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
Hearing	:	**14, 15, and 18 March, 2019**
Summing Up	:	**20 March 2019**
Judgment	:	**21 March, 2019**

JUDGMENT

1. On 14 March 2019, the accused appeared in Court on the following information:

Statement of Offence

MURDER: Contrary to section 237 of the Crimes Act 2009.

Particulars of Offence

TAVENISA RACEVA on the 9th day of March 2017 at Navua in the Central Division murdered her new born baby – an unnamed infant.

2. The information was read and explained to her, in the presence of her counsels. She said, she understood the same, and pleaded not guilty to the charge. The matter then

went to trial before myself and three assessors on 14, 15 and 18 March 2019. On 20 March 2019, I delivered my summing up to the assessors. They later returned with a unanimous opinion finding the accused guilty as charged. I adjourned the matter today to deliver my judgment. This is my judgment.

3. The law at this stage of the trial is section 237 (1), (2), (4) and (5) of the Criminal Procedure Act 2009, which reads as follows:

> *"...237 (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
>
> *(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors...*
>
> *(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –*
>
> *(a) written down; and*
> *(b) pronounced in open court.*
>
> *(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for... all purposes..."*

4. In **Ram Dulare, Chandar Bhan and Permal Naidu vs Reginam** [1956 – 57], Fiji Law Report, Volume 5, pages 1 to 6, page 3, the Fiji Court of Appeal, said the following, on an equivalent section of the then Criminal Procedure Code:

> *"...In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a Jury in a trial. In the case of the King v. Joseph 1948, Appeal Case 215 the Privy Council pointed out that the assessors have no power to try or to convict and their duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the High Court sitting with the assessors is that of the trial Judge and the trial judge alone and*

in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors..."

5. In **Sakiusa Rokonabete** v **The State**, Criminal Appeal No. AAU 0048 of 2005, the Fiji Court of Appeal said as follows:

> ***"...In Fiji, the assessors are not the sole judge of facts. The judge is the sole judge of fact in respect of guilt, and the assessors are there only, to offer their opinions, based on their views of the facts..."***

6. I have reviewed the evidence called in the trial, and I have directed myself in accordance with the Summing Up I gave the assessors yesterday. The assessors' verdict was not perverse. It was open to them to reach such conclusion on the evidence. However, I am not bound by their opinion. On my analysis of the case based on the evidence, and on my assessment of the credibility of the witnesses, I am bound to disagree with the unanimous guilty opinion of the three assessors.

7. My reasons are as follows.

8. I agree with the three assessors that on the facts of this case, the accused was guilty of the offence of murder. The accused (DW1), in her sworn evidence, and in her police caution interview statements (Prosecution Exhibit 2A and 2B), admitted suffocating her baby child by pressing his nose with one hand and putting a cloth over his mouth, to stop him from breathing, at the material time. The facts showed that she succeeded in this because from her own sworn evidence, and police caution interview statements, she admitted that she suffocated the child until his body turned black and he was not moving, at the material time. She also admitted, in her sworn evidence and in her police caution interview statements, that she did the above because she did not want her child to grow up in a poverty stricken family without any family or societal support. So in a sense, she admitted that she, at the material time, intended to cause her child's death. I make the above my findings of fact.

9. Because of the above, the prosecution had proven beyond reasonable doubt, the statutory requirement of Section 244 (1) (a) of the offence of "infanticide" in the Crimes Act 2009. At this point, it may be prudent to quote the defence and/or 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 subsection (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 subsection (1), not withstanding 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. "*

10. To understand the defence/offence of "infanticide" in Fiji, it is prudent to look at His Lordship Mr. Justice Aruna Aluthge's observation in **State v. Alena Mausa**, Criminal Case No. HAC 23 of 2012, High Court, Lautoka, paragraphs 4 to 36. I tend to agree with His Lordship's observations, but I will not dwell on it in this judgment. The law required the defence to prove before me, the trial judge, that the situation demanded by Section 244 (1) (c) (iii) of the Crimes Act 2009, existed in this case, on the balance of probabilities. This is essential to succeed on the defence of "infanticide". In proving the above, it would be helpful to me to use social welfare, psychologist or even psychiatric reports and assistance. However, it is not mandatory. A well presented case, even on the accused's own sworn evidence, can be sufficient, on the balance of probabilities, to prove the defence required by Section 244 (1) (c) (iii) of the Crimes Act 2009.

11. I have heard the whole evidence. I had carefully considered them. In my view, on the evidence, the accused has committed murder in accordance with Section 244 (1) (a) of

the Crimes Act 2009. I find, as a matter of fact, that the child was under 12 months old (Section 244 (1) (b) of Crimes Act 2009). I also find as a matter of fact that, at the time she killed her child, the balance of her mind was disturbed by reasons of other matters, condition, state of mind or experience associated with her pregnancy, delivery or post-natal state (Section 244 (1) (c) (iii) of Crimes Act 2009).

12. On this note, I accept the accused's evidence on the reasons of why she killed her child. She obviously was living in an extreme life of poverty. The state of her dwelling as revealed by the Booklet of Photos showed extreme social deprivation. This is not uncommon in Fiji. She was earning $100 per week to support an 82 year old mother and her three young children. In these days and age, $100 per week is not enough to feed a family of that size. Furthermore, the cultural factors. She was the youngest in the family and constantly abused by her elder brother Urai, who gives no support whatsoever to her. None of her siblings contribute to the upkeep of her 82 year old mother. She reached Class 8 level education. She did not think about adopting the child out or calling for Social Welfare Support. In my view, the sum total of the above, led to the balance of her mind being disturbed when she killed the child.

13. Because of the above, I find that three assessors did not properly look at the defence of "infanticide", and in that, I am of the view, they respectfully erred. I therefore do not accept the three assessors' opinion. I find the accused not guilty of murder, but guilty of the offence of "infanticide".

14. As a result, I acquit the accused of the charge of murder. I find her guilty of the offence of "infanticide", and I convict her accordingly.

Salesi Temo
JUDGE

Solicitor for State : **Office of the Director of Public Prosecution, Suva**
Solicitor for Accused : **Legal Aid Commission, Suva**