IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0005 OF 2001S
(High Court Criminal CaseNo. HAC006 of 1996)

BETWEEN:

MARIA ASUMITA BABAKOBAU

Appellant

AND:

THE STATE

Respondent

Coram: Eichelbaum JA, Presiding Judge
Tompkins JA
Smellie JA

Hearing: Wednesday, 21 November 2001, Suva

Counsel: Mr. G. O'Driscoll for the Appellant
Mr. P. Ridgway for the Respondent

Date of Judgment: Thursday, 22 November 2001

JUDGMENT OF THE COURT

On 26 September 1996 the appellant was convicted of the murder of her daughter Akesa aged 21 months and was sentenced to life imprisonment. By leave of this Court granted on 18 May 2001, she now appeals against her conviction.

At the trial there was little dispute about the facts. The appellant, who was aged 20, and her child had been living with her stepsister Ilisapeci. At times Ilisapeci had looked after Akesa on her own. The father of the child had married another person, and the appellant relied on Ilisapeci and her husband for financial support. There were strains in the household

and matters seem to have come to a head when the appellant absented herself for two days leaving Ilisapeci to care for the child. On 18 December 1995 Ilisapeci told the appellant to go and stay with her aunt. The appellant left, with Akesa, taking her and her daughter's clothing with her.

In the afternoon the appellant caught a bus to Tailevu. She stayed on the bus when the driver, having completed his scheduled trip, turned the bus around to return to where he was staying the night. At the appellant's request the driver put her down near the Natovi Bridge. She had the child and her luggage with her. Leaving the bags at the side of the bridge she went under the bridge with the child and drowned her. The appellant then let the body float away.

After that the appellant obtained a ride to Burelevu where she made contact with Dorote to whom she was related by marriage, saying she had come to stay. Dorote took her to her house. Later that evening, when Akesa's body was found, circumstances quickly led to police to the appellant. In a detailed statement made under caution the next day she admitted drowning her daughter. She said that when she set out she had already made up her mind to kill her child as she realised how difficult it would be to look after her child alone. She estimated that she had held Akesa's head under water for 20 or 30 minutes, until there was no further movement. As she admitted she told various lies to try to cover her tracks.

At the trial the appellant made an unsworn statement in which she told of the

difficulties of life in her stepsister's home, and that she had been beaten and mistreated, and asked to leave many times. She stated that because of the things her stepsister did, she could not bear it any longer. At the end her stepsister insisted on her leaving notwithstanding that she had no money and nowhere to go. She killed her child because she knew most of her relatives did not want her, and "it came into my mind to do this so that my child could rest in peace".

At trial it seems the prosecution case was presented solely under section 202 (a) of the Penal Code (Cap 17) the relevant portion of which reads:

> **Malice aforethought shall be deemed to be established by evidence proving .....**
>
> **(a) an intention to cause the death of or to do grievous harm to any person.....**

The principal issue at trial, at any rate so far as we can glean from the final addresses and the summing up, was whether the necessary intent had been proved. Defence counsel submitted it had not, and that there should be a finding of not guilty. Defence counsel must also have alluded to insanity, as the trial Judge gave some directions about that. The Judge instructed the assessors about the elements of murder and told them that if they were satisfied that the appellant murdered her child, they should return a verdict of guilty, and otherwise, they should acquit the accused. After a short retirement the assessors unanimously returned an opinion of guilty, which the Judge confirmed.

The first ground of appeal relates to the alleged incompetence of trial counsel.

No leave has been sought to file any evidence in this regard. Thus it has not been suggested that counsel acted contrary to any instructions, but the contention is that incompetence can be inferred from the trial record, in particular the paucity of the cross examination.

We have said enough about the facts to indicate the difficulty of the task facing defence counsel. The appellant's conduct and her subsequent formal statement gave clear evidence of premeditated intent to kill. The admissibility of the statement was not challenged and there is nothing in the record to indicate that any grounds existed for challenging it.

Counsel appearing on the appeal also submitted that trial counsel should have pursued the defence of insanity, or temporary insanity, more vigorously. Again however there is no material before us to indicate that evidence was available to support such a plea. The appellant was in St Giles' hospital from 5 to 12 January 1996 during which time she was examined by the medical Superintendent who had worked in psychiatry for many years. He formed the opinion there was nothing to show she was insane at the time of the offence, although she may have been "in turmoil". By this, he explained, he meant the effect that her social circumstances had had upon her. He concluded she was responsible for what she did, nevertheless. There were no delusions or false experiences. In support of the appeal counsel criticised the absence of meaningful cross examination of the Superintendent and other witnesses, but in light of the opinions expressed by this witness, counsel could reasonably have taken the view that further questioning would only have emphasised the strength of the prosecution case. As to pursuing the topic with other witnesses (from whom of course counsel

could only have elicited facts that might support the defence, not opinions) there is nothing before us to indicate that any such questioning would have yielded favourable results.

We do not consider that the allegation of counsel's incompetence has been made out. Even less persuasive is the contention that in some way the trial Judge should have intervened, presumably by taking over questioning which ought to have been conducted by counsel. While of course Judges can properly ask questions for clarification, it is most unwise for a trial Judge to intervene to the extent of taking over counsel's role. Counsel cited the decision of this Court in *R v Michael Iro* Criminal Appeal No 11 of 1966, judgment 13 June 1966, but that case was concerned with the different situation of an unrepresented accused.

Under the second ground it was argued the Judge erred in not taking into account, and in not directing the assessors to take into account, the evidence of the appellant's mental state at the time of the offence, particularly that the appellant was under great emotional and psychological stress from her family. In the summing up however the Judge in fact reminded the assessors of the hardship she was facing at home, and of her assertion that this led her to kill her child.

It was also submitted that the Judge failed sufficiently to explain intent. Counsel drew our attention to *R v Nedrick* [1986] 3 All ER 1 as indicating that an acceptable direction would have been to the effect that the assessors had to determine whether having regard to all the circumstances, including what she said and did, the accused intended to kill or do

serious bodily harm.

We appreciate there may have been difficulties in compiling a Record years after the trial, and that the transcript of the summing up may not be complete. Accepting that the straightforward facts did not require any elaborate direction on intent, it still has to be said that on this issue , what has been recorded in the present summing up was sparse to the point of deficiency. However, we have no hesitation in applying the proviso to section 23 of the Court of Appeal Act, authorising the Court to dismiss the appeal where it considers, as we do, that no substantial miscarriage of justice has occurred. The evidence was overwhelming, and we have no doubt that on a full direction on intent, any reasonable assessors would have returned the same opinion.

Counsel also criticised the terms of the direction on insanity, saying it was tantamount to withdrawing the defence from the jury. While we do not agree, the direction was deficient in not defining the test of insanity for the jury. However, as State counsel submitted in response, the evidence was insufficient to allow insanity to be put to the jury at all, bearing in mind that in respect of insanity, the onus lies on the accused. It was thus favourable to the appellant to allow the subject to be before the assessors.

The final ground was that the Judge erred in not taking into account the appellant's diminished responsibility, and in not directing the assessors on the subject, when this might have resulted in a verdict of manslaughter.

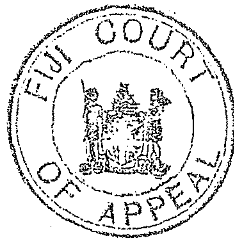
Diminished responsibility is not part of the law of Fiji. English cases were cited, but diminished responsibility is open for consideration in England because of specific statute law. In New Zealand, for example, where there is no equivalent, the Courts have from time to time raised the subject as one that might well merit parliamentary consideration, but have not regarded the matter as one the Courts were free to incorporate into law themselves. In New Zealand, as in Fiji, the criminal law is in codified form. Where the law has been codified it is particularly difficult for the Courts to expand the law in a manner such as suggested in this case. In Fiji we consider such an amendment would need to be effected by the legislature. Counsel referred to the recent acceptance of the battered woman's syndrome by the High Court during sentencing in *State v Prabha Wati* No. HAC 0009 of 1991, 9 October 2001. However, we do not consider that is an analogy. The battered woman's syndrome has been accepted in a number of jurisdictions as relevant to established defences such as provocation or self defence, see *R v Gordon* (1993) 10 CRNZ430, 438 and *R v. Oakes* [1995] 2 NZLR 673, 675. It has not been accepted as a new form of defence.

As we said in another case decided today having some similarity, given the background one cannot help feeling sympathy for the appellant, and her child. However, we have to deal with the case according to law, and none of the grounds argued have been made out.

Result

Appeal dismissed.

Eichelbaum JA, Presiding Judge



Tompkins JA

Smellie JA

Solicitors:

Messrs. Khan and Company, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent