IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

Criminal Appeal No: AAU 0070 of 2010
(High Court Case No: HAC 042 of 2009)

BETWEEN	:	**MEREWALESI BALEINIUSILADI**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Basnayake, JA** **Jayamanne, JA** **P. Fernando, JA**
Counsel	:	**Mr. S. Waqainabete for the Appellant** **Mr. S. Vodokisolomone for the Respondent**
Date of Hearing	:	**8 February 2016**
Date of Judgment	:	**26 February 2016**

JUDGMENT

Basnayake JA

1. I agree with the reasons and conclusions of Jayamanne JA.

Jayamanne JA

Back ground

2. The accused was charged with section 199 and 200 of the Penal Code for committing the murder of her new born baby on 26th February, 2009.

3. After trial the assessors brought a unanimous opinion of guilt for murder. Having agreed with the opinions the learned trial judge convicted the accused for the offence of murder and on 25thAugust imposed mandatory life imprisonment with non-parole period for 12 years.

Grounds of Appeal

4. The accused-appellant, who is referred to hereinafter as appellant, filed a leave to appeal application against the conviction and the sentence. A single judge of the Court of Appeal granted leave to appeal on the following two grounds:

   i. *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 additional facts to convict for infanticide*

   ii. *Leave to appeal against sentence on the ground 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 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.*

5. The counsel for the appellant made oral submissions and stated that he relies on the written submissions also. The summary of the submissions is as follows:

Submission of Counsel

6. He submitted that the appellant never planned in advance to cause the death of the child and the intention arose only with the delivery of the child. The knife and the *sulu* were obtained after the delivery of the baby from the kitchen of the Aunt where she lived. She developed pain early in the morning. There is no evidence that she took any medication to advance the birth. At that time the inmates of the house were asleep. While in the kitchen she cut the umbilical cord to deliver the baby. If the intention was to kill the baby, she might have chosen a different place.

7. Counsel submitted further that had the child was born when the aunt was awake the appellant may not have been able to commit the act. Had she got pain during any other time of the day too she wouldn't have been able to kill the baby..

8. Counsel submitted that after giving birth, all the circumstance that led to the birth may have come to her mind. Not only the physical reasons but also the reasons associated with mental, emotional, environmental and psychological factors may have caused severe effect in causing the death of her child.

9. Counsel reiterated following points in support of the appeal:

   i. *The learned trial judge erred in law and fact when he did not direct the assessors on the question of the appellant's history of lack of communication, introversion, isolation, feelings of conviction and stigmatization of having a child out of wedlock from a married man rendered her incapable apprehending the wrongdoing when she wrapped the body with the cloth.*
   ii. *That the learned Judge erred in fact and in law todirect assessors of the failure of the appellant's family to accept her while giving birth out of wedlock,rejection by the biological father to provide care to the appellant and the baby, to take equal responsibility for her birth and upbringing of the child have led the accused to believe that what she did was right; and*

   iii. *That the learned Judge erred in law and fact in failing to direct the assessors of the mental torment the appellant had gone through during the time, given her character of being an introvert she could not avail herself of any advice,*

she could not return to anyone for understanding, she was the focus of her family's disapproval that rendered her incapable of appreciating the wrongness of her action.

iv. That the learned Judge erred in law in not taking into consideration moral, cultural social and economic factors that contributed to the commission of offending.

10. The counsel for the State submitted in response that;

i. The grounds advanced by the appellant are not necessarily defences to replace the offence of murder to the lesser offence of infanticide.

ii. It can be done only when the balance of mind of the woman was disturbed by reason of not having fully recovered from child birth or effect of lactation.

iii. Social human experience such as stigmatization is not included in section 205 of the Penal Code though those grounds are covered under the subsequent law namely section 244 of the Crimes Decree 2009 which came into operation in February 2010.

Facts

11. The appellant aged 29 years was a single mother with a daughter from her previous marriage. She became aware of her second pregnancy sometime in June 2008 (eight months prior to the incident). From the time she discovered that she was pregnant until the birth of her child, the appellant did not undergo any pre-natal check-up or medical attention.

12. The appellant gave birth to the child in question, a baby boy, between 2.30 am and 3.00 am on 26th February. At the time she was residing with her aunt and uncle. The child was alive at birth. The appellant wrapped the child with a *sulu* from his head to his feet. The child died as a result of the tightly wrapped sulu around his head to feet. The appellant knew that her child died after she had finished wrapping.

Version of the appellant

13. She was from Nacula, Yasawa, she was unemployed and unmarried. However she had a child and her cousin was the father of the child. Her parents were unhappy as she was conceived out of wedlock. She promised her father that she would get married before having another child. She left her child with her parents and came to Suva and stayed at her uncle's place in Suva in 2005.

14. In Suva she developed an affair with one Esiromi with the expectation of getting married to him. She became pregnant by Esiromi. When she informed the pregnancy, Esiromi told her that he was already married and got children and therefore he is unable to look after the child of the appellant. As her father had warned her previously she was scared to tell her parents about the pregnancy. Thereafter, she was not in contact with Esiromi. She left Suva and came to Lautoka and stayed with an uncle and an aunt. Aunt knew that the appellant was pregnant.

15. On the day of the incident on 26 February 2009, around 2.00 am she felt pain and lay down in the kitchen. Once the baby was delivered she looked out for a kitchen knife that was in the cupboard. Having found a knife, she cut the umbilical cord with it. She says that at that time, she was scared and not in a correct frame of mind. Thereafter she went into the room and with a piece of cloth and wrapped the baby. She did so as she did not want the child to go through the problems that she went through. Having put the baby with the *sulu* into a plastic bag, she then kept it near the place where rubbish is collected.

16. Then she came back and cleaned the blood stains in the kitchen and went out and sat near a mango tree. She felt very weak and hungry and bleeding. She says she was confused due to a number of reasons:

    i. She was scared as she gave birth out of wedlock in spite of her father's warning
    ii. Refusal of the boyfriend's (Child's biological father) to accept the child

iii. She did not want her child to go through what she had undergone and the child to hear words especially in Fijian community. In particular she never wanted her child to be stigmatized.

17. Few hours later when her aunt got up, the appellant did not tell her that she delivered the baby. Having noticed that she was feeble her aunt forced her (the appellant) to go to hospital for treatment. Instead, she took the plastic bag with the child and left the house. In the evening when the appellant returned home her aunt scolded her for not going to the hospital.

18. On the following day the appellant having put the child into a bucket and put in a sack. She then threw the sack into a nearby stream. Two days later, the police came and arrested her.

Law

19. The appellant was charged with section 199 & 200 of the Penal Code. The contention of the prosecution is that the appellant is guilty of the offence of murder. On the hand, the position of the defence is that the offence should have been reduced to Infanticide under Section 205 of the Penal Code. The sentence for murder is mandatory life imprisonment. The sentence for infanticide is not mandatory. The court has a discretion, subject to sentencing guidelines, to impose a sentence up to life imprisonment (vide section 201 of the penal Code).

20. The first issue in this case is whether it is legally feasible to reduce the offence to infacticide. Section 171 of the Criminal Procedure Code stipulates that when a woman is charged for murder of her child under certain circumstances, she can be convicted for Infanticide although she was not charged with it. Similarly sec 162 (1) (a) of the Criminal Decree 2009 also allows to convict a person for Infanticide though she is charged for murder.

21. It is pertinent to examine the elements of Infanticide in Section 205 of the Penal Code which reads as follows:

'205. Where a woman by way of 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'.(emphasis added)

22. There are two vital elements that have to be proved in order to reduce the offence of murder to infanticide. They are as follows:

    i. *That balance of the mother's mind was disturbed and*
    ii. *That the mother has not fully recovered from the effect of giving birth to the child*

23. The next question is who has the onus to prove these elements. When an accused person is charged for Infanticide, the onus is on the prosecution to prove each element of the offence. However, when Infanticide is raised as an alternative to murder, no probative onus rests on the accused. This principle has succinctly laid down in **R. Karolina Adiralulu** [1983]AAU 11/83 (July) 1983 where it says:

    "Evidence must lay 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"

24. In light of the said judgement I have to examine whether the appellant had discharged the initial evidentiary onus and if so, the offence is proved. The other important issue is whether the trial judge has given adequate directions on this point to the assessors.

25. Another important aspect is to understand the interpretation given to the words *"effect of giving birth" in* the section. One needs to scrutinize whether it confines to the physical effect or whether it extends to mind also. If it extends to mind then I have to examine whether it is permissible to consider social, emotional, psychological and environmental factors also that prevailed during the pregnancy. In *State v Kesaravi Tinairatu* [2002] HAC 8/01S 5 September 2002 it was held that;

> *"Mother who lacked adequate social and emotional support during pregnancy, received no pre-natal advice or care during pregnancy, and where the circumstances of the delivery contributed to her emotional stress which caused her mind to be disturbed are factors that can be considered".*

26. In **Verebasaga v State** [2001] FJCA9; AAU00 42/2000,(22 November 2001) it was held that although 'social human experience' is not included in Section 205, it may be still relevant. The Court of Appeal further held

> *'that the circumstances in which the accused had been living may be relevant. Those may have be impeded the accused's recovery. On the hand the Court might regard them as the cause of the symptoms the accused was exhibiting'*

27. In the case of **State v Tumuri** *(unreported)* HAC 8 of 2001 the High Court pronounced that

> *'The psychiatric found that you were a mother who lacked adequate social and emotional supporting during pregnancy, that you received no pre-natal advice or care during pregnancy, and that the circumstances of the delivery contributed to your emotional stress which caused your mind to be disturbed'.*

28. In **State v Radininausori** [2007] FJHC 53 the court said that:

> *'Experience tells us that many such cases arise not as a result of mental illness,but of social failure-failure to accept mothers who give birth out of wedlock,failure to provide care to suchmothers and babies,and failure to ensure that the fathers of such babies take equal responsibility for birth and upbringing of their children'*

Evolution of law relating to Infanticide

29. It is admitted that the law relating to the instant case is the repealed Penal Code, as the offence was committed on 26th February 2009. The Crimes Decree 2009 came into operation on 1st of February 2010 and after trial in the High Court, the accused was convicted on 19th August 2010. Sentence was imposed under Section 18 of the Sentencing and Penalties Decree 2009. Criminal Procedure Decree 2009 also came into operation on the 1st of February 2010.

30. Though the appellant was charged under the Penal Code it is relevant to peruse the amended provision of the Crime Decree with regard to Infanticide. This perusal is carried out in order to examine the development of the law relating to Infanticide. Section 244 (1) (c) is reproduced as follows:

> "244(1) (c) at the time of the act or omission the balance of her mind was disturbed by reason of:
>
> *(i) her not having fully recovered from the effect of giving birth to the child; or*
>
> *(ii) the effect of lactation consequent upon the birth of the child; or*
> *(iii) <u>any other matter, condition, state of mind or experience associated with her pregnancy, delivery or post natal state that is proved to the satisfaction of the court.</u>*
> (Emphasis added)

31. It is interesting to note that Section 244(1) (c) (iii) is an additional element for diminished responsibility of infanticide which did not exist in the Penal Code. This means factors such as social human experience, social condition, moral situation, cultural upbringing, economic plight and circumstance of the pregnancy can beconsidered as grounds to reduce the offence of murder to infanticide. It appears this section was introduced not as a result of accident or haphazardness. This was a result of a clever and deliberate move in giving effect to long standing common law principle that was practised in Fijian High Courts. There has been a consistent and established practice that considered the factors mentioned above in order to

reduce the offence of murder to infanticide under section 205 of the Penal Code. The array of cases I have cited clearly demonstrates this point.

32. Law is not confined to provisions in a Code or Decree. In giving interpretation to words *'the effect of giving child birth'* in section 245 of the Penal Code, courts have consistently given a wide meaning and it has been practiced effectively. The narrower construction would affect the mothers who happened to deliver children under tragic circumstances. This does not mean that an open licence should be given to kill every child who is born out of wedlock. Whether to convict for murder or Infanticide depends on the facts and circumstance of each case. In cases of this nature, there is a salutary duty on the part of the trial judge to appraise the assessors of the development of the common law on this issue. The Judge must place before the assessors the relevant evidence to consider not merely the physical aspect of birth but also the circumstance surrounding the child birth. The judge must explain the availability of the option to convict for infanticide in the attending circumstances of the case. The circumstance cannot be confined merely to 'depression' which most mothers who are even married suffer with.

Analysis

33. The learned trial judge has not referred to the important evidence given by the psychiatrist who said that pre-natal stress would be increased in cases where;(page 232,233)

    i. *Unplanned pregnancy*
    ii. *Decline of the father of the child to support*

34. Though the trial judge has repeatedly used the word 'depression' it appears he employed this word in the context of physical suffering of the mother. He has hardly invited the Assessors to consider the circumstance of the appellant. The trial judge has failed to instruct the assessors that they should consider the previous circumstances should be considered in deciding *'the effect of giving child birth'* in Section 245 of the Penal Code. It appears that the development of the law has escaped from the mind of the learned trial judge. I am of the

view that had the assessors been directed on this point succinctly they may have very likely brought an opinion for Infanticide.

35. The learned trial judge has merely reproduced the entire evidence given by the appellant (pages 96 – 107). The judge without merely producing the transcript of the evidence should have explained the defence case. The circumstances of her pregnancy were not specifically explained to the assessors. He should have explained the following evidence and the legal position with regard to *'effect of giving child birth'*;

> i. *She was scared to face her father as she gave birth out of wedlock in spite of her father's warning.*
>
> ii. *Refusal of her boyfriend's (Childs father),the biological father to accept the child*
>
> iii. *She did not want her child to go through what she had undergone and the child to hear words especially in Fijian community. In particular she never wanted her child to be stigmatized.*
>
> iv. *The appellant obtained a knife from the kitchen to cut the umbilical cord. She did not use the knife to cut the baby. She did not strangulate the child.*
>
> v. *For nearly one day, she kept the dead baby in a basket and travelled with it. Later she returned to the house of aunt which shows the extent to which she was confused.*
>
> vi. *Not obtaining pre-natal treatment*
>
> vii. *No person was available in her life to give advice and counselling*
>
> viii. *She was unemployed and not an educated person*

36. In fairness to him, the learned trial judge has correctly directed the assessors on most of the issues. For example he has explained the offence of murder in clear terms and specifically invited the assessors to decide whether the appellant had malice aforethought or not. (para

32).He has explained the offence of manslaughter in paragraph 34 and 39,46 also in a succinct manner.

37. The law relating to Infanticide was discussed in paragraphs 35,36,37,38,40,44,47 and 48. I am of the view that the direction given at paragraph 47 is confusing and not clear enough. This was a very vital direction which the learned trial judge ought to have been very clear. Unclear directions may have misled the assessors about elements of the offence of Infanticide. The question is whether the assessors really understood the correct legal elements which are required to prove in order to convict a person for the offence of infanticide. The questionable paragraph reads as follows;

> *'If you are satisfied beyond reasonable doubt, that the accused acted with malice aforethought and intended to kill the baby or to cause him serious harm but she was confused and irrational, that she could not form any such intention and that if you think that she could not form such intention and she did not have knowledge due to the imbalance in her mind after child birth, which I explained fully before, or if you have a reasonable doubt about it, then you can find her not guilty of murder or manslaughter but guilty of infanticide."* (Emphasis added)

38. The learned trial judge stated in the said paragraph that in order to convict for the offence of infanticide the assessors must be satisfied that that the appellant could not form intention or she did not have knowledge. Indirectly what the judge says is that if there is evidence of intention or knowledge the appellant cannot be convicted for infanticide. I state that this is a wrong construction of the law. Absence of intention or knowledge is not a requirement to convict an accused for Infanticide. On the other hand, even if an appellant had the intention or knowledge the appellant has to be convicted for diminished offence of Infanticide if there is evidence that the balance of mind was impaired due to circumstances relating to child birth as discussed in the previous paragraphs.

39. The learned High Court Judge in failure to give directions and giving misdirection's may have impeded the assessors in bringing a decision for the offence of Infanticide.

Result

40. Therefore I hold that Ground one of the Appeal has been successfully established. I allow the appeal and set aside conviction of murder and I hold the Appellant guilty of the offence and convict the appellant for the offence of Infanticide.

41. Dealing with Ground Two, I set aside the sentence imposed for the offence of murder. I shall now consider sentence afresh for the offence of Infanticide.

Sentence

42. I do not intend to reiterate the fact of the case since I have in great detail set out facts previously. I have considered those facts for sentencing.

43. The maximum penalty for infanticide is the same as that of manslaughter, i.e, life imprisonment (sections 201 and 205 of Penal Code, Chapter 17). However, Her Ladyship Justice N.Shameem said the following in **State v Kesaravi Tinairatu Tumuri** *(Criminal Case No. HAC 008 of 2001S):*

> *"The tariff for infanticide cases in Fiji and in other Commonwealth countries is a non-custodial sentence with counselling or hospital orders. In **R -v- Sainsbury** (1989) 11 Cr. App.R(s), Current Sentencing Practice B1-63 the English Court of Appeal quashed a 12 month custodial term for an offence of infanticide committed by a 17 year old offender, saying that of 59 cases of infanticide in 10 years, all had resulted in orders of probation or supervision or hospital orders. The court said (per Russell LJ) that while the offence was a serious one "the mitigating features, in our judgment, were so overwhelming that without any hesitation whatever we set this sentence aside for it that which we think will best serve the interests not only of this appellant but of society as well." A 3 year probation order was substituted.*
>
> *Similarly in Australia, in **R -v- Cooper (2001) NSWSC 769**, a 21 years old offender, who pleaded guilty to infanticide, was ordered to enter into a good*

> *behaviour bond for four years with supervision and probation conditions, the sentencing judge holding "that a custodial sentence would be quite inappropriate to meet the circumstances of the case."*
>
> *In the* ***Queen -v- Diseree Anne Wright*** *(Ca 478/00) the New Zealand Court of Appeal said that infanticide cases in New Zealand usually led to two year supervision orders.*
>
> *This is the case in Fiji too. In* ***State -v- Envangeline Kiran Nair*** *Crim. Case No. 32 of 1989, the offender was bound over under section 42(1) of the Penal Code to be of good behaviour for 1 year."*

44. The aggravating factor in this case is the obvious loss of life of an innocent young child, and especially so, from the person who is duty bound to protect that life from the beginning, that is, the mother. The manner, in which this young innocent life was lost, was also an aggravating factor.

45. The mitigating factors were as follows:
    - *(i) Being a first offender.*
    - *(ii) Moral, cultural, social and economic factors.*
    - *(iii) Co-operation with the police and admission at the caution interview soon after arrest.*
    - *(iv) Showing remorse.*
    - *(v) There being no history of violence.*
    - *(vi) Acknowledging the wrongdoing and taking responsibility.*

46. Counsel for the appellant further relied on the written submissions with regard to mitigating circumstances. He in particular brought to the notice of the court that the appellant has been in prison for the last six years pending the appeal.

47. In the circumstances I accept the submissions made by counsel, that this is a case for a non-custodial sentence. The community's need to see justice done does not lead inevitably to a punitive term of imprisonment for someone who has already been subjected to deprivation and social disadvantage and mental agony caused by the effects of childbirth out of wedlock.

48. Considering the aggravating and mitigating factors, I would sentence the appellant for one year imprisonment suspended for two years.

49. The appellant had already served six years in prison; therefore I order that she be released from prison forthwith.

P. Fernando JA

50. I too agree with the reasoning and conclusions of Jayamanne JA.

Orders of the Court:

1. *Appeal allowed. Convicted for Infanticide and sentenced for one year imprisonment suspended for two years.*
2. *Release the appellant forthwith from Prison.*

....
Hon. Mr. Justice E. L. Basnayake
JUSTICE OF APPEAL

....
Hon. Mr. Justice S. Jayamanne
JUSTICE OF APPEAL

....
Hon. Mr. Justice P. Fernando
JUSTICE OF APPEAL