IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 23 OF 2012

STATE

-v-

ALENA MAUSA

Counsel: Mr A. Datt for the State

Ms L.Volau with Ms Manueli for Accused

Date of Summing Up: 5th February, 2018

Date of Judgment: 12th February, 2018

JUDGMENT

1. The Accused was charged with Murder by the Director of Public Prosecutions. The information reads as follows:

Statement of Offence

MURDER: Contrary to Section 237 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

ALENA MAUSA on the 7th day of January 2012 at Vatukacevaceva, Rakiraki in the Western Division, murdered her new born infant.

2. The trial was conducted before three assessors. Having heard evidence led in trial, Assessors unanimously found the accused guilty of Murder as charged. They rejected the version of the Defence that the balance of accused's mind was disturbed at the time of the offence and thereby rejected the defence of infanticide.

3. I adjourned for deliberation and judgment. Three day workshop in Suva provided me a golden opportunity to deliberate on the issues raised in trial. I spared some time and energy to do some research on the law on infanticide. Having thoroughly reviewed the evidence led in the trial, I have decided to reject the unanimous opinion of assessors.

4. Before I venture into analysing the evidence led in trial I thought it proper and relevant to discuss briefly the historical background and recent developments of infanticide law in Fiji, especially after the enactment of the Crimes Act 2009.

5. The Infanticide Act 1922 was introduced in the United Kingdom primarily for the judges and juries to exercise leniency for mothers who killed their child in the context of being unmarried and facing adverse social and economic conditions. A verdict of guilty of murder in the early 20th Century would have resulted in death penalty for mothers who killed their baby.

6. The circumstances surrounding the introduction of the infanticide provisions in the first half of 20th Century are no longer relevant in our current society given the abolishment of death penalty, availability of defence of diminished responsibility, availability of effective contraceptive measures to avoid unwanted children and more social acceptance of single mothers and better financial support for them.

7. Infanticide is an offence in its own right. The Infanticide Act 1938 of the UK provides that when a mother kills her child, when the child is under 12 months old, and at the time the balance of the mother's mind was disturbed as a result of her not having fully recovered from the effect of giving birth or due to the effect of lactation, then the mother will be guilty of infanticide rather than murder.

8. Infanticide, when it was first introduced to Fiji under the Penal Code, it had all the features of infanticide law under the English Infanticide Act of 1938.

9. A mother charged with murder in the circumstances may also raise infanticide as a defence.

10. The offence of infanticide has a number of notable features that distinguish it from other defences specially, diminished responsibility. It is pertinent to note those distinguishable features because they are very much relevant in this case in order to properly analyse the evidence, particularly the expert evidence led in trial.

11. Firstly, unlike the partial defences of diminished responsibility and provocation, infanticide operates not only as a defence to a charge of murder, but is also a separate offence.

12. Secondly, the offence/defence of infanticide does not require that the act or omission of killing be causally linked to the disturbance of the mother's mind (Parker 1981, LRC WA 2007). There need only be a temporal connection. In contrast, diminished responsibility requires that the defendant's "abnormality of mind ... substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.

13. Thirdly, the phrase "the balance of her mind was disturbed" is unique to infanticide. At the time this phrase was introduced in the United Kingdom, Parliament decided not to use an existing legal term of art [Hansard (HL), vol 50, cols 761 to 762 (25 May 1922)]. It is different to both the test for insanity and the test for diminished responsibility ("abnormality of mind"). It is notable that test "the balance of her mind was disturbed" does not accord with medical terminology. When the Infanticide Bill was considered by the House of Lords in 1938, its subject matter "belongs to the territory where law and medicine meet, and to some extent carries with it difficulties which attach to both [Hansard (HL), vol 108, col 292 (22 March 1938)].

14. Fourthly, the offence/defence of infanticide is unique in that it is only available to a particular group of accused (biological mothers) who kill a particular victim (their own baby who must be less than 12 months old).

15. The final distinguishable feature, which concerned the burden and standard of proof, has been removed when the Crimes Act was enacted. Under the repealed Penal Code, there was no legal or probative onus on the accused who wished to raise infanticide as a defence. Even when raised as a defence, he only had an evidential burden and the overall burden of proof was on the prosecution to disprove a claim of infanticide beyond reasonable doubt.

16. This legal position was explained in ***R. Karolina Adiralulu*** [1983] AAU 11/83 (July) 1983 where it says:

> *"Evidence must lay a sufficient foundation of fact on which such a defence may be based. Thus there is initially an evidentiary onus resting on the accused but when the necessary foundation of fact has been held to be laid the question becomes, not whether the allegation has been proved either on the balance of probabilities or beyond reasonable doubt, but whether upon the whole of the evidence the Crown has proved guilt beyond reasonable doubt"*

17. In ***Merewalasi Baleiniusiladi*** Criminal Appeal No: AAU 0070 of 2010 (High Court Case No: HAC 042 of 2009), this legal position was again emphasised by the Court of Appeal:

> *"when Infanticide is raised as an alternative to murder, no probative onus rests on the accused.*

18. In contrast in the event infanticide is raised as a defence, the Crimes Act explicitly shifts the burden of proof to the accused to discharge on the balance of probabilities, of course 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.

19. Relevant part of Section 244(2) of Crimes Act states:

> *"The onus of proving the existence of any matter referred to in sub-section (1)(c) lies on the accused person and the standard of proof of such matters shall be on the balance of probabilities".*

20. This novel legal position introduced by the Crimes Act is similar to Section 2 of the Homicide Act 1957 of the UK, which provides for the defence of diminished responsibility which, explicitly shifts the burden of proof to the defendant to discharge on the balance of probabilities.

21. It is therefore clear that, under the Crimes Act, a higher degree of burden is cast on the defence to prove the defence of infanticide. This, in my view, is a policy decision carefully taken by law makers when they introduced another significant change (which I discuss below) to the offence/defence of infanticide in Fiji.

22. The second significant change which I just referred to has broadened the scope of the reasons that may be shown to establish that the balance of mind of a mother was disturbed. Under the repealed Penal Code, the reasons that were allowed to be proved or rather shown to establish that the balance of mother's mind was disturbed (at the time of the offence) were limited to two; namely that:

(a) by reason of her not having fully recovered from the effect of giving birth to the child or

(b) by reason of the effect of lactation consequent upon the birth of the child.

23. Section 205 of the repealed Penal Code describes the offence/defence of infanticide as follows:

> *"Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of felony, to wit, infanticide, and may for such offence be dealt with and punished as if she had been guilty of manslaughter of the child".*

24. Under the Crimes Act, in addition to these two reasons, a broader basis of disturbance has been recognised. Thereby, 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.

25. Section 244 (1) of the Crimes Act reads as follows:

> 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.

26. This significant change I believe has been introduced by law makers having taken into consideration the socio-economic context prevalent in Fiji and various observations made from time to time by the Fiji Judiciary. A good example of such an observation is found in ***State v Radininausori*** [2007] FJHC 53; HAC015J.2006S (8 August 2007) where Madam Shameem J stated:

> *"This case is a clear example of the inadequacy of our laws relating to the killing of babies by their mothers. The law of infanticide requires evidence of post-natal mental illness. Experience tells us that many such cases arise not as a result of mental illness, but as a result of social failure – failure to accept mothers who give birth out of wedlock, failure to provide care to such mothers and babies, and failure to ensure that the fathers of such babies take equal responsibility for the birth and upbringing of their children. The killing of babies by their mothers, sadly common in Fiji, is an indictment on society. I have said before and I will continue to say, that the law should be reformed to define the offence of infanticide and murder to include the defence of diminished responsibility. That has been the step taken in other jurisdictions as a result of the injustice which results from the restricted definition of infanticide.*

27. Similar sentiments were expressed by the UK Parliament in respect of Infanticide at the time the original Infanticide Act was passed in 1922, and again in 1938. The Parliament recognised and debated its potential flaws and considered alternative options. For example, the phrase "the balance of her mind was disturbed" was challenged and the problems inherent in introducing medical evidence were acknowledged. Similarly, the link between the disturbance of the mind and birth was questioned and a broader basis of disturbance induced by poverty and despair was proposed. The need to ensure unmeritorious cases did not fall within the offence/defence of infanticide was stressed.

28. The potential link between "environmental or other stresses consequent upon birth" and mental disturbance was recognised by the Criminal Law Revision Committee of ("CLRC") of the UK. In 1980, the CLRC recommended the amendment of the offence/defence of infanticide to incorporate disturbance of the mother's mind by reason of the effect of giving birth or circumstances consequent upon that birth.

29. It is essential that the disturbance in the balance of mind be causally linked to a disorder associated with her pregnancy, delivery or post-natal state. A lenient verdict should be made available only if the act or omission causing death was result of a mental disturbance to avoid preferential treatment. Infants are a particularly vulnerable population and preferential treatment of offenders against such population is not warranted.

30. It has to be born in mind that, in any event, it is essential to prove that the balance of mother's mind was disturbed by any of the reasons listed in Section 244 (1) C (i, ii or iii) . Therefore, having proved the disturbance of mother's mind, a clear link has to be established between the said 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 per se will not be sufficient if the fact that "the balance of mind of the mother was disturbed at the time of the offence" was not proved to the satisfaction of court.

31. The Court of Appeal in its recent decision of ***Merewalesi Baaleiniusiladi v The State*** [2016] FJCA 32; AAU070.2010 (26 February 2016) at paragraphs 31 and 32, observed as follows:

> *"It is interesting to note that Section 244(1)(c)(iii) is an additional element for diminished responsibility of infanticide which did not exist in the Penal Code. This means factors such as social human experience, social condition, moral situation, cultural upbringing, economic plight and circumstance of the pregnancy can be considered as grounds to reduce the offence of murder to infanticide. It appears this section was introduced not as a result of accident or haphazardness. This was a result of a clever and deliberate move in giving effect to long standing common law principle that was practised in Fijian High Courts. There has been a consistent and established practice that considered the factors mentioned above in order to reduce the offence of murder to infanticide under*

section 205 of the Penal Code. The array of cases I have cited clearly demonstrates this point.

"Law is not confined to provisions in a Code or Decree. In giving interpretation to words 'the effect of giving child birth' in section 245 of the Penal Code, courts have consistently given a wide meaning and it has been practiced effectively. The narrower construction would affect the mothers who happened to deliver children under tragic circumstances. This does not mean that an open licence should be given to kill every child who is born out of wedlock. Whether to convict for murder or Infanticide depends on the facts and circumstance of each case. In cases of this nature, there is a salutary duty on the part of the trial judge to appraise the assessors of the development of the common law on this issue. The Judge must place before the assessors the relevant evidence to consider not merely the physical aspect of birth but also the circumstance surrounding the child birth. The judge must explain the availability of the option to convict for infanticide in the attending circumstances of the case. The circumstance cannot be confined merely to 'depression' which most mothers who are even married suffer with.

32. With all due respect, I beg to differ with the observation that *'Section 244(1)(c)(iii) is an additional element for diminished responsibility of infanticide which did not exist in the Penal Code'*. I also beg to differ with the observation that factors such as social human experience, social condition, moral situation, cultural upbringing, economic plight and circumstance of the pregnancy themselves can be considered as grounds to reduce the offence of murder to infanticide.

33. The defence of diminished responsibility has now been statutorily recognized in Fiji as a separate defence to a Murder charge (Section 243 of the Crimes Act). Infanticide is completely a different defence and unique in the sense that it applies only to biological mothers charged with Murder. At paragraphs 11 -15, I have already discussed the significant differences between infanticide and diminished responsibility.

34. Section 244(1)(c)(iii) of the Crimes Act has to be read in conjunction with Section 224 (1) (c) which states that "at the time of the act or omission the balance of her mind was disturbed by reason of". Therefore, factors such as social human experience, social condition, moral situation, cultural upbringing, economic plight and circumstance of the pregnancy cannot be considered as grounds to reduce the offence of Murder to Infanticide unless it is proved that the balance of mind of the mother was disturbed by any of those factors.

35. Therefore the recent observation made by the Court of Appeal in ***Merewalesi Baaleiniusiladi*** (supra), in my opinion has to be read to give effect to the clear legislative intention. Overlooking the causative link can potentially result in mothers killing their infants for reasons unrelated to any psychiatric condition where mothers having socio economic problems which are not seen as exculpatory factors in other crimes availing the infanticide as a defence.

36. Having discussed the historical background and recent developments in law relating to the offence / defence of infanticide, I now turn to apply the legal principles to the evidence led in the trial.

37. Accused admitted the following facts:

    i. that the accused gave birth to a male baby ("the baby") inside a toilet in the early hours of the morning of 7th January 2012.

    ii. That after delivering the baby the Defendant wrapped the baby in a cloth and took it to a nearby river.

    iii. That the Defendant cast the baby into the river.

    iv. That the baby was still alive at the time when the Defendant cast it into the river.

    v. That the baby died as a result of being cast into the river.

    vi. That the conduct of the Defendant was a substantial cause of the baby's death.

38. The only issue to be determined at trial is the state of mind of the Defendant at the time she had cast the baby into the river. Prosecution led evidence to prove that the accused killed the new born baby either intentionally or recklessly.

39. There is ample evidence from which a reasonable inference could be drawn that the accused intended to kill her baby. She had hidden the pregnancy from her family and the villages and refrained from attending anti-natal clinics. At the caution interview, she admitted having drunk herbal medicine to abort the baby; she said that she strangled baby's neck and covered his nose. She also said she thought that baby will not float and stop anywhere and nobody would see the baby.

40. Furthermore, she admitted that the baby was wrapped in a towel and threw it into the river. From this evidence it is clearly established that the accused was reckless as to causing the death of the baby. Therefore, there is ample evidence to find the accused guilty of Murder if not for Section 244 of the Crimes Act.

41. The main area of contention in this case boiled down to one issue, namely whether the Defence had established the fact that the balance of accused's mind was disturbed at the time of offence by any of the reasons described in Section 244 so as to claim the benefit of the defence of infanticide.

42. In this regard, the Prosecution heavily relied on expert evidence adduced at the trial although the psychiatric report was obtained by the Defence. Defence on the other hand called the accused to the witness box to prove that the balance of her mind was disturbed at the time of the offence. There was no evidence led however by the Defence to prove that the balance of accused's 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;

43. Defence entirely relied on Section 244 (1) (C) (iii) of the Crimes Act which states that the balance of accused's mind was disturbed by reason of "any other matter, condition, state of mind or experience associated with her pregnancy, delivery or post-natal state".

44. Dr. Jay Lincoln, who is the Psychiatric Registrar at St. Giles Hospital, had obtained the MBBS Degree in 2006 and a Post Graduate Diploma in Mental Health from the Fiji School of Medicine. Although he is not a consultant psychiatrist, he is the only physician assigned at St. Giles Hospital to conduct mental state psychiatric assessments for courts. He prepares on an average 30 psychiatric reports monthly, mostly for the magistrates courts. For the past 2 - 3 years, he had conducted about 6 psychiatric evaluations where mothers have been alleged for killing their new born child. He was giving evidence for the first time in a High Court.

45. Pronouncing his professional opinion, the doctor said that accused's most likely state of mind at the time of alleged criminal act was normal; she was not defected or disturbed. Doctor said when he obtained the history from the accused, he

could not find any evidence that balance of her mind was disturbed as a result of her not having fully recovered from the effect of giving birth to the child; or the effect of lactation consequent upon the birth of the child.

46. With regard to any other matter, condition, state of mind or experience associated with mother's pregnancy, delivery or post-natal state, the doctor said that he had done 6 psychiatric evaluations involving infanticides and in his experience and knowledge the major reasons for mothers to commit such acts of killing a new born baby had been the same. Those were social and economic problems. Most of the mothers had financial difficulties. Some mothers had given birth out of wedlock and felt ashamed; they felt guilt so they didn't want to have anything to do with the child. In his opinion, those factors do not always affect the balance of mother's mind. Doctor agreed that, according to what Alena said and the history she provided, accused had some of those stresses and bitter experiences associated with pregnancy. However, on the basis of the result of his mental state examination, he flatly denied that any of those factors had contributed to a disturbance of accused's mind at the time of the offence.

47. Despite my strong warning in the Summing-Up that an opinion of an expert should not be accepted blindly, assessors no doubt attached a great weight to the opinion of Dr. Lincoln when they returned with a unanimous opinion of guilt in respect of Murder charge.

48. However, I'm not inclined to accept the opinion expressed by Dr. Lincoln for following reasons.

49. Firstly, it is quite evident that Dr. Lincoln in his medical report which he had prepared contemporaneously with his medical evaluation had never mentioned the opinion he expressed in Court. It is only after his attention was drawn to Section 244 of the Crimes Act that he came up with his opinion.

50. According to Doctor's evidence, he generally conducts psychiatric evaluations to determine whether, at the time of the commission of the alleged offence, the accused was aware of his/ her actions and additionally to give his opinion on whether he/she was fit to make a plea in court and knew how to set up a legal strategy or a defence. It is obvious that the doctor had never deviated from his general procedure or test in evaluating the accused in this case. He specifically referred to Section 28 of the Crimes Act and had applied the test generally applied in cases involving the defence of insanity (to determine if the accused

had a mental illness) or perhaps diminished responsibility (to determine if the accused had an abnormality of mind).

51. In his report, Dr. Lincoln concludes:

> *"Based upon above two conclusions, it is my judgment that this defendant presently is medically competent to stand trial.*
>
> *It is my judgment that this defendant was able to appreciate the wrongfulness of her conduct at the time of the offence. The findings that support this conclusion are inferred from the history (see part IV) given by the accused which depicted her state of mind.*

52. This is not the opinion expected of a psychiatrist in an infanticide case. In his medical report, he had never stated that the balance of mind of the accused was not disturbed at the time of the alleged offence due to any of the reasons advanced by the accused. His evidence further confirmed that he had not evaluated the accused against the correct test.

> *Crt: Do you know the test in the Crimes Decree. Have you referred to the Crimes Decree?*
>
> *A: Yes my Lord, I am very familiar with Section 28.*
>
> *Crt: Have you referred to the Crimes Decree Section before the evaluation.*
>
> *A: Yes, we always look at the Crimes Decree.*
>
> *Crt: That particular Section, Section 244?*
>
> *A: No, for us we have a Mental Health Decree and we have.*
>
> *Crt: Yes that's the problem if you have that. So please have a look at this Section.*
>
> *.....(doctor reads Section 244 (1) (C) of the Crimes Act)*
>
> *Çrt: So did you evaluate the client on this particular Section?*
>
> *A: No, I did not look at this but I've seen this. I'm a law student myself, I study this so I know, I am aware of this but it's possible, her mind could have disturbed due to anything,.....*

53. By the Order issued by this Court (upon an application of the Defence), psychiatrist at the St. Giles Hospital was specifically ordered to evaluate the state of mind of the accused as at the date of the commission of the offence. He was not supposed to determine whether the accused had a mental illness or an abnormality of mind.

54. The Defence Counsel who was present at the psychiatric evaluation had provided all the necessary information including the nature of the charge and the caution statement of the accused. Doctor said that he was aware that he was evaluating an accused who was charged with killing her new born baby. Unfortunately, the doctor has not apparently directed his mind to Section 244 of the Crimes Act and applied the test required by it, namely, whether, by reason of any of the reasons prescribed in the Section, 'the balance of accused's mind was disturbed' at the time of the offence .

55. Having faced with this difficult situation, I had to enter into the arena and, to ensure fairness, examine the doctor perhaps to an extent not expected of a judge in an adversarial jurisdiction.

56. When the doctor was referred to the Order sent by Court, and asked whether his evaluation would have been done differently had he read it (Court Order), the doctor stressed that:

> *"Nothing different because the psychiatric assessment is basically the same regardless of the client, the situation, you always come up with the two components, one is the history and one is the mental state assessment, so nothing different.*

57. I am not inclined to agree that the psychiatric evaluation or the test is the same in all cases. The test under Section 244 is materially different to that applied under Section 28. Therefore, it is not safe to act on the opinion of the doctor to resolve the issue at hand.

58. Secondly, the doctor failed to satisfy this court as to the accuracy of his psychiatric evaluation which was done almost five years after the alleged offence. When questioned about the time gap between the alleged offence and the psychiatric evaluation, the doctor said that, through the comprehensive history he had obtained, he was able to come to the conclusion that accused's mind was not disturbed at the time of the offence.

59. However, the doctor had formed his opinion in regards to a mental illness, upon an evaluation conducted under section 28 of the Crimes Act.

> *Crt: So you examined her 5 years after the alleged incident?*
>
> *A: Yes my Lord, based on my assessment on this date and based on the history, this is my professional opinion that she was not **mentally sick** at the time. So this even though it's been since 2012 but in my professional opinion, her mind was **sane** at the time of the alleged criminal conduct.*
>
> *Crt: Sorry, you use the word **sane**?*
>
> *A: Yes my Lord.*
>
> *Crt: Would you be able to say that, after 5 years, whether her mind was not disturbed at the time of the offence? Would you be able to say after 5 years as a Psychiatrist?*
>
> *A: I think it's possible. In my professional opinion and in my experience, yes, because it's related to the history. 90% of the diagnosis comes from the history and if we take a good history that will, she gave me a very good history, a very relevant history and I based my opinion on what she told me. And what she told me there was nothing there to point to a **mental illness**.*
>
> *Q: .....you discussed the history of my client's case, she was able to recollect, to recall what happened then. Now is it because it's been 5 years and she has fully recovered?*
>
> *A: In my opinion if she had **mental sickness** it's unlikely that she will recover without medications so I am not quite sure what you inferring to, because if a person is **sick** they cannot just get away just like that without any sort of treatments. So that's why in my assessment I assessed her, she knew the events from 2012.*

60. It is hardly believable that a psychiatrist, after five years of the incident, will be able to give a correct and conclusive opinion as to whether or not the balance of accused's mind was disturbed (as opposed to whether she had a mental illness) at the time of the offence. Doctor admitted that it is hard to say whether her mind was disturbed due to some non-psychiatric illnesses unless she went (at that time) to see a medical doctor or medical intern.

'Through the mental state examination we will notice if the client is displaying psychotic symptoms or mood symptoms, depressive symptoms, those are the major psychiatric illnesses. It's hard to say whether her mind was disturbed due to some non-psychiatric illnesses unless she went to see a medical doctor or medical intern because it can be due too to medical problem. It's not just limited to psychiatric problem. Some people have medical problems and it causes them to have symptoms that may make psychiatric illnesses'.

61. Thirdly, the doctor had based his psychiatric evaluation entirely upon the history given by the accused. However the doctor himself had doubted the creditworthiness of the accused when he perused her inconsistent caution statement. Nevertheless he had acted upon the history provided by the accused to arrive at his conclusion.

62. Fourthly, the doctor agreed that, according to the history he had obtained, accused was going through multiple stresses while she was pregnant and even when she gave birth. He also agreed that some of the stresses could disturb the balance of a mother's mind. However, he dismissed the possibility that those stresses could have disturbed the mind of the accused at the time of the offence. He failed to give logical reasons for his opinion.

63. Finally, doctor did not completely rule out the possibility that contradictory answers of the caution interview may have been given by the accused due to her disturbed mind. This finding does not support his conclusive opinion that the balance of her mind was not disturbed at the time of the offence.

64. Generally, in a case of this nature, a greater degree of weight is attached to the psychiatrist's assessment. It is often argued that, in the absence of an opinion of a psychiatrist, proving the offence / defence of infanticide is virtually impossible. This argument is based on the premise that, without a proper psychiatric evaluation, it is impossible to determine the state of mind of an accused *vis a vis* his or her mental disorder.

65. On the other hand, the test "the balance of her mind was disturbed" is unique to infanticide and does not accord with medical terminology. There are practical difficulties in availing the defence of infanticide as it relies on concepts which medical experts find ambiguous and unscientific. Its subject matter "belongs to

the territory where law and medicine meet, and to some extent carries with it difficulties which attach to both.

66. Therefore, it is my considered opinion that, in the absence of a reliable psychiatric evaluation or specific psychiatric diagnosis, the fact finders (assessors/court), having considered all the circumstances associated with pregnancy and child birth should be able to determine whether the balance of mother's mind was disturbed at the time of the offence.

67. When considered the unique socio economic context prevalent in Fiji, this approach will do justice to mothers generally (and specifically in the circumstances of this case to the accused) who kill their babies under multiple stresses associated with pregnancy and child birth.

68. This approach will also neutralize the difficulties in discharging the rather heavy burden of proof on the part of the defence, introduced under the Crimes Act. Under the new law (Crimes Act), when infanticide is availed as a defence to a murder charge, there is a legal burden on the defence to prove, on a balance of probabilities, that the balance of mind of the accused was disturbed at the time of the offence. One would appreciate the fact that it is virtually impossible to discharge this burden without a reliable psychiatric evaluation promptly taken after the offence. A poor ignorant mother from a place as far as Rakiraki cannot be expected to undergo a psychiatric evaluation in a situation where she has killed her baby unless such an evaluation was facilitated by police or other agents of the State. Therefore, a mother rightly entitled to this defence may lose the opportunity to prove her defence at the trial due to lack of psychiatric evidence taken contemporaneously with the killing.

69. Generally, where women have killed their babies and there is absolutely no psychiatric evidence that the balance of the mind was disturbed then the DPP's office will proceed on the basis that this is Murder. They will not bother to collate evidence to prove the lesser offence of Infanticide. However, with the new development of law in this area, it is highly desirable and I would rather say that it is the responsibility of the State and its agents in the criminal justice sector (Police/ DPP/ Magistrates) to ensure that a proper psychiatric evaluation is done promptly when such a matter is reported.

70. Unfortunately, the police in this case have failed to produce the accused for a psychiatric evaluation on the first available opportunity although they had evidence to suspect that accused was undergoing some mental stresses

associated with her pregnancy. Accused was admitted to the Rakiraki Hospital on the 10th of January, 2012, only to ascertain whether she had given birth to a child on the 7th. No psychiatric evaluation was done at the hospital. Upon being discharged from hospital, accused was interviewed under caution by police on the 13th January, 2012, where she made a number of remarkable contradictory statements from which a sensible police officer would have realized that it was on the safe side to produce the accused for a psychiatric evaluation. Unfortunately she was psychiatrically evaluated after nearly 5 years when the court order was given to that effect upon conclusion of the *voir dire* proceedings.

71. It is trite law that *"the expert will not be permitted to point out to the jury matters which the jury could determine for themselves or to formulate his empirical knowledge as a universal law"* ***Clark v Ryan*** (1960) 103 CLR 486 at 491 ***Matioli v Parker*** [1973] Qd R 499, ***Turner*** (1974) 60 Crim Appn R 80, per Lawton LJ.

72. The decision of the Australia High Court in ***Clark v Ryan*** (supra) has become a touchstone for the principles in the area of expert evidence. In that case Dixon, CJ (with whom Fullager, J agreed) said:

> *"The rule of evidence relating to the admissibility of expert testimony as it effects the case cannot be put better than it was by J. W. Smith in the notes to Carter v Boelm, 1 Smith L.C., 7th ed. (1876) p 577. "On the one hand" that author wrote, "it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it." Then after the citation of authority the author proceeds: "While on the other hand, it does not seem to be contended that the opinion of witnesses can be received when the enquiry is into a subject matter the nature of which it is not such as to require any peculiar habits or study in order to qualify a man to understand it." Adapted by Harding A.C.J. in R v Camm (1883) 1 Q.L.J. 136"(emphasis added).*

73. Assessors and the trial judge in this case in my opinion are properly equipped to draw the proper inferences as to the state of mind of the accused at the time of the offence (as opposed to a mental illness) from facts placed before this Court. Expert witness should not be allowed to speculate about accused's state of mind.

74. For these reasons I reject the expert opinion of Dr. Lincoln.

75. The accused in her evidence said she was 'ashamed', 'scared', 'worried', and 'frightened' about her pregnancy.

76. Accused's evidence of her poor economic background and hardships she faced during pregnancy was not disputed. She lived with her mother, grandmother, daughter, and two brothers in a remote village called Vatukacevaceva, in Rakiraki. Her mother earned a living selling lemon and chili in the market. Accused was entirely dependent on his famer brother Peniasi who supported the accused to raise her first child.

77. Accused's first partner had deserted her after the birth of daughter Seini. Accused was then in a short relationship with a young man and it is from this relationship she became pregnant with this ill-fated baby. He also left the accused behind making her pregnant and disappeared into *Vanua Levu*. She did not have even the phone contact to inform the father about the child.

78. It is in this context accused was hiding her pregnancy not only from villages including the village nurse, but from her own family. When rumors were going around the village she kept on denying her pregnancy. Finally the rumour ended up in her brother Peniasi. Peniasi got angry and had told her that 'he only knows one child and, does not want to know another child'. When she heard this, she felt scared, ashamed and weak. She was scared of her brother that he might do something bad to her if she gave birth to another child.

79. She did not bother to attend anti-natal clinics or counseling. She even made an unsuccessful attempt to abort the baby by drinking herbal medicine. She was ashamed and stayed inside the house. Witnesses called by the Prosecution and her mother confirmed her evidence.

80. She did not have any proper source of income. She did not have money even to go to the hospital. She was scared and worried and was thinking about unborn child's uncertain fate in the absence of her brother's support.

81. Under cross examination, Accused admitted that after throwing her second baby in the river she got pregnant again and that the third child she gave birth to is living in the village with her and is being supported by her mother.

82. Prosecution argued that if she had such financial difficulties and family stresses why she would want to have another baby. Accused has given an acceptable explanation to counter this argument. She said she had learnt from her past

mistake. After she threw the baby in the river, she was repenting and thinking that she shouldn't have killed the baby. Psychiatrist confirmed that she was extremely remorseful of her mistake.

83. When her third pregnancy was acknowledged, everybody in the family including his elder brother was willing to accept the third child. It is not unnatural for his brother and family to change their attitude towards the third child and be sympathetic after the unfortunate death of accused's second child.

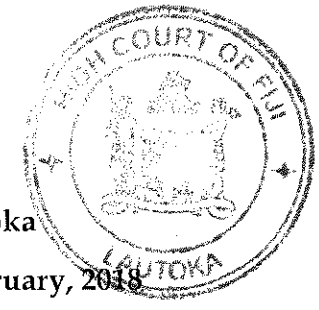
84. In her caution interview, accused had given remarkable contradictory answers. If she wanted to mislead the police she could have maintained the position that the baby fell on the floor and died accidently. However, she admitted killing the baby. She gave contradictory answers about Fane's involvement in delivery. The Defence Counsel strongly argued that inconstant answers in her caution statement point to her disturbed mind. Even the psychiatrist did not completely rule out such a possibility. It is more probable than not that the balance of her mind was disturbed by multiple stresses associated with her pregnancy.

85. For these reasons I accept the evidence of the Defence.

86. I am satisfied that economic and family stresses and social stigma associated with pregnancy had disturbed the balance of accused's mind at the time of the offence. Defence proved their case on a balance of probabilities.

87. I reject the unanimous opinion of Assessors. I find the accused not guilty of Murder and find her guilty of Infanticide. I convict the accused for Infanticide accordingly.

88. That is the judgment of this court.



Aruna Aluthge

Judge

At Lautoka

12th February, 2018

Solicitors: **Director of Public Prosecution for State**

Legal Aid Commission for Accused