IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0042 OF 2000S
(High Court Criminal Case No. HAC0008/00S)

BETWEEN:

ILIBERA VEREBASAGA

Appellant

AND:

THE STATE

Respondent

Coram: Eichelbaum JA, Presiding Judge
Tompkins JA
Smellie JA

Hearing: Tuesday, 20 November 2001, Suva

Counsel: Mr. A.K. Singh for the Appellant
Mr. J. Naigulevu for the Respondent

Date of Judgment: Thursday, 22 November 2001

JUDGMENT OF THE COURT

This appeal relates solely to the terms of the summing up in a murder trial. It was not in dispute that on 9 November 2000, an hour or so after giving birth, the appellant killed her male child by burying him alive in a swamp. At the trial the only issue was whether the crime was murder or infanticide. In the unanimous opinion of the assessors, it was the former and the Judge (Shameen J) agreed. The formal grounds of appeal were:

> *1. That the Learned Judge erred in law in not adequately and/or sufficiently and/or misdirected herself and/or the assessors on law or purpose of the offence of infanticide.*

2. That the Learned Judge erred in that she did not properly and/or adequately and/or misdirected herself on the issues of the Standard and Burden of proof.

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."

The appellant, together with her child from a former relationship and her current partner were living with and dependant on appellant's mother. The family was subsisting in difficult social conditions where a further child would have exacerbated problems and been unwelcome. The child the appellant was carrying was from her former relationship, but she had been unable to bring herself to tell her current partner the truth about that. Unsurprisingly there was evidence that during her pregnancy, the appellant was depressed. Evidence regarding the appellant's mental state after the event was conflicting. In a statement afterwards she said she killed the baby because he was not the child of her present partner. While it is impossible to avoid feeling sympathy for the appellant in the predicament in which she found herself, we are satisfied that the grounds advanced do not justify allowing the appeal.

In summing up the Judge gave the assessors the definition of infanticide, from which it is self evident that what is required is that at the time of her act the balance of the appellant's mind was disturbed because she had not fully recovered from the effects of childbirth. The Judge chose not to put any gloss on or give a further explanation of those provisions nor did the nature of the case require it. A Judge is free to explain to the jury that the purpose of the legislation creating the offence was to afford women mitigation from the consequences of murder where the balance of their minds had been disturbed through childbirth, but it is not obligatory for Judges to give such an explanation. Normally counsel would make the point anyway. Counsel cited a passage from Smith & Hogan's *Criminal Law* (6th Edn, 362) rehearsing a number of reasons why infanticide should be considered less reprehensible than other forms of homicide. Without doubting the correctness of that proposition, we do not accept it was necessary for the Judge to explain the nature of the offence to the assessors in such terms.

Counsel submitted that the Judge ought to have given greater emphasis to the evidence about the unfortunate and difficult social environment in which the appellant was living. It was not suggested that the Judge's summary of the evidence in this regard was inaccurate, merely that it was unduly brief. In a case like the present, if the Court is satisfied that at the time the balance of the accused's mind was disturbed, it has to decide whether this was because the accused had not fully recovered from the effects of childbirth (or whether there was at least a reasonable doubt about that). On that issue, the circumstances in which the accused had been living may be relevant. They may have impeded the accused's

recovery. On the other hand the Court might regard them as the cause of the symptoms the accused was exhibiting.

What the Judge said under this heading was:

> *"In considering these matters, you may consider the accused's statement to the police, in which she told the police she had killed the child because it was not her partner's, the evidence of her partner of her depressed and withdrawn behaviour before the child was born, the poverty and deprivation of her home circumstances, her mother's attitude to the possibility of her pregnancy, the lack of support from the real father of the child and her own lack of education and resources. You may also consider that both Doctors gave evidence that the accused was depressed a few hours after childbirth."*

In the circumstances of this case we do not criticise what was said (it was certainly not unfavourable to the appellant) but perhaps it bears emphasis that the issues are whether at the time the balance of the accused's mind was disturbed, and whether this was due to the causes set out in the statute. Counsel told us that in the United Kingdom, there had been a Report by a Law Revision Committee recommending that the available causes should be expanded by the inclusion of environmental and family stress, but this recommendation had not been actioned.

Counsel emphasised the evidence which tended to show that the appellant's mind was or may have been disturbed. As already noted, there was also evidence the other way. The Judge appropriately summarised the testimony relevant to this issue, the critical and for practical purposes the only issue in the case. The conflicting possibilities were advanced by counsel at the trial and fairly put in the summing up. It was for the assessors and the Judge

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to resolve them, and in the absence of error in the trial process or the summing up, there is no basis for an appellate court to interfere with the outcome. The absence of complexity is shown by the fact that after a summing up from 930 to 10 am, by 1045 am the assessors had reached their conclusions. There is no merit in the first ground.

The second ground of appeal encompassed two separate propositions. The first focussed on the Judge's direction regarding the assessment of the appellant's own evidence. The passage on which this submission was based stated that it was the assessors' duty to consider the appellant's evidence carefully and assess it along with the other evidence in the case in the same way as they would treat the other evidence. The complaint was that this could be misunderstood as meaning that the appellant carried the onus of proving her assertions. But immediately preceding the passage complained of was the following:

> ***"The Accused gave evidence on her own behalf. She was not obliged to do so. The burden of proving this case lies squarely on the Prosecution and never shifts to the accused."***

When the relevant portion of the summing up is read as a whole, the appellant's contention is unsustainable.

The second proposition related to a passage to the effect that the issue was whether the appellant killed her child intentionally or knowingly, and whether at the time she did so, the balance of her mind was disturbed as a result of the effects of childbirth. The complaint was that the Judge did not immediately tell the assessors there was no onus on the

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appellant to prove that her mind was disturbed at the relevant time.

In fact the summing up continued as follows:

> ***"You must remember that it is the Prosecution's duty to prove malice aforethought, and failing proof beyond reasonable doubt of that, the Prosecution's duty to prove that the accused did a wilful act thus causing the death of her child whilst suffering from the effect of childbirth."***

A little later the Judge said:

> ***".....you must consider all the circumstances of the case to decide whether the accused killed her child with malice aforethought or whether she did so whilst the balance of her mind was disturbed. You must remember that it is for the Prosecution to prove that the accused was not mentally disturbed by childbirth, it is not for the defence to prove that she was."***

Later there is yet a further passage emphasising that in respect of either offence, the onus of proof was on the prosecution.

In the light of these passages there is no possible ground for complaint regarding the summing up on these grounds. It may be helpful however to add the following.

Where infanticide is the only offence charged, clearly the onus is on the prosecution, in the usual way, to prove each element of the offence: *R v Karolina Adiralulu*, Criminal Appeal No. 11 of 1983, judgment July 1983 at page 8.

Where the charge is murder, and the defence wishes to raise infanticide as an

alternative for the Court's consideration, the position is not so straightforward. We endorse the following passage from the judgment of this Court in *R v Karolina Adiralulu*, also at page 8:

> *"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."*

Result

Appeal dismissed.

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Eichelbaum JA, Presiding Judge

FIJI COURT OF APPEAL

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Tompkins JA

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Smellie JA

Solicitors:

Messrs. A.K. Singh Law, Nausori for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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