IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No.11 of 1983

Between:

KAROLINA ADIRALULU — Appellant

and

REGINAM — Respondent

E. Vula for the Appellant
K.R. Bulewa for the Respondent

Date of Hearing: 4th July, 1983
Delivery of Judgment: July, 1983

JUDGMENT OF THE COURT

This is an appeal from the appellant's conviction by the Supreme Court of Fiji of the offence of attempted murder contrary to sections 214 and 380 of the Penal Code (Cap.17 - 1978). An appeal against sentence is included in the notice.

There is little dispute about any of the physical facts of the case. On the morning of the 7th September, 1982, the appellant buried in the earth in the back yard of premises where she was living, a child to which she had given birth a few hours before. When the infant, a short time later, was disinterred, it was found to be alive and it survived. The learned Judge correctly directed the assessors that on a charge of attempted murder nothing less than an actual intention to kill the proposed victim will suffice - it was essential for the prosecution to

prove that the accused person intended to kill the child.

Basically the defence of the appellant, put forward in an unsworn statement from the dock, was that after giving birth to the child she thought it was dead, so she left it on the ground. Later she buried it. The issue whether she at this time thought it was dead, or, as the prosecution contended, knew or thought it was alive, was called to the attention of the assessors by the learned trial Judge.

It is necessary to refer to a particular aspect of the proceedings in the Supreme Court. The information to which the appellant pleaded, contained simply a charge of attempted murder of the infant to which we have referred above. After counsel for the prosecution had opened the case the learned Judge called counsel into Chambers and asked whether the appropriateness of the charge had been fully considered - reference was made to infanticide. Counsel for the prosecution assured him that it had been anxiously considered in the light of the medical evidence, whereupon the Judge said he would proceed to try the charge as framed. The evidence was then called. Included in the medical evidence was that of a consultant psychiatrist who had not been called at the preliminary inquiry.

At the conclusion of the evidence the prosecution closed its case and the appellant in an unsworn statement from the dock relied upon the statement she had made to the police.

Mr. Bulewa, who appeared in both Courts for the prosecution, addressed the Court and at least referred to infanticide under the heading of "alternative conviction". Mr. Vula, who also appeared in both Courts for the appellant in the course of his address is also recorded as referring to infanticide as a possible alternative conviction.

However, after an adjournment, Mr. Bulewa obtained leave to make a submission in the absence of the assessors. In essence his submission was that there was no such offence as attempted infanticide. Mr. Vula agreed with the submission.

After a further adjournment the learned Judge gave his ruling, of which the effect, we think is contained in the following passage :

> "There is, in my view, such an offence as voluntary infanticide with intent, not only in relation to the act or omission, but also in relation to the death of the child; and I am also of the view that it follows that there is such an offence as attempted infanticide just as there is such an offence as attempted manslaughter. "

He found also, that, by virtue of section 169(2) of the Criminal Procedure Code (Cap.21 - 1978) it was possible for there to be a conviction of attempted infanticide on a charge of attempted murder.

The assessors then returned and the learned Judge summed up. We need advert at this stage to only one aspect of the direction to the assessors; he told them that it was open to them (if so satisfied by the evidence) to find that the accused was guilty of attempted murder or of attempted infanticide, which latter attracted a lesser punishment than attempted murder.

Having dealt in considerable detail with the evidence relating to the charge of attempted murder the learned Judge turned to that concerning infanticide and left attempted infanticide to the assessors as a possible alternative opinion. This alternative was accepted by the assessors who gave it as their unanimous opinion that the appellant was guilty of attempted infanticide.

The learned Judge, however, did not share the view of the assessors. In his judgment he said :

> "But with the utmost respect, I do not share their opinion that the balance of the accused's mind was disturbed. I do not accept that opinion. I do not consider that it is really supported by the medical evidence. I am of the view that the evidence shows no more than, at the worst, that she was weak and depressed. "

The learned Judge continued :

> "Whereas it is common ground that she acted oddly in going under her bed when she returned to the flat at about 1 a.m. or 2 a.m. on the morning of 7th September, I am convinced that this indicated no more than an initial desire to conceal her appearance. Mrs. Naigulevu and her mother having returned to the flat apparently without having found the baby, the accused then, I am satisfied beyond reasonable doubt, resolved to go, and did go, to where she had left the child in the back yard in order to bury it. For my part, I accept the evidence of Mrs. Naigulevu which was definite and insistent (and no reason has been shown why she should fabricate such evidence against her own cousin) that the accused told her she had heard the baby cry and I find as fact proved beyond reasonable doubt that the accused actually believed that the baby was alive when she buried it and that she also believed she had convinced Mrs. Naigulevu either that the baby was dead in spite of her having heard it cry or convinced her that she (the accused) believed it was dead.
>
> I find the accused guilty as charged in the information and convict her accordingly. "

From this conviction the present appeal has been brought and the notice, so far as it relates to conviction, contains only one ground :

> "1. The learned trial Judge erred in directing the Assessors that there was such an offence in law as attempted infanticide and in so doing so confused the issues put before the assessors that it resulted in a gross miscarriage of justice. "

With all respect to the view of the learned Judge as set out above we are of the opinion that there is no such offence in Fiji as attempted infanticide. Learned counsel referred us to numerous authorities and texts, in the main, bearing indirectly on the topic but in the end we think the question is concluded by the terms of the Penal Code. The "infanticide" section is section 205, which reads :

> " 205. Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of felony, to wit, infanticide, and may for such offence be dealt with and punished as if she had been guilty of manslaughter of the child. "

Section 380 of the Penal Code provides :

> " When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment and manifests his intention by some overt act, but does not fulfil his intention to such extent as to commit the offence, he is deemed to attempt to commit the offence. "

The italics are ours.

From the words italicised, it is clear that a person can be deemed to attempt to commit only that offence he was intending to commit when he began to put that intention into execution. To be deemed to attempt infanticide he must at the outset have had an intention to commit infanticide. But the primary intent in respect of infanticide is to commit murder. Section 205 commences "Where a woman by any wilful act or omission causes the death of her child". Murder (section 199) is committed, inter alia, "where any person who of malice aforethought causes the

death of another person by an unlawful act or omission". "Malice aforethought" is deemed established inter alia by evidence proving "an intention to cause the death" and a person who carries out an intention to cause death by an unlawful act or omission does so by a wilful act. Furthermore, what is primarily envisaged in section 205 is the offence of murder. The words "notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder" which appear in section 205 leave no room for doubt as to that. Accordingly, the initial intent of a person who by wilful act or omission causes the death of her child in circumstances which may result in her conviction of the offence of infanticide is not to commit infanticide. It is to commit murder. If the attempt fails, then she could be charged with and convicted of attempted murder. But not of attempted infanticide.

In Stephen's Digest 5th Edition (1894) Art. 50 one finds the definition of attempt to commit a crime as -

> "An act done with an intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. "

When the appellant buried her child in the ground her intention (assuming that she knew it was still alive) was not to commit infanticide but to commit murder. And her acts alone could never constitute the actual commission of infanticide if they were not interrupted or had been carried through to the conclusion she intended. To constitute the offence of infanticide superadded must be her condition of mind as prescribed in section 205. And that, of the very nature of things, could not be part of her initial intention nor an element of the consequence she intended.

In Halsbury, Fourth Edition, Volume 11, para. 65 it is stated :

> "In order to support a charge of attempting to commit a crime, it must be shown that the defendant intended to commit the completed crime ..... "

See Mohan (1976) Q.B. 1, (1975) 2 All E.R. 193.

Professor Glanville Williams discussing, in his Textbook of Criminal Law (1978), the provisions of section 1 of the Infanticide Act, 1938 (U.K.), of which section 205 is ipsissima verba, had this to say (p.632) :

> "But if the woman botches the killing and merely injures the child the Act does not apply; she will be charged with attempted murder or wounding with intent ....."

No case is cited as authority for the proposition. Nonetheless the passage itself is taken from a work by an author of eminence and it coincides with the views we have reached by the route we have taken.

We shall return later to the consequences which should follow on the opinion we have expressed. In case, however, our opinion should not be correct, there is another aspect of the case, on the basis upon which it actually proceeded in the Supreme Court, which requires mention. In the summing up the learned Judge directed the assessors as follows :

> "... you are satisfied beyond reasonable doubt that the accused, of her own free will, deliberately and intentionally buried the child intending thereby to kill it, but if at the same time you are of the opinion (in the sense that you think it more probable so than not so) that the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to that child or by reason of the effect of lactation consequent after the birth of that child, then it will be open to you to give the opinion that the accused is guilty of attempted infanticide and that is the opinion you should give even if you believe she is guilty of attempted murder. Provided of course, that if you are satisfied beyond reasonable

> doubt that she is guilty of attempted murder you should not give the opinion she is guilty of infanticide (sic) unless it is your opinion that it is more probable than not that the balance of her mind was so disturbed. "

Assuming for the present that there is such an offence of attempted infanticide, we are of the opinion that this passage either contains or proceeds upon the basis of a misdirection as to the onus of proof, and in his judgment the learned Judge said that he had directed himself in the terms of his summing up as a whole.

Section 205 of the Penal Code casts no onus either probative or evidentiary upon an accused person. Even in section 171 of the Criminal Procedure Code (in which a charge of murder may be reduced to infanticide for the same reasons as render infanticide an offence by section 205 of the Penal Code) no probative onus rests on the accused. In that situation if infanticide were to be raised as a matter of defence such would not be for consideration unless there is in the evidence for the prosecution or in evidence adduced by the accused, a sufficient foundation of fact on which such a defence may be based. Thus there is initially an evidentiary onus resting on the accused but when the necessary foundation of fact has been held to be laid, the question becomes, not whether the allegation has been proved, either on the balance of probabilities or beyond reasonable doubt, but whether upon the whole of the evidence the Crown has proved guilt beyond reasonable doubt. In the substantive offence of infanticide, there being no express provision as to the onus of proof, the onus is upon the prosecution throughout to establish all the elements of the offence beyond reasonable doubt. And, of course, in that offence the elements include the negative proposition as to full recovery and the affirmative as to the disturbed balance of mind.

If, then, there is indeed an offence in this country of attempted infanticide, the Judge in his judgment,

proceeded on a wrong basis as to onus of proof and applied a wrong standard of proof; and accordingly the judgment could not stand.

We turn now to the question of the order to be made by this Court. On the basis of our finding that the possibility of a conviction of "attempted infanticide" should not have been left to the assessors or considered by the Court there has been a mistrial. Certainly in law it was open to the learned Judge to convict of attempted murder, as he did, but only after he had received and considered the opinions of the assessors properly directed. The case falls clearly within the principle in Bharat v. R. [1959] 3 All E.R. 292 where the Privy Council said - " ... the trial is with the aid of assessors .... the Judge is not bound to conform to their opinions, but he must at least take them into account. If they have been misdirected on a vital point, their opinions are vitiated."

It cannot be said that on a proper direction the assessors' opinions must necessarily have been the same as that arrived at by the learned Judge. They might have preferred a not guilty opinion on a doubt whether in view of her mental condition the appellant had been able to form a clear intent at all, or had in fact done so. Had the assessors been in favour of an acquittal the learned Judge himself might have been influenced to accept that view.

In our opinion these considerations are fatal to the conviction of attempted murder and, if our view of the "attempted infanticide" should be erroneous, we remain of opinion that the conviction must be quashed by reason of the misdirection on onus of proof, which we have discussed. The summing up was painstaking but, perhaps necessarily, involved. It called for a clear and accurate direction on onus and it is impossible to say that the error in question could have caused no miscarriage of justice.

The appeal is allowed and the conviction and sentence quashed. Had we been called upon to consider the sentence of one year's imprisonment passed by the learned trial Judge we would have considered it heavy in the circumstances. On the appeal that question does not now arise but as a matter relevant to the issue whether a new trial should be ordered by the Court it emphasizes the difficulties of such sad cases. Clearly the assessors took a different view from that of the learned Judge of the mental condition of the appellant at the time. That field, not well charted in this class of crime, remains hardly more than a matter of opinion. The appellant must have suffered considerably during the last twelve months or thereabouts and we do not consider that the interests of justice require that we should order a new trial. Neither counsel has pressed us to take that course and we accordingly make no such order.

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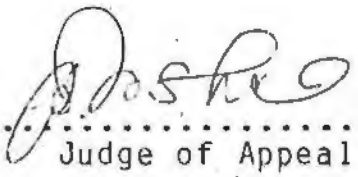
Vice President



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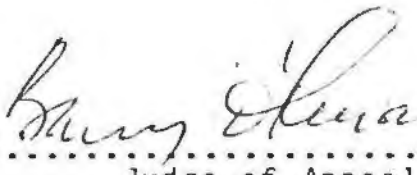

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