

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 4 of 2023

STATE

-v-

SAINAZ BEGUM

Counsel: Mr. T. Tuenuku for the State
Mr. J. Prasad for the Accused

Date of Trial: 17 – 20 March 2025

Date of Judgment: 17 April 2025

JUDGMENT

1. This sad case reveals the complexities that often arise when mothers are accused of murdering their new born babies. It also raises for consideration the question whether section 244 of the Crimes Act 2009 sufficiently ameliorates the serious consequences for those mothers who murder their babies in circumstances where the balance of their mind *may* have been disturbed by circumstances related to having recently given birth.
2. Ms. Sainaz Begum (“the accused”) was charged with having murdered her new born baby girl on 15 December 2022.
3. In the afternoon of 15 December 2022, Mr. Mohammed Takib, the accused’s husband, received a call at work informing him that his wife was unwell. He rushed home and found her lying on their bedroom floor covered in blood. There was also blood on the floor. His wife was not able to move. When he asked his wife about

the blood, she told him that there was a blockage in her stomach and “*bad blood*” had come out. His nephew helped him carry his wife to their vehicle and they took her to Labasa Hospital.

4. After examining his wife, the doctors came and asked him where the baby was. He was shocked to hear that because he was not aware that his wife was pregnant. She had never told him.
5. When he told the doctors that he didn’t know anything about a baby, the doctors called the police to search for the baby.
6. The police searched his house that evening, but they did not find a baby. When the police conducted a more thorough search the following morning, the baby was found wrapped in a wet blanket in a bucket under the accused’s bed. It was the bucket in which they usually kept snacks for their two young daughters.
7. Dr. Kishore was on duty at the Emergency Department of Labasa Hospital when the accused was brought in by family members at around 4.15pm. The accused told him that she had gone to the washroom and passed some clots into the toilet pan. She had then collapsed in her bedroom. The accused had her eyes closed, but was oriented in time and space. On examination, Dr. Kishore concluded that the accused had recently given birth but, upon questioning, she denied having given birth.
8. The accused was given a blood transfusion as she was anemic. She was admitted to the Gynecology Ward from 15 to 19 December 2022, and later moved to the Covid Ward from 19 to 22 December 2022.
9. Dr. Temo, who conducted a post mortem examination of the dead baby, concluded that the cause of death was asphyxia. For reasons that will become apparent, it is necessary to return to Dr. Temo’s evidence in greater detail in this Judgment below.

Elements

10. To establish the count of Murder the prosecution must prove beyond reasonable doubt that:

- (a) the accused;
- (b) engaged in conduct; and
- (c) the conduct caused the death of the baby; and
- (d) the accused intended to cause, or was reckless as to causing, the death of the baby.

Triable issues

11. At the pre-trial stages, the Court attempted to narrow the trial issues. Unfortunately, those attempts fell on stony ground. Mr. Prasad informed the Court that the accused did not accept that she had been pregnant and had given birth. It was not accepted that the dead baby found in a bucket under her bed was the accused's baby. Mr. Prasad even suggested that the dead baby may have been planted under his client's bed.
12. It was only during his cross-examination of Dr. Kishore that Mr. Prasad informed the Court that the accused was prepared to accept that she had, in fact, been pregnant. She was not, however, prepared to go as far as to accept that she had given birth to the baby that she stood accused of murdering. Whilst this struck the Court as an absurd position to take, Mr. Prasad explained that the accused collapsed inside her bedroom, and the next thing she remembers is waking up at the hospital.
13. The evidence that the accused had given birth was, of course, irrefutable. Common sense finally prevailed and, by the close of the prosecution case, Mr. Prasad quite properly did not contend that his client did not have a case to answer on the charge of murdering her new born baby.
14. By that stage of the trial the key litigation issue had emerged. That issue is whether the prosecution has proven beyond reasonable doubt that the accused had done something that caused the baby to die of asphyxia.
15. The accused did not give evidence in her own defence, and did not call any witnesses.

Dr Temo's evidence

16. Dr. Temo adduced a document headed "Post-Mortem Findings of the un-identified Fetus". He performed a post-mortem examination at Labasa Hospital Mortuary on 18 December 2022. The body was that of a new born female. There were no skin injuries or body deformities noted.
17. The lungs were placed in a bowl of water and noted to be floating, suggesting the presence of air in the lungs. He noted pleural and lung surface petechial haemorrhages, suggesting suffocation.
18. In Dr. Temo's opinion, the cause of death was: *"(a) Disease or condition directly leading to death (1) Asphyxia secondary to (2) Suffocation."*
19. In his sworn testimony, Dr. Temo stated that he has been a pathologist for 16 years. His expertise was not challenged.
20. The baby's larynx was more red than usual, which is a sign of struggle trying to suck in air *"trying to breathe in, but there is something stopping air flow"*. Dr. Temo confirmed that there were no obvious signs that anyone had tried to block the baby's nose or mouth. There were no signs of manual or ligature strangulation.
21. Dr Temo said that the baby had been born alive, and died of asphyxia due to suffocation. Suffocation is blockage of airways. He said that the baby's airways were completely filled with fluid. When the Court asked where the fluid came from, Dr Temo answered: *"I'm guessing either from outside, or if the baby vomited the gastric content it could also block the airway."* He could not rule out that the baby had choked on her own vomit.
22. Given the obvious importance of this evidence, the Court sought further clarification:

"Judge: Ultimately, doctor it would be a matter for me to decide, but I would appreciate your professional expert opinion. Is it possible that this baby died of natural causes?"

Dr Temo: At this moment Sir, I would say that is a possibility due to the limitation of testing that we can do locally, but if there was a test available, then I would be confident that this is not a natural –

Judge: Yes, but given the limitations, and this is not a criticism, given the limitations of resources etc., your opinion is that you cannot rule out that the baby died of natural causes?

Dr Temo: Yes, Sir.”

23. When Mr. Tuenuku asked whether wrapping a new born baby in a wet blanket may cause suffocation, Dr Temo agreed that was possible.
24. Dr Temo was inclined to the view that the baby died of unnatural causes, but he could not be sure.

The prosecution case

25. In the Information, the prosecution particularized the count of Murder as follows:

“Sainaz Begum, on the 15th day of December, 2022, in Coqeloa, Labasa, in the Northern Division, intentionally murdered her new born baby by suffocating her.”
26. It is worth noting at this juncture that the prosecution did not spell out the method by which the accused was said to have intentionally suffocated her baby.
27. It emerged in evidence that the baby suffocated by drowning (fluid blocking her airways).
28. As mentioned above, the prosecution suggested as a possible cause of drowning, the wrapping of the baby in a wet blanket. By the time Mr. Tuenuka came to close his case, however, he quite properly acknowledged that there was no direct evidence of what the accused had done to drown her baby.
29. In his well-argued written and oral closing submissions, Mr Tuenuku sought to persuade the Court that the only reasonable inference from the totality of the evidence is that it was the accused, and no one else, who had done something to her baby which caused her to suffocate.

The defence case

30. As alluded to above, the defence strategy from the outset was to put the prosecution to the strictest of proof.
31. It would appear that Mr. Prasad was constrained from advancing the potential partial defences of diminished responsibility and infanticide by his client's inability to accept that she had given birth. This is an issue to which I shall return below.
32. Be that as it may, Mr. Prasad was astute in recognizing the difficulties for the prosecution arising from Dr Temo's evidence. In focused and well-argued written and oral closing submissions, Mr. Prasad has drawn my attention to what he terms the '*uncertainty*' in the pathologist's findings. In essence, Dr Temo was unable to exclude the possibility that the fluid that blocked her airways, and caused her to suffocate, was the baby's own vomit that had re-entered her airways.
33. It is this uncertainty that underpins Mr. Prasad's argument that the prosecution have failed to prove beyond reasonable doubt that it was the accused who did something to cause the death of her baby.

Analysis

34. The prosecution must prove that the accused is guilty. The accused does not have to prove anything to me. The defence does not have to prove that the accused is innocent. The prosecution will only succeed in proving that the accused is guilty if I have been made sure of her guilt. If, after considering all of the evidence, I am not sure that the accused is guilty, my verdict must be not guilty.

Directions/Warnings

35. I remind myself that I must not draw an adverse inference against the accused arising from her election not to give evidence in her own defence.
36. There is no prescribed form of direction when, as in this case, the prosecution's case is based on circumstantial evidence alone. The essential point is that, when the different pieces of evidence are taken together, I must be sure of the accused's guilt because there is no reasonable explanation for them other than the accused's guilt.

37. The prosecution relies on evidence that the accused told her attending doctors that she had not just given birth to a baby. They argue that this was a lie, and the lie is evidence that she is guilty of murdering her baby. When considering this evidence, I must consider whether she lied and, if so, why she lied. I bear in mind that an accused person who tells a lie is not necessarily guilty; sometimes an accused person who is not guilty will tell a lie for some other reason. If that reason was, or may be, the reason for the accused to have lied then I must take no notice of this lie and not hold it against her.

Determination

38. I am sure that the accused gave birth to a baby girl on 15 December 2022. I am sure that she was alive when she was born. I am also sure that this baby died shortly after birth and was found wrapped in a wet blanket in a bucket under the accused's bed when police searched her bedroom on 16 December 2022. I accept Dr Temo's unchallenged evidence that the baby died of asphyxia as a result of suffocation. I find that she suffocated as a result of fluid in her airways.
39. I am not, however, sure that the fluid got into the baby's airways as a result of a deliberate act on the part of the accused.
40. Dr Temo's evidence went no further than expressing his opinion that the fluid probably came from an external source. He could not rule out that the baby had, in layman's terms, choked on her own vomit.
41. It is not the only reasonable inference from the totality of the prosecution case that the accused must have suffocated her baby by causing fluid to block her airways.
42. As for the '*lies*' relied on by the prosecution, I am not sure that the accused knowingly lied. The evidence revealed that she had been through a traumatic experience, and was in a bad way when she arrived at the Emergency Department. Obviously, she had just given birth, but it may be that she had blocked out that memory. She may have been too emotionally disturbed by that experience or too ashamed about not having followed the proper ante-natal procedures. In my view, the fact that she did not tell the doctors that she had given birth at home earlier that day is not something I can reasonably hold against the accused.

43. There was no evidence adduced by the prosecution that the accused had spoken about killing her unborn child. Indeed, the medical evidence was that she had attended the hospital for two scans. The second visit, in November 2022, arose out of her concern for reduced foetal movement. I cannot speculate about her reasons for not making the usual bookings. It would also be wrong for me to hold against the accused the fact that she kept it from her husband that she was pregnant with their third child. She may have had her own good reasons for not sharing with her family that she was pregnant.
44. In all the circumstances, the prosecution has not made me sure that the accused's conduct was the factual and legal cause of death. I find the accused not guilty of murder and acquit her accordingly.

Infanticide

45. The accused did not seek to advance the partial defence of infanticide and, because the Court found that the prosecution did not prove that the accused's wilful act caused the death of her baby, the issue whether the accused may have been guilty of the lesser offence of infanticide did not arise for consideration at trial.
46. Nevertheless, I consider it worthwhile to add some observations about infanticide.
47. This case is a good illustration of what is a serious problem with the law concerning infanticide in Fiji. Because the accused was unable or unwilling to admit that she had given birth, and had deliberately committed an act or omission that caused her baby's death, she would have been in a difficult situation had the Court been made sure that she did wilfully cause her baby to suffocate.
48. It is hardly uncommon that a mother who has in fact killed her infant is unable to admit it. This may be because she is too unwell to do so, or too emotionally disturbed by what she has in fact done, or too deeply troubled by the consequences of an admission of guilt on her ability to care for any surviving children.
49. When this happens, it may be very difficult to produce evidence relating to the balance of the mother's mind at the time of the killing. In the present case, the accused did not give evidence or call any witnesses to sustain the defence of

infanticide. Yet, of itself, it does not automatically follow from denial that the balance of her mind was not disturbed: in some cases it may help to confirm that it was.

50. This is also one of the problems with the current law of infanticide in England and Wales, where there have been repeated calls for reform. However, the problem in Fiji is exacerbated by the shifting of the legal burden to the defence. As remains the position in England and Wales, under the repealed Penal Code there was no legal or probative onus on the accused who wished to raise infanticide as a defence. She only had an evidential burden, and the overall burden of proof was on the prosecution to disprove a claim of infanticide beyond reasonable doubt.
51. Under the modernised law in Fiji, in the event infanticide is raised as a defence, the Crimes Act 2009 explicitly shifts the burden of proof to the accused when the first two ingredients of the offence, namely *“(a) any wilful act or omission, causes the death of her child”; and (b) “the child is under the age of 12 months”*, have been proved by the Prosecution beyond reasonable doubt. Section 244(2) of Crimes Act states:

“The onus of proving the existence of any matter referred to in subsection (1) (c) lies on the accused person and the standard of proof of such matters shall be on the balance of probabilities”.
52. Under the Crimes Act 2009, a broader basis of disturbance has been recognised. Evidence of other matters, conditions, states of mind or experiences associated with the accused’s pregnancy, delivery or post-natal state can be adduced to establish that the balance of mother’s mind was disturbed at the time of the offence.
53. It must be appreciated, however, that a clear link has to be established between such disturbance and asserted *“other matters, conditions, states of mind or experiences associated with the accused’s pregnancy, delivery or post-natal state.”* Proof of economic hardships, social stigma or stresses associated with the accused’s pregnancy, delivery or post-natal state will not be sufficient if the fact

that “*the balance of mind of the mother was disturbed at the time of the offence*” is not proved to the satisfaction of court.

54. Whilst the legislature may be lauded for broadening the underlying potential reasons for a new mother’s disturbance of mind, it is not clear that there was a justifiable reason for simultaneously making it more difficult for a mother accused of murdering her baby to avail herself of the partial defence.
55. It is an interesting question whether the shifting of the burden to an accused mother to prove that the balance of her mind was disturbed for reasons associated with giving birth impermissibly infringes on the presumption of innocence.
56. Since this question has not arisen in this case, further consideration of this issue shall have to await another case in which the court has had the benefit of hearing full argument.
57. For present purposes, it perhaps suffices for this Court to draw attention to the tension between the clear legislative intention behind section 244 of the Crimes Act 2009 to be merciful and the legislature also making it potentially much more difficult for those mothers intended to be treated mercifully to receive mercy.
58. 30 days to appeal to the Court of Appeal.

 
Hon. Mr. Justice Burney

At Labasa

17 April 2025

Solicitors

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