

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 23 OF 2012

STATE

-v-

ALENA MAUSA

Counsel: Mr A. Datt for the State
Ms L. Volau with Ms Manueli for Accused

Dates of Hearing: 29th January, 2018 to 2nd February 2018

Date of Summing Up: 5th February, 2018

SUMMING UP

1. Madam Assessor and Gentlemen Assessors.
2. It is now my duty to sum up the case to you. In doing so, I will be directing you on matters of law which you must accept and act upon. You must apply the law as I direct you in this case.
3. As far as the facts are concerned however, what evidence to accept, what witnesses to accept or reject, these are matters for you to decide for yourselves. So if I express any opinion on the facts, or if I appear to do so, you may reject

what I say and form your own opinions. In other words, you are the judges of fact.

4. Counsel for the Prosecution and Defence have all made strong submissions to you as to how you should find the facts of this case. That was in accordance with their duties as counsel. However you are not bound by what counsel have said to you about the facts of this case. You are the representatives of the community at this trial, and it is you who must decide which version of the evidence to accept.
5. You will not be asked to give reasons for your opinions, but merely your opinions themselves, and your opinions need not be unanimous although it would be desirable if you could agree on them. Your opinions are not binding on me, but I will give them great weight when I come to deliver my judgment.
6. On the issue of proof, I must direct you as a matter of law that the onus or burden of proof lies on the Prosecution to prove the case against the Accused. That burden remains on the Prosecution throughout the trial and never shifts. There is no obligation upon the Accused person to prove his innocence. Under our system of criminal justice, an Accused person is presumed to be innocent until he or she is proved guilty.
7. The standard of proof is one of proof beyond reasonable doubt. This means that before you can find the Accused guilty of the offence charged, you must be satisfied so that you are sure of his guilt. If you have a reasonable doubt about his guilt, then it is your duty to express an opinion that he is not guilty. It is only if you are satisfied so that you feel sure of the guilt of the Accused that you can express an opinion that he is guilty.
8. Your opinions must be based only on the evidence you have heard in this courtroom and upon nothing else. You must totally disregard what you have read or heard in the media or elsewhere about the case. Your duty is to apply the law to the evidence you have heard. You must also put aside emotions which might affect your objectivity. Concentrate on the law as applied to the evidence.

9. The evidence is what the witnesses said from the witness box, the documents, the things received as Prosecution or Defence exhibits and any admissions made by the parties. Statements, arguments, questions and comments by the Counsel are not evidence. A thing suggested by a counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening and closing submissions made by both counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
10. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
11. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.

12. You may also have to consider whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.
13. Lady and Gentlemen Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses is truthful and reliable. I must emphasize, it does not matter whether that evidence was called for the Prosecution or for the Defense. You must apply the same standards, in evaluating them.
14. Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
15. When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not of the charge against her. I have used the term "question of fact". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should use your common sense and wide experience which you have acquired living in this society.

16. It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
17. In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
18. But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
19. Documentary evidence is important in this case. Prosecution tendered number of documents in evidence; for example, the cautioned interview of the Accused and the medical report of the doctor.
20. Expert evidence is also important in this case. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid us to decide the issue or issues before court on the basis of their learning, skill and experience.

21. The doctor in this case, came before court as an expert witness. He, unlike any other witnesses, gave his opinion based on his expertise. If you believe that the medical report and the evidence he produced are logical and well founded, then you can rely on his evidence.
22. However, expert evidence is not accepted blindly. You will have to decide the issue before you by yourself and you can make use of doctor's opinion if his reasons are convincing and acceptable to you; and, if such opinion is reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence led in the trial.
23. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreed facts of this case are:
 - I. *That the Defendant gave birth to a male baby ("the baby") inside a toilet in the early hours of the morning of 7th January 2012.*
 - II. *That after delivering the baby the Defendant wrapped the baby in a cloth and took it to a nearby river.*
 - III. *That the Defendant cast the baby into the river.*
 - IV. *That the baby was still alive at the time when the Defendant cast it into the river.*
 - V. *That the baby died as a result of being cast into the river.*
 - VI. *That the conduct of the Defendant was a substantial cause of the baby's death.*
 - VII. *That the only issue to be determined at trial is the state of mind of the Defendant at the time she had cast the baby into the river*

24. Accused is charged with one count of Murder. You have been given a copy of the Information filed by the Director of Public Prosecutions. Please refer to it. The Information is as follow:

Statement of Offence

MURDER: Contrary to Section 237 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ALENA MAUSA on the 7th day of January 2012 at Vatukacevaceva, Rakiraki in the Western Division, murdered her new born infant.

25. Murder has four essential elements which the Prosecution must prove. For the Accused to be found guilty of "Murder" the Prosecution must prove beyond reasonable doubt that :
- (i) the Accused;
 - (i) engaged in a conduct; and
 - (iii) the said conduct caused the death of the deceased; and
 - (iv) at the time of the said conduct act, the Accused either;
 - (a) intended to cause the death of the deceased; or
 - (b) is reckless as to causing the death of the deceased.
26. The first element is concerned with the identity of the person who committed the offence.
27. The second element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it is not accidental. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental. It is what he /she

wanted to happen in a particular situation. This is the physical element of the offence of Murder.

28. When dealing with the third element, whether the said conduct of the accused caused the death of the deceased you should remember that, at law, the act of the accused need not be the sole or principal cause, but the act should substantially contribute to the deceased's death. Therefore, if you are satisfied beyond reasonable doubt that the conduct of the accused substantially contributed to the death of the deceased, that is sufficient to satisfy the element that the 'conduct caused the death of the deceased'.
29. With regard to the final element which concerns the state of mind of the accused, the Prosecution must prove beyond reasonable doubt, either, that the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased. The prosecution should prove only one of the two limbs of this element. It is not possible to have direct evidence regarding an accused's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of the accused from the facts and circumstances you would consider as proved.
30. In order for you to conclude that the accused intended to cause the death of the deceased, you should be sure that she meant to bring about the death or that she was aware that death will occur in the ordinary course of events as a result of her conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the deceased.
31. In the event you find that the accused did not have the intention to cause the death of the deceased or you are not sure whether she had that intention, you should then consider whether the accused was reckless as to causing the death of the deceased. The accused will be reckless with respect to causing the death of the deceased, if;

- (a) She was aware of a substantial risk that death will occur due to her conduct; and
 - (b) Having regard to the circumstances known to her, it was unjustifiable for her to take that risk.
32. What you have to consider with regard to this particular state of mind is whether the accused did foresee or realise that death was a probable consequence or the likely result of her conduct and yet she decided to go ahead and engage in the conduct regardless of that consequence. The accused must foresee that death was a probable consequence or the likely result of her conduct and after realising that, if she decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then she was reckless as to causing the death of the deceased. In order to constitute the offence of murder by recklessness, actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt.
33. If you are satisfied that the prosecution has established all the above elements beyond reasonable doubt, then you must find the accused guilty of Murder.
34. If you find that the prosecution has failed to establish any of these elements in relation to the charge beyond reasonable doubt, then you must find the accused not guilty of Murder.
35. I will now draw your attention to the offence of Infanticide. Infanticide is an offence in its own right and a defence to a Murder charge. A mother charged with murder in the circumstances may raise infanticide as a defence. In this case, the Defence took up Infanticide as a defence. Defence says that the accused is only guilty of the offence of Infanticide; not of Murder. If you find that the offence of Infanticide has been made out you must not find the accused guilty of Murder. Instead, you must find her guilty of lesser count of Infanticide even though she was not initially charged with Infanticide.
36. Section 244 of the Crimes Act describes Infanticide as follows:
- (1) A woman commits the indictable offence of Infanticide if—

(a) she, by any wilful act or omission, causes the death of her child;
and

(b) the child is under the age of 12 months; and

(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) 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.

37. You must bear in mind that the onus of proving the existence of any matter referred to in sub-section (1)(c) (whether at the time of the act or omission the balance of her mind was disturbed) lies on the accused person and the standard of proof of such matters shall be on the balance of probabilities.
38. As regards the physical elements of infanticide, you must be satisfied beyond reasonable doubt that the accused caused the death of the deceased by a wilful act or omission; and also that the deceased was under the age of 12 months at the time of the offence.
39. Once these elements of Infanticide have been proved by the prosecution, the onus shifts to the accused of proving the existence of mental condition referred to in sub-section (1)(c) of Section 244 of the Crimes Act, namely that 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 the effect of lactation consequent upon the birth of the child; or 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.

40. The standard of proving such matters shall be on the balance of probabilities. This is the standard of proof usually adopted in civil cases that the case that is the more probable should succeed. As Assessors you have to weigh up the evidence and decide which version is most probably true; the case of the accused or that of the prosecution.
41. Therefore, if the accused, on a balance of probabilities, proves the existence of any of the above matters referred to in sub-section (1)(c) of Section 244 of the Crimes Act, then you must not find the accused guilty of Murder but must only find her guilty of Infanticide.
42. Prosecution presented in evidence the record of caution interview conducted by police with the Accused on 13th and 14th of January, 2012. Prosecution says that the accused was accorded her rights and treated well and she gave those answers freely and voluntarily. Interviewing officer said that accused was calm and answering the questions confidently. Meanwhile the Defence claims that it was accused's first interview with police; and that she was under stress having just discharged from hospital after a child birth and was also on medication; and she had been given limited time to rest and therefore she was stressed and that's why she had given inconsistent answers to police.
43. Firstly, you ask yourselves whether the Accused in fact made those statements. If you are satisfied, that the accused had made those statements, then, it is for you to decide whether the contents of those statements are truthful, and what weight you should attach to them. It is for you to decide whether the whole of the caution interview or part of it or none of it as truthful and credible. You must consider all other evidence adduced during the course of the hearing and admitted facts in deciding the truthfulness and the reliability of the statement she made to police.

44. These are some of my directions on law. I will now deal with the summary of evidence in this case. In doing this I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision on this case.

Case for Prosecution

PW.1 Seini Nailolo

45. 1st witness Seini is the elder sister of Alena, the accused. On 29th December 2011, from Suva, she came down to Vatukacevaceva with her children to spend the new year with her siblings. Upon arrival, she did not notice anything unusual in her younger sister Alena.
46. On 7th January 2012, she saw some stains in Alena's clothes. Again on 8th January, 2012, she saw a stain on Alena's clothes. On seeing the stain she questioned Alena in regards to the stain. Alena informed that she was having her monthly period. Again on 9th January, 2012 she could see a stain on Alena's cloths.
47. Seini heard rumours that a body of a baby was floating in a river in Koro. She came and questioned Alena about it. She questioned twice. When she questioned Alena the second time, Alena admitted that she aborted the baby. She asked Alena "*Alena, did you abort the baby or it was your normal delivery?*" Alena informed that she drank one Fijian medicine. Alena appeared weak, scared and she was also ashamed.
48. Under cross examination, Seini said that her mother, elder brother Peniasi, his wife Mere Droka, younger brother Tevita, younger sister Alena Mause and her daughter Seini were residing at Vatukacevaceva house. Alena was not married. She further said that none of the occupants of the household was employed. Everybody was dependent on the elder brother, Peniasi who was a farmer with one child. Her mother, who was receiving government assistance from the Social Welfare, also assisted Alena financially.

49. Alena was a happy kind of a girl. She always mingled and socialized with everyone in the village. After this incident happened in 2012, Alena was shy and did not socialize or mingle around with people in the village. She always stayed home.

PW.2 Taraivina Ranadi

50. Ranadi was the village Nurse during 2011-2012 period in Vatukacevaceva. In the first week of December, 2011, around 8.00pm, Ranadi was visiting Vaseva Tilatila, also known as Fane. At that time, Fane was mixing one Fijian medicine, '*Kalabuci Damu*'. Alena Mousa also came there. She could see that Alena's stomach was big. Ranadi had already questioned Alena twice about that. Alena had informed that she's not pregnant. '*Kalabuci damu*' is used by females when they are having stomach-aches and not having proper monthly period so they can have proper flow of monthly period.
51. Under cross examination, Ranadi said that when she received the news that Alena was pregnant she went, as the village nurse, straight to her and asked her. Alena denied the pregnancy.
52. Ranadi had a conversation with Pniasis's wife, Mere Droka, regarding Alena Mousa's pregnancy. Droka informed that they could see Alena Mousa was pregnant.

PW 3 Vaseva Tilatila/ Fane

53. Fane said that, in December, 2011, she prepared '*Kalabuci Damu*' and drank it for her back pain.

PW 4 Vasiti Leweniwai

54. Vasiti said that, on 7th January, 2012, Alena came to her tap to wash her clothes. All the clothes she was washing contained blood. Vasiti asked Alena why blood was on the clothes. Alena informed her that after a long time she had her

monthly period. Before Alena came to wash her clothes Vasiti had asked Alena if she was pregnant. Alena had informed that she was not pregnant.

55. Vasiti is Alena's sister-in-law. She was also present when Seini asked Alena whether or not the baby was hers. When Seini asked her, first, she did not respond. Alena was worried or scared. The second time she cried.

PW 5 DC Sailosi Bawaqa

56. Interviewing officer Bawaqa read the entire caution interview of the accused. Officer said that, during the caution interview, the accused was calm and she answered all the questions confidently. Under cross examination, witness denied that inconsistencies in accused's caution statement were due to the facts that she had just been discharged from hospital after a child birth and that she lacked adequate rest.

PW 6 Hydar Begg

57. Hydar Begg, the Justice of Peace, who had participated in the interview as an observer said that accused talked to him as a normal person and answered all questions at the interview.

PW 7 Jay Dean Lincoln

58. Dr. Jay Lincoln is the Psychiatric Registrar at St. Giles Hospital. In 2006, he obtained MBBS Degree and Post Graduate Diploma in Mental Health from the Fiji School of Medicine. There is no Consultant Psychiatrist at St Giles. Through the past 4 years, to the present he has been a psychiatrist at St. Giles Hospital. He is the only physician assigned at St. Giles to conduct mental state psychiatric assessments for courts. He prepares on average 30 psychiatric reports monthly, mostly for the magistrates courts. For the past 2 – 3 years, he had conducted about 6 psychiatric evaluations where mothers have been alleged for killing their new born children.

59. Main sources of information for this psychiatric evaluation is the client, whom he takes history from and court documents with the court order and charge sheet. Legal documents in this case were provided by Mr Luvena the defence counsel who was present during evaluation.
60. Doctor generally conducts psychiatric evaluations to determine whether, at the time of the commission of the alleged offence, the accused was aware of his/ her actions and additionally to give his opinion on whether he/she was fit to make a plea in court and knew how to form a legal strategy or a defence.
61. Pronouncing his professional opinion, the doctor said that accused's most likely state of mind at the time of alleged criminal act was normal. She was not defected or disturbed.
62. When the Court drew doctor's attention to Section 244 of the Crimes Act and the test applicable in an infanticide case, doctor said that there is nothing different between this test and other tests because the psychiatric assessment is basically the same regardless of the client, and the situation. He said that he always comes up with two components, history and the mental state assessment.
63. Doctor said that he obtained a comprehensive history from the accused and thereby he was able to conclude that, at the time of the offence, balance of her mind was not disturbed as a result of any of the reasons given in Section 244 of the Crimes Act.
64. Doctor said when he obtained the history from the accused, he could not find any evidence that balance of her mind was disturbed as a result of her not having fully recovered from the effect of giving birth to the child; or the effect of lactation consequent upon the birth of the child.
65. With regard to any other matter, condition, state of mind or experience associated with her pregnancy, delivery or post-natal state, the doctor said that he had done 6 psychiatric evaluations involving infanticides and in his experience and knowledge the major reasons for mothers to commit such acts of

killing a new born baby had been the same. Those were social and economic problems. Most of the mothers had financial difficulties. Some mothers had given birth out of wedlock and felt ashamed; they felt guilt so they didn't want to have anything to do with the child. In his opinion, those factors do not always affect the balance of mother's mind.

66. Doctor agreed that, according to what Alena said and the history she provided, accused had some of those stresses and bitter experiences associated with pregnancy. However, on the basis of the result of his mental state examination, he flatly denied that any of those factors had contributed to a disturbance of accused's mind at the time of the offence.
67. When questioned about the time gap of nearly five years between the alleged offence and the psychiatric evaluation he had done, the doctor said that, through the comprehensive history he had obtained, he was able to come to the conclusion that accused's mind was not disturbed at the time of the offence.
68. Under cross examination, the doctor said that he took into consideration the history and reasons given by the accused as to why he did not want this baby. Doctor denied that any of those reasons had contributed to her disturbed state of mind. Further elaborating on his position he further said:

"These are stressors. Everybody in their everyday life has stressors. You and I have stressors in our lives but it doesn't always mean they made you go crazy. It doesn't always mean you have a disturbed state of mind. So from my assessment, these stressors did not cause the client to have a disturbed state of mind"

69. Doctor ruled out the possibility that the inconsistencies in her statement given to the Police may have been due to circumstances under which the interview was conducted. He also did not agree that the inconsistencies are indicative of symptom of post-natal depression. He said that it is possible that she was purposely misleading Police in the first place and giving inconsistent answers.

70. That Lady and Gentlemen was the end of the Prosecution case. You then heard me explain several options to the Accused. I explained to her that she could remain silent or give sworn evidence and call witnesses on her behalf and she could also address Court. She was given these options as those were her legal rights. The burden of proving his guilt on Murder charge rests on Prosecution at all times.
71. As you are aware, accused elected to give evidence and call witnesses on her behalf. That is her right. Now I must tell you that the fact that an accused gives evidence in his or her own defence does not relieve the Prosecution of the burden to prove their case to you beyond reasonable doubt. Burden of proof remains with the prosecution throughout in respect of the charge levelled against the accused. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
72. In this case however, the defence took up the defence of infanticide to the Murder charge. Therefore you must carefully consider the evidence adduced by the accused and her mother along with evidence called for Prosecution so that you can decide whether the Defence had proved the offence/defence of infanticide on a balance of probabilities.

DW1 -Alena Maususa (Accused)

73. Alena Mause, gave evidence for Defence first. Alena is not married. She lives at Vatukacevaceva with her mother, brother and her daughter Seini Nailolo whose father is Akuila Nadola. Alena's father died in 1995 and ever since then she was financially supported by her mother who sells chilly and lemon in the market.
74. Her elder brother Peniasi Navukula supports Alena's daughter. In 2012, Peniasi was controlling and looking after the family. Alena had a good relationship with Peniasi who would go out of his way to look for things to find some work to earn money to support her daughter.

75. On 7th January, 2012 Alena was at Vatukacevaceva house with her mother, elder sister Seini and grandmother. On that day, early in the morning, she gave birth to a baby in the toilet, baby fell down. She wrapped the baby in the towel and put it in the river. No one was there with her when she gave birth to child. She couldn't see the baby, because it was dark.
76. Alena said that she had been hiding her pregnancy because she was scared of her family. Alena was ashamed and stayed inside the house. His brother Peniasi had told her that 'he only knows one child and, does not want to know another child'. When she heard this, she felt scared, ashamed and weak. She was scared of her brother Peniasi that he might do something bad to her if she gave birth to another child.
77. She did not have any proper source of income. There were rumours going around in the village that she was pregnant and, when her family questioned her in that regard, she denied.
78. She did not go to an ante-natal clinic. Only reason she did not go to a doctor or clinic because she did not have a source of income or bus fair to go to the hospital.
79. When she gave birth to the baby, she was scared, worried and did not know how to inform the family. She was thinking what source of income will be there to support the baby. She did not have the phone contact to inform the father of the child, Toni Silivale, who was living in *Vanua Levu*. When she threw the baby into the river, she was standing and thinking that she shouldn't have done that when she gave birth to the baby.
80. When she was taken by police for questioning, she was really scared and was giving inconsistent statements because that was the first time for her to be taken by Police.
81. Under cross examination, Alena admitted that after throwing her second baby in the river she got pregnant again and that the third child she gave birth to is

living in the village with her and is being supported by her mother. She further said that when she got pregnant with the third child her elder brother Peniasi knew that she was pregnant, but he did not have any problem with the third child.

82. Under cross examination, when Alena was referred to the answers she had given at the caution interview, she agreed that they formed a significant part of her correct answerers. However she did not agree that she was quite confident and not worried or stressed when giving those answerers. But she agreed that she were in full senses while giving answers.
83. Alena admitted that she could have confided to her elder sister Seini Nailolo about pregnancy and delivery, because she was not against having a second child. Although she had realized that she had done a very big mistake, she continued to hide this fact because she did not know what source of income would be there to support her baby.
84. Alena admitted that, at the time she threw the baby into the river, she knew exactly what she was doing and appreciated the right and the wrongness of her actions. She also admitted that she never intended to keep the baby from the start and that is why she disposed it off.
85. Alena said that it is during an argument that her brother expressed his displeasure at her having a third child. By that time, her brother knew that she was pregnant.
86. Under re-examination, Alena said that she concealed the pregnancy from her sister Seini Nailolo because she was ashamed to tell her. She agreed that her third child was born in 2015 and decided to keep it because she had learnt from her past mistake. Her family was not opposed to the third child.
87. When she was taking the baby to the river, she knew that nobody will see the baby or that the baby will not float and stop anywhere.

DW 2 Ana Adiralulu

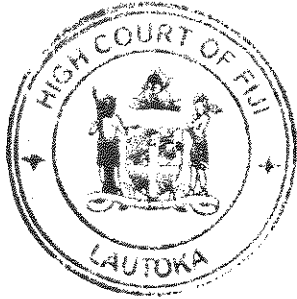
88. Second witness for Defence was Adiralulu, the mother of the accused. She said that Alena Mause's third time pregnancy to Iowane was acknowledged by her and her family and they accepted her. When she was pregnant during 2012, Alena had told that she was not pregnant.


Analysis

89. There is no dispute about the identity of the accused. Defence also does not dispute the physical elements and the causation of the offence of Murder and Infanticide. It is admitted that the Accused wrapped the new born baby in a towel and threw it into the river thus causing the death of the baby.
90. Prosecution says that the accused killed the new born baby either intentionally or recklessly. You must carefully analyse the evidence presented in the trial to decide what ran on accused's mind when she wrapped the baby in a towel and threw it into the river. To deduce her state of mind, you may consider what she had done and said before, at the time and after she threw the baby into the river. In this regard, you are to consider accused's evidence and the caution statement to police, if you believe she had told the truth.
91. If you are not sure that the accused had acted with a murderous intention then you are to consider whether she was reckless in causing the death of the baby when she wrapped the baby in a towel and threw it in to the river. If you are satisfied beyond reasonable doubt that the accused had intended the baby's death or was reckless as to causing the death of the baby then you must find the accused guilty of Murder.
92. However, before you find the accused guilty of Murder you must consider whether the offence/ defence of infanticide had been proved by the Defence on a balance of probabilities. In this regard, you may consider accused's own evidence and the evidence given by the psychiatrist.

93. Psychiatrist was of the opinion that, at the time of the offence, the balance of accused's mind was not disturbed by any of the reasons advanced by the accused. He gave reasons for his opinion. As I said before, you are not bound by psychiatrist's opinion. However, if you are satisfied that the opinion he expressed is logical and that it had been expressed having taken into consideration all the relevant factors, then you may rely upon his evidence. Of course, you are bound to consider other evidence, especially that of the accused to determine whether the balance of her mind was disturbed at the time of offence.
94. Accused told us that her family was opposed to the second pregnancy and therefore was scared that her brother will not support her or will do something bad to her. She was also worried that she did not have a proper source of income and therefore feared that no one would be there to look after her baby. Defence argued that these factors had disturbed the balance of accused's mind at the time of the offence. Prosecution on the other hand heavily relied on psychiatrist's opinion and impeached the credibility of the version of the accused. They say that accused's mind was not disturbed by any of the reasons advanced by the Defence. You decide what version is more probably true, whether it was that of the Prosecution or that of the Defence. If you find version of the defence is more probable then you must find the accused guilty only of Infanticide.
95. Lady and Gentleman Assessors, this concludes my summing up. Now you may retire and deliberate together and may form your individual opinions on the charges against the accused. When you have reached your separate opinions you will come back to Court and you will be asked to state your separate opinions.
96. Your possible opinions would be:
- a. Charge of Murder Accused guilty or not guilty? or
 - b. Lesser Charge of Infanticide Accused guilty or not guilty?
97. You may now retire to consider your opinions.

Any redirections?




Aruna Aluthge
Judge

At Lautoka
05th February, 2018

Solicitors: Office of the Director of Public Prosecution for State
Legal Aid Commission for Accused.