

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**APPEAL JUDGEMENT**

**Case No.: CA 62/2016**

In the matter between:

**THE STATE**

**APPELLANT**

and

**PENEYAMBEKO NGHIMBWASHA**

**RESPONDENT**

**Neutral citation:** *S v Nghimbwasha* (CA 62/2016) [2017] NAHCNLD 99 (17 October 2017)

**Coram:** TOMMASI J and JANUARY J,

**Heard:** 03 August 2017

**Delivered:** 17 October 2017

**Flynote:** Criminal Procedure – Appeal – Sentence – Murder – Infanticide – Guidelines cases of Infanticide – Most important factors the mental condition at the time of the

crime – Motive – Balanced sentence to be imposed – 42 stab wounds with scissors – Sentence 8 years imprisonment of which 4 years are suspended – found to be shockingly inappropriate.

**Summary:** The appellant was represented in the court *a quo* and pleaded guilty to murder-infanticide. She murdered her 1 day old baby. She testified in mitigation but could not enlighten the court of her state of emotions at the time and the motive for the murder. These factors are the most important in cases of this nature. She stabbed the deceased 42 times with a scissor. She was sentenced to 8 years imprisonment of which 4 years were suspended on conditions. The court finds the sentence to be shockingly lenient. The sentence is increased to 10 years' imprisonment of which 3 years' are suspended for a period of 5 years' on condition the accused is not convicted of murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 committed during the period of suspension. The guidelines in cases of this nature are summarized and reiterated.

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## ORDER

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1. The appeal succeeds;
2. The sentence of 8 years' imprisonment of which 4 years are suspended on condition that accused is not convicted of murder read with the provisions of the Combating Domestic Violence Act (Act 4 of 2003) is set aside and substituted with a sentence of;
3. 10 years' imprisonment of which 3 years' are suspended for a period of 5 years' on condition the accused is not convicted of murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 committed during the period of suspension.
4. The sentence is back dated to 15 September 2016.

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## APPEAL JUDGEMENT

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### **JANUARY J, (TOMMASI J CONCURRING)**

[1] This is an appeal against sentence by the State in accordance with the provisions of section 310 of the Criminal Procedure Act 51 of 1977. The respondent pleaded guilty to murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003, of her 1(one) day old baby in that upon or about the 25<sup>th</sup> day of June 2012 and at or near Endombo Compound, Nombstoub in the district of Tsumeb the accused did unlawfully and intentionally kill a male new born baby boy by stabbing the baby with scissors multiple times on his chest and face and that a domestic relationship existed as defined by section 1 of the Combating of Domestic Violence Act, Act 4 of 2003, to wit: the baby was the accused person's biological son.

[2] The accused is the mother of the deceased. She was represented by Mr Van Sittert in the court *a quo*. She was sentenced to 8 (eight) years' imprisonment of which 4 (four) years' are suspended for a period of 5 (five) years' on condition that accused is not convicted of murder read with the provisions of the Combating of the Domestic Violence Act, Act 4 of 2003 committed during the period of suspension.

[3] Mr Van Sittert drafted and handed to court a statement in terms of section 112(2) of the Criminal Procedure Act, Act 51 of 1977. The statement reads as follows:

'I, the undersigned

PENEYAMBEKO NGHIMBWASHA

The accused in this matter, am charged with

MURDER read with the provision of the combating of Domestic Violence Act as fully amplified by the annexure to the charge sheet:

1. I herewith confirm my plea of GUILTY to the Count, namely:

MURDER read with the provisions of the combating of Domestic Violence Act

2. I confirm that I am fully aware of the allegations contained in the charge preferred against me.
3. I further confirm that I am fully aware of and have been informed by my counsel of my rights namely:
  - 3.1 That I am presumed innocent until proven guilty beyond a reasonable doubt.
  - 3.2 That I cannot be compelled to give self-incriminating evidence, and that if I so wish can remain silent and do not have to testify during these proceedings.
4. In amplification of my plea of guilty, I confirm that:
  - 4.1 I tender this plea of guilty of my own free will. Nobody has influenced me in any manner whatsoever to plead guilty, nor was I made any promises in exchange for my aforesaid plea.
  - 4.2 I furthermore am fully aware of the consequences of this plea, namely that I can be convicted on these charges, without the Prosecution having to call witnesses or tender any evidence in relation to this charge against me.
  - 4.3 I am aware of the serious nature of the charge to which I have pleaded guilty, as well as of the sentence prescribed.
5. In further amplification of my plea of guilty I wish to state the following:
  - 5.1 I admit that on 21st DAY of June 2012, at ENDOMBO COMPOUND, Tsumeb, in the regional division of Namibia, I did unlawfully and intentionally killed (sic) my new born baby, after delivery, by stabbing him with a scissor
  - 5.2 I admit that ENDOMBO COMPOUND is located within the Regional Division of Namibia, and that the Honourable Court has the necessary jurisdiction to deal with this case.
  - 5.3 I admit that my action was wrongful and that I the time realized that I could be prosecuted, convicted and sentenced for my actions
6. I tender this plea of guilty as a token of my remorse and beg the court for lenience in considering my sentence.
7. I also beg the court to consider that:
  - 7.1 I have been 22 years old, when this offence took place
  - 7.2 I am a first offender.

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Signed by accused'.

[4] The State accepted the plea and did not prove any previous convictions.

[5] The accused testified in mitigation. She stated that on the date of sentencing she was 26 years old and at the time of the commission of the crime she was 22 years' old. She was in custody from June 2012 until November 2012. She realises that she did wrong but could not tell the court in what condition she was. She just remembers that she felt pain and the next moment she was taken to the hospital. She was alone in the toilet and felt weak because she gave birth on her own. She cannot tell why she did not go for help. At the time she was staying with her brother, two sisters and father. Her father is a strict person and she did not tell him about the pregnancy. She was not on speaking terms with the father of the deceased. She did not receive any counselling afterwards and asked the court for forgiveness. She feels hurt by what she did. She understands that it was murder and alleges that evil spirit must have come over her.

[6] The State called a qualified nurse who is a midwife for 26 years. She knows the accused since the incident at the hospital. She discovered the accused in the toilet having given full birth. The baby was in a folded bag already dead. The nurse testified that the accused was stable, standing on her own and could communicate. The accused walked on her own to the ambulance, could communicate and did not fall.

[7] A post mortem report was by consent handed up in court. This post mortem report reflects the chief post mortem findings as a term baby body with 42 stab wounds as follow:

- 12 (twelve) penetrating wounds to thorax
- A mortal stab wound to the right atrium of the heart
- Hemothorax of 11 ml of blood
- Bilateral wounds of limbs
- Hydrostatic test positive
- Generalized pallor noted

#### **The external appearance of body and condition of limbs**

A body of a term baby male with 42 (fourty two) stab wounds located at the face, neck and upper chest, close to each other, different forms but regular edge, not appear to be produced by a knife but for an object provided with sharp and point. A penetrating wound located at the right region of the chest 7mm from the nipple. Running through the 3<sup>rd</sup> intercostal muscle to pericardium and right atrium is the fatal wound. Generalized pallor noted.'

[8] The grounds of appeal are:

'3.1 The sentence of eight (8) years imprisonment of which four (4) suspended (sic) for five years on condition that the respondent is not convicted of suspension (sic) is shockingly inappropriate in that it:

1.1.1 Is lenient and induce a sense of shock when considered against sentence imposed for similar offences in this Honourable Court.

1.1.2 The Learned Magistrate erred in law and or on the facts in over-emphasising the personal circumstances of the respondent.

1.1.3 The learned Magistrate erred in law and or on the facts by totally ignoring and or attaching little weight to the seriousness of the offence and or the interest of society.

1.1.4 The learned Magistrate erred in law and or on facts by failing to consider the fact that the punishment must fit the crime committed.

1.1.5 The learned Magistrate erred in law and on facts by finding that no other sentence would suffice except a partially suspended sentence.'

[9] It is by now established law that sentencing is pre-eminently within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo*. A court of appeal can only interfere;

- when there was a material irregularity; or
- a material misdirection on the facts or on the law; or
- where the sentence was startlingly inappropriate;
- or induced a sense of shock; or

- was such that a striking disparity exists between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance in that;
- irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.<sup>1</sup>

[10] There is no doubt that the unlawful killing of infants is not less serious than that of other children and adults; and a new-born baby, has the same right to life and protection under the Constitution as any other person on Namibian soil would have. See: Article 6<sup>2</sup> and 15<sup>3</sup> of the Constitution defining the protection of life and children's rights, respectively.

[11] The courts, prior to independence and still today, are under the duty to uphold law and order, and protect the rights of others in society through its decisions and sentences – especially where the vulnerable such as the elder, women and children have fallen prey to criminals. The courts have repeatedly stated that it would not shy away from its duty by sending accused person's, guilty of serious crimes such as murder, rape and robbery, to prison for considerably long periods when it involves crimes committed against those vulnerable in society. Murder has always been viewed by the courts in a serious light and usually, only in exceptional circumstances, would this offence not attract a lengthy custodial sentence. This much is evident from the remarks made in *The State v Shaningwa* 2006 (2) NR 522 (HC), where Damaseb, JP stated the following:

*'...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'* (para [6])

Also at para [8]:

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<sup>1</sup> *S v Kasita* 2007 (1) NR 190 (HC); *S v Shapumba* 1999 NR 342 (SC) at 344 I to 345A; *S v Jason & another* 2008 NR 359 at 363 to 364G

<sup>2</sup> "The right to life shall be respected and protected."

<sup>3</sup> (1) "Children shall have the right from birth to a name, ... as far as possible the right to know and be cared for by their parents."

*“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”*

*It is the Court’s duty, however, to ensure that the murder of new-born babies and concealment of birth are nipped in the bud.’ (para [10])*

[12] I appreciate that in cases of infanticide, courts experience a difficulty to mete out appropriate sentences as there is a tendency to treat such cases with leniency.

‘This is clear from the remarks made by Damaseb, JP in *Muzanima* and *Shaningwa*, respectively, where it was said: *“One inclines to leniency in these sort of matters but this offence (especially the killing of newborn babies) are very serious and do not seem to be isolated events in this division”* and *“It is no exaggeration that this is one of the most difficult sentencing decisions I have to take, in view of your personal circumstances.”*<sup>4</sup>

[13] There is in Namibia, like in the former Rhodesia, a wide discrepancy between the sentences which have been imposed for infanticide. It varies from detention until the rising of Court<sup>5</sup> to custodial sentences of as high as twelve years’ imprisonment on a second conviction and 20 years’ imprisonment for a first offender. This court, however attempted to set out guidelines in the *Maria Akwenye matter* (supra) with reference to a former Rhodesian case *S v Rufaro* 1975 (2) SA 387 (RA) when that court set out guidelines to courts when dealing with this type of offence. The court in the *Akwenye matter* posed a question and answered it as follow:

‘...if the same principles to sentencing apply, why then are substantially more lenient sentences imposed in cases of infanticide, compared to ‘ordinary’ murder cases? It seems to me, the answer to this question lies in the fact that in these cases, considerable weight is given to the *circumstances under which the murder was committed* and *the personal circumstances of the accused*. Although the courts are enjoined to consider these two factors when considering sentence, it is clear that in cases such as the present, these two factors are emphasised at the expense of the

<sup>4</sup> See: *Akwenye v S* (CA 117/2010) NAHC 106 (8 April 2011).

<sup>5</sup> *S v Glaco* 1993 (2) SACR 299 (Nm).



others i.e. the seriousness of the crime and the interests of society. (See: *S v Van Wyk (supra)* 448D-E).’

[14] I agree and associate myself with the guidelines in the *Akwenye* matter. These guidelines are from my understanding as follows:

- The general objectives of punishment and factors should not be lost sight of;
- The most important factor to take into account is the emotional state of the mother at the time when she kills the child;
- It should not be assumed simply because a new born child has been killed that the emotional state of the mother must necessarily have been unbalanced or was substantially the reason for the murder. There are many factors which must be taken into account and, depending on the facts of each particular case, the Court will place the weight on each one of these factors as the merits of the case demand;
- there is the age of the mother to be considered;
- The number of previous births is another factor which can be usefully considered. It is a well-known fact that the first child birth is usually more difficult than subsequent ones so a mother is more likely to be upset by her first child birth than she would be if she had had a number of easy and successful child births before the birth of the child that she murdered.
- The motive for the killing is another factor which may be taken into account, especially in deciding to what extent the killing was a premeditated one or not
- The manner of the killing is another factor. The manner of the killing will often indicate the extent to which the mother had succumbed to her emotions;
- has the accused shown contrition?
- The need to provide counselling for the accused as soon as possible after the commission of the crime; where the accused person is assisted and guided to confront the emotions experienced at the time of committing the offence; and to convert these into words.
- Not only would the accused person be in a better position to explain her state of mind (at the relevant time) to the court, but would also be able to lead expert evidence on this crucial aspect before sentence.
- “The state of emotion of a mother who is driven to the desperate act of taking the life of her newly born child is an extremely difficult factor to gauge. It is

something which is inescapable of objective determination – it is one of the things which only a mother who has experienced pregnancy and subsequent birth can understand and appreciate. Yet it may not be an easy matter for a young mother to convey to others, least of all a Court considering the degree of her culpability, the state of the turmoil of her mind at the relevant time. It is for this reason that judicial nescience must not be stretched to the extreme length of requiring from her a vivid description of her emotional state and despair.”

The time has come for the Ministry of Gender Equality and Child Welfare to explore all possible avenues to provide counselling as soon as it is reasonably possible to those mothers guilty of infanticide, simply because of the peculiarity of the offence.

- Sight should not be lost that punishment imposed on these persons hardly ever result in them being taken out of society for lengthy periods, and they are usually required to reform whilst outside of prison
- As was stated hereinbefore, there are many factors that must be taken into account and the weight to be given to each one of these factors will depend on the merits of the case.
- The next factor is the motive behind the killing and whether it was premeditated.
- Although the court should always be mindful of the principle of uniformity in sentencing, a sentence imposed in one case must not be regarded too slavishly as a guide for a sentence to be imposed in another case where the facts are similar or almost identical
- I have come to the conclusion that, as far as it concerns sentences imposed for the killing of new-born babies in this jurisdiction, no general pattern of sentences imposed for offences which are very similar to each other exists, except that a custodial sentence is deemed to be appropriate. The terms of imprisonment imposed, however, differing markedly.
- A factor of importance in sentencing is the prevalence of the particular offence, a factor usually considered to be aggravating.
- Regrettably, the situation in Namibia is quite different where there has been a notable increase of cases of infanticide being reported. The courts in this jurisdiction have taken notice thereof and in no uncertain terms through its judgments made it clear that deterrent sentences should be imposed “*to ensure*

*that the murder of newborn babies and concealment of birth are nipped in the bud” (Shaningwa (supra)).*

- I am furthermore of the opinion that in order to bring an end to the commission of this heinous offence, the time has come for the courts to re-visit the objectives of punishment when sentencing in cases of this nature, and that the emphasis should now fall on deterrence.
- “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 sentence be considered in cases of offences involving the murder of a newborn child.”
- that all attempts should be made to get expert evidence before the court as far as it is reasonable possible, enabling the court, to objectively gauge the state of emotion of the accused.

[15] In *S v Kanguro* 2011 (2) NR 616 (HC), a case where a mother murdered her one year old son, this court again reiterated that:

‘[6] In determining what an appropriate sentence in the circumstances of this case would be, the accused’s mental condition, and more specifically her state of mind at the time of committing the offence, is a crucial factor in the court’s determination of the accused’s moral blameworthiness. It is trite that the degree of moral blameworthiness should be reflected in the sentence imposed on the offender. In Terblanche *Guide to Sentencing in South Africa* 2 ed at 150 para 7.2.2 the following is said:

“The modern view of the seriousness of crime generally also refers to the blameworthiness of the offender. According to this view, the seriousness of the offence is affected by the extent to which the offender can be blamed or held accountable for the harm caused or risked by the crime. This is a partly objective assessment. It should also include those subjective factors which lessen (mitigate) or increase (aggravate) the blame that can be attributed to the offender. Typical examples include the youth of the offender, *or any other factor which reduces or diminishes her criminal capacity.*’ [Own emphasis added.]<sup>6</sup>

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<sup>6</sup> At 681 B-E

[16] In the *Kanguro* matter the accused was found to have acted with diminished responsibility on the strength of a psychiatric report that was admitted into evidence. The accused was sentenced to 12 years imprisonment of which 4 years were suspended on conditions.

[17] Turning to this appeal before court, there is no evidence on the state of mind of the appellant when she committed the crime nor of the motive why she did it. She was represented in the court *a quo* and more should have been done to place sufficient evidence before the court on her mental condition and motive. As I have already mentioned hereinbefore the only evidence about her condition soon after the crime was discovered is that of a qualified nurse and midwife who is not an expert on state of mind and mental issues. It is, in my view, significant that the case was before trial postponed for about 8 (eight) times for a mental observation report. There is no report on record and the appellant testified that she did not receive counselling.

[18] I have already referred to the personal circumstances of the appellant. In my view the motive for the murder is in all probability because her father is a strict person and she was afraid that he may not approve the pregnancy and or baby. The manner in which she inflicted the injuries is however brutal. One cannot imagine a mother to act in such a manner. The state of mind of the appellant remains unclear. She cannot tell what went wrong with her.

[19] The interest of society in the circumstances, in my view, calls for a custodial sentence. The learned magistrate *a quo* duly considered the personal circumstances of the appellant. He was aware of the guidelines in the Akwenye matter and the former Rhodesian case referred to above.

[20] After having considered the personal circumstances of the appellant, the crime and the interest of society, I am of the view that the sentence is lenient to an extent that it induces a sense of shock and it is certainly not a sentence that this court would have imposed had it sat as a court of first instance. I firmly hold the view that the accused's personal circumstances are outweighed by society's need for a retributive and deterrent sentence. The sentence moreover underemphasizes the factor of deterrence contrary to what is stated in *Akwenye v The State* (supra)

' [32] In my opinion too often is it reported in the media that new-born babies are either killed or abandoned after birth due to unwanted pregnancies; thereby creating the impression that the killing of new-born babies is less serious and in certain circumstances even justified, especially where the baby impedes on the interests of the mother. I am furthermore of the opinion that in order to bring an end to the commission of this heinous offence, the time has come for the courts to re-visit the objectives of punishment when sentencing in cases of this nature, and that the emphasis should now fall on deterrence. Although the accused person's circumstances and other important factors such as motive should never be ignored; the need to deter other expecting mothers, finding themselves in similar situations and entertaining the thought of taking the lives of their new-born babies instead of considering less drastic alternative solutions, has become compelling'.

[21] In the result:

1. The appeal succeeds;
2. The sentence of 8 years' imprisonment of which 4 years are suspended on condition that accused is not convicted of murder read with the provisions of the Combating Domestic Violence Act (Act 4 of 2003) is set aside and substituted with a sentence of;
3. 10 years' imprisonment of which 3 years' are suspended for a period of 5 years' on condition the accused is not convicted of murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 committed during the period of suspension.
4. The sentence is back dated to 15 September 2016.

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**H C JANUARY**

**JUDGE**

I agree

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**M A TOMMASI**

**JUDGE**

**Appearances:**

For the Appellant:

Adv Gaweseb

**Of Office of the Prosecutor-General**

For the Respondent:

Ms Kishi

**Of Dr. Weder, Kauta & Hoveka Inc.**