IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO: AAU 013 of 2015
[High Court Case No: HAC 174 of 2011)

BETWEEN	:	**SUSANA CAGIMAIRA**
		Appellant
AND	:	**THE STATE**
		Respondent

Coram	:	Hon. Mr. Justice Daniel Goundar
Counsel	:	Ms M Tarai for the Appellant Mr L J Burney for the Respondent
Date of Hearing	:	13 June 2017
Date of Ruling	:	19 June 2017

RULING

[1] Following a trial in the High Court at Lautoka, the appellant was convicted of murder of her new born child. On 11 November 2014, she was sentenced to life imprisonment with a minimum term of 12 years to serve. This is an application for an enlargement of time to seek leave to appeal against conviction.

[2] The facts are succinctly summarized in the State's submission as follows:

> ...sometime in the evening of 30 November 2010, the appellant was found to have given birth in her room at the Bounty Island Resort where she worked as a receptionist. When the appellant was initially found by her colleague Salanieta Nasilasila shortly after giving birth, the baby was alive and crying on the bed. After the appellant attempted to cut the umbilical cord with a pair of scissors, Mrs Nasilasila left the room to get help. By the time the resort nurse

arrived at the appellant's room between 10 and 11 pm the baby was dead. The baby was later found to have sustained a basilar skull fracture, which led to a subarachnoid haemorrhage, the eventual cause of death. This occurred through the appellant stepping on the baby's head, which, at trial she agreed had been accidental.

[3] Section 35(1) of the Court of Appeal Act, Cap 12 gives a single judge power to grant an enlargement of time to appeal. The factors to be considered are:

(i) The reason for the failure to file within time.
(ii) The length of the delay.
(iii) Whether there is a ground of merit justifying the appellate courts consideration?
(iv) Where there has been substantial delay, nonetheless is there a ground that will probably succeed?
(v) If time is enlarged, will the respondent be unfairly prejudiced? (*Kumar v State* unreported Cr App No CAV0001 of 2009; 21 August 2012).

[4] Section 26 of the Court of Appeal Act prescribes for a 30-day appeal period from the date of the decision appealed against. The initial notice of appeal was filed in person by the appellant on 28 January 2015, by which time the appeal was late by about two months. The reasons for the delay are explained in the appellant's affidavit dated 27 April 2017. When the appellant was sentenced, she was seven months pregnant with her fourth child. In January 2015, she gave birth while serving her sentence. She kept her new born child with her in prison. By the time she obtained legal advice from the Legal Aid Commission on the procedure and merits of her appeal, the appeal was out of time. I am satisfied that the length of the delay is not substantial and the reasons associated with child birth in prison are justifiable. The real question is whether there is a ground of merit justifying the appellate courts consideration?

[5] The grounds of appeal are:

(1) The learned Trial Judge erred in law and in fact when he failed to adequately consider the evidence of the Pathologist whose evidence supported the version of the Appellant that she had accidently stepped on the deceased child.

(2) The learned Trial Judge erred in law and in fact when he failed to properly introduce to the assessors that there was a lesser offence of infanticide that they can consider if the elements of Murder was (sic) established by the prosecution beyond reasonable doubt.

(3) That the learned Trial Judge erred in law when he failed to properly consider section 244 (3) of the Crimes Decree after he has found that the evidence was sufficient to establish the guilt of the Appellant beyond reasonable doubt for the offence of Murder.

(4) That the learned Trial Judge erred in law and fact when he did not consider making an order for the Appellant to undergo a psychiatric evaluation in light of the circumstances of the case and this prejudiced the Appellant.

Evidence of the pathologist

[6] The pathologist's evidence was that the cause of death was 'subarachnoid haemorrhage due to crush injury'. The fatal injury was a fracture on the base of the head. The pathologist said the fracture could have been caused by stepping on the head using severe force. Under cross-examination, the pathologist could not rule out that the fatal injury could not have been caused by accidental stepping on the head.

[7] The learned trial judge fairly summarized the pathologist's evidence in paragraphs 62 and 63 of the summing up and in paragraph 64 he told the assessors that the weight to be attached to the pathologist's evidence was a matter for them. The assessors and the trial judge found the fatal injury was not accidental but caused by a deliberate conduct. This finding was reasonably open on the evidence. Ground 1 is unarguable.

Infanticide

[8] At the trial, the appellant did not rely upon infanticide as one her defences. Infanticide is not a complete but a partial defence provided by section 244(3) of the Crimes Act. Under this statutory provision, infanticide reduces murderous culpability to a lesser

culpability for a woman who wilfully causes the death of her child under the age of 12 months and at the time of act, 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 to 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 be the satisfaction of the Court.

[9] The accused has the onus to prove that the balance of her mind was disturbed by reason of either one of the above three factors and the standard of proof is the balance of probability.

[10] The evidential basis for the learned trial judge's decision to direct the assessors on the lesser offence of infanticide cannot be ascertained without the benefit of the court records. However, the learned trial judge did decide to put infanticide for the assessors to consider. Having made that decision he was obliged to fairly and adequately direct the assessors and himself on infanticide. Apart from reciting the statutory provision on infanticide, the learned trial judge offered no further assistance to the assessors regarding how they were to consider infanticide as it related to the facts established by evidence led at the trial. The learned trial judge's judgment also lacks any consideration of infanticide. Grounds 2 and 3 are reasonably arguable.

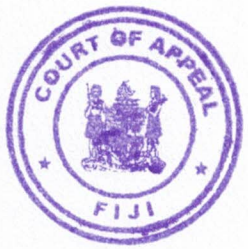
Psychiatric report

[11] There is no overarching principle that requires that on every case where a woman is charged with the murder of her new born child, the court is obliged to call for a psychiatric report. The evidential burden of proof that the appellant's balance of mind was disturbed when she caused the death of her new born child lied with her. She was legally represented at the trial. She did not contend that the balance of her mind was disturbed. Her defence was that she accidentally stepped on her baby's head. There was no legal or factual basis for the trial judge to call for the appellant's psychiatric report. Ground 4 is unarguable.

[12] **Result**

Enlargement of time granted.

Leave granted on grounds two and three only.



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Hon. Mr. Justice Daniel Goundar

JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for the Appellant

Office of the Director of Public Prosecutions for the State