IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CRIMINAL PETITION NO. CAV 0001 of 2024
Court of Appeal No. AAU 118 of 2019

BETWEEN	:	**ROZLEEN RAZIA KHAN**
		Petitioner
AND	:	**THE STATE**
		Respondent

Coram	:	**The Hon. Mr. Chief Justice Salesi Temo** **President of the Supreme Court**
		The Hon. Mr. Justice Terence Arnold **Judge of the Supreme Court**
		The Hon. Mr. Justice William Young **Judge of the Supreme Court**
Counsel	:	**Messrs M Yunus and R Prasad for the Petitioner** **Ms L Latu for the Respondent**
Date of Hearing	:	**4 April 2025**
Date of Judgment	:	**29 April 2025**

JUDGMENT

Temo, P

[1] I agree with his Lordship Mr Justice William Young's judgment and conclusions.

Arnold, J

[2] I have read the judgment of Young J in draft. I agree with the conclusion he reaches, for the reasons he gives.

Young, J

The proposed appeal

[3] Following a trial before a Judge and assessors in July 2019, the petitioner, Rozleen Razia Khan, was found guilty of murdering her four year old daughter, Rahika Rahida Ali. She was subsequently sentenced to life imprisonment but with no requirement to serve a minimum term before a pardon may be considered. Her conviction appeal having been dismissed by the Court of Appeal, she now seeks leave to appeal to this Court.

The factual background

Preliminary comments

[4] There was no dispute at trial that the petitioner deliberately drowned Rahika on 6 May 2018 and endeavoured to kill herself. The only live issue at trial was whether she could rely on the defence of diminished responsibility provided for by s 243 of the Crimes Act 2009.

[5] A number of events occurred on 6 May that preceded Rahika's death. In the morning two police officers served family court proceedings on the petitioner in relation to the custody of Rahika and two older siblings. The petitioner discussed the proceedings with the police officers. On her narrative, the understandings she derived from those discussions and what she made of the papers that had been served on her were material to her later actions. Later that day, she drove away from the family home with Rahika. While in the car with Rahika, she had two telephone discussions with her husband and one with her mother. What was said in those discussions was relevant to her defence of diminished responsibility. But, strangely to my way of thinking, the prosecution did not call the police officers, her husband or her mother to give evidence. Nor were

copies of the court papers or mobile telephone records establishing the timing of the telephone calls produced as exhibits. This meant that the only evidence as to the events that led to the petitioner killing her daughter and what she was saying or doing at the time came from the petitioner, in her caution interview and what she said from the witness box at trial.

The events that led up to Rahika's death

[6] In 2000, the petitioner married Mohamed Imraz Ali. She was 16 years of age, and it was an arranged marriage. The following year she gave birth to their oldest child, Ashad. A second child, Rifah, was born in or around 2005 and Rahika on 31 January 2014.

[7] In the course of the marriage, the petitioner and her husband were frequently apart. This was for reasons that initially were primarily associated with the demands of her husband's haulage business. As well, from April to December 2017, the petitioner lived with the children in Labasa while her husband was working in Dreketi. During this time, she worked to help fund payments due on her husband's truck.

[8] From late 2017 or perhaps early 2018, the petitioner and her three children were living with her husband in Nausori where she started work as a cashier.

[9] The marriage was unhappy. In her caution interview, the petitioner this said this was because her husband blamed her for "having outside affairs". It appears that she had been involved with a man in Labasa from around 2013. She said in evidence that her husband knew about the affair (although she sometimes referred to "affairs") but put up with it because she was paying off what he owed on his truck. In both her caution interview and evidence, she gave comparatively little detail about her relationship with her husband. It is, however, clear that she was unhappy and, reading between the lines of snippets of what she said at interview and in evidence, from her point of view the marriage was loveless.

[10] On 30 April 2018, the petitioner gave up her job in Nausori and flew to Labasa to be with her partner. She remained in Labasa until 5 May. During this time, the children

stayed in Nausori. Although what happened on 30 April put in train the events that culminated in the petitioner killing Rahika, there was no explicit evidence from anyone (including the petitioner) as to what had precipitated her leaving for Labasa on that day.

[11] On the petitioner's evidence at trial, she had several discussions with her husband while she was in Labasa and, in the course of one of them, asked him if he was taking court proceedings in relation to custody of the children. She said he told her he was not going to do so. But, as it happened, he commenced custody proceedings in the Nausori Family Court on 3 May.

[12] The petitioner returned to Nausori on 5 May. Her husband picked her up at a bus-stop there and they returned to the family home. There was an argument when they got home. In her caution interview, the petitioner said her husband had tried unsuccessfully to punch her in the course of this argument and that this was the first time he had ever attempted to assault her. I also note that in one passage of her evidence at trial she said that her husband had threatened to kill her and her partner. My impression from the transcript is that she was implying that this occurred on 5 May although she was not explicit as to this. This threat was not mentioned in the caution interview.

[13] When the petitioner got back to the family home in Nausori on 5 May, the children were at her mother's house which was also in the Nausori area. Her husband told her that he had applied to the courts for orders in relation to the children. She went to her mother's house and asked the children to return with her to the family home. Ashad and Rahika agreed to do so, but Rifah stayed with the petitioner's mother.

[14] The following day, 6 May, her husband, having gone out after telling the petitioner that he was going to do some maintenance on his truck, brought two police officers to the house. There they served court papers on the petitioner. The papers that were served were not produced in evidence. But according to the petitioner their effect, as she understood them, was that the court had placed the three children in the custody of the husband. The petitioner said that she asked one of the police officers if she could take Rahika with her to Labasa but was told that this was not possible as the

court had given her husband custody of the children. Looking at the evidence as a whole, I think it unlikely that the papers that were served included court orders in relation to the children. However, there having been no challenge to the petitioner's evidence as to this, and the prosecution having neither called the husband and police officers as witnesses nor produced as exhibits the documents that were served, I have to approach the case on the basis that the petitioner at least believed that a custody order had been made and that she could not take Rahika away from Nausori.

[15] According to the petitioner, later on 6 May, her husband asked her to cook an evening meal for him and two of his friends who would be visiting. She did not wish to do so and instead drove off in the family car, taking Rahika with her. This seems to have been some time around, but after, 5.30pm. She had asked Ashad if he would come with her, but he declined to do so. On the basis of what she said in the caution interview and in evidence, she did not, at this stage, have a settled plan as to what she was going to do. I am inclined to accept that this is so. I do not think it likely that she would have asked Ashad to go with her if she, at that point, intended to kill Rahika and commit suicide; this because Ashad would have prevented her doing so.

[16] The petitioner's caution interview and evidence suggest that after she left the family home, she drove around in what was initially an aimless way. At some stage she stopped and telephoned her mother. This was not a happy discussion, with the petitioner complaining about actions of her mother which she thought meant that her mother was not supporting her. According to what she said in her caution interview, she then decided to kill herself and Rahika by driving the car into the Rewa River. As to this, there was this question and answer in the caution interview:

> Q93 Why did you want to kill yourself and your daughter?
>
> Ans Because when I talked to my family, they said they didn't have any place for me.

I take the reference to "my family" not having "any place for me" as encompassing not only the discussion with her mother but also Rifah not going with her the preceding day (something that she complained about when she telephoned her mother on the evening of 6 May and was in her mind at the time) and perhaps Ashad not accompanying her in the car when she left the family home a little earlier.

[17] Before attempting to drive into the river, the petitioner rang her husband. In her evidence, but not in the caution interview, she said that he told her to come home to cook for his friends. On both accounts, she said that she told him that she was not going home. She then drove the car off the road, through a fence and in the direction of the Rewa River. Although the petitioner when giving evidence at trial was not specific as to how (and why) the car came to leave the road, I have no doubt that she intended that the car would go into the river and that she and Rahika would drown. In her caution interview she said that this was an attempt to kill herself and Rahika. Photographs later taken at the scene and a plan drawn by a scene-of-the-crime officer show that this was a serious attempt to drive into the river. But, as it happened, the car wound up stuck on the bank of the river, just short of the water.

[18] After the petitioner got out of the car, she rang her husband to tell him where the car was. She later tied Rahika to her stomach using a scarf and jumped into the river. The narrative given in the caution interview suggested that her jumping into the water with Rahika closely followed the failed attempt to drive the car into the river and the telephone call to her husband. In her evidence, however, she suggested that she had waited by the river for her husband to come. After doing so for some time, she heard police sirens:

> After that telephone call [ie to the one made from the river bank to her husband] I was really scared that he might come back and beat me up and bring the police again. He had never beaten me before. But when I came back from Labasa [a reference to 5 May 2018] he tried to slap me.
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> After that I took my daughter with me, I was thinking what to do next. I was waiting for him, but he didn't come. By that time, I heard the police vehicle siren. When I heard the siren, I was really scared and tied my daughter around me and I jumped in the water. After that for quite some time, I heard the sirens. After that I don't know.
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> I tied my daughter because my daughter was alone there with me and I didn't know what to do, the only thing that came in my mind, my husband has already applied for custody, he will take all the children, and this is the only way I can be with my daughter.
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> When I jumped in the water tied with my daughter, I just know that I don't know how to swim, and the place is known that if anything goes in the water is never found.

[19] In the wrap-up phase of the caution interview, when it was put to her that she had intended to kill Rahika, she said:

> My intention was that I wanted both of us to drown together not to be separated.

She added a little later:

> My intention was both of us to die together, if I wanted to kill my daughter, I could have thrown her first to the river before I jumped.

[20] As it happened, the petitioner floated in the river and eventually shouted out for help. Rescuers retrieved her from the river but by this stage Rahika was dead. Unclear on the evidence is how long she was in the river before she sought assistance.

The trial

The course of the trial

[21] As I have explained, the prosecution case at trial relied substantially on what the petitioner said when interviewed under caution. This was on 7 and 8 May 2018. What the petitioner said in this interview was reasonably congruent (although not necessarily in all details) with the narratives that the Police had obtained from others closely connected with the case, including the petitioner's husband and mother and the police officers who had served the court papers on her. It was also broadly consistent with what she later told a doctor, Dr Kiran Gaikwad, who was a prosecution witness.

[22] There were also admitted facts which included:

> 8. THAT [the husband] filed an application on the 3rd of May and served the same on 6th May at the Nausori Family Court to have full custody of all the three children ….
>
> 9. THAT on the 6th of May 2018, the [petitioner] took the deceased into the vehicle and drove to Kasavu.
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> 10. THAT the [petitioner] got off the vehicle and tied the deceased using a scarf around her chest.
>
> 11. THAT when the residents along Kasavu came to the rescue, they were both rushed to hospital.
>
> 12. THAT upon arriving to hospital, the deceased was already dead.

13. THAT the Post Mortem Report of the deceased dated 8/05/18 revealed that she died from Asphyxia, Drowning.

[23] The trial commenced on 8 July 2019. Counsel for the petitioner told the Judge that the voluntariness of the caution interview was not challenged and that there were "no other issues".

[24] The first witness was the police officer who interviewed the petitioner under caution. When she began her evidence, the Judge became concerned whether she had properly explained the right of silence to the petitioner. In the result, counsel for the petitioner challenged the admissibility of the caution interview; this despite what he had said shortly before, when the trial started. The Judge dealt with this challenge in the absence of the assessors and, in a short ruling, dismissed it. So, the caution interview was admitted. I will discuss all of this in more detail later in these reasons.

[25] The other prosecution evidence came from:

(a) One of the people who rescued the petitioner and recovered the body of her daughter from the river.

(b) A scene-of-the-crime officer who produced (i) photographs of what was to be seen at the location of the car by the Rewa River and of the post-mortem examination; (ii) a sketch plan of the area by the Rewa River; and (iii) the post-mortem examination report.

(c) Dr Gaikwad, who gave evidence as to his psychiatric assessment of the petitioner in the latter part of May 2018.

[26] The petitioner gave evidence in her own defence and also called a psychologist, Elena Vuru.

[27] I will defer discussion of the evidence of Dr Gaikwad and Ms Vuru until later in these reasons when I come to focus on the defence of diminished responsibility.

[28] Following a summing up in which the Judge left diminished responsibility to them, the assessors expressed the unanimous opinion that the petitioner was guilty of murder. Being of the same opinion, the Judge convicted her of murder for reasons that he explained in a short judgment on 19 July 2019.

The appeal to the Court of Appeal

[29] This appeal was dismissed in a judgment delivered on 29 November 2023.

[30] Save for concerns I have as to how the defence of diminished responsibility was dealt with at trial and its merits, the approach taken by the Court of Appeal largely accords with my own views. In respects in which I am in agreement with the Court of Appeal, I see no need to set out the substantially similar reasoning that Court.[1] I will, however, refer to aspects of the Court of Appeal's reasoning as to diminished responsibility with which I disagree when I come to discuss this aspect of the case.

Proposed grounds of appeal to this Court

[31] The proposed grounds of appeal involve only two issues that warrant more than mention. They relate to:

(a) The admissibility the caution interview.

(b) The way in which the Judge dealt with the defence of diminished responsibility.

[32] I can deal summarily with the other points advanced.

(a) There is a complaint that the post-mortem report was presented by a police officer who witnessed the post-mortem rather than by the pathologist. There is nothing in this complaint. Defence counsel, for good reason, did not object to the post-mortem report being produced in this way. This is because it was common ground at trial that Rahika died of asphyxia caused by drowning, as was acknowledged in the agreed facts.

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1 See below at [32] and [33] - [45] for my discussion of the issues in respect of which I agree with the Court of Appeal.

(b) There is a second complaint that the Judge did not direct the assessors to consider whether the petitioner was under imminent threat to her life when she jumped, with Rahika attached, into the Rewa River. As I have noted, the petitioner gave evidence at trial of a threat that she said had been made by her husband to kill her and her partner. On my reading of her evidence, she did not mean that the threat had been made that night. And in any event, that threat, assuming it was made, was not why she took Rahika into the river. As the petitioner admitted, she did this with the intention that both would drown, and she did so as she thought this was the only way they could be together.

(c) The Judge summed up on diminished responsibility on the basis that the onus of proof was on the petitioner. Counsel for the petitioner contended that this was wrong. This contention was misconceived. Section 243(2) makes it clear that the onus of proof is on the defendant. This subsection may require careful application in cases where the evidence at trial is capable of supporting verdicts of not guilty because of mental impairment and guilty of manslaughter by reason of diminished responsibility and there is an issue as to which verdict is appropriate.[2] This, however, is not such a case.

The admissibility the caution interview

What happened

[33] Shortly after the caution interview began, the interviewing officer advised the petitioner:

> … under the provisions of the Constitution, you have the right to remain silent *but, in that case, we would not be able to get your side of the story and such we may have to proceed further and prosecute you for the allegation with the evidence currently on hand*. You shall feel free to make your choice now, are you willing to remain silent or you answer the question.
>
> (Emphasis added)

The petitioner indicated that she would answer questions.

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2 See for instance *R v Grant* [1960] Crim LR 424 (Paull J).

[34] When the interviewing officer gave evidence at the trial, the Judge raised the question whether the words that I have emphasised meant that her explanation of the right of silence deviated from what is required by s 13(1)(a)(ii) of the Constitution of the Republic of Fiji. As I have noted, it was at this point that counsel for the petitioner advanced a challenge to the admissibility of the caution interview on the basis signalled by the Judge.

[35] The Judge heard this challenge in the absence of the assessors. Defence counsel did not ask to cross-examine the interviewing officer in relation to the admissibility challenge and neither the prosecutor nor defence counsel sought to lead additional evidence from anyone else.

[36] In *State v Matia*, a judgment delivered on 13 March 2019 – that is four months before the petitioner's trial – Goundar J had held that the use of language to substantially the same effect as the emphasised passage did not conform to the relevant constitutional requirements.[3] Following the approach taken by Goundar J, the trial Judge held that the interviewing officer had not properly explained to the petitioner her right of silence. However, he concluded that he had a discretion to admit the caution interview on the basis of a balancing of the rights of the petitioner and the public interest in the efficient investigation of crime. He then concluded:

> Considering the facts and circumstances of this case [which included a concession by the petitioner that she had given her answers voluntarily], I consider it appropriate not to exclude the caution interview statement … based on the fact that the right to remain silent was not properly explained to the accused.

The arguments advanced by the petitioner

[37] The petitioner wishes to argue that the Judge should have conducted a voir dire hearing but did not do so and, in any event should have excluded the caution interview.

The voir dire point

[38] The Judge conducted the hearing as to the admissibility of the caution interview in the absence of the assessors. The issue that concerned him and which counsel for the

3 *State v Matia* [2019] FJHC 188.

petitioner then raised was apparent from the question and answer sequence I have set out. There was no obvious need for additional evidence and no indication from counsel for the petitioner that he wished to cross-examine the police officer on the point or call any other evidence.

[39] I see no fault in the procedure that the Judge adopted. Indeed, I see that process as amounting to a voir dire.

The correctness of the decision to admit the caution interview

[40] If the facts of the case and dynamics of the trial had been different, there might have been scope for useful argument as to the approach of the Judge in admitting the caution interview despite his conclusion that the warning that the interviewing officer had given the petitioner was not consistent with the obligation under s 13(1)(a)(ii) of the Constitution inform her of the right to remain silent. But unless there was prejudice to the petitioner associated with the admission of the caution interview, there is no point in engaging with this issue. This is because if there was no prejudice, it could not sensibly be suggested that the decision to admit the caution interview resulted in a miscarriage of justice.

[41] For reasons I will now explain, there was no prejudice to the petitioner associated with the admission of the caution interview.

No prejudice to the petitioner

[42] If the caution interview had been excluded, the prosecutor would presumably have called some additional witnesses (such as the petitioner's husband and mother) to provide a narrative for the Judge and assessors. So, I think it a little artificial to assess the prejudice issue on the assumption that had the interview been ruled inadmissible, the evidence that would have been called would have come only from the witnesses who, as it happened, did give evidence. But that said, the evidence those witnesses gave was enough to establish to the prima facie case standard that the petitioner had killed Rahika and had done so deliberately.

(a) The scene-of-the-crime evidence indicated that a car associated with the petitioner had left the road in a manner that was consistent with an attempt to drive into the Rewa River.

(b) The one rescuer who was a witness at trial said that when the rescuers responded to the petitioner's cries for help, they found her in the water with Rahika tied on to her and apparently dead. The petitioner gave no explanation to her rescuers as to how this had happened.

(c) The agreed facts already set out, referred to the service of the family court proceedings, the petitioner having tied Rahika to her and entering the water and the cause of Rahika's death (asphyxia by drowning).

(d) Dr Gaikwad gave evidence of what he was told by the petitioner which correlated to what the petitioner had said in her caution interview.

[43] All of this means that the petitioner would have been practically required to call evidence, and the case would have come down to what the Judge and assessors made of her defence of diminished responsibility in light of her evidence and that of Dr Gaikwad and Ms Vuru, which is what happened at trial.

[44] On my assessment, the narrative given in the caution interview was more favourable from the point of view of the petitioner than the evidence she gave at trial. This is primarily because its narrative structure was far more coherent than her at times meandering evidence. As well, at interview she squared up to all the hard issues (for instance why she drove towards the Rewa River) – something which she did not always do at trial.

[45] In the course of argument, I asked counsel for the petitioner to identify any prejudice to the petitioner that resulted from the caution interview being admitted. He was unable to do so.

Diminished responsibility

General comments

[46] This defence is provided for by s 243(1) and (2) of the Crimes Act 2009:

> (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in *such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair—*
>
> (a) the person's capacity to understand what the person is doing; or
>
> (b) the person's capacity to control the person's actions; or
>
> (c) the person's capacity to know that the person ought not to do the act or make the omission —
>
> the person is guilty of manslaughter only.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.

[47] A defence of diminished responsibility was recognised by the common law of Scotland in the nineteenth century. This common law defence was the model for the statutory diminished responsibility defence created by s 2(1) of the Homicide Act 1957 (UK). The wording in s 243 that I have italicised is substantially the same as the corresponding language in s 2(1) of the Homicide Act. For completeness, I note that the defence is now provided for in England and Wales in reformulated terms by s 52 of the Coroners and Justice Act 2009. However, for present purposes, it is the jurisprudence on s 2(1) of the Homicide Act that is important.

[48] One of the issues that the English courts had to deal in the aftermath of the enactment of the Homicide Act was whether a defendant advancing a defence of diminished responsibility had to show insanity, or something close to it to (sometimes referred to as "borderline insanity") to establish that he or she had been affected by a substantial abnormality of the mind. On this issue, the two leading judgments were *R v Byrne*, a

judgment of the Court of Criminal Appeal, and *Rose v R* (a judgment of the Privy Council).[4]

[49] The position as it emerges from these cases is that although the sort of "abnormality of the mind" which would provide a defence of diminished responsibility would be likely to involve insanity or something close to it, that is not the legal test. In this context, as explained in *Byrne*, "abnormality of the mind" means "a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal." Although it must be shown that such abnormality arises "from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury", this does not require proof that the defendant had a recognised mental illness. As the Privy Council pointed out in *Rose*:

> There may be cases in which the abnormality of the mind relied on cannot readily be related to any of the generally recognised types of "insanity".

The Privy Council also noted that where diminished responsibility is in issue, words that are customarily used in relation to insanity should be used (and by implication, construed) in ways that correspond to their "broad popular sense". It follows that the meanings of "injury" or "disease" in s 243(1) are not confined to how a doctor might define those words. To be clear, however, I see the requirement to link the abnormality of the mind to "a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury" as a significant limitation on what might otherwise be within the scope of the defence; by way of example, as excluding intoxication resulting from the voluntary consumption of alcohol or the consequences of voluntarily using illicit drugs.

[50] More generally, the approach under s 2(1) of the Homicide Act was that consideration of a defence of diminished responsibility involved two steps: first, whether the defendant had, at the time of the killing, been in a state of abnormality of the mind arising "from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury"; and, secondly, if so, whether it had resulted in a substantial impairment of the abilities to understand the nature of the conduct, to

4 *R v Byrne* [1960] 3 All ER 1 and *R v Rose* [1961] AC 496.

form a rational judgment or to exercise self-control.[5] Expert evidence, almost invariably from a psychiatrist, was required to show that the abnormality relied on arose from "arrested or retarded development of mind or inherent causes" or was "induced by disease or injury". Expert evidence could be given as to the second step – that is substantial impairment – but was not required.

[51] Contextually relevant to the application of s 243 is s 28 of the Crimes Act which provides for the defence of mental impairment. Section 28(1) is in these terms:

> A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that —
>
> (a) the person did not know the nature and quality of the conduct; or
>
> (b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or
>
> (c) the person was unable to control the conduct.

As will be apparent, the capacities referred to in s 243(1) are not set out in the same order as, and are expressed in slightly different terms to, the impairments described in s 28(1). That said they correlate closely to them and logic requires that they be applied consistently. This means that s 243(1)(c) should be applied in a way that reflects the policy that underpins s 28(1)(c). To be more specific, I consider that a substantial impairment of a defendant's capacity to "reason with a moderate degree of sense and composure" as to why he or she "ought not to [have done] the act" will suffice for the purposes of s 243(1)(c).

What was the evidence as to "abnormality of the mind"?

[52] I have already set out the explanations by the petitioner in her caution interview and evidence for why she killed Rahika. As I have explained the two accounts were not, in all respects, identical. They were, however broadly consistent and amounted to a claim that she had been being overwhelmed by a combination of long-standing

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5 This was the language of s 2(1) of the Homicide Act which corresponded to the slightly different wording of s 243(1)(a), (b) and (c).

matrimonial difficulties coming to head, the service of court proceedings (including what she took to be custody orders in relation to the children) and lack of support from her family; this to the point where she concluded that she and Rahika could only be together if they both drowned in the Rewa River. It is at least implicit in what she said that she thought this was the best option for them both. As well, Dr Gaikwad's report noted that the petitioner had told him that having decided to kill herself, she killed Rahika because she was "fretful about her daughter's future after her death". There is nothing in the evidence to suggest that the petitioner had any ill-will towards Rahika. Likewise, the evidences does not suggest that she killed Rahika to inflict pain on her husband (or anyone else, for the matter). There is a good deal of literature, both legal and psychiatric, dealing with parents (usually mothers) killing children for the same or similar reasons. This is referred to as "altruistic filicide". On the petitioner's account of events, her killing of Rahika could fairly be classified in this way.

[53] The petitioner's claimed rationale for her actions was challenged in cross-examination. It was put to her that she decided to kill herself and Rahika because she had a guilty conscience over the affair and that her actions were a "calculative effort" – propositions that she denied. The guilty conscience hypothesis is not particularly persuasive. I have reservations whether the petitioner did feel guilty about her affair. As well, as there had been no secret about the affair, there is no reason why a supposed guilty conscience about it would have induced her to want to kill herself on 6 May if it were it not for the other stressors that were affecting her at that time. And, most importantly, there is no reason why such a guilty conscience would have caused her to kill Rahika.

[54] Dr Gaikwad's report, completed in May 2018, was to the effect that the petitioner did not suffer from a mental or personality disorder. He concluded:

> 1. It is my opinion that the accused does not suffer mental illness at present.
> 2. Fitness to plead – It is my judgment that the accused is fit to plead in court.
> 3. On the state of mind at the time of the alleged offence – Based on this examination, the accused was aware of her actions at the time of the alleged criminal act.

[55] At no time in his report or evidence did Dr Gaikwad expressly refer to the defence of diminished responsibility. As this implies, he was not directly cross-examined on the issue. The closest defence counsel came to doing so was at the end of the cross-examination:

> Q: … would you accept that the crime we face her could be done by a person, in this case, Mrs Khan, due to a build-up of pressure over time?
>
> A: As per the information I got from Mrs Khan, it appears to be an impulsive behaviour when her husband informed her regarding the custody of the children is to be with her husband.
>
> Q: Is it correct that would be often described as a trigger incident?
>
> A: It appears to be a trigger incident.
>
> Q: Do you accept in general and even in this case there is normally a build-up in a trigger incident?
>
> A: That's not always the case. Sometimes it can be a build-up, sometimes it can be a one off incident or a very short duration of stress. It depends on person to person.
>
> Q: In relation to Mrs Khan do you accept that there was build-up to this based on the history you have recorded?
>
> A: As mentioned in the report, she has voiced to me that there were ongoing marital conflicts, and I agree any person will be under stress dues to such conflicts.

[56] It was put to Dr Gaikwad in cross-examination that he met the petitioner for no more than 10 minutes. He denied this, saying that such discussions usually take 20 or 30 minutes. Either way, it was not a lengthy discussion. His inquiry into why she had acted as she did was comparatively limited. Associated with all of this, he never considered whether she was affected by an abnormality of the mind that, although not a recognised mental illness, had resulted in a substantial impairment in the sense contemplated by s 243.

[57] Ms Vuru's report which formed the basis of her evidence likewise did not explicitly refer to the diminished responsibility criteria in s 243. She did, however, say:

> The presence of her husband's friends before the incident reinforces inmate's frustrations, embarrassment, disowned of her rights as a mother to be heard from both parties, officers and husband, less self-control, low self-esteem and confidence. It was a critical time for her, a war for custody towards her children with whom she always feels a sense of comfort and strength. According to the

> inmate she was the only parent present with their children throughout the years of their development. The thought of losing her children reinforced a psychological trauma which led her to find a way out of the situation.
>
> Psychologically traumatised and in a state of mind confusion led the inmate away from the unhealthy association [presumably a reference to driving away with Rahika from the family home] and was in search for a sense of hope, support and care. She called a few of her relatives but no one picked up their phones. She was desperate for help but was unsuccessful. She was disorientated to her surroundings and with a confused state of mind towards the situation she was in led the inmate escape by committing the offence. At the critical moment she was psychologically traumatized and pushed to an extreme with proper and logically thinking which resulted in the incident.

In her evidence in chief, she said at the time of the offending, the petitioner "was psychologically traumatised and not in a right state of mind."

[58] I consider that the petitioner's state of mind as described by Ms Vuru, amounted to a "mental abnormality" that had been "induced by disease or injury" for the purposes of s 243(1). This is because, in light of *Rose*, the psychological trauma referred to by Ms Vuru is tantamount to an "injury" and, in any event, the consequent disturbance of her mind is a "disease" when that word is used in its "broad popular sense", as it must be, as *Rose* requires. This means that the defence evidence was sufficient to justify leaving diminished responsibility to the assessors, which is what the trial Judge did.

[59] Ms Latu for the State suggested to us that Ms Vuru was not the right person to give evidence as to mental abnormality. As I have indicated, English practice is for such evidence to be given by a psychiatrist. Given the dearth of psychiatrists in Fiji, it would be unrealistic for the courts in Fiji to adopt the same practice.[6] Instead evidence from a doctor, preferably with some psychiatric training and experience, or psychologist who has the appropriate expertise should suffice. Importantly, Ms Vuru is a psychologist, and her expertise was not challenged at trial by the prosecutor. Also not challenged by the prosecutor were her conclusions that the petitioner was "psychologically traumatised and not in a right state of mind".

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6 By way of illustration, although in charge of St Giles, the psychiatric hospital in Suva, and acting Director of Mental Health in Fiji, Dr Gaikwad is not a consultant psychiatrist. Instead, he is medically qualified and holds a postgraduate diploma in mental health. I am not sure if there are any consultant psychiatrists in Fiji and there are comparatively few doctors who have had Dr Gaikwad's level of psychiatric training.

[60] I accept that in some respects Ms Vuru's evidence as to the context went beyond the petitioner's evidence. By way of example, unless Ms Vuru was speaking figuratively, it was not correct for her to say that the petitioner "called a few of her relatives but no one picked up their phones". As I have explained, her telephone calls to her husband and mother were answered. However, I do not see such inconsistencies as there were between Ms Vuru's evidence and that of the petitioner as material to the conclusion she reached.

The summing up

[61] The Judge summed up on the basis that the onus of proof was on the petitioner. He then went on:

> 47. … Abnormality of the mind is not a medical term, and it does not have to be a mental illness as you would usually understand it. It is a legal term and means a state of mind which is so different from that of ordinary people that you would recognise it as abnormal. The term abnormality of mind covers all its workings, such as the ability to form appropriately, and to exercise, perception, understanding, judgment and will.
>
> 48. The defence case is that the accused was suffering from marital problems over a period of years and her conduct of killing the deceased was triggered by the serving of custody papers to her by the police that day where she was faced with the fear of losing her children.
>
> 49. The prosecution case is that the decision to kill the deceased was a calculated decision. According to [Dr Gaikwad] the accused was normal as far as her mental state was concerned. Therefore, the prosecution takes up the position that there was no abnormality of mind.
>
> 50. According to law, for this defence to be available, the abnormality of mind should substantially impair;
>
> a) the person's capacity to understand what the persons is doing; or
>
> b) the person's capacity to control the person's actions; or
>
> c) the person's capacity to know that the person ought not to do the act … .
>
> 51. The accused's responsibility was only diminished if you conclude that it is more likely than not that, as a result of the marital problems and then being faced with the fear of losing the children after the documents were served, the accused's capacity to understand what the accused is doing, or her capacity to control her actions was substantially impaired or her capacity to know that she ought not to do the act; was substantially impaired.

52. This requires you to consider to what extent the accused's state of mind differed from that of the ordinary person, Was it so abnormal that the accused's mental responsibility was substantially reduced" "Substantially" is an ordinary English word to which you bring your own experience. It means less than total, more than trivial. Where you draw the line is for your good judgment.

53. In deciding this issue, it may be relevant for you to take into account the evidence with regard to the events that took place after the accused was served until the accused jumped into the river with the deceased tied onto her. The defence say that the serving of the papers by the police was the trigger point and because of that she faced the fear of losing the children. In this regard it may be relevant for you to consider the accused's evidence that she was in Labasa from 30th April to 05th May without her children and that while she was in Labasa she asked her husband whether he filed a case for custody of the children. Further, the accused's evidence was that she jumped into the river because the husband did not respond after waiting for him and after she heard the police siren.

[62] The assessors were unanimously of the opinion that the petitioner was guilty of murder.

The judgment convicting the petitioner of murder

[63] In his judgment convicting the petitioner of murder, the Judge said:

13. The defence case was that the accused was suffering from marital problems over a period of years and her conduct of killing the deceased was triggered by the serving of custody paper to her by the police that day. According to the defence, the accused was faced with the fear of losing her children as a result of being served with the said papers.

14. I have carefully considered the evidence presented by the defence and also the explanations the accused had provided in her cautioned interview statement. All in all I am not convinced that the accused suffered from an abnormality of the mind that substantially impaired her capacity to understand what she was doing, or the capacity to control her actions, or the capacity to know that she ought not to do the act, when she killed the deceased.

The way the Court of Appeal dealt with diminished responsibility

[64] The critical reasoning of the Court of Appeal on this aspect of the case was as follows:

57. Ms Vuru set out what she described as "important contributing factors that led to the crime" namely an unhealthy relationship with continuing accusations from her husband and in-laws, abusive language during arguments, poor support, being overloaded with family responsibilities and loss of trust.

58. Ms Vuru concluded: "At the critical moment she was psychologically traumatised and pushed to an extreme without proper and logically thinking which resulted in the incident."

59 The appellant submits that taking the prosecution and defence evidence in its entirety "it is clear that her mind was substantially impaired at the time she committed the offence" thus her culpability is reduced, and she should have been convicted of manslaughter.

60. Ms Vuru's report sympathetically describes the very real domestic and marital difficulties that have beset the appellant. Her marital experience is of loneliness and lack of moral support. Ms Vuru's report tended to focus, however, on what led the appellant to take the actions she took rather than the state of mind that s 243 requires in order to prove diminished responsibility.

61. For example, in cross-examination, Ms Vuru was asked whether a psychologically traumatised person can still be aware of their actions. Ms Vuru answered, "not fully" and that whether a psychologically traumatised person could control their actions depended on the situation they were in. Ms Vuru did not amplify "fully."

62. At [44] - [53] of his summing up, the trial Judge gave clear, appropriate and complete guidance on the defence of diminished responsibility. The Judge summed up accurately on the nature and degree of abnormality of mind required for responsibility to be diminished, the burden of proving the defence and the consequence of the defence being proved namely, "that she should be found not guilty of murder and guilty of the lesser charge of manslaughter."

[65] I see the case rather differently. This is in three respects.

(a) The first concerns the Court of Appeal's criticism in [60] of its judgment that Ms Vuru had not focussed on "the state of mind that s 243 requires in order to prove diminished responsibility". For the reasons I have already given (see [58], above), I consider that what Ms Vuru said in her report and evidence provided an evidential basis for a conclusion that the petitioner suffered from an abnormality of the mind that satisfied the s 243(1) test. So, I disagree with what the Court of Appeal said at [60] of their judgment.

(b) Secondly and relatedly, this part of the Court of Appeal's judgment seems to have been based at least implicitly on the premise that an abnormality of the mind had not been established. But the Court did not articulate in its own words what an abnormality of the mind meant in the context of this case and likewise did not explain why the petitioner's psychological trauma and resulting

scrambled thinking as described by Ms Vuru did not amount to a mental abnormality. In this respect the judgment was just conclusory.

(c) Thirdly, for reasons that I will explain in detail shortly I have a view of the summing up that differs from that of the Court of Appeal.

My reasons for concluding that there has been a miscarriage: summary

[66] The reasons are provided under the following headings:

(a) No alternative likely explanation for the petitioner's behaviour was ever advanced.

(b) There was no substantial engagement by the prosecution with the diminished responsibility defence.

(c) The summing up did not accurately and fairly put the issues to the assessors.

(d) The reasons given by the Judge for convicting the petitioner were inadequate.

No alternative likely explanation for the petitioner's behaviour was ever advanced

[67] In his submissions for the petitioner, Mr Yunus noted:

> [The petitioner] instructs me to ask the Court, would a mother in her right mind kill her own child …

[68] The petitioner's question is legitimate, indeed obvious. Yet, it was never squared up to at trial. Dr Gaikwad's evidence came down to little more than a conclusion that whatever caused the petitioner to kill her daughter, it was not a mental illness. He did not proffer an opinion as to why she did it (other than to repeat her explanation) and his comments on her associated thought processes were at a high level of generality. The prosecutor suggested that the petitioner killed her daughter because she felt guilty about her affair. But this is not a plausible explanation for her actions. And in his judgment rejecting the defence of diminished responsibility and convicting the

petitioner of murder, the Judge did not offer an alternative explanation for what had happened.

There was no substantial engagement by the prosecution with the diminished responsibility defence

[69] As I have already explained, Dr Gaikwad's assessment was largely limited to the petitioner's fitness to plead and whether she suffered from mental illness that would have engaged the defence of mental impairment. He never turned his mind to mental abnormality and the s 243 defence. While his unchallenged assessment that the petitioner did not suffer from a mental illness was relevant to the mental abnormality issue, it did not preclude a conclusion that she was in a state of mental abnormality when she killed Rahika.

[70] Ms Vuru's assessment that the petitioner was affected by psychological trauma and had not been thinking straight was not itself challenged in cross-examination and I do not see Dr Gaikwad's evidence as inconsistent with it.

The summing up did not accurately and fairly put the issues to the assessors

[71] I preface what I am about to say by acknowledging that this case presented considerable difficulties for the Judge. In the first place, my understanding is that diminished responsibility has not been a common defence in Fiji and the issues it raised would thus have been unfamiliar. Secondly, there was far less evidence at to what happened in the lead-up to Rahika's death than I would have expected. Thirdly, the way in which the expert evidence was led was unhelpful with neither Dr Gaikwad nor Ms Vuru engaging with the evidence of the other. Fourthly my impression of the addresses of counsel (based on what is a limited transcript) is that there was limited engagement with the competing arguments. For these reasons, I am left with view that the unfamiliar and by no means easy issues raised by the defence had not been clearly identified and argued in front of the Judge.

[72] All of that said, I have a number of concerns about the summing up.

[73] First, when summing up to the assessors, the Judge correctly explained what constitutes an abnormality of the mind. He accurately captured the law in [47] of his summing up. But he then departed from that in [49] which as I read it, left it open to the assessors to reject the defence solely on the basis that the petitioner had not suffered from a mental illness.

[74] Secondly, the Judge did not make it clear that the assessors should adopt a two-step process, addressing whether: (a) the petitioner had been affected by a mental abnormality within the meaning of s 243; and (b) if so, it had resulted in a substantial impairment in the respects provided for by s 243. Such a two-step approach accords with English practice. Had he adopted that same approach, it would have set the scene for an orderly analysis of the petitioner's defence against the statutory criteria.

[75] Thirdly, as to the first step he should have told the assessors that if they accepted Ms Vuru's evidence of psychological trauma and not thinking straight, they would conclude that mental abnormality was established. The assessors were not obliged to accept Ms Vuru's assessment but, as it had not been challenged in cross-examination, it would have been a strong thing to reject it.

[76] Fourthly, he gave the assessors no assistance as to whether the petitioner's mental abnormality (assuming it was established) had substantially compromised her ability to know that she ought not kill Rahika. As to this, the extraordinary conduct of the petitioner in drowning a daughter she loved might be thought to provide some support for her case. This point was not made by the Judge.

[77] Fifthly, I regard the comments made by the Judge in [53] of the summing up as unhelpful.

(a) It was never put to the petitioner that her five days between 30 April and 5 May 2018 in Labasa without the children meant that on 6 May she was not concerned about where they would live. Indeed, I think it clear that once the family court papers were served on 6 May, petitioner was terribly troubled at the prospect of losing custody of the children. The comments made by the Judge on this aspect of the case were pretty much an invitation to the assessors

to reject the substance of the petitioner's evidence. Such invitation was unfair (because the criticism the Judge made had not been put to her in cross-examination) and was illogical in any event (for the reasons I have given).

(b) Likewise, the Judge was wrong to suggest that the petitioner's evidence that while in Labasa she had inquired of her husband whether he would seek custody logically detracted from her contention at trial as to the great concern she experienced once the family court proceedings were served on her. And in any event, her case was that what she did at the Rewa River was the consequence of the cumulative effect of a number of events. These were not confined to the service of the proceedings but extended also to the interactions that had led her to conclude that her family had "no place" for her.

(c) The petitioner's evidence of what happened between her getting out of the car on the bank of the Rewa River and getting into that river with Rahika was far more detailed than what she said in her caution interview. In that sense, the two narratives were perhaps not entirely consistent. But common to both narratives is that she got into the water with Rahika because she thought it was the only way they could be together. This was at the heart of what she was saying. It was thus incorrect of the Judge to say that her reasons for jumping into the river with Rahika were the absence of response from her husband and her hearing police sirens. In directing the attention of the assessors to at what, in this context, were only peripheral details but not the core of the defence, the Judge lost sight of the wood for the trees.

The reasons given by the Judge for convicting the petitioner were inadequate

[78] The Judge's judgment finding the petitioner guilty of murder was expressed in conclusory terms. His reasons for his rejection of the defence of diminished responsibility must therefore be inferred from his summing up. This brings into play the comments that I have already made about the summing up.

Where I get to

[79] As is apparent, I consider that the evidence of the petitioner and Ms Vuru provided an evidential basis for a conclusion that the petitioner was affected by an abnormality of the mind for the purposes of s 243. Since the critical aspects of the evidence of the petitioner and Ms Vuru in relation to this were not challenged at trial. I would therefore have expected the Judge to tell the assessors that they would have little difficulty in accepting that this element of the defence had been established. This would have left in play whether that mental abnormality had substantially impaired her capacity to know that she ought not kill Rakika. The substantial impairment issue would have called for an evaluative assessment by the assessors and later by the Judge. For the reasons given in [51] above, this was to be assessed in terms of whether there had been a substantial impairment of the petitioner's ability to reason with a moderate degree of composure about why she ought not to kill Rahika. To state (in fact repeat) the obvious, that the petitioner had killed a daughter she loved provided appreciable support for this aspect of her defence.

[80] All of this means that the defence of diminished responsibility had considerable merit, and far more than the Judge and Court of Appeal recognised. Their scepticism about the defence resulted from failures to analyse systematically what she had to establish and apply that to the evidence she provided. By way of illustration of this, there is nothing in the summing up, judgment convicting the petitioner or the judgment of the Court of Appeal that articulates a reasoned basis for rejecting (as I think the Judge and Court of Appeal did) the argument that the psychological trauma to the petitioner referred to by Ms Vuru and her consequentially scrambled thinking amounted to mental abnormality for the purposes of s 243.

[81] In short, I am satisfied that there was a miscarriage of justice.

Disposition of the petition

[82] I would grant leave to appeal and allow the appeal. Given my view of the merits of the diminished responsibility defence and with the nearly six years that have elapsed since the trial, I think it inappropriate to direct a new trial. So, I would replace the conviction for murder with a conviction for manslaughter.

[83] On her conviction for manslaughter, I would sentence the petitioner to imprisonment for five years, six months, a sentence that will allow for immediate release.

Orders of the Court

1. *The application for leave to appeal is granted.*
2. *The appeal is allowed.*
3. *The conviction for murder is set-aside and replaced with a conviction for manslaughter.*
4. *A sentence of five years, six months imprisonment is imposed.*

SUPREME COURT FIJI

The Hon. Mr. Chief Justice Salesi Temo
President of the Supreme Court

The Hon. Mr. Justice Terence Arnold
Judge of the Supreme Court

The Hon. Mr. Justice William Young
Judge of the Supreme Court