IN THE COURT OF APPEAL
CRIMINAL JURISDICTION

APPEAL No. AAU 70 of 2010
(High Court HAC 42 of 2009L)

BETWEEN	**:**	**MEREWALESI BALENIUSILADI**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Calanchini P**
Counsel	**:**	**Ms. N. Nawasaitoga for the Appellant.** **Mr L Fotofili for the Respondent**
Date of Hearing	**:**	**21 August 2013**
Date of Decision	**:**	**25 October 2013**

DECISION

[1] This is an application for leave to appeal against conviction and sentence.

[2] The Appellant was convicted by the High Court at Lautoka on one count of murder following the unanimous guilty opinions of the three assessors. The Appellant was sentenced on 25 August 2010 to the mandatory sentence of life imprisonment with a non-parole term of 12 years.

[3] Pursuant to section 21 (1) of the Court of Appeal Act Cap 12 (the Act) a person convicted of an offence after a trial in the High Court may appeal, with the leave of the Court of Appeal, to the Court of Appeal against (i) his conviction on any ground of appeal involving a question of fact alone or a question of mixed law and fact and (ii) the sentence passed on conviction unless the sentence is one fixed by law. Pursuant to section 35 (1) of the Act the jurisdiction of the Court of Appeal to grant leave to appeal may be exercised by a single judge of the Court.

[4] The Appellant's Notice of Appeal was dated 21 September 2010 but was filed or received by the Registry on 27 September 2010. The date of sentence was 25 August 2010. To the extent that the date of filing is outside the time limit of 30 days prescribed by section 26 of the Act, I am prepared to extend the time for appealing by two days. This power may also be exercised by a single judge of the court under section 35 (1) of the Act.

[5] The Appellant's amended grounds of appeal against conviction were filed on 31 May 2013 and as a result leave was not required for the filing of the amendments. (See Rule 37 of the Court of Appeal Rules). The Appellant seeks leave to appeal against conviction on the following grounds:

> *"1. The learned trial Judge erred in law and fact when he did not direct the assessors on the question of the accused's history of lack of communication, introversion, isolation, feelings of conviction and stygmatization of having a child out of wedlock from a married man rendered her incapable appreciating the wrongness of her actions when she wrapped the body with the cloth.*
>
> *2. That the learned Judge erred in law and in fact in failing to direct the assessors that the accused did not appreciate the wrongness of her acts given her depressive state, history and surrounding circumstances.*
>
> *3. That the learned Judge erred in fact and in law to direct the assessors of the failure of the accused's family to accept her giving birth out of wedlock, rejection by the biological father to provide care to the accused and the baby, to take equal responsibility for her birth and upbringing of the child have*

led the accused to believe that what she was doing was right; and

4. *That the learned Judge erred in law and in fact to direct the assessors of the mental torment the accused had gone through during the time, given her character of being an introvert she could not avail herself of any advice, she could not turn to anyone for understanding, she was the focus of her family's disapproval that rendered her incapable of appreciating the wrongness of her actions."*

[6] The amended grounds of appeal against sentence were set out in the document filed on 17 September 2012 as follows:

"The learned trial Judge erred in law in imposing a minimum term of 12 years imprisonment on the Appellant not taking into consideration the following as per section 4 (2) (k) of the Sentencing and Penalties Decree 2009:

(a) The moral factors that contributed to the commission of the offending;
(b) The cultural factors that contributing to the commission of the offending;
(c) The social factors that contributed to the commission of the offending, and
(d) The economic factors that contributed to the commission of the offending."

[7] The relevant background facts for the purposes of the application for leave to appeal may be borrowed from the agreed facts adopted by the parties and tendered in evidence as an exhibit at the trial. In summary, the Appellant was a single mother with a daughter from a previous marriage. She became aware of her second pregnancy sometime in June 2008. From the time that she discovered that she was pregnant until the birth of her second child the Appellant did not undergo any pre-natal check up or medical attention. The Appellant gave birth to her second child, a baby boy, between 2.30a.m. and 3.00a.m. on 26 February 2009. At the time she was residing with her aunt and uncle at 53 Musuniwai Street, Rifle Range, Lautoka. The child was alive during birth. The Appellant wrapped the child with a wrap around sulu from his head to his feet. The child died as a result of the tightly wrapped sulu around his head which suffocated him. The Appellant knew that her child died after

she had finished wrapping him. The Appellant was subsequently charged with murder. She pleaded not guilty.

[8] In the written submissions filed on behalf of the Appellant, it was submitted that the grounds of appeal against conviction can be regarded as one ground, namely that the learned trial Judge erred in law and in fact in that he failed to give proper directions on the mental element of the offence of murder taking into account that the Appellant did not appreciate the wrongness of her acts given her depressive state, history and surrounding circumstances.

[9] In order to obtain leave to appeal against conviction the Appellant is required to establish no more than that the condensed ground of appeal raises an arguable point which warrants the further consideration of the Court of Appeal.

[10] It is apparent that the Appellant's appeal is concerned with the mental state of the Appellant at the time she gave birth. The appeal challenges the directions given by the learned trial Judge in relation to what was termed the mental element of murder. This is referred to as malice aforethought or mens rea. However, it is quite apparent from the evidence that has been quoted by the learned Judge in his summing up that it was open to the assessors to conclude that the Appellant knew what she was doing and intended to kill the baby for the reasons outlined in her evidence. In my opinion there is no error in the summing up in relation to malice aforethought. There was no basis for any further analysis of the facts relating to malice aforethought. The Appellant is in fact submitting that the learned trial Judge should have directed the assessors on the issue of diminished responsibility. However at the time of the offence Fiji had not enacted diminished responsibility. As the Court of appeal noted in **Babakobau –v- The State** (unreported AAU 5 of 2001; 22 November 2001) diminished responsibility was not part of the law of Fiji.

[11] Since the date of the offence section 243 of the Crimes Decree 2009 has with effect from 1 February 2010 introduced a defence of diminished responsibility in respect of homicide which may, if established, reduce a charge of murder to a conviction of manslaughter.

[12] There is however another issue which is discussed by the learned trial Judge and about which it may fairly be said his directions were confusing. (see paragraphs 35 to 48).

[13] The issue concerns the lesser offence of infanticide and two provisions in the statute law, section 205 of the Penal Code Cap 17 and section 171 of the Criminal Procedure Code Cap 21. At the time of the commission of the offence in 2009, these two provisions were in force. By the time of the trial in 2010, both pieces of legislation had been repealed and replaced by the Crimes Decree 2009 and the Criminal Procedure Decree 2009 respectively.

[14] The situation in this case is that the Respondent charged the Appellant with murder rather than infanticide. It may be argued that the purpose of the legal framework reflected by section 205 of the Penal Code and section 171 of the Criminal Procedure Decree was to encourage prosecutions for infanticide rather than murder in cases such as the present. Nevertheless, the same legal framework left it open for the tribunal of fact (in Fiji, the trial Judge assisted by the opinion of assessors) having decided that murder was established because of a wilful and intentional killing, to then consider whether by reason of giving birth or lactation, the balance of her mind was disturbed.

[15] As I have indicated earlier in this decision, the directions of the learned Judge to the assessors and hence his self-directing appear confusing. In my judgment, although the learned trial Judge has agreed with the opinion of the assessors and convicted the Appellant of murder, I believe there are arguable grounds for concluding that the matter of the lesser verdict of infanticide and the evidence in support of that lesser offence has not been dealt with correctly in the summing or in the judgment on conviction.

[16] I am prepared to grant leave to appeal against conviction on the ground that although the conviction for murder can be supported on the evidence, whether the lesser offence of infanticide should replace the conviction for murder on the basis that the evidence established the additional facts to convict of infanticide.

[17] The decision of the Court of Appeal in **Devi –v- The State** (unreported AAU 8 of 2009; 30 January 2012) is sufficient authority for concluding that leave to appeal should be granted on the ground that I have proposed. I am satisfied that there is an arguable ground on the basis that it has not been made sufficiently clear to the assessors that the intention to kill and the actions leading to the death of the baby are the starting point for the further necessary enquiry as to whether the Appellant murdered her baby while the balance of her mind was disturbed.

[18] So far as the application for leave to appeal against sentence is concerned, I am prepared to grant leave to appeal on the basis that it is necessary for the Court of Appeal to determine whether the power to fix a non-parole term under section 18 of the Sentencing and Penalties Decree 2009 is open to appeal under section 21 of the Act and if so whether a non-parole term of 12 years is harsh and excessive in the circumstances of the present case.

Orders:

(i) Appellant is granted leave to appeal against conviction on the ground specified in paragraph 16 (above) and

(ii) Appellant is granted leave to appeal against sentence on the ground specified in paragraph 18 (above).

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HON. MR JUSTICE CALANCHINI
PRESIDENT