

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 103 OF 2017S

STATE

VS

TAVENISA RACEVA

Counsels : Ms. J. Fatiaki for State
Ms. T. Kean and Ms. A. Singh for Accused
Hearings : 14, 15 and 18 March, 2019
Summing Up : 20 March, 2019

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound

by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove her innocence. Under our system of criminal justice, an accused person is presumed to be innocent until she is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that she is guilty. If you have any reasonable doubt so that you are not sure about her guilt, then you must express an opinion, that she is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, and I will now read the same to you:

"... [read from the information]..."

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:

- (i) Did the accused, on 9 March 2017, at Navua in the Central Division, murder her new born baby, an unnamed infant?

E. THE OFFENCE AND IT'S ELEMENTS

9. The accused was charged with "murder", contrary to section 237 of the Crimes Act 2009. It was alleged that, on 9 March 2017, at Navua in the Central Division, the accused murdered her newborn baby, an unnamed infant. For the accused to be found guilty of the offence, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) that the accused did a wilful act; and
 - (ii) that wilful act caused the death of the deceased; and
 - (iii) at the time of the wilful 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.
10. On the first element of murder, a "wilful act" is a voluntary act by the accused. It is a feeling of strong determination to do something that she wanted to do. It is what she wanted to happen in a particular situation. This is the physical element of the offence of murder. For example, if A assaults B in what manner whatsoever, A thereby did a "wilful act" to B.
11. On the second element of murder, "the wilful act must cause the death of the deceased". This simply meant that the accused's wilful act, substantially contributed to the death of the deceased. The accused's wilful act must be a substantial contributor to the death of the deceased. In other words, the accused's wilful act was a substantial cause of the deceased's death. Continuing from the above example, when A assaulted B, it caused serious injuries to the body of B, thereby resulting in B's death. A's assaulting B, set in motion a chain of events that led to B's death, and as such, was a substantial cause of B's death. B would not have died, but for A's assault.
12. The third element of murder concerned its fault element. There are two fault elements for murder, as described in paragraphs 9(iii) (a) and 9(iii) (b). In this case, the prosecution is running its case on the fault element in paragraph 9 (iii) (a), that is, the accused intended to cause the deceased's death. We will therefore concentrate on this fault element, rather than the other. The prosecution

must make you sure that when the accused did "the wilful act", she "intended to cause the death of the deceased". You cannot cut open the accused's head, to find out what her intentions were, at the time she allegedly assaulted the deceased to death. But you can examine her conduct at the time, that is, what she said and did, and the surrounding circumstances, to infer whether or not she intended to kill the deceased, when she allegedly assaulted him. If you find that she intended to kill the deceased, at the material time, that would be sufficient to support the third element of murder, that is, an intention to kill.

13. If you are sure that all the elements of murder, as expressed above, are satisfied by the prosecution beyond a reasonable doubt, then you must find the accused guilty as charged. If you find that some of the elements of murder, as described above, are not satisfied beyond a reasonable doubt by the prosecution, then you must find the accused not guilty as charged.
14. If you find the accused guilty of murdering the deceased, you may need to consider the lesser offence of "infanticide". "Infanticide" is not a complete defence against murder. It is a partial defence reducing what would otherwise be murder, to the lesser offence of "infanticide". This was permissible, although she was not formally charged in the alternative, on the offence of "infanticide". You had heard the defence's case on 18 March 2019. They are saying that the accused was not guilty of murder, but guilty of the offence of "infanticide". Section 244 (1), (2) and (3) of the Crimes Act 2009 reads as follows:

"244.(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.

(2) The onus of proving the existence of any matter referred to in sub-section (1) (c) lies on the accused person and the standard or proof of such matters shall be on the balance of probabilities.

(3) In circumstances provided for in sub-section (1), notwithstanding that they were such

that but for the provisions of this section the offence would have amounted to murder, the woman shall be guilty of infanticide, and may be dealt with and punished as if she had been guilty of manslaughter of the child."

15. You will see that the elements of section 244 (1) (a) of the Crimes Act 2009 encompasses the elements of the offence of "murder", as discussed in paragraphs 9 (i), 9 (ii) and 9 (iii) (a) hereof. Therefore, for you to understand the meaning and effect of the words in section 244 (1) (a) of the Crimes Act 2009, you must take on board the discussions we had in paragraphs 10, 11 and 12 hereof, when discussing the elements of the offence of murder. So, for "infanticide" to apply, the accused must already have been guilty of the offence of "murder", within the terms of section 244 (1) (a) of the Crimes Act 2009.
16. However, Parliament, by virtue of section 244 (1), (2) and (3) of the Crimes Act 2009 (infanticide), had permitted women, who fall within the terms of section 244 of the Crimes Act 2009, to escape the mandatory life imprisonment sentence for murder. Thus, for the defence to succeed, they must bring their case within the four corners of section 244 of the Crimes Act 2009. It appears that the parties do not dispute that the accused willfully killed her baby on 9 March 2017, and the baby was less than 12 months old. However, the defence submitted that she did so because at the time, the balance of her mind was disturbed by reason, of the matters mentioned in section 244 (1) (c) (iii) of the Crimes Act 2009.
17. The law required you to ask yourselves the following questions. When the accused pressed the baby's nose and covered his mouth with a cloth, on 9 March 2017, was she intending to kill the child? At the time, was the balance of her mind disturbed by reason of "any other matter, condition, state of mind or experience associated with her pregnancy, delivery or post-natal state"? Are you satisfied on the balance of probabilities that the accused's balance of mind at the time was disturbed by reasons of the matters mentioned above. If you accept, on the evidence that, her balance of mind was disturbed by reasons of the matters mentioned above, when she killed the child, then you must find her not guilty of murder, but guilty of the lesser offence of infanticide. If otherwise, you must find her guilty of murder. It is a matter entirely for you.

F. THE PROSECUTION'S CASE

18. The prosecution's case were as follow. On 9 March 2017, the accused was 39 years old. She was the youngest in her family. She had 4 brothers and 2 sisters. The family grew up in the family farm at Vakabalea Farm Road. Her father built the family a tin house. Her mother, now aged 82, also lived in the house. As time went on, the accused's siblings moved on in life. Her eldest brother Uraia, moved to Deuba Village. He was 56 years old. Brother Anasa (48 years) moved to Nadi. Jonacagi (45 years), another brother, moved to New Zealand. Brother Sakaraia (39 years) settled in Nadi. Her sister Ana (50 years) moved to Tonga, while the other sister, Luisa (49 years) settled in Nadroga.
19. In 2017, according to the prosecution, the accused had six children. Her eldest daughter was 22 years old. Three sons followed, aged 18 years, 16 years and 11 years. Then two daughters aged 5 years and 3 years old. The above children were fathered by four different males. In 2017, her eldest daughter had got married in Nadi, while her two eldest sons resided with relatives at Nabukavesi and Nadi. She resided with her mother and her three youngest children at the family home at Vakabalea Farm Road. According to the prosecution, the accused reached class 8 education and was employed as a housegirl, earning \$100 per week. She worked Monday to Friday.
20. According to the prosecution, she was the sole bread winner, and with the \$100 per week pay, supported her mother and three young children. All the children attended Deuba Primary School. According to the prosecution, her father died in 2005, and the children's father and/or her siblings, never provided any kind of financial or emotional support to her family. They supplemented their income by growing their own dalo, cassava and vegetables in their family farm. According to the prosecution, there was not enough money nor resources to make ends meet. Her family was constantly in a state of poverty. There was not enough to eat. According to the prosecution, when their dalo and cassava matured, her eldest brother Uraia would come and uproot the same without their permission. Because he was the eldest, according to the prosecution, he saw the family house and farm as his. He repeatedly called for the accused and her family to vacate the same.
21. According to the prosecution, when the accused gave birth to her child on 2 March 2017 at CWM Hospital, she didn't want the baby to go through what she had went through. She didn't want the

baby to go through a life of poverty. According to the prosecution, as a result of the above, she killed her baby on 9 March 2017, by suffocating him. Because of the above, the prosecution is asking you as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

22. On 14 March 2019, the first day of the trial, the information was put to the accused, in the presence of her counsels. She pleaded not guilty to the charge. In other words, she denied the allegation against her. When a prima facie case was found against her, at the end of the prosecution's case, wherein she was called upon to make her defence, she chose to give sworn evidence and called a witness, DW2, as her only witness. That was totally within her rights.
23. The accused's case was very simple. In her counsel's closing submission, the accused said she was not guilty of murder, but guilty of the offence of infanticide. In her police caution interview statements, which were tendered in evidence, as Prosecution Exhibit No.2A and 2B, she admitted that she killed her unnamed child by suffocating him (Questions and Answers 33, 34, 36, 45 and 78). She did not challenge the admissibility of the above alleged confession in a voir dire hearing. In her sworn evidence in court and in her own police caution interview statements, she appeared to say that she killed her child because the balance of her mind was disturbed at the time, because she could not bring up her child given her extreme poverty, and the inability of her mother and family to provide support to her. If you accept her version of events, you will have to find her not guilty of murder, but guilty of infanticide. If otherwise, you will have to find her guilty of murder. It is a matter entirely for you.
24. In any event, because she pleaded not guilty to the charge, she is asking you, as assessors and judges of fact, to find her not guilty of murder, but guilty of infanticide. That was the case for the defence.

H. **ANALYSIS OF THE EVIDENCE**

(a) **Introduction:**

25. In analysing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analysing the evidence, we will first discuss the "Agreed Facts" and its significance. Then we will discuss the State's case against the Accused with reference to the three elements of murder as described in paragraphs 9(i), 9(ii) and 9(iii)(a) hereof. Then we will discuss the defence's case, and the need to look at all the evidence.

(b) **The Agreed Facts:**

26. The parties submitted two "Agreed Facts", dated 5 October 2018 and 14 March 2019. There are 3 paragraphs of "Agreed Facts" in the two "Agreed Facts". Because the parties are not disputing those three paragraphs of "Agreed Facts", you may take it that the prosecution had proven those three paragraphs of "Agreed Facts" beyond a reasonable doubt. As such, you may treat them as established facts.

27. The significance of the "Agreed Facts" was that it provided background information about the case. It stated who the parties were to this proceeding, and their relationships. It somehow sets the stage for what allegedly unfolded on 9 March 2017, the date of the alleged murder. You must read the "Agreed Facts" carefully.

(c) **The State's Case Against the Accused:**

28. The state's case against the accused was based fundamentally on her alleged confession to the police, when she was caution interviewed by WDC 4081 Ilisabeta Iliana (PW1), at Navua Police Station on 22 and 23 March 2017. The interview was witnessed by Ms. Aifreeda Vakarewakobau (DW2). PW1 said, she asked the accused 88 questions and she gave 88 answers. PW1 said, she was given her legal rights, right to counsel and was formally cautioned. PW1 said, she was given the standard rest and meal breaks. PW1 said, she gave her statements voluntarily and out of her

own free will, and her statements were the truth. PW1 said, she was not forced nor threatened to give her statements.

29. The accused's police caution interview notes were tendered in evidence as Prosecution Exhibit No. 2A (i-Taukei version) and 2B (English version). Regarding the elements of murder as described and discussed in paragraphs 9 (i), 9 (ii), 9 (iii) (a), 10, 11 and 12 hereof, the accused allegedly admitted that she suffocated the child by "pressing his nose with her hand and covered his mouth with a cloth" until he stopped moving and "his body turned black" (the accused did a willful act and that willful act caused the death of the child). In questions and answers 60 and 80, it appeared by her answers that, the accused intended to cause the death of her child when she suffocated him, at the material time. Please, also consider questions and answers 17 to 22, 32 to 37, 45 to 47, 59 to 60, 62, 68 and 76 to 78. The answers the accused gave to the police appear to show that she did a willful act (suffocation), and that willful act caused the child's death, and at the time, she intended to cause the child's death. If you accept the accused's alleged confession, you must find the accused guilty as charged. If otherwise, you must find her not guilty as charged. It is entirely a matter for you.
30. In any event, when considering the above alleged confession by the accused, I must direct you as follows, as a matter of law. A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If its otherwise, you may give it less weight and value. It is a matter entirely for you.

31. The defence did not challenge the admissibility of the accused's above alleged confession. This appear to show that they did not challenge the prosecution's assertion that the accused gave her alleged confession voluntarily and out of her own free will.

(d) The Accused's Case:

32. I had summarized to you the defence's case from paragraphs 22 to 24 hereof. I repeat the same here. You had heard the accused give evidence in Court on 18 March 2019, and I am sure her evidence is still fresh in your minds. You had heard her explained the reasons of why she killed her unnamed baby on 9 March 2017. You have read her statements to police when caution interviewed on the reasons why she killed her child, at the material time. You had watched her demeanor in Court while she was giving evidence. I will not bore you with the details of her sworn evidence and the details of her police caution interview statements, tendered via Prosecution Exhibit No. 2A and 2B. I will only summarize to you the salient points regarding the charge of "murder", and the lesser offence of "infanticide".
33. The defence openly submitted in their closing submission that the accused was not guilty of murder, but guilty of infanticide. This meant that they have accepted that the accused wilfully killed her unnamed child, at the material time, when she suffocated him. She also admitted her wilful act abovementioned caused the death of her unnamed child. This admission by them satisfied the statutory requirement demanded by Section 244 (1) (a) of the Crimes Act 2009, that is, the accused by wilfully suffocating her child (intentional and/or wilful act) caused the death of the child. By admitting to the requirements of Section 244 (1) (a) of the Crimes Act 2009, the defence is in fact, admitting to the offence of murder.
34. The defence main argument was that she killed her child because "the balance of her mind was disturbed by reasons of – any other matters, condition, state of mind or experience associated with her pregnancy, delivery or post-natal state," at the material time. (Section 244 (1) (c) (iii) of the Crimes Act 2009). You have heard the accused's sworn evidence. You have read her police caution interview statements. How you answer the above issue is entirely a matter for you. If you accept the defence argument, you must find her not guilty of murder, but guilty of infanticide. If

otherwise, then you will find her guilty as charged, if you agree with the prosecution's version of events. It's a matter entirely for you.

(e) The Need To Consider All the Evidence:

35. The prosecution called two witnesses:

- (i) WDC 4081 Ilisabeta Iliana (PW1);
- (ii) WPC 4567 Maria Fane (PW2)

The prosecution submitted three exhibits:

- (i) Booklet of Photos, Prosecution Exhibit No. 1;
- (ii) Accused's Caution Interview Statements, Prosecution Exhibit 2A (I-Taukei) and 2B (English);
- (iii) Accused's Charge Statement, Prosecution Exhibit 3A (I-Taukei) and 3B (English).

36. The Defence called two witnesses:

- (i) Accused (DW1);
- (ii) Ms. Alfreeda Vakarewakobau (DW2).

37. Altogether, there was a total of four witnesses on whose evidence, you will have to make a decision. Remember also the Admitted Facts. Compare and analyze all the above evidence together. If I haven't mentioned a piece of evidence you consider important, please take it on board in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of her evidence, in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of her evidence, in your deliberation. You are the judges of fact.

I. SUMMARY

38. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove her innocence, or prove anything at all. In fact, she is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find her guilty as charged. If you do not accept the prosecution's version of events, and

you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find her not guilty as charged.

39. Your possible opinion are as follows:

- (i) Murder: Accused – Guilty or Not Guilty
- (ii) If Not Guilty of Murder, alternative of Infanticide – Guilty or Not Guilty

40. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive your decisions.




Salesi Temo
JUDGE

Solicitor for the State
Solicitor for the Accused

:
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Office of the Director of Public Prosecution, Suva.
Legal Aid Commission, Suva.