

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 108 of 2016

STATE

V

VIKA KELEKELE LALIQAVOKA

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

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

Summing Up : 10 July 2017

Judgment : 12 July 2017

JUDGMENT

[1] The accused is charged with the following offence:

FIRST COUNT

Statement of offence

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

Particulars of the Offence

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

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 7 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, the three Assessors unanimously found the accused guilty of Murder.
- [4] I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors.
- [5] In this case, it is admitted facts and, as such, proved, that from the month of December 2010 to 18 July 2011, the accused, Vika Kelekele Laliqavoka, was pregnant. On 18 July 2011, at about 5pm, she went to the bathroom at her residence and remained there for about one hour. Between 5pm and 6pm, in the bathroom of her residence, she gave birth to a male child.
- [6] There is no direct evidence in this case to establish as to what else happened in the bathroom. The prosecution submits, by way of circumstantial evidence, that the accused caused the death of her unnamed child.
- [7] In support of their case, the prosecution led the evidence of Viniana Digitaki (an aunt of the accused), Mere Bale (elder sister of the accused), Mereoni Buloulevu (mother of the accused) and Dr. James Kalougivaki (who was called upon by the prosecution to give evidence on the post mortem examination and report of Dr. Ramaswamy Ponnu Swamy Goundar, who is now retired and currently based in Australia).
- [8] Dr. James Kalougivaki, explained in detail the external and internal injuries found on the unnamed deceased child. He testified that there was a high probability that the baby was born alive. The cause of death has been stated as Asphyxia due to or as a consequence of smothering.
- [9] The Assessors were directed that in order to prove the count of Murder, the prosecution must establish beyond reasonable doubt that;
- (i) the accused;
 - (ii) on the specified day (in this case the 18th day of July 2011);
 - (iii) at Cunningham, Nasinu, in the Central Division;
 - (iv) engaged in a conduct; and
 - (v) the said conduct caused the death of her unnamed child (the deceased);
and
 - (vi) the accused intended to cause the death of her unnamed child; or
the accused was reckless as to causing the death of her unnamed child by the conduct.
- [10] Each of the above elements were further elaborated upon in my summing up.

- [11]** The Assessors were also directed that as an alternative to Murder, they may consider whether the accused is guilty or not guilty of the offence of Infanticide, in terms of Section 244 of Crimes Act.
- [12]** The Assessors were directed that in order to prove the offence of Infanticide, the prosecution must establish beyond reasonable doubt that;
- (i) the accused;
 - (ii) on the specified day (in this case the 18th day of July 2011);
 - (iii) at Cunningham, Nasinu, in the Central Division;
 - (iv) caused the death of her unnamed child (the deceased) by any wilful act or omission; and
 - (v) the child is under the age of 12 months at the time.
- [13]** Each of the above elements were further elaborated upon in my summing up.
- [14]** The Assessors were advised that in such cases the onus shifts to the accused of proving the existence of any matter referred to in sub-section (1)(c) of Section 244, namely that 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.
- [15]** The Assessors were told that the standard of proving such matters shall be on the balance of probabilities. This is also known as preponderance of evidence. This is the standard of proof usually adopted in civil cases, demanding that the case that is the more probable should succeed. This is the kind of decision represented by the scales of justice. As Assessors they would have to weigh up the evidence and decide which version is most probably true. The case of the accused or that of the prosecution.
- [16]** Therefore, the Assessors were directed that if the accused proves the existence of any of the above matters, referred to in sub-section (1)(c) of Section 244, on a balance of probabilities, then they must find the accused guilty only of Infanticide.
- [17]** I did not deem it necessary to direct the Assessors on the ingredients of Manslaughter. It was my view that any such directions on Manslaughter would confuse the Assessors' thinking. Prior to my summing up, I ascertained from the Learned State Counsel and

Defence Counsel as to whether directing the Assessors on Manslaughter was required. Both Counsel agreed that directing the Assessors on Manslaughter was not necessary.

- [18] In this case, the accused denies having killed her new born baby.
- [19] Around 5.00 p.m. in the evening, on 18 July 2011, she had gone to the bathroom to have a shower. She had been wearing a t-shirt and a sulu as the time. After hanging her sulu, she took off her panty. She was taking off her t-shirt, when she had felt like someone poked her with a needle on her lower back. She was still in a standing position. She had then felt something fall off. She said it was her baby. She had then tried to sit down. She had then laid the back of her head on the toilet pan. She had then had a blackout.
- [20] After regaining consciousness, she had looked at the newborn baby. The baby had been lying face downwards. She had then held the baby. The baby wasn't moving nor breathing. She had noticed the baby was not breathing as the baby's stomach was not moving. She had then tried to open the baby's mouth. She had pressed his nose twice. She had been pressing the baby's nose and trying to open his mouth. However, the baby did not respond.
- [21] She had then pulled her sulu that was hanging on the wire and wrapped the baby. She had cut the umbilical cord with an old scissor. She had done so after wrapping the baby in the sulu.
- [22] The Assessors have found the evidence of prosecution as truthful and reliable, as they unanimously found the accused guilty of Murder. Therefore, the Assessors have rejected the denial of the accused, whereby she states that she did not kill her new born baby.
- [23] There is no doubt that the prosecution has established by adducing truthful and reliable evidence that the accused caused the death of her unnamed child. The issue for Court to decide is whether she should be found guilty for Murder or for Infanticide.
- [24] In the case of **Ronika Devi v. State** [2012] FJCA 1 (30 January 2012); the Fiji Court of Appeal discussed in great detail the legal framework applicable in Fiji for trials alleging Murder or Manslaughter or Infanticide.
- [25] In the case of **Baleiniusiladi v State** [2016] FJCA 32 (26 February 2016); the Fiji Court of Appeal elaborated on the evolution of the law relating to Infanticide.
- [26] It was held:

"It is admitted that the law relating to the instant case is the repealed Penal Code, as the offence was committed on 26th February 2009. The Crimes Decree 2009 (Crimes Act) came into operation on 1st of February 2010 and after trial in the High Court, the accused was convicted on 19th August

2010. Sentence was imposed under Section 18 of the Sentencing and Penalties Decree 2009 (Sentencing and Penalties Act). Criminal Procedure Decree 2009 (Criminal Procedure Act) also came into operation on the 1st of February 2010.

Though the appellant was charged under the Penal Code it is relevant to peruse the amended provision of the Crime Decree with regard to Infanticide. This perusal is carried out in order to examine the development of the law relating to Infanticide. Section 244(1)(c) is reproduced as follows:

“244(1)(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.

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.”

[27] In the instant case the following factors are clear:

- (i) the accused was 34 years at the time;
- (ii) she was the mother of four children. The eldest Everlyn (15 years at the time), the second Levani (8 years at the time), the third Apisai (5 years at the time) and the fourth Lasarusa (2 years at the time);
- (iii) the father's of each of the above children were different (only the father of the third and fourth children were the same);

- (iv) *the father of the new born baby was Laisiesa Matanisiga, an army officer;*
- (v) *the accused had not informed him of her pregnancy as he had left Fiji on a tour of duty overseas;*
- (vi) *she had left her parental home, where she had been staying with her children, prior to her pregnancy, as her parents did not approve of her relationship with the said Laisiesa Matanisiga;*
- (vii) *at the time of the incident she was staying at the house of her sister Mere Bale. She had arrived there just two weeks prior to the date of incident;*
- (viii) *she was unemployed at the time and had no source of income of her own. She admitted that the fathers' of her children were supporting her children financially.*
- (ix) *at no time of her pregnancy did she attend an ante-natal clinic for examination. She said she couldn't do so as she didn't have the time nor the resources to do so.*

[28] It is my opinion, that the above factors would clearly bring this case under Section 244(1)(c)(iii) of the Crimes Act. It is my opinion that these factors could have disturbed the balance of the accused's mind. As such, the above can be considered as grounds to reduce the offence of Murder to Infanticide.

[29] In my view, the Assessor's should have considered these factors and found the accused guilty of Infanticide rather than of Murder. It was open for them to reach such a conclusion on the available evidence.

[30] Therefore, I differ with the unanimous opinion of the Assessors finding the accused guilty of Murder.

[31] In the circumstances, I find the accused guilty of Infanticide.

[32] Accordingly, I convict the accused for Infanticide.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT SUVA

Dated this 12th Day of July 2017

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