

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 108 of 2016

STATE

V

VIKA KELEKELE LALIQAVOKA

Counsel : Ms. Darshani Kumar for the State
Ms. Christina Choy for the Accused

Dates of Trial : 27-29 June and 3-6 July 2017

Summing Up : 10 July 2017

Judgment : 12 July 2017

Sentence : 19 July 2017

SENTENCE

[1] Vika Kelekele Laliqavoka you were charged with the following offence:

FIRST COUNT

Statement of offence

MURDER –Contrary to Section 237 (a) and (b) and (c) of the Crimes Act No. 44 of 2009.

Particulars of the Offence

VIKA KELEKELE LALIQAVOKA on the 18th of July 2011 at Cunningham, Nasinu, in the Central Division, murdered her unnamed child.

- [2] You pleaded not guilty to the above mentioned charge and the ensuing trial was held over 7 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, the three Assessors unanimously found you guilty of Murder.
- [4] Having reviewed all the evidence, this Court differed with the unanimous opinion of the Assessors finding you guilty of Murder. Instead, this Court found you guilty of the lesser offence of Infanticide, in terms of Section 244 of the Crimes Act. Accordingly, you were convicted of Infanticide.
- [5] In this case, it is admitted facts and, as such, proved, that from the month of December 2010 to 18 July 2011, you were pregnant. On 18 July 2011, at about 5pm, you went to the bathroom at your sister's residence and remained there for about one hour. Between 5pm and 6pm, in the bathroom of the said residence, you gave birth to a male child.
- [6] There is no direct evidence in this case to establish as to what else happened in the bathroom. The prosecution submits, by way of circumstantial evidence, that you caused the death of your unnamed child.
- [7] In support of their case, the prosecution led the evidence of Viniana Digitaki (your aunt), Mere Bale (your elder sister), Mereoni Buloulevu (your mother) and Dr. James Kalougivaki (who was called upon by the prosecution to give evidence on the post mortem examination and report of Dr. Ramaswamy Ponnu Swamy Goundar, who is now retired and currently based in Australia).
- [8] Dr. James Kalougivaki, explained in detail the external and internal injuries found on the unnamed deceased child. He testified that there was a high probability that the baby was born alive. The cause of death has been stated as Asphyxia due to or as a consequence of smothering.
- [9] Infanticide is a serious crime. In terms of section 244 (3) of the Crimes Act it is provided that a woman found guilty of Infanticide, may be dealt with and punished as if she had been guilty of manslaughter of the child.
- [10] According to Section 239 of the Crimes Act, the maximum penalty for the offence of Manslaughter is imprisonment for 25 years. Since the punishment for Infanticide is the same as that of Manslaughter, the maximum penalty for the offence of Infanticide would also be 25 years imprisonment.
- [11] However, Her Ladyship Madam Justice N. Shameem in the case of **State v. Kesaravi Tinairatu** Criminal Case No. HAC 008 of 2001S; said the following:

"...The tariff for infanticide cases in Fiji and in other Commonwealth countries, is a non-custodial sentence with counselling or hospital orders. In R v Sainsbury (1989) 11 Cr. App. R(s), Current Sentencing Practice B1 – 63 the English Court of Appeal

quashed a 12 month custodial term for an offence of infanticide committed by a 17 year old offender, saying that 59 cases of infanticide in 10 years, all had resulted in orders of probation or supervision or hospital orders. The court said (per Russell LJ) that while the offence was a serious one "the mitigating features, in our judgment, were so overwhelming that without any hesitation whatever we set this sentence aside for it that which we think will best serve the interests not only of this appellant but of society as well". A 3 year probation was substituted.

Similarly in Australia in R v Cooper (2001) NSW 769, a 21 year old offender, who pleaded guilty to infanticide, was ordered to enter into good behaviour bond for four years with supervision and probation conditions, the sentencing judge holding "that a custodial sentence would be quite inappropriate to meet the circumstances of the case."

In the Queen v Diseree Anne Wright (Ca 478/00) the New Zealand Court of Appeal said that infanticide cases in New Zealand usually led to two year supervision orders.

In Fiji, this has also been the case. In State v Evangeline Kiran Nair Crim. Case No. 32 of 1989, the offender was bound over under section 42(1) of the Penal Code to be of good behaviour for 1 year..."

[12] The above guiding principles were adopted and followed by the Fiji Court of Appeal In the case of **Baleiniusiladi v State** [2016] FJCA 32 (26 February 2016).

[13] The aggravating factors in this case are as follows:

- (i) The offence resulted in the loss of life of your new born baby.
- (ii) The death of the new born baby was caused by his own mother, the person who is expected to be naturally and instinctively protective of the new born.
- (iii) You showed no regard to the new born baby's right to life.
- (iv) After committing the act, you attempted to conceal the death of the new born baby by wrapping him in a cloth, and thereafter putting him inside a brown bag, which you then placed at the extension of your sister's residence.

[14] The mitigating factors in this case are as follows:

- (i) You do not have any previous convictions. Therefore you are a first offender.
- (ii) You have cooperated with the Police after your arrest.
- (iii) You have spent one month and one week in remand custody for this offence (from 9 March 2016 to 18 April 2016).
- (iv) You appear remorseful for your actions.


[15] You are now 40 years of age. At the time of the incident, which took place 6 years ago, you were 34 years of age. You are the mother of 4 children. Your eldest daughter is now 21 years of age. Your three sons are now 14, 11 and 8 years of age respectively. Your daughter is now married while your three sons are still attending school. These are your personal circumstances.

[16] Having considered all the above circumstances, including the nature of the offence, your character, your home environment and your personal circumstances, I sentence you as follows:

(1) To 2 years imprisonment, which term of imprisonment is suspended for 3 years.

And

(2) You are to undergo counselling with the Department of Social Welfare during this period of 3 years.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



AT SUVA

Dated this 19th Day of July 2017

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