

**IN THE HIGH COURT OF LESOTHO**

In the matter of :

**MAMPE MATHAFENG**

**vs**

**REX**

**REASONS FOR JUDGMENT**

Delivered by the Honourable Mr. Acting Justice S.N. Peete  
on the 17th day of June 1998

The appellant, a young mosotho female adult aged about 30 years, appeared before the Leribe Subordinate Court on the 4th November 1997 charged with the crime of contravening the provisions of Section 2(1) of the Concealment of Birth Proclamation No.3 of 1949.

The charge as drafted by the public prosecutor reads thus -

“.....upon or about the 20th day of October 1997 and at or near Matukeng in the Leribe district, the said accused did wrongfully and intentionally give birth to a baby child born out of her body and thereafter the said accused did unlawfully dispose the body of the said child.”

To this charge, the appellant, who was not legally represented at her trial, pleaded guilty and the prosecutor Mr. Lebeta accepted the plea and outlined the facts as follows:-

“The evidence would disclose that the accused was engaged to be married. And it was noticed that accused was pregnant. And on 20/10/97 accused gave birth to a baby girl. Then following the said delivery accused took the baby and threw her away the result of which baby in question died of exposure.

When accused's mother became aware that accused was no longer pregnant she questioned her and the latter furnished an explanation that she disposed of the baby because she had made her with another man other than her fiancé and she was afraid that the latter would leave her. The baby's body was taken to the mortuary where it was found to have scratches on examination. Accused also examined and was found to just given birth.

Accused had no right to dispose off body in the manner that she did.”

The appellant is recorded as having admitted the facts as outlined by the Public Prosecutor and the presiding magistrate then returned a verdict of “Guilty as charged.” After she had pleaded in mitigation, the appellant was sentenced to 9 months imprisonment. This appeal is against both conviction and sentence. Mr. Teele for appellant informed this Court that the appellant had since served her sentence.

Section 2 of the Concealment of Birth Proclamation No.3 of 1949 reads:-

- “(1) Any person who disposes of the 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 on conviction to a fine not exceeding two hundred rands or to imprisonment for a period not exceeding three years.
- (2) Whenever a person disposes of the body of any such child which was recently born, otherwise than under a lawful burial order, he shall be deemed to have disposed such body with intent to conceal the fact of the child’s birth, unless it is proved that he had no such intent.
- (3) A person may be convicted under sub-section (1) although it has not been proved that the child in question died before its body was disposed of.” (my underlining)

It is clear that this section penalises the disposal “of the body” which means that at the time of disposal the child must be dead; subsections (2) and (3) are merely presumptive clauses to assist the prosecution to prove (a) intent to conceal birth and (b) the occasion of death. - *R v Maleka - 1965 (2) SA 774.*

In this case, the charge sheet was inelegant or sloppish to say the least;

in drafting statutory charges prosecutors must always try to follow as closely as possible the wording in the section creating the offence especially where there are presumptions operating against the accused. - *S. v Shangase 1972 (2) SA 753*; *S. v Nkosi, 1972 (2) SA 753*; *R. v Ah Foo - 1926 CPD 167*; *R. v Dhladhla - 1968 (1) SA 459*; *R. v Preller 1952 (4) SA 452*.

In the charge sheet in this case the intention relates to the giving birth of a child and not to the concealing the fact of its birth. The charge was thus fatally defective. Furthermore the facts as outlined by the prosecutor (if they are true) reveal or prove that the baby was alive when the appellant threw her away as a result of which the baby in question died of exposure. These facts therefore do not support the charge under Section 2(1) of the Proclamation but reveal a case of culpable homicide. In the case of *R. v Oliphant 1950 (1) SA 48* it was held by De Beer J.P. that -

“The meaning of the section under which the accused was charged, however, to my mind quite clearly envisages the disposal of a dead body and this is an essential element of the crime which should have been alleged. The words “whether the child died before, during or after birth” further stress the fact that it must have been dead at the time of its concealment.

The third subsection.....merely facilitates proof. thus where there is an allegation that the dead body was disposed of, it shall not be incumbent upon the crown to prove that it was in fact dead before its body was disposed of. The omission to allege this essential element

is therefore fatal to the crown case.” (at p.51)

In the case of *R v Verrooi - 1913 CPD 864* it was held that a conviction under a similar section cannot ensue where the child is alive at the time of the attempt to conceal its birth.

In the present case the charge was perhaps drawn by Mr. Lebeta in haste without following as closely as possible the wording of the section. This was probably due to the fact that the appellant had indicated her intention to plead guilty. Prosecutors even in such cases must be careful in the drafting of their charges especially for statutory offences. Prosecutors must always ensure that-

- (a) the outline supports the charge and
- (b) that the outline discloses an offence otherwise a conviction will not stand despite the plea of guilty. (*R v Motjola 1977 LLR 1; Rantsoti Nkhatho v R - 1978 (1) LLR 160.*)

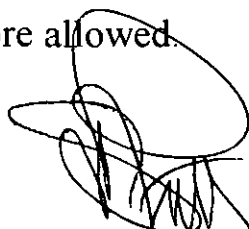
Magistrate presiding over trials under the section 240 procedure must also be vigilant to see -

- (a) that the charge discloses an offence (this is even more important when the accused is not legally represented); and
- (b) that the outline of facts by the prosecutor supports the charge in question.

In the present case if at all the prosecutor had sufficient evidence to prove that a living baby was born and was thrown away by the appellant with the intent to conceal its birth and that such child died because of exposure, the appropriate charge was culpable homicide.

In the peculiar circumstances of this case Ms. Mokitimi for the Crown did not support the conviction.

The appeal was therefore allowed.



S.N. PEETE

Acting Judge

**For Appellant : Mr. Teele**

**For Crown : Ms. Mokitimi**