I did not know what to do with the body or where to take it.

5.7 I decided to place it in a pit close to where I had given birth and proceeded to do so

5.8 Regarding the allegation that I threw the body into a well, I say that is not true. I put the body in a pit that was nearby but not into a well.

5.9 I recognise and understood that my actions I failed to alert the civic authorities of the birth of my baby as I am required to have done even though my baby was still born.

5.10 I therefore admit that in so doing, I unlawfully concealed the birth of my still born baby.

5.11 I have been advised by my legal practitioner that the concealment of birth is a criminal offence at law and that I could be convicted and punished on the basis of my admission without the state being required to prove the facts I admit.

5.12 I confirm that I make the above admission freely and voluntarily and that it may be recorded as a formal admission in terms of s 220 of the Criminal Procedure Act 51 of 1977.'

[4] On count 2 & 3 of Defeating or obstructing or attempting to defeat or obstruct the course of justice and in contravening section 132(1) (h) read with sections 1 and 132 (2) (b) of the Water Resources Management Act 24 of 2004 (WRMA)- Polluting a Water Resource, she also gave an explanation. Specifically that, on the allegation that she dumped the body of her baby in order to frustrate the investigations of the police or to suppress the ends of justice, she said that at that point in time, she was afraid of what her biological parents would say about what transpired since they did not even know that she was pregnant; she was also afraid of taking a still born baby to the house of her aunt where she was staying at the time; she was also afraid of what the church elders would say about the fact that she fell pregnant and that the baby had passed away. In all of this fear, she thought the best would be, to burry and not report any of this to her parents. At a time, police investigations were the least of her worries. She further admitted therefore that she buried her still born baby in order to conceal the birth and to avoid the news of it reaching her parents. She denied that this was done to frustrate police investigations or to suppress the course of justice.

Evidence

[5] Ndapandula Ngelapitu Lukolo a friend to the accused, schooled with her at Ongha Secondary School in grade 12. She knew the accused from 2019 to 2020. During December 2020 she received a text message from the accused who was pregnant requesting to come and stay at her place so that she will be closer to the hospital. Permission was sought from Lukolo's mother Ms. Leticia Hifikwa who granted permission for the accused to come and stay with them. The accused arrived at their village before Christmas.

[6] On the 29 December 2020 during night, the witness awoke to find that the accused was not in the room they shared. Since accused was taking too long to return, she decided to go and look for her. She was calling out to her and there was no response. She returned to their home and when she passed by the bricks near their sleeping room, she found the accused at the bricks though she had not been there earlier. She questioned the accused of her where-about and she responded that she was in the field helping herself, and she could not respond to her calls because there were people passing-by where she was sited.

[7] On 30 December 2020, during the day accused had asked her to buy her pads. However she refused because accused had told her that she was 7 months pregnant and she thought it was not urgent since pregnant women do not get periods. On the same day accused informed her that the following day on 31 December 2020 she was going to see her doctor at Onandjokwe hospital. In the morning of 31 December 2020, she escorted the accused up to the road for the accused to take a hike to the hospital and the witness proceeded to Oshikango. At around 10:00 am the same day, the accused informed her that she gave birth to a baby girl and that the baby had died due to too much water and fat on the lungs.

[8] It was Ndapandula's evidence that she communicated with the accused on 3rd January 2021 inquiring about the funeral. Accused informed her that she had already buried the baby boy and that she was going to Rundu. On the same day she was informed that there were people surrounding the communal well which was at their village. On 4 January 2021 she went to the well and saw the police removing a white plastic bag from the well. Since she stood at a distance and did not go closer she was unable to see what was removed from the well. She was the one who informed the headman who was enquiring if anyone knew of someone who was pregnant about the accused.

[9] The next witness Letisia Hifikwa confirmed the evidence of Lukolo in material respect in that she granted permission for the accused to come and stay at her place as she had no money to pay rent and she wanted to be closer to the doctor. She also

corroborated her evidence in that on the 29 December 2020 during night she heard Ndapandula shouting that accused was not in the room and later they came to find her by the bricks which were in the house close to the sleeping room. On the 30 December 2020 accused informed her that she was going to Onandjokwe hospital and the following day the accused and Ndapandula left together. On the same day at 11:00 she received a call from Ndapandula telling her that accused had a baby who passed away and that it had already been buried. On the 3 January 2021 after she got a report from her neighbour she went to the well where she witnessed the police removing the baby which was floating on top of the water in the well. According to this witness, the well was located in the field, is used for drinking water, cooking and to give water to animals. The water was only used again in June 2021 for animals as it was contaminated after the baby was discovered in it.

[10] Doctor Kandjimi is a senior medical doctor who conducts post-mortems at Engela hospital. He testified that on 16th January 2021 he examined the body of a black female newborn baby identified to him by W/O Kankondi as that of B/O Lonia Nafika who died on 3rd January 2021 as informed. He was unable to determine whether the child was alive at birth, the gender of the baby and what was the cause of death as the body was decomposed. By using the Ballard scale the doctor was able to estimate the age of the deceased to be 35 weeks/8 months at the time of delivery. According to the doctor he considered various factors such as the bulkiness of organs of the baby to determine the gestational age at the time of birth.

[11] He further testified that in his opinion, the fetus would have had a chance of survival at the time the accused gave birth because from 28 weeks onwards the baby can survive outside the womb without assistance. Furthermore when presented with the accused's version, the doctor informed the court that it was improbable or unlikely that the accused would spontaneously give birth in the manner she described in Exhibit F, because there will be signs that she is going into labour prior to delivery. Further stated that those signs take hours as the cervix has to gradually open and ripen to allow for the birth of the baby hence the accused would have known that she is going into labour.

[12] Monika Uusiku who is accused's cousin was the last witness called by the State. She testified that accused came home on 31 December 2020 and the police came to their house on 3 January 2021 looking for the accused and they took her along. The witness did not know that the accused was pregnant and had not seen the accused since 3 June 2020 when she went for school. She said both accused's parents are alive and the accused has another child who was born on 24 March 2018 and this child is with the paternal grandmother. Her evidence has no relevance on the issue at hand and will not be considered in this judgment.

[13] After the State had closed its case, Mr Shipila applied for the discharge of the accused in terms of s 174 of the Criminal Procedure Act 51 of 1977 ('CPA') which was opposed. The court after hearing the submissions and arguments from both counsel declined to discharge the accused as per its ruling.¹ Accused was placed on her defence but opted to close her case without leading any evidence or calling witnesses.

Submissions by counsel

[14] Ms. Khama, counsel for the State submitted that from the plea explanation accused gave; the date, place, identity of the deceased and the domestic relationship between the accused and deceased were not disputed. She further submitted that accused raises two defences namely that the deceased was stillborn and that she did not dump her baby in the well but put it a pit or buried him. That the accused who is not a medical doctor, was the only person present when the offences were committed. She did not testify in her defence to explain what made her to conclude that the child was stillborn nor ensure that medical attention is sought for her baby in order for medical personnel to make a clinical determination as to the cause of death or perform lifesaving work on the baby.

[15] Relying on the doctor's evidence, she submitted that accused did not dispute the gestational age of the baby being 35 weeks and that at that time a baby can survive on its own outside the mother's body. She further submitted that the accused's conduct

¹ *S v Nafika* (6/2022) [2023] NAHCNLD 72 (02 August 2023).

clearly showed that the pregnancy was unwanted and her intention to kill the baby. The accused did not tell her family members about the pregnancy. After giving birth and dumping the baby she was happy and laughing clearly relieved that she had gotten rid of the baby. Therefore in referring to case law, more, specifically to *S v Leevi*² counsel implored the Court to reject the accused's version as false and find her guilty of murder as charged on count 1. It was counsel's further submission that in case the court has doubt whether the deceased was born alive then the accused should be found guilty of attempted murder reasoning that the impossibility of the object in this case is that the baby was born dead and one cannot kill what is already dead.

[16] With regard to count 2 and 3, counsel contended that the elements of the offence have been proven given the admissions in exhibit F. She contended that it is not a justification to dispose of the body in the manner accused did and the reason she gave. Counsel further contended that even if accused is denying to have thrown the body of the deceased in the well, she was the only person who had the means, motive and opportunity to commit the crime. She respectfully submitted that the state has proven its case beyond a reasonable doubt and the court should find the accused guilty on all three counts.

[17] On his part, Mr Shipila counsel for the accused submitted that there is no evidence that the baby allegedly killed by the accused was alive at birth, or that accused threw her baby into a well. Further submitted that none of the State witnesses disputed that the baby born on 29 December 2020 was a still born. The post-mortem report could not assist the court and accused's exculpatory statement remains uncontroverted and undisputed. It was his further submission that the identity of the deceased was not proven. Accused's child was a boy but the body of the baby girl was found and removed from the well. It cannot be correct for the state to conclude that the body found in a well was that of the accused's baby. He contended that the allegation by Ndapandula Ngelapitu Lukolo that the accused had told her that she had given birth to a baby girl at the hospital but passed away was strenuously denied by the accused during cross-examination. Such evidence was also inconsistent with the facts proven in this case. It

² *S v Leevi* (38/2008) [2009] NAHC 76 (20 July 2009).

was proven before this court that there was no baby born to the accused in a hospital. The court cannot merely accept the say so of Ndapandula as it is improbable in light of all the proven facts. If her version is to be accepted then it must be taken in its entirety.

[18] Mr Shipila further submitted that with regard to count 2 and 3 none of witnesses had seen the accused throwing her baby into the well. The evidence led does not support a conclusion that the baby found in a well is that of the accused. Counsel submitted that for that reason the accused did not contaminate the well or any other water source by means of dumping her baby in it. The state did not also disprove accused's explanation that her conduct was not aimed at the course of justice nor was it aimed to frustrate the course and administration of justice. Mr. Shipila in making reference to several case law submitted that the accused should be acquitted on all three counts.

The law

[19] Murder is defined as the unlawful and intentional causing of the death of another human being.³ The prosecution has to prove all elements of the offence of murder i.e. (a) causing the death (b) of another person (c) unlawfully and (d) intentionally.

[20] The intention requirement is satisfied not only if the accused had direct intention (*dolus directus*) to kill the deceased but also where the accused foresees the possibility of the deceased being killed and reconciles himself/herself to this possibility (*dolus eventualis*). The test is subjective and this subjective mental state may nevertheless be inferred from the objective facts proved by the State. In this regard the accused's motive is irrelevant. Whilst negligence connotes the opposite of thought-directed action and precludes the element of positive intent to achieve a given result.

[21] It is a well-established principle that where an accused provides a plea explanation of exculpatory nature, the state incurs an additional obligation of negating those explanations. In *S v Shivute*⁴ the court stated in the head-notes that exculpatory

³ CR Snyman *Criminal Law* 5 ed (2008) at 447.

⁴ *S v Shivute* 1991 NR 123 HC.

statement in the plea explanations must as a general rule, be repeated by the accused under oath except, possibly when a defence is raised in such exculpatory part of statement, in which case state might have to negate such defence.

[22] In *S v Reddy & others* 1996 (2) SACR 1 (A) 8 at C-H the principles applied in assessing circumstantial evidence were re-stated as follows:

'In assessing circumstantial evidence, one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in *R v Blom* 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn.'

Evaluation

[23] There are no eye-witnesses who actually saw the killing of the deceased by the accused or any person who witnessed the commission of the other offences the accused was charged with. The evidence against the accused is mainly centred on the admissions she made in court, some of which were recorded as formal admissions in terms of s 220 of the CPA while others remained informal admissions as well as circumstantial evidence led by the state.

Count 1 Murder

[24] With regard to the murder charge, accused in a statement prepared in terms of s 115 of the Criminal Procedure Act 51 of 1977 (the CPA), admitted that on or about 29 December 2020 at or near Eenghango village in the district of Eenhana, she gave birth to a boy. She gave birth at home after she had gone into the field to answer nature's call. While there, she started to feel severe abdominal pains. She could not make it

back to the homestead as a result she gave birth on her own without assistance in the field. Sadly her baby never cried, nor did he show any signs of life. He was still born and was not born alive. Having realised that her baby was not alive, she did not know what to do with the body or where to take it. She decided to place it in a pit close to where she had given birth and proceeded to do so. It is for that reason the state apart from its inherent onus of proof, has an additional duty to disprove the aforesaid informal admissions.

[25] The offence of murder is committed when the state proves that a human being who was alive was killed. The evidence led by the state was that on 29 December 2020 in the middle of the night, accused went out of the room she shared with Ndapandula. After Ndapandula realised she was not in the room she went to look for her and eventually found her by the bricks near the sleeping room in the house. Ndapandula's evidence on that point was corroborated in material respects by her mother Letisia. Thereafter on the 31 December 2020, accused informed Ndapandula that she gave birth to a baby girl in the hospital and later she was told that the accused buried her baby boy. From her evidence the issue of identity and that the accused gave birth to a still born baby girl remain in dispute.

[26] Doctor Kandjimi testified that he examined the body of black female baby who died on 3 January 2021 as informed which was identified to him by the police. There was no link between the body of a new-born baby found and removed from a well and that of the accused's new born baby. Already in the reply to the state's pre-trial memorandum, accused vehemently denied that the baby discovered in the well was her new born baby. The state in this instance was to prove that a domestic relationship existed between the accused and the said baby. It is therefore not correct for counsel for the state to submit that the identity of this baby and domestic relationship between the accused and this baby were not in dispute. The aforesaid accused's reply to the State pre-trial memorandum could have placed the state in a position where they could properly prepare their case in disproving those facts.

[27] A witness Letisia Hifikwa was present at a well before the body of a baby was removed. She testified that she saw a body like that of an adult male person floating on top of the water. However after it was removed from the well she could see it was the body of a baby yet was unable to state whether it was a baby girl or boy. If her evidence is to be accepted that she saw a body of a baby boy, such evidence will still contradict that of the doctor who did not examine the body of a baby boy. The police whose evidence could have assisted the court in establishing that link was not called to testify and no reason was given.

[28] In determining the aforesaid issues, the court is guided by established rules and principles of law that the onus rests on the state to prove the guilt of the accused beyond reasonable doubt in order to secure a conviction. In view of the standard of proof in a criminal case, a court does not have to be convinced of the truth of every detail of the accused's version. The accused is entitled to an acquittal if his or her version or explanation is reasonably possibly true and can only be rejected if it is so improbable that it cannot be believed. What is required is for the court to be convinced that it is not only improbable, but false beyond reasonable doubt (See *R v Difford*⁵ and *(S v Jaffer*⁶). Even if the accused's version is rejected, that alone cannot absolve the state of its burden of proof. In other words the court still has to analyse the state's case in order to be convinced that it indeed constitutes proof beyond reasonable doubt.

[29] In this case the evidence of accused's friend Ndapandula could not prove the identity of accused's baby nor could it prove that the said baby was born alive and/or the baby seized to live as a result of the intentional and unlawful conduct of the accused. The medical evidence was of no assistance either. If I understand Doctor Kandjimi's evidence well which I believe I did, it was of a general application that from 28 weeks onwards, the foetus had a chance of survival at the time of birth. Doctor Kandjimi did not examine the accused during her pregnancy or immediately after she had given birth.

⁵ *R v Difford* 1937 AD 370 at 373.

⁶ *S v Jaffer* 1988 (2) SA 84 at 89D.

[30] Accused maintained throughout the trial that she did not kill her child in any manner as the baby was a still born. The true stance was, accused did not give birth to a baby girl or boy in the hospital on the 31 December 2020 but gave birth to a baby on 29 December 2020. She actually lied to Ndapandula with regard to a date she gave birth to and the gender of her baby. This court finds merit in counsel for the accused's contention that Ndapandula was lied to and no reliance will be placed on that piece of evidence. As such there is further no single inference to be drawn from the evidence in its totality that accused is guilty on the preferred charges as the requirements in *R v Blom* referred above were not met. However the fact that accused lied in one respect does not make him or her a liar in all respects (See *S v Kamati* 1991 NR 116). The court also finds no basis upon which to select certain portions of her evidence as being true and others as false (See *S v Madisia* (CC 8/2022) [2023] NAHCMD 267 (16 May 2023)). The law requires that he who alleges must prove beyond reasonable doubt, it is therefore safe to conclude that there is a reasonable possibility that the explanation accused gave may be substantially true on a murder charge. That does not mean accused is not guilty of any other or competent verdict such as concealment of birth.

[31] In exhibit "F", the accused admitted that after she gave birth to a stillborn, she placed the body of her baby in a pit close to where she had given birth. She went further admitting that, she unlawfully concealed the birth of her still-born baby. She recognised and understood that by her actions she failed to alert the civic authorities of the birth of her baby as she was required to have done even though her baby was still-born. That she concealed the birth of her still-born baby and that the concealment of birth is a criminal offence at law and she knew that she could be convicted and punished on the basis of her admissions without the state being required to prove the facts she admitted.

[32] From the aforesaid admissions, it is without any doubt that accused gave birth to a baby whose body she threw away. The crime of concealment of birth is not one against the taking of a life because it only becomes applicable where the child is already

dead and not whilst still alive.⁷ It is enacted by s 7 (1) and (2) of Ordinance 13 of 1962 as a competent verdict on a murder charge⁸. Subsection (1) provides that any person who disposes of the dead body of any child with intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable to a fine not exceeding N\$200 or to imprisonment for a period not exceeding 3 (three) years. While subsec (2) creates a presumption which provides that a person who disposes of the dead body of any such child shall be deemed to have disposed of such body with intent to conceal the fact of the child's birth, unless it is proved that such person (the accused) had no such intent.

[33] In the present case accused disposed of the body of her baby and kept the birth a secret or concealed it throughout, well knowing that Ndapandula, her friend was looking for her that night after she disappeared from the room. By so doing and her decision not to testify in this case, led to an inference to be properly drawn that the accused acted with intent to conceal the child's birth. In view of the court's findings about the accused's intentions being duly established, the provisions of subsection (2) need not be relied upon and decided. Therefore I am satisfied that all the elements on a competent verdict were satisfied and accused has to be convicted of disposing of the body of a child with intent to conceal the fact of its birth in contravening s 7 of General Law Amendment Ordinance 13 of 1962.

Defeating or attempting to defeat the course of justice and Polluting a Water Resource in contravening s132 (1) (h) read with s 1 and 132 (2) (b) of the WRMA 24 of 2004

[34] Accused was further charged with Defeating or attempting to defeat the course of justice and Polluting a Water Resource in contravening s132 (1) (h) read with s 1 and 132 (2) (b) of the WRMA 24 of 2004. In that the said accused did unlawfully and with intent to defeat or obstruct the course of justice kill her new born baby and disposed of the body/corpse by throwing it in a well whilst the accused knew or foresaw the

⁷ See *S v Oliphant*, 1950 (1) SA 48 (O) at 51; *S v Maleka*, 1965 (2) SA 774 (T).

⁸ Section 7 is analogous to s113 of the General Law Amendment Act 46 of 1935, a South African law as a competent verdict to murder in terms of s 258 of the Criminal Procedure Act 51 of 1977 which was not made applicable in Namibia. As such the accused cannot be convicted under the South African law. The law applicable in Namibia is s 7 of General Law Amendment Act 13 of 1962.

possibility that her conduct may conceal or destroy evidence which would indicate the true circumstances under which her baby died.

[35] In her plea explanation accused also admitted to have thrown her baby boy in a pit. It appears to me that the issue in dispute was the state's allegations that the accused killed her new born baby, threw the body into a well in order to conceal the true circumstances under which the baby had died. In that regard the evidence led by the state and admissions made by the accused on the identity of the baby and where the body was disposed of were found mutually destructive.

[36] In *S v Britz*⁹ the following was said where the court is faced with two mutually destructive versions:

'[34] Where a court is presented with two mutually destructive versions, it is a rule of practice that the court must have good reason for accepting one version over the other, and should not only consider the merits and demerits of the State and defence cases respectively, but also the probabilities (*S v Engelbrecht*).¹⁰ Evidence presented by the State and the defence must neither be considered in isolation as an independent entity when assessing the credibility of the witnesses and the veracity of their versions. The approach the court must follow is to take into account the State's case and determine whether the defence's case does not establish a reasonable hypothesis. In *S v Radebe*¹¹ the court at 168 D-E said:

The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis."

[37] With regard to the charge of contravening s132 (1) (h) read with s 1 and 132 (2) (b) of the WRMA 24 of 2004- Polluting a Water Resource, the only evidence is that of Letisia that she saw the body which looked like that of an adult male floating on top of

⁹ *S v Britz* 2018 (1) NR 97 (HC).

¹⁰ *S v Engelbrecht* 2001 NR 224 (HC); *S v Petrus* 1995 NR 105 (HC).

¹¹ *S v Radebe* 1991 (2) SACR 166 (T).

the water in the well. Accused denied to have committed this offence. Letisia Hifikwa who was present at the time when the body was removed from the well could not assist the state in proving the identity of the baby alleged to have been thrown in a well. Counsel for the state argued that the accused was the only person who had the means, motive and opportunity to commit the crime and it is irrefutable that the baby was found in the well. Good and well as the argument sounds, but does that evidence support a conclusion that, that the body of a baby found in a well was that of the accused and/or whether it was the accused who threw the body of that baby in a well in order to contaminate or infest the water source.

[38] The evidence led by the state although established a *prima facie* case on a competent verdict on a murder charge, did not prove accused's guilty on the remaining charges. In order for the State to succeed in proving its case, it was incumbent not only to disprove accused's defence but also to prove the accused's guilty beyond reasonable doubt on both charges. Given the accused exculpatory statement, the court found there is no evidence to prove this baby found in the well was that of the accused as no link could be established or that accused threw it there with intent to defeat or attempt to defeat the course of justice it could not at the end be cogent to conclude that it was the accused who contaminated the water source.

Conclusion

[39] The evidence before court calls for speculation. Accused in any event could not be convicted for lying and there is no basis for a finding that her explanation is entirely false to be rejected. Neither could she be convicted of any suspicious behaviour she displayed. It seems to me that this is an instance where the exception to the general rule articulated in *S v Shivute*¹² finds application. Having considered the evidence by both the State and the defence, merits and demerits as well as the probabilities, I find that the state has failed to prove its case beyond reasonable doubt on charges of defeating or obstructing the course of justice and of Contravening s 132(1) (h) read with

¹² *S v Shivute* 1991 NR 123 (HC);1991 (1) SACR 656

s 1 and 132 (2) (b) of the Water Resources Management Act 24 of 2004 - Polluting a Water Resource and on those 2 counts accused has to be acquitted accordingly.

[40] In the result the following order is made:

1. Count 1: Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003:- Not guilty and acquitted on a charge of murder read with the provisions of Combating the Domestic Violence Act 4 of 2003 but guilty on a competent verdict of contravening s 7 of the General Law Amendment Act 1962 (Act 13 of 1962) – disposing of the body of a child with intent to conceal the fact of its birth.
2. Count 2: Defeating or obstructing the course of justice: Not: Guilty and acquitted.
3. Count 3: Contravening s 132(1) (h) read with s 1 and 132 (2) (b) of the Water Resources Management Act 24 of 2004 - Polluting a Water Resource: Not guilty and acquitted.

J T Salionga
Judge

