

THE STATE
versus
MERCY MADZIWA

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 18 July 2016

Review judgment

CHATUKUTA J: The accused was charged with and was convicted of contravening s 108 (1) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. She was sentenced to 13 months imprisonment of which 3 months were suspended on condition of future good behaviour. The remainder was suspended on condition that the accused performed community service.

The facts giving rise to the conviction are that on 8 January 2016, the accused gave birth to a baby boy. She tied the baby's neck with a t-shirt. She then placed the baby in a plastic bag and she tied the bag. She dumped the baby at a cemetery. The baby was found crying and taken to Harare Hospital.

It appears the charge preferred against the accused, given the above facts which accused admitted, was wrong. The accused should have been charged with contravening s 189 (1) as read with contravening s 48 (1) of the Code. Section 108 (1) in terms of which the accused was charged with provides for mere abandonment or exposure, of an infant in a place or in circumstances that death may result from the exposure, though death would not have been intended. Section 108 (1) provides that:

“Any person who intentionally abandons an infant in such a place or in such circumstances that death may result from the exposure shall be guilty of exposing an infant and liable to a fine not exceeding level ten or imprisonment for a period exceeding five years or both”

The accused did not only abandon the infant as envisaged in s 108 (1). She tied a t-shirt around the baby's neck, placed the baby in a plastic bag and tied the bag. It can be inferred from the above conduct that the accused intended to cause the death of the infant. The baby could have suffocated.

The court *a quo* should have proceeded in terms of s 108 (2) (b). Section (2) provides that:

“Where the abandonment of an infant as described in subsection (1)-

.....

(b) results or was intended to cause the death of the infant, the person who abandoned the infant shall be charged with murder or attempted murder or attempted infanticide, as the case may be whether or not concurrently with exposing or infact in contravention of subsection (1);”

As alluded to earlier, the conduct of the accused clearly exhibited an intention to cause the death of the infant. The accused’s conduct falls within the ambit of s 108 (2) (b). In fact the accused could have been charged with contravening s 189 (1) as read with s 48 (1) of the Code and concurrently with contravening s 108 (1).

The proceedings were therefore not in accordance with real and substantial justice.

I accordingly withhold my certificate.

CHATUKUTA J