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

CRIMINAL APPEAL NO. AAU 13 OF 2015
(High Court No. HAC 174 of 2011)

BETWEEN : **SUSANA CAGIMAIRA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka JA**
A Fernando JA
Nawana JA

Counsel : **Mr S Waqainabete for the Appellant**
Mr L Burney for the Respondent

Date of Hearing : **17 September 2019**

Date of Judgment : **3 October 2019**

JUDGMENT

Prematilaka JA

[1] I have read in draft the judgment of Fernando JA and agree with the reasons and conclusions.

Fernando JA

The Appeal

[2] The Appellant had appealed against her conviction for the offence of murder.

The charge

[3] The Appellant had been charged with the offence of Murder contrary to section 237 of the Crimes Act 2009. According to the particulars of offence "*Susana Cagimaira between the 30th day of November 2010 and 1st December 2010 at Lautoka in the Western Division, murdered her child"*. The killing was of her new born baby soon after giving birth.

Grounds of Appeal filed by the Appellant when seeking leave

[4] The Appellant in seeking Leave to Appeal against conviction had filed the following grounds of appeal:

(i) "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.

(ii) 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 established by the prosecution beyond reasonable doubt.

(iii) 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 of the offence of Murder.

(iv) The learned Trial Judge erred in law and in 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." (verbatim)

Grounds of upon which leave had been granted by a Single Judge

[5] The learned Single Judge of this Court refused to grant leave to appeal against grounds (i) and (iv) but granted leave in respect of grounds (ii) and (iii). Granting of leave on the said grounds meant that the learned Single Judge left it open for the full Court to consider whether the Appellant should have been convicted of the lesser of offence of manslaughter on the basis of Infanticide. There is no application for renewal before the full Court in respect of the two grounds for which leave has been refused.

[6] In refusing to grant leave on ground (i), on the basis that it is unarguable, the learned Trial Judge had said that the Assessors and the Trial Judge had found the fatal injury on the base of the head was not accidental but caused by a deliberate conduct by stepping on the head using severe force, although the pathologist could not rule out that the fatal injury could not have been caused by accidental stepping on the head. Counsel for the Respondent in his written submissions filed at the leave stage had stated that whilst it was open for the learned Trial Judge to believe the version of the Appellant that it was an accident, it was also open for him and the Assessor Panel to reject it. In refusing to grant leave on ground (iv), on the basis that it is unarguable, the learned Trial Judge had said *"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."* (emphasis placed by me)

[7] In granting leave on grounds (ii) and (iii) the learned Single Judge had said that *"the accused has the onus to prove the balance of her mind was disturbed by either one of the*

three factors set out in section 244(1)(c) of the Crimes Act 2009 and the standard of proof is the balance of probability. 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 on infanticide. Apart from reciting the statutory provision on infanticide, the learned trial judge offered no 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."*

Position taken up by the State in the appeal

[8] Counsel for the State in his written submissions filed before this Court states: *"Whilst the evidential foundation for a verdict of infanticide was relatively weak-indeed the appellant did not expressly advance the defence at trial-the fact remains that the trial judge considered there was sufficient evidence to leave the defence to the assessors. In these circumstances, this Court could not be sure that the assessors would inevitably have rejected the partial defence of infanticide had they been adequately directed on the law".* Counsel for the State had suggested that a retrial be ordered.

[9] I have however decided to look into the conviction of the Appellant for the offence of Murder and this has necessitated me to look into not only the elements of Murder, but Manslaughter and Infanticide as well.

Law pertaining to the offences of Murder, Manslaughter and Infanticide.

[10] In defining the offence of **Murder, section 237 of the Crimes Act 2009** states:

"*A person commits an indictable offence if —*

(a) the person engages in conduct; and

(b) the conduct causes the death of another person; and

(c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.

Penalty — Mandatory sentence of Imprisonment for life, with a judicial discretion to set a minimum term to be served before pardon may be considered."

[11] In defining the offence of **Manslaughter, section 239 of the Crimes Act 2009** states:

"*A person commits an indictable offence if—*

(a) the person engages in conduct; and

(b) the conduct causes the death of another person; and

(c) the first-mentioned person—

(i) intends that the conduct will cause serious harm; or

(ii) is reckless as to a risk that the conduct will cause serious harm to the other person.

Penalty — Imprisonment for 25 years."

[12] In defining the offence of **Infanticide, section 244 of the Crimes Act 2009** states:

"*(1) A woman commits the indictable offence of infanticide if—*

(a) she, by any willful 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.

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

(3) In circumstances provided for in sub-section (1), notwithstanding that they were such that but for the provisions of this section the offence would have amounted to murder, the woman shall be guilty of infanticide, and may be dealt with and punished as if she had been guilty of manslaughter of the child."

[13] It is clear from the definition of murder and manslaughter that there is a physical element and a fault element set out in the said offences and in the absence of either of which, the offence will not be constituted in view of the provisions of **section 14 of the Crimes Act**.

[14] A physical element of an offence as set out in **section 15 of the Crimes Act** and as relevant to the facts of the case, is '*conduct'*, which according to the said section means *"an act, or an omission to perform an act…"* To 'engage in conduct*" means to "do an act or omit to perform an act".*

[15] According to **section 16 of the Crimes Act,** "*conduct can only be a physical element if it is voluntary*," that is if it is a product of the will of the person whose conduct it is. An "*unwilled bodily movement*" is not voluntary under **section 16(3)(a)** of the said Act.

[16] According to **section 17(b) of the Crimes Act,** an omission to perform an act can only be a physical element if the law creating the offence impliedly provides that the offence is committed by an omission to perform an act, that by law there is a duty to perform and according to **section 241 of the Crimes Act,** it is the duty of every person having charge of another who is unable by reason of age to withdraw from such charge to provide for that other person the necessaries of life and shall be deemed to have caused any consequences which adversely affects the life or health of the other person by reason of any omission to perform that duty.

[17] According to **section 16(4) of the Crimes Act,** "*An omission to perform an act is only voluntary if the act omitted is one which the person is capable of performing.*"

[18] According to **section 18(1) of the Crimes Act,** "*A fault element for a particular physical element may be intention, knowledge, recklessness or negligence*," and according to **section 19 (1)** of the said act, "*A person has intention with respect to conduct if he or she means to engage in that conduct*."

[19] According to **section 20 of the Crimes Act** "*A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events*."

Prosecution evidence in Brief:

[20] PW 1, S. Nasilasila testifying before the Court had stated that she and the Appellant worked at Bounty Island Resort, she worked at the restaurant while the Appellant at the reception. She had known the Appellant since 2009. On the day of the incident she had met the Appellant at her room. The Appellant had said her stomach was painful. The Appellant was lying on her bed. Nasilasila while in the Appellant's room had fallen asleep. When she woke up the Appellant had told her that she was bleeding and Nasilasila had seen a baby lying on the bed and the baby was crying. The Appellant had tried to stand up and cut the umbilical cord with scissors. Nasilasila had told the Appellant that she will go and look for help. The Appellant had told her that she doesn't need help and wants to kill the baby. Nasilisila had then run out of the room looking for help. She had then met her husband and told him what has happened and what the Appellant had told her. She had then run to the office and reported to the Resort Manager.

[21] Under cross-examination Nasilasila had denied handing over the scissors to the Appellant, taking the baby to the bathroom and wrapping the baby with a bed sheet.

[22] PW 2, T. Nasilasila, the husband of PW 2 had corroborated the evidence of his wife Nasilasila about her running out of the Appellant's room and telling him what had happened and what the Appellant had told her. His wife according to him was confused and scared. When he looked into the room of the Appellant he had seen the Appellant in the bathroom wearing a towel. He had heard the baby crying inside the bathroom and told the Appellant not to kill the baby. He had then accompanied his wife to the office and informed the Manager and PRO about what had happened. They had then gone to the Appellant's room.

[23] PW 3, T. Rogo, the Asst. Manager of Bounty Island Resort had said that around 10.00-11.00 pm, PW 1 had told her that the Appellant had given birth to a baby. PW 3 had then informed the over-all Manager and the nurse. PW 3 had then gone to the room of the Appellant. The Appellant had told her that the baby was dead and in the bathroom. She had known the Appellant for about 7-8 years. She had asked the Appellant earlier whether she was pregnant but the Appellant had replied in the negative.

[24] PW 4, L. Namua had said that on receipt of information that the Appellant had given birth to a baby she had gone to the Appellant's room. The Appellant was sitting down. There had been blood stains on the bed and floor. The Appellant had told her that she had bled. It was a large amount of thick blood. The Appellant had not told her that she had a baby. While she was in the Appellant's room the nurse had come. She had been asked by the nurse to bring a bag which was inside the bathroom. On removing stuff from the bag they had seen the baby wrapped in cloth. She had felt sorry and gone out of the room.

[25] PW 5, L, Vulakoro, was a nurse who worked in the resort. On receipt of information about the delivery of a baby she had gone to the room of the Appellant and seen the Appellant dressed up nicely sitting on a bed. When asked initially the Appellant had denied that she delivered a baby. The Appellant had said that she passed clots of blood in the toilet. When she persisted in her questioning, the Appellant had told her that the baby was in the bathroom. She had then asked PW 4 to get the bag. On opening the bag she had seen the baby wrapped in a sulu. There had been a cut between the eye brow and eye.

The Appellant had told PW 5 that she stood up, dropped the baby and stepped on the baby by accident.

[26] PW 6, L. Bola, the PRO at Bounty Island Resort had said that the Appellant had wanted her to cover the night shift as she was having a stomach ache. She had been at the front office when PW 1 had come running and informed her that the Appellant had given birth to a baby. PW 1 had been crying and looked scared and confused. About 4 months prior to the incident the Appellant had asked her to massage her stomach. After massaging the stomach PW 6 had told the Appellant that she is pregnant. The Appellant had told her that she will not keep the baby and she will have an abortion and kill the baby. Thereafter the Appellant had been avoiding her.

[27] PW 7 and 8 were police witnesses. PW 9, Dr. P. S. Goundar had conducted the post mortem examination on the body of the deceased baby. According to his findings the lungs were expanded and pink in appearance which meant that the baby had breathed after birth and taken air. According to the doctor: *"There was extensive hemorrhage between skull and subcutaneous tissues. There was extensive subcutaneous hemorrhage over all the parts of the brain. There was extensive fracture of the base of the skull over the orbital and nasal bone. The cause of death was subarachnoid hemorrhage due to a crush injury. According to him the head should have been between two hard surfaces to cause this injury and could have been caused by a person stepping on the baby with quite severe force. There was also a cut injury on left side of nose just below bridge of nose measuring 1 cm in length".* Under cross-examination he had said that the baby was a full time baby. He had also said that if a person *"accidentally steps on an infant's head, the injury will depend on the force of stepping on the head".*

Appellant's evidence before the Trial Court:

[28] Appellant testifying before the Trial Court had said that she was a single and had two children aged 5 and 7 years. The baby born to her on the day of the incident was her third child. She had been a receptionist at Bounty Island Resort and was residing in the staff

quarters. On the day of the incident she was scheduled to be on night shift but had asked PW 6 to cover for her as she was having abdominal pain. She had also informed the assistant manager about her condition. She had got to her room and had massaged her stomach with oil. Then PW 1 had come and she had told her about the abdominal pain. The Appellant had been lying on the bed while PW 1 laid down on the floor. Then the Appellant noticed that she was bleeding. After sometime she felt that she had delivered a baby. She had been *"scared, confused, shocked it was first time it happened to me like that."* (verbatim) She had informed PW 1 who was shocked and confused and ran out of the room, when she had asked PW 1 to help her. After a while PW 1 had returned. She had then asked PW 1 to give her a scissors to cut the umbilical cord. When she was given the scissors the Appellant had said *"All I know was that there was spirit inside of me I just cut anywhere of umbilical cord*". (verbatim) PW 1 had run out of her room when she cut the umbilical cord. Thereafter the Appellant had gone to the bathroom to wash herself, to shower, leaving the baby on the bed. While she was at the shower PW 1 had returned. The Appellant had asked PW 1 to bring the baby to her so that they could clean the baby. At this stage too blood was coming out and she was finding it difficult to stand. PW 1, as requested had brought the baby to the Appellant wrapped in the Appellant's sulu. She could only see the head of the baby. The Appellant had said that PW 1 had put the baby right beside where she was sitting under the shower. PW 1 had left the room again. The Appellant had thought PW 1 would return. She had expected someone to come to help her. Thereafter she had heard PW 1's husband, PW 2, calling out to her. PW 2 had told her that PW 1 had run away. Thereafter the Appellant had gone on to say: *"Then I tried to stand up the baby was just lying beside me. All I can see was head of the baby the rest of the body covered with my sulu I stand up bathroom was slippery I was trying to come to the side of the baby and all of a sudden when I felt that I accidentally step on head of the baby and then I tried to sit down beside the baby because bath room was slippery."* (verbatim) She says that she was shocked when she stepped on the head of the baby as blood was still coming out of her. She had been sitting for about 30 minutes beside the baby and no one had come to help her. Thereafter she had crawled into her room removed the clothes she was wearing and put them inside her bag. After some time she had felt that the baby was dead as he was not crying. She had then put the baby inside

the bag. Having put the baby in the bag she had worn her towel and come and sat on the bed. After some time PW 4 Luisa, PW 3, the assistant manager and PW 5, the nurse had come into her room. When the nurse came she had asked where the baby was and on being told that the baby was inside the bag in the bathroom Luisa had brought the bag. The Appellant had said that she did not know that she was pregnant, for even in respect of her two other children she had come to know that she was pregnant only when she was 5-6 months. She had continued to have her menstruation. She had admitted that some staff had asked her whether she was pregnant and she had said that she did not know. She had said, that had she known that she was pregnant she would have looked after the baby.

[29] Under cross-examination she had insisted that it was PW 1 who had brought the baby into the bathroom when told, that PW 1 had denied it. The Appellant had said that she does not know whether she told PW 1 that she wanted to kill her baby. The Appellant had said that she could not recall when her menstruation stopped. The Appellant denied having told PW 6, Losana that she will have an abortion. She had then been contradicted on that matter with her police statement. She had said that PW 1 had no problems with her to say anything negative about her. The Appellant when asked as to why she had not called for assistance during the 30 minute period she was in the bathroom had said she was weak and couldn't even go to make a call. She had denied that she told the nurse that she had not given birth to a baby.

The basis for the conviction of the Appellant for Murder:

[30] The basis for the conviction of the Appellant for murder, appears to be that the Appellant had deliberately trampled her new born baby. As stated at paragraph 15 above, according to **section 16 of the Crimes Act,** *"conduct can only be a physical element if it is voluntary,"* that is, if it is a product of the will of the person whose conduct it is. An *"unwilled bodily movement*" is not voluntary. I have examined the summing up in detail and find that all that the learned Trial Judge had said in this regard is: *"The question you have to decide in this element is if the accused stepped on the face of the baby was it intentional to cause the death of the baby as the prosecution claims or*

is it an accident as claimed by the accused." In directing the Assessors in this manner the learned Trial Judge appears to have erred by mixing up the physical element with that of the mental element of an offence, when each of those elements need to have been separately established. The proper direction should have been *"Did the accused step on the face of the baby willfully or was it an unwilled bodily movement, namely by accident"* in relation to the physical element. In my view the error on the part of the learned Trial Judge in this regard becomes important as there is no evidence whatsoever to show that the Appellant willfully stepped on the head of the baby, other than what she is alleged to have told PW 1 about her intention to do so to. Appellant had said that she does not know whether she told PW 1 that she wanted to kill her baby. The only evidence in regard to the physical element is that of the Appellant who said that it was an accident. The doctor who performed the post-mortem examination is unable to exclude that it could have been an accident. I am however of the view that this error on the part of the learned Trial Judge would not have caused any prejudice to the Appellant as a willful omission to perform an act is considered a physical element of the offence. The willful omission would be failure to take due care not to step on the baby in view of her duty under section 241 of the Crimes Act as stated at paragraph 16 above.

[31] I have set out at paragraphs 16 and 17 above how an omission to perform an act becomes a physical element of the offence. Appellant not taking due care not to step on the baby and her behavior, having stepped on her new born baby in not taking any steps to find out what has become of the baby and remaining without calling for any form of assistance for 30 minutes as per her own testimony, clearly satisfies the physical element of the offence of murder.

[32] In the case of **Miller [1983] 2 AC 161**, D fell asleep on his mattress while smoking a cigarette. When he awoke, he saw that his mattress was smoldering but, instead of calling for help, he simply moved into another room, thereby allowing the fire to flare up and spread. He was convicted of arson, for not starting the fire but for failing to do anything about it. In **R v Evans (Gemma) [2009] EWCA Crim. 650** the appellant obtained heroin and gave some to her sister who self-administered the drug. The appellant was concerned

that her sister had overdosed so decided to spend the night with her but did not try to obtain medical assistance as she was worried she would get into trouble. When she woke up she discovered that her sister was dead. She was convicted of manslaughter and appealed. The Court of Appeal dismissed her appeal.

[33] It cannot be said that the Appellant did not know the consequences of stepping on the head of a new born baby, and thus satisfies also the fault element, namely knowledge, of the offence of murder as stated at paragraphs 18 and 19 above.

Could the Appellant have been convicted of the offence of infanticide?

[34] It now remains to be seen whether the Appellant could have been convicted of the offence of infanticide as set out in paragraph 12 above, on the basis of the directions to the assessors in the summing up and evidence available in this case. **Section 24(2) of the Court of Appeal Act** states:

> " *Where the appellant has been convicted of an offence, and the judge could on the information have found him guilty of some other offence, and on the findings of the judge it appears to the court of Appeal that the judge must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity*."

[35] The single Judge of this court had stated in his Ruling on Leave to Appeal: *"At the trial, the appellant did not rely upon infanticide as one of her defences...The accused has the onus to prove the balance of her mind was disturbed by either one of the three factors set out in section 244(1)(c) of the Crimes Act 2009 and the standard of proof is the balance of probability. 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 on infanticide. Apart from reciting the statutory provision on infanticide, the learned trial judge offered no 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." The learned Single Judge's statement regarding an '*evidential basis'* is because he at the time of the Ruling did not have the benefit of the court records. I do agree that apart from reciting the statutory provision on infanticide, the learned trial judge offered no assistance to the assessors regarding how they were to consider infanticide as it related to the facts established by evidence led at the trial. In the case of **Merewalesi Baleiniusiladi v The State Cr. App AAU 0070 0f 2010 (26 February 2016)**, this Court said "*Whether to convict for murder or Infanticide depends on the facts and circumstances of each case…The Judge must place before the assessors the relevant evidence to consider not merely the physical aspect of birth but also the circumstances surrounding the child birth. The judge must explain the availability of the option to convict for infanticide in the attending circumstances of the case*."

[36] I do not agree with the submissions of the State that "*the evidential foundation for a verdict of infanticide was relatively weak-indeed the appellant did not expressly advance the defence at the trial*". The learned Counsel for the State had in his written submissions stated: "*In the usual course, if a conviction is quashed as a result of error by the trial Judge, a retrial should follow unless a retrial would not be in the interests of justice. The appellant has served almost 5 years of a life sentence for murder. Nevertheless, it is submitted that murder of a new born baby is an offence of the utmost gravity and, in all the circumstances of this case, it is manifestly in the interests of justice that retrial is ordered".*

[37] I am of the view that to order a retrial in respect of an offence that had been committed 9 years ago and where the Appellant had served almost 5 years will not be in the interests of justice. In the case of **Merewalesi Baleiniusiladi –v- The State,** referred to earlier, a mother had killed her baby soon after delivery after smothering her. She had been convicted of murder by the trial court but on appeal, convicted by this Court of

infanticide as the trial Judge had failed to give adequate directions to the Assessors. No re-trial was called for in that case by the State presumably because almost 7 years had elapsed since the commission of the offence and her conviction, by the time the appeal came to be heard.

[38] I am of the view that there was indeed an evidential foundation for a verdict of infanticide, based on the testimony of the Appellant. I do not think that an accused has to expressly state that she is advancing the defence of Infanticide or use the legal terminology set out in section 244 of the Crimes Act to advance the defence of infanticide. If from the evidence as a whole it is clear that an accused can avail herself of such defence that would suffice.

[39] It is clear that the causing of the death of the Appellant's child had occurred less than an hour after the delivery. The Appellant in her testimony before the Court had said after she had delivered the baby she had been *"scared, confused, shocked and weak, it was first time it happened to me like that."* (verbatim). Even PW 1 who saw the delivery was shocked and confused and ran out of the room. When she had the scissors the Appellant had said *"All I know was that there was spirit inside of me I just cut anywhere of umbilical cord".* The new born baby had been placed right beside her when she was under the shower with blood coming out of the Appellant and splashed around her in the bathroom. According to the unchallenged evidence of the Appellant after having accidentally trampled the baby she had been sitting beside the baby for about 30 minutes, without calling for help. As submitted by Counsel for the Appellant at the hearing she was all alone in the room without anybody to help her for quite sometime. According to the Appellant she had put the dead baby inside a bag in the bathroom and covered herself with a towel and gone and sat on the bed.

[40] In my view the said evidence falls squarely under the provisions of section 244(1)(c) referred to at paragraph 12 above, namely "*A woman commits the ... offence of infanticide if she, by any willful act or omission, causes the death of her child, and the child is under the age of 12 months; and at the time of the act or omission* <u>*the balance of*</u>

her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child." The willful act on the part of the Appellant was, of taking her new born baby to the shower where there was blood and water spilt around and the willful omission was, of not calling for assistance when she accidentally stepped over the baby's head. I do not think that one needs a Psychiatrist to explain whether the balance of the Appellant's mind was disturbed or not and whether the Appellant had fully recovered from the effect of giving birth to her child within 30 minutes of the delivery, especially in the circumstances of this case.

[41] The fact that Appellant had tried to conceal her pregnancy to some of those who had questioned her and the fact that she had told some persons that she intended to do an abortion or kill the baby, should not outweigh her mental status soon after delivery. In the case of **Merewalesi Baleiniusiladi v The State** referred to earlier, this Court said: "*Absence of intention or knowledge is not a requirement to convict an accused for infanticide….even if an appellant had the intention or knowledge the appellant has to be convicted for …offence of Infanticide if there is evidence that the balance of mind was impaired due to circumstances relating to child birth…*"

[42] It is to be noted that she had not hidden herself from the public eye when she delivered the baby, nor had she disposed of the dead body of her baby. She had in fact sought permission from the Assistant Manager to rest in her room complaining of abdominal pain and had got PW 6 to cover her work that night, prior to delivery of the baby. The Appellant had PW1 in her room when she delivered her baby.

[43] I am also of the view that a distinction needs to be drawn between raising the defence of diminished responsibility and infanticide. **Section 243 of the Crimes Act 2009** in defining the defence of diminished responsibility states:

> "(1) *When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded*

development of mind or inherent causes or induced by disease or injury) as substantially to impair—

(a) the person's capacity to understand what the person is doing; or

(b) the person's capacity to control the person's actions; or

(d) the person's capacity to know that the person ought not to do the act or make the omission —
the person is guilty of manslaughter only.
(2) on a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.
(3) When 2 or more persons unlawfully kill another, the fact that 1 of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons."

[44] To prove that the balance of a woman's mind is disturbed by reason of her not having recovered fully recovered from the effect of giving birth to a child and especially 30 minutes after child birth is not arduous, as proving that the accused at the time of causing death was in *"such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair*" his capacity to understand, to control or to know what he is doing. The former condition is something within the knowledge of many while the latter needs some form of medical evidence. In **Blackstone's Criminal Practice 2015, F 10.8** it is stated: "*Expert opinion may only be received on a subject calling for expertise, which a lay person, such as magistrate or a juror, could not be expected to possess to a degree sufficient to understand the evidence given in the case unaided. If the tribunal of fact can form its own opinion without the assistance of an expert, the matter being within its own experience and knowledge expert opinion evidence is inadmissible because it is unnecessary (Turner [1975] QB 834, per Lawton LJ at p 841, applied in Loughran [1999] Crim. LR 404). Thus a psychologist or other medical expert will not be permitted to give an opinion on the likely deterioration of memory of an ordinary witness (Browning[1975] Crim. LR 227).*" At **F 10.2** of the said book, evidence of a person's age (Cox[1898] 1 QB 179 or the general appearance of his state of health, mind or emotion have been cited as other examples where expert evidence is not necessary.

[45] In the **Seventh Australian edition of Cross on Evidence at 29050** it is stated: "*If the court comes to the conclusion that the subject of investigation does not require a sufficient degree of specialized knowledge to call for the testimony of an expert, evidence of opinion will generally be excluded. The danger of this evidence is that it dresses up matters which are within the ordinary experience of the tribunal of fact in a beguiling scientific garb which may conceal the blemishes within*." In **R v Weightman [1990] 92 Cr App R 291** a psychiatrist's evidence of how a person not suffering from mental illness is likely to react to the stresses and strains of life has been rejected. Likewise, it is for the jury to make decisions about the accused's reaction to provocative acts (**R v Turner [1975] QB 834**), about whether the sexual insecurity of the accused would affect his dealings with women (**R v Loughran [1999] Crim. LR 405(CA**), or whether the passive response to sexual abuse by a child is indicative of the falsity of its accusation (**R v C [1993] 60 SASR 467 (FC)**, or whether the accused was likely to succumb to temptation (**R v Massey [1994] 62 SASR 481**).

[46] In the Australian High Court decision in **Clark v Ryan [1960] 103 CLR 486** the court said: "*the expert will not be permitted to point out to the jury matters which the jury could determine for themselves…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.*".

[47] In the Canadian case of **R. v. Borowiec 2016 SCC 11 [2016] 1 S.C.R. 80 (Supreme Court of Canada)** it was held:

> "*The question of the meaning of the phrase "her mind is then disturbed"* (appearing in section 223 dealing with the offence of Infanticide in Canada) *is one of statutory interpretation. The grammatical and ordinary sense of the words, their place within the Criminal Code, the provision's legislative history and evolution, and the jurisprudence interpreting the phrase "her mind is then disturbed" do not support the conclusion that Parliament intended to restrict the concept of a disturbed mind to those who have "a substantial psychological problem". Rather, the phrase "mind is then disturbed" should be applied as follows: (a) the word "disturbed" is not a legal or medical term of art, but*

should be applied in its grammatical and ordinary sense; (b) in the context of whether a mind is disturbed, the term can mean "mentally agitated", "mentally unstable" or "mental discomposure"; (c) the disturbance need not constitute a defined mental or psychological condition or a mental illness. It need not constitute a mental disorder under S 16 of the Criminal Code or amount to a significant impairment of the accused's reasoning faculties; (d) the disturbance must be present at the time of the act or omission causing the "newly-born" child's death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or of lactation; (e) there is no requirement to prove that the act or omission was caused by the disturbance. The disturbance is part of the actus reus of infanticide, not the mens rea; (f) the disturbance must be "by reason of" the fact that the accused was not fully recovered from the effects of giving birth or from the effect of lactation consequent on the birth of the child."

[48] In **Borowiec** it was also said based on his assessment of the evidence, the trial judge was entitled to conclude or have a reasonable doubt that B's mind was "*disturbed*" at the time of the offences despite any indication of rational behaviour and wilful blindness. In the instant case too one may argue that certain actions on the part of the Appellant gives an indication of rational behavior.

[49] In **State –v- Alena Mausa HAC 23 of 2012** Justice Aluthge of the High Court of Fiji sitting at Lautoka, rejecting the psychiatric evidence and relying on the evidence of the accused stated: "*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". Earlier on in his judgment he had stated: "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*."

[50] I therefore convict the Appellant for the offence of Infanticide.

Sentence:

[51] It now behooves this Court to consider the issue of sentence. The Appellant had served 5 years since the imposition of her sentence by the High Court. The maximum penalty for infanticide is the same as that of manslaughter according to **section 244(3) of the Crimes Act** as mentioned at paragraph 12 above. The maximum penalty for manslaughter is 25 years according to **section 239** of the said Act.

[52] The tariff in sentencing in cases of infanticide has ranged between binding over orders, conditional discharges, and suspended sentences, the maximum been a period of one year imprisonment imposed on the convict in **State v Adigakula** [1990] HAC 11/90 S. In **State v Evangeline Kiran Nair** [1990] HAC 32/89S 9 April 1990, the convict was bound over to be on good behavior for 1 year, following the sentence in **State v Amali Rasalusalu** [2003] HAC 3/03 June 2003 where Shameem J said "*In cases of Infanticide a binding-over order or a conditional discharge with orders for counselling may be considered appropriate.*" In **State v Roshni Deo** [1993] HAC 26/93S 22 October 1993, where the appellant had already served 4 months, a sentence of 9 months was imposed on appeal. In **State v Vasiti Nakama** [1995] HAJ 1/95L 8 December 1995, the convict was bound over to keep the peace for 1 year.

[53] In the case of **State v Kesaravi Tinairatu Tumuri**, Cr. App HAC 008 of 2001S, Her Ladyship Justice Shameem said: "*The tariff for infanticide 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 59 cases of infanticide in 10 years, all had resulted in orders of probation or supervision or hospital orders. The court said (per Russel 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 2 year probation order was substituted.

[54] In **State v Kesaravi Tinairatu Tumuri** [2002] HAC 8 /01S 5 September 2002 the convict was placed under the supervision of the probation officer for a period of 2 years. In **State v Vasiti Marawa** [2007] HAC 92/07 19 October 2007 it was reiterated that the tariff for Infanticide is a non-custodial sentence of probation to good behavior bond with counselling or hospital orders, and the convict was bound over to be of good behaviour for 12 months on condition of counselling. In **Merewalesi Baleinusiladi** Cr. App AAU 0070 0f 2010 referred to earlier in this judgment, this Court, in February 2016, setting aside the conviction of murder and substituting a conviction on infanticide in place, imposed a sentence of one year imprisonment suspended for two years. The Court also ordered her immediate release since the Appellant had already served 6 years in prison by the time the appeal came to be heard.

[55] Taking into consideration the above I sentence the Appellant to a period of one years imprisonment. Since the Appellant has already served 5 years in prison I order that she be released from prison forthwith.

Nawana JA

[56] I agree.

Orders of the Court:

i. *Appeal allowed,*

ii. *Conviction for murder quashed and a conviction for infanticide substituted in place,*

iii. *The Appellant's sentence quashed and a sentence for a period of one year is substituted,*

iv. *The Appellant to be released forthwith as she has already served her sentence.*

Hon. Justice C Prematilaka
JUSTICE OF APPEAL

Hon. Justice A Fernando
JUSTICE OF APPEAL

Hon. Justice P Nawana
JUSTICE OF APPEAL