

the accused's newborn baby, the plea explanation also contained certain admissions in terms of s220 of the CPA to the accused's plea of not guilty to count 1. I shall refer to these admissions later.

[3] The plea of guilty on the second count was accepted by the State, but not the plea of not guilty to the first count of murder.

[4] I was satisfied that the accused intended to plead guilty to that count and contravention of s 7(1) of the said ordinance and convicted her accordingly.

[5] The State then commenced to lead evidence in respect of the first count. I have already referred to the admissions that the accused made in respect of s220 of the CPA on this count. The following admissions appear on paragraphs 2-3 in paragraphs 3.1 to 3.16 of the plea explanation. They are:

- “3.2 I was pregnant during the period leading to the 19th of April 2003. I got pregnant as a result of an incestuous and cohesive sexual relationship with my brother, Akser Andreas Kaapamgelwa.
- 3.3 I admit that I experienced labour pains on the morning of 19th April 2003 whilst I was asleep. I woke up at about 5:00 am and went to a nearby Mahangu field where I was in labour for about twelve (12) hours.
- 3.4 I admit that at about 12:00 midday I gave birth to a baby boy who was alive at the time. I know that the baby was alive because it was crying and coughing when it came out.
- 3.5 I admit that after giving birth I waited for about one (1) hour for the placenta to come out whilst the baby laid on the ground with the umbilical cord wrapped around its neck. After a while the baby became quite as if dead. I believed therefore that it was dead.
- 3.6 I admit that after the placenta came out I took a scarf and tied it tightly twice around its neck and body to cover it before burying it, but not to kill it. When I was doing this baby did not cry or move and seemed not to breath. If the baby was alive when I put the scarf, I did not know it as to me it seemed dead.
- 3.7 I admit that thereafter I put the baby's body in the plastic bag and dug a hole with a stick and buried it.
- 3.8 I admit further that I gave birth to the baby boy on the 19th April 2003, I did not inform anyone about the birth until after it was discovered that I have given birth on the 19th of April 2003. I admit that I buried the dead body of the baby with the intention to conceal the birth.
- 3.9 I admit that after giving birth I experienced lot of bleeding and went to Okahao Hospital where after I was transferred to Oshakati Hospital where I was admitted due to illness associated with post natal complications.
- 3.10 I admit that there are no issues from section 119 proceedings.
- 3.11 I do not dispute that a post mortem report examination was conducted on the remains of the baby on 23 April 2003 nor the content of the post mortem report.

- 3.12 I do not dispute the identity of the deceased infant.
- 3.13 I do not dispute the admissibility of and/evidential value of my warning statement as recorded by W/O S I Kandetu.
- 3.14 I dispute the photo plan and key thereto compiled by W/O Likius Hihelao.
- 3.15 I admit that it was wrong of me not to tell anyone about the birth or that I have buried the baby.
- 3.16 I further admit that I realised that I was acting wrongly and unlawfully and that I could be punished if found by a Court of law."

[6] The State also handed in the following documents as exhibits:

- a) The warning statement by the accused;
- b) A photo plan and key;
- c) The *post mortem* examination report by Dr Yury Vasin; and
- d) The s 119 proceedings in the magistrate's court of 12 December 2003.

The defence did not object to handing in these documents.

[7] Dr Yury Vasin, a forensic medical officer at Oshakati State Hospital mortuary was the only State witness. He testified at the hand of the *post mortem* examination report completed by him in respect of his findings of the body of the accused's deceased baby. He found clear strangulation marks resembling the neckerchief that was found tightly bound around the baby's neck and knotted in front. This caused asphyxia and he also found haemorrhage marks in the lungs of the baby, which confirmed his conclusion of the strangulation. What is further important is that by floating the lungs of the baby in water, he could establish that the baby was alive after birth. This is not in dispute. What is in dispute, is whether the baby died of a natural cause, namely as result of its umbilical cord wrapped around its neck or as a

result of strangulation. The doctor conceded that the former situation is not unusual and can possibly cause asphyxia. This was the defence of the accused on this count and several questions were put to the doctor in this regard. In particular, it was put to the doctor by Ms Natanael that he could not determine that similar strangulation marks would be found whether death occurred before or after. In certain respects the doctor conceded that certain of the questions put to him by the defence might possibly occur, but he remained adamant that they are unlikely or not probable. In this regard he said that the strangulation marks that he found are unlikely to be caused by the umbilical cord wrapped tightly around the infant's neck and that it is more probable that the asphyxia was caused by strangulation, because the neckerchief was tied so tight around the baby's neck.

[9] The accused testified that she was impregnated by her brother and in the night had to leave the hut in which she was staying, because she had stomach pains and wanted to relieve herself. In the veld she gave birth to the baby after being labour from 05h00 until 12h00, namely approximately 7 hours. She was tired, in pain and could not think properly or clearly. From the time that the baby was born she had to wait for another hour for the placenta to come out. She knew the baby was alive had the umbilical cord around its neck, but said she was too tired to loosen it so that the baby could breath. She said the baby coughed, cried and moved. When the placenta came out she observed the baby was dead. Then she took the scarf from her head and tied it around the baby's whole body, except is head. She removed the umbilical cord around the baby's neck. She found a plastic bag and put the baby in the scarf into it and into a hole that she dugged with a stick. The baby was apparently still attached to the placenta with the umbilical cord and this was also put into the plastic bag and buried it.

[10] During cross-examination the accused admitted that this baby was her second child, the oldest one being 11 now and 7 at the time. That child was born in the hospital. She was severely cross-examined about her failure to loosen the umbilical cord around the neck of the baby and after only providing the excuse that she was in pain and tired and could not think straight for the whole period of an hour before the placenta came out, it was put to the accused that she lied about the umbilical cord being around the baby's neck and that she in fact intended to kill it. The accused was also

confronted with the doctor's findings and his opinion, but remained adamant that the baby died not because of the tied handkerchief, but because of the umbilical cord around its neck.

[11] I do not believe the accused's version at all and it is rejected. If the umbilical cord was around the baby's neck, which I do not accept, the baby was alive. The baby was crying, coughing and kicking after birth, despite her version the umbilical cord was around its neck. This is not the usual case where child is stillborn because the umbilical cord is turned around its neck and asphyxia is so caused. Even if the umbilical cord was around the baby's neck, the accused could loosen it during the period of an hour, while the baby was lying next to her, still attached to the placenta. The accused is not a first time mother. She had already experienced childbirth. She observed her baby and that it was alive and kicking and crying. I cannot believe that any mother would leave it if she sees the umbilical cord around her baby's neck, no matter how tired she is or how much pain she experiences. She will not leave it to die, unless she does not want it to live. The accused made a Freudian slip when she answered a question of the Court, namely whether she wanted her baby. She said no, she did not want it and provided reasons for that, namely because of the shame and that it is unacceptable in her culture. This attitude proves that she did not want the baby to live and is the reason why she buried it to conceal the baby's body and the birth. She later attempted to obliterate this slip by testifying the opposite by saying she did want the baby and she would have told the elders about it. The question is why did not she do so when she became pregnant with her brother's child. If the elders would have understood this now, I am certain that they would have then and could then have assisted her and she would have been relieved of the stress and would probably have received proper medical assistance.

[12] The final nail in the coffin of the accused's version, so speak, came when Ms Jacobs confronted her with what she said in her warning statement to the police and to the magistrate. In her warning statement she did not make any mention at all of what her defence now seems to be, namely that the umbilical cord was tied around the baby's neck and caused its death. The accused's lame attempt to explain this obvious omission is not only unimpressive, but it is clearly a lie. Although she made the statement the same day, she was informed that she is not obliged answer any question and only if she makes any statement it will be taken down. The accused said in the statement she did not want legal representative and that it is her choice to make a statement. Only then did the accused make the statement, leaving out the defence that the accused now relies on, namely that the umbilical cord was around the baby's neck and caused its death. Even more damaging to her defence is what she said to the magistrate during the s 119 proceedings. The accused indicated that she pleads guilty to the charge put to her, which was murder with the concealment of birth as an alternative at the time. From her answers to the questions put to her by the magistrate it is clear that she knew that she was accused of the murder of her newborn baby. Ms Natanael emphasized the fact that the charge differed at that stage from what it is now. That argument does not hold water. This is not an appeal in

which the procedural aspect of the charges is in issue. The only issue in respect of s119 proceedings is what her answers, as an innocent person, are to the questions put by the magistrate. There is no indication that she did not understand the questions or that she was influenced at all by other people telling her that she killed her baby. Her answers to the magistrate's questions were clear and unambiguous and she had the opportunity in the first instance to plead not guilty or to state her defence. The questions and answers speak for themselves:

“Q: Why do you plead guilty to the charge?

A: Because I have done wrong.

Q: What is wrong that you do?

A: I have killed.

Q: Whom did you kill?

A: A newborn baby.

Q: When did you kill the new baby newborn baby?

A: On 19 April 2003.

Q: Was it at Onandjo village in the district of Outapi?

A: Correct.

Q: How did you kill the newborn baby tell the court?

A: I buried the child while it was alive. Then I left the child there and went to hospital and the nurse called the police.

Q: Why did you bring the newborn baby?

A: the pregnancy belonged to my brother and he said I must not mention him. I have birth behind the yard and I decided to bury it.

Q: Did you realised you were committing an offence?

A: I was confused.

Q: Which language do you prefer to speak at your trial?

A: Oshiwambo

Q: Will you need a lawyer or legal aid or conduct own defence?

A: I will conduct my own defence.

Q: Will you call witness?

A: No.”

[13] It is not necessary to analyse the accused's answers which are in contradiction with her evidence before me. The accused's answers speak for itself. The accused admitted the s119 proceedings and said she had no issue with it. The accused's admission, together with the untruthfulness of her

version in this Court make its clear beyond any reasonable doubt that she intended to kill her baby and strangled it by tying the handkerchief so tight around its neck that it could not breathe and died of asphyxia. She then buried it, probably still alive. In the circumstances I find that the State has proved that the accused committed the offence of murder on the basis of *dolus directus* and the accused is convicted on count 1.

[14] The accused had already been convicted on count 2.

MULLER, J

ON BEHALF OF THE STATE:

MS H.

JACOBS

**INSTRUCTED BY:
GENERAL**

OFFICE OF THE PROSECUTOR-

ON BEHALF OF THE DEFENCE:

MS R.NATANAEL

INSTRUCTED BY:

DIRECTORATE OF LEGAL AID