KESARAVI TINAIRATU v STATE

COURT OF APPEAL — CRIMINAL JURISDICTION

REDDY P, EICHELBAUM and GALLEN JJA

8, 17 May 2002

[2002] FJCA 84

Criminal law — defences — appeal against conviction and sentence — conviction for murder — non-direction on defence — alternative verdict of Infanticide — Penal Code Cap 17.

The Appellant was convicted of Murder and was sentenced to life imprisonment. The three assessors who assisted the learned judge in the trial, found the Appellant guilty of Murder. The main grounds of the appeal dealt with the judge's failure to direct the assessors on the Appellant's substantive defence and the judge's failure to leave the issue of Infanticide as an alternative to Murder.

Held:

(i) Failure to direct the assessors on the Appellant's main line of defence of not killing the baby constituted serious non-direction. The Appellant was entitled to have her defence put to the assessors in the specific way it was presented. The assessors' opinions must not necessarily have been the same if such directions were given.

(ii) There was at the very least some evidence that at the time of the alleged act constituting the offence the balance of her mind was disturbed, just as there was some evidence that at the time the Appellant had not sufficiently recovered from the effects of giving birth. The possibility that the Appellant was guilty of Infanticide arose, and, the learned judge's failure to consider, and to leave the alternative defence of Infanticide to the assessors, constituted an error of law.

Appeal allowed.

Cases referred to

R v Maxwell (1990) 91 Crim App R 61, cited.

Iowane Taroga v State Crim App Nos 7 & 8/1998; *R v Karolina Adiralulu Crim App No 11/1983*, considered.

A. Wolf for the Appellant

G. Allan for the Respondent

Reddy P, Eichelbaum and Gallen JJA. On 19th November 2001, the Appellant was convicted of Murder, by the High Court (Surman J) at Suva, and sentenced to life imprisonment. The three assessors who assisted the learned judge in the trial, found the Appellant guilty of Murder.

State's evidence

The Prosecution case was that on 27th January 2001, sometime after midday, the Appellant gave birth to a fully grown male infant inside a bathroom in a flat, at Nairai Road in Raiwaqa, Suva. The flat was occupied by the Appellant's sister, her husband and two children. The Appellant lived with them. After giving birth the Appellant wrapped the infant in a sulu and a T-shirt, then placed it in a red bucket, carried the bucket to the upstairs flat and left it inside the bathroom. The upstairs flat was occupied by the witness Unaisi Vakaloloma, with whom the Appellant spent a good deal of her time. According to the witness Mere Cassidy

who is the Appellant's sister, the Appellant was in the bathroom for 1 hour before she came out and went up to Unaisi's flat with a bucket of clothes.

On the 28th January 2001, the Appellant went to the CWM Hospital because she was bleeding heavily. She was examined by Dr Pushpa Wati. The Appellant first told Dr Pushpa Wati that she had aborted a 4-month-old foetus, but later admitted that she had given birth to a fully grown infant the previous day, that she had wrapped up the infant, placed it in a bucket, and left the bucket in the bathroom of her friend's flat.

On the same day at about 11.30 am, Sgt Balwant Singh found the red bucket behind a door, inside the toilet in the flat occupied by Unaisi Vakaloloma. Inside the bucket he found the dead infant totally and tightly wrapped in a sulu and white T-shirt.

On 30th January 2001, Dr Eta Buadromo a pathologist at the CWM Hospital conducted a post-mortem on the infant. She found that the child's lung was inflated — which indicated that it had taken in air after birth. The doctor also found small dark spots on the skin of the abdominal wall, the chest, membrane of the eye and white parts of the eye. According to Doctor Buadromo the small dark spots (petechiae haemorrhage) was caused by the application of external pressure to the chest and the abdominal wall, resulting in the rupture of the blood vessels and bleeding. The doctor also saw an area of haemorrhage on the neck, which could have been caused by birth trauma or manual strangulation. Doctor Buadromo said that the rupture of the blood vessels and the signs of bleeding that she saw could have been caused due to pressure applied to the blood vessels as a result of being tightly and wholly wrapped. Doctor Buadromo concluded that the infant was born alive, and died as a result of suffocation.

The Appellant was interviewed by Detective Constable Malakai Seru on the 31st of January 2001, under caution. The appellant told that Constable that apart from her sister, with whom she lived, she did not tell anyone that she was pregnant. She was concealing the pregnancy because she did not want people to know that the father of her child was a man called Veta and not Jepeca, her boyfriend at the time. She said that she had planned to conceal the child when born, and she intended to do this by wrapping the infant and hiding it somewhere, even if the infant was born alive. She also told Constable Seru that at birth the child was alive, that she heard the child cry, that it was a boy, that she wrapped the child, the umbilical cord and the placenta with some clothes and placed it in a bucket. She said that she knew that her actions would result in the death of the infant, and that she intended to kill the infant. When asked to explain why she killed the child, she replied:

> *I am not working and dependant on my sister. I did not believe Veta will make me pregnant because I have my boyfriend Jepeca. I didn't know who will support my baby.*

She told the Constable that after placing the infant in the bucket, she carried the bucket up to Unaisi's flat and left it inside her bathroom.

At the end of that interview, when asked if she had anything to say, she replied:

> *I wish to say that I admitted killing my baby.*

When formally charged with murder of her child, she said:

> *I admit that I kill my baby. I did this because I knew that no one is going to look after him. I am unemployed. I do not want to bring them more problems. Another thing was that I do not want my other boyfriend to know that I am pregnant.*

State's case

On that evidence, it is not surprising that the Prosecution ran this as a case of Murder. The overarching motive of the Appellant, the Prosecution alleged, was to conceal her pregnancy, and to this end she was prepared to kill the infant if born alive. The Prosecution case was that the infant was born alive, and the Appellant with intent to kill the infant, proceeded to tightly wrap the infant in the t-shirt and the sulu and packed him into the bucket with the head down, carried the bucket to the upstairs flat and left it in the bathroom. As a result of the Appellant's deliberate actions the infant suffocated and died.

The appellant's evidence

The Appellant gave evidence on oath.

The Appellant said that she was not treated very well by her sister Mere Cassidy, she did all the work at home, such as cooking, washing, cleaning up and looking after her sister's children. She said that if she did not do the work, she was spoken to harshly by her sister, and she found that hurtful. She said that she did not tell her sister about her pregnancy for 4 months, and she did not see a doctor or go to a clinic during her pregnancy. She did not ask her sister for help because she did not feel close to her.

She described how she gave birth to the infant unaided in the bathroom lying down on the floor. This is how she described those moments:

> *… I did not know it was the pain of baby coming out — I was still outside watching. After that I came to the bathroom — from there I felt something wants to come out. Then suddenly the water broke and the baby came out.*
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> *When the baby came out I was lying down. I did not see how the baby came out. I was in fear. I heard the cry — like it was far from me and I did not notice anything again. I was unconscious and my mind like I was lost. I was shaking and I was in fear. I was weak. It was quite a long time. I struggled for my life. I was lying down there. I felt nothing. The baby was lying. It was really quite a long time — about 30 minutes. I heard the baby stop crying and the only thing I remember was to touch his left hand and it was down — to check his pulse — he was not breathing. When I touched his pulse. I was really in fear. I did not know what to do seeing the baby there.*
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> *I took the clothes and wrapped him. I just wrapped him, and then I put him in the bucket. I was still shocked for what happened. I could not believe it could be like that. I called for my sister but she didn't hear me. I take the bucket up to Una's house and I wanted to lie down. I did lie down. My sister came up. She was asking what happened. Asking Una what happened.*

The Appellant denied that the baby was breathing when she wrapped him up, and she denied that she suffocated him. She said that she made the damning admissions referred to earlier, but she did not mean to do so. She did it out of fear of the officer who told her at the hospital that she had killed the baby.

The appeal

Non-direction — Ground 5(v)

The petition of appeal sets out five separate grounds of appeal. We will deal with the last ground first, since it deals with the judge's failure to direct the assessors on the Appellant's substantive defence. The Appellant, in her evidence said that the infant was dead when she wrapped him in the T-shirt and the sulu, or at least, she believed that he was dead. According to her evidence the infant stopped crying, she touched his left hand which was down, and felt his pulse, and he was not breathing.

When cross-examined, she insisted that the baby was not breathing when she wrapped him, and she denied that she suffocated him. There was some support for her explanation in Dr Buadromo's evidence when she said that she could not be 100% sure that the baby was suffocated by the wrappings. Two other possible ways in which death could have resulted were suggested to her in cross-examination, and her answers did not rule out the possibility altogether.

Apart from reading a summary of the Appellant's evidence to the assessors the judge did not give any specific directions on the nature and effect of appellant's evidence on the issue. At the end of all of the evidence adduced in the case, including the Appellant's explanation, the judge and the assessors were left in one of three possible positions in the case. First, if they believed the Appellant and accepted her explanation then she was not guilty of Murder as charged. Second, even if they did not believe her and accept her explanation, but if her evidence left them in doubt, she was still not guilty of Murder as charged. Third, if on a consideration of the whole of the evidence in the case, including her explanation, if they were satisfied so as to be sure that the infant was alive and the Appellant knew that he was alive and she wrapped him as described, and did so with intent to kill him, or to cause him some grievous harm, and thereby caused his death, then she was guilty of Murder as charged. Although the judge explained the offence of Murder, as defined in the Penal Code to the assessors, nowhere in the summing up did he deal with the first two positions that we have postulated above.

The facts of the case, and the defence raised by the Appellant, called for specific and clear directions, along the lines we have suggested. No such directions were given. The trial was by a judge assisted by lay assessors. Although the judge was not bound to accept the assessors' opinions nonetheless he is required to take them into account. Failure to direct the assessors on what was, the Appellant's main line of defence, constituted in our view, such serious non-direction so as to render the conviction unsafe. In our view the appellant was entitled to have her defence put to the assessors in the specific way in which it was presented. It cannot be said, that if such directions were given, the assessors' opinions must necessarily have been the same. We therefore uphold this ground of appeal.

Alternative verdict

Ground 5(ii) and 5(iv)

Ground 5(ii) and 5(iv) of the grounds of appeal are directed at the learned judge's failure to leave the issue of Infanticide as an alternative to Murder.

In the Penal Code (Cap 17) Infanticide is defined as follows:

> *205. 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.*

In *R v Karolina Adiralulu, Criminal Appeal No 11 of 1983*, this court said:

> *In section 171 of the Criminal Procedure Code (in which a charge of murder may be reduced to infanticide for the same reasons as render infanticide an offence by section*

205 of the Penal Code) no probative onus rests on the accused. In that situation if infanticide were to be raised as a matter of defence such would not be for consideration unless there is in the evidence for the prosecution or in evidence adduced by the accused, 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. In the substantive offence of infanticide, there being no express provision as to the onus of proof, the onus is upon the prosecution throughout to establish all the elements of the offence beyond reasonable doubt. And, of course, in that offence the elements include the negative proposition as to full recovery and the affirmative as to the disturbed balance of mind.

The Appellant was 24 years old at the time of the offence. She became pregnant in May 2000. Although the state alleged that the Appellant wished to conceal her pregnancy, the evidence suggests that her boyfriend Jepeca, her sister Mere Cassidy, and her friend Unaisi Vakaloloma, all knew about her pregnancy before she gave birth — in the case of Jepeca and Mere Cassidy, well before.

She gave birth alone in the bathroom. She had no pre-birth medical care or advice. She gave birth lying on the floor of her sister's bathroom. She was in the bathroom for an hour from the time she went in, and the time she came out carrying the bucket with the infant's wrapped body inside. The alleged act constituting the offence was committed within that hour. The Appellant herself gave a vivid account of the fear, pain and the anxiety she felt at the time. She talked of hearing the infant cry as if from a distance, of her mind drifting away, of her struggle for life, of the sense of shock she felt at what had happened — and the evidence in our view raised sufficient foundation of facts on which a defence of infanticide could be grounded. There was at the very least some evidence that at the time of the alleged act constituting the offence the balance of her mind was disturbed, just as there was some evidence that at the time the appellant had not sufficiently recovered from the effects of giving birth.

We appreciate that at the trial, for tactical reasons this defence was not pursued by counsel who represented the Appellant, but once the Appellant gave evidence, as we have indicated above, it became incumbent upon the learned trial judge to consider the issue and to direct himself and the assessors accordingly.

The duty of a trial judge where the possibility of an alternative verdict exists, is well understood and was restated by this court in *Iowane Taroga v State, Criminal Appeal Nos 7 and 8 of 1998*. This court said:

… In some cases, of course, such an alternative simply does not arise on the facts as they have unfolded in the evidence. Equally the possibility of such a verdict may be so contrary to the defence case that it would be wrong to suggest it. The judge must decide in each case whether, on the evidence, such a possibility exists and, where it does, give a clear and adequate direction on how the assessors should approach it.

Later in their judgment, and dealing with the particular facts of that case, the court said:

It is right, as counsel for the respondent points out, that the defence of the second appellant did not suggest manslaughter as a possibility but the evidence as a whole undoubtedly left such a possibility open and the lack of such a direction was a serious omission that may have resulted in a miscarriage of justice. The danger here, as suggested by Ackner L J in *R v Maxwell* (1990) 91 Crim App R 61 and 68, *is that, in the absence of an alternative, the assessors may have convicted of murder out of a reluctance to see the appellants get away with actions that they found unlawful.*

On the evidence as it unfolded the possibility that the Appellant was guilty of infanticide arose, and, the learned judge's failure to consider, and to leave the alternative defence of Infanticide to the assessors, constituted such an error of law that it would be unsafe to allow the conviction to stand. We uphold this ground of appeal.

Unbalanced directions

Ground 5(i) and (iii)

These two grounds complain that the summing up was not balanced, since the judge overemphasized the incriminatory parts of the evidence, without balancing that with parts that were exculpatory or favourable to the Appellant. This imbalance is said to have arisen from the way in which the learned trial judge dealt with Dr Buadromo's evidence, and the interview of the Appellant by Constable Seru. In view of the conclusions that we have arrived at in respect of grounds 5(ii), (iv), and (v), we find it unnecessary to deal with these grounds at length or to arrive at any conclusions thereon.

In the course of his summing up the learned judge drew the assessors' attention to certain specific questions put to the appellant by Constable Malakai Seru, and the answers to those questions. These questions and the answers were highly incriminatory of the Appellant. It is settled law that when considering pre-trial statements of accused persons, the entire statement has to be considered, in the context of whole of the evidence in the case. In our view it is undesirable for a trial judge to direct attention to specific questions and answers without giving a further direction that in determining the issue of guilt or innocence, they must weigh up the effect of the statement as a whole.

Conclusion

We uphold grounds 5(v), (ii) and (iv)of the grounds of appeal. We allow the appeal and set aside the conviction for Murder, and order a new trial before another judge. If the Appellant wishes to apply for bail, application can be made to the High Court.

Appeal allowed.