IN THE HIGH COURT OF FIJI

AT LABASA

CRIMINAL JURISDICTION

Criminal Case No. HAC 45 of 2023

STATE

-v-

KATARINA TIKOMAINAQAI

Counsel: **Mr. T. Tuenuku for the State**
Ms. R. Raj and Ms. A. L. Vono for the Accused

Date of Trial: **31 – 2 April 2025**
Date of Judgment: **25 April 2025**

JUDGMENT

1. This sad case raises for consideration the question whether section 244 of the Crimes Act 2009 ("Crimes Act") sufficiently ameliorates the serious consequences for those mothers who murder their babies in circumstances where the balance of their mind *may* have been disturbed by circumstances related to having recently given birth.

2. Ms. Katarina Tikomainaqai ("the accused") was charged with having murdered her newborn baby boy on 14 March 2023.

3. The accused was working as a bowser attendant at Marimuttu & Sons Service Station, Savusavu on the afternoon of 14 March 2023 when her waters broke. She went into a small office where she delivered a baby boy. She used a pair of scissors to cut the umbilical cord. She also inflicted 61 wounds to the baby with those scissors, including a deep wound to the baby's cheek, and a deep wound to

his chest which penetrated his lung. She put the baby in a sack, which she placed inside a draw. Concerned about her well-being, her boss tasked her colleagues to go to the office to find out what was wrong with her.

4. Ms. Selina Kurusiqa found the office door locked and called out to the accused, but she did not respond. Ms. Adi Maca, who was a good friend of the accused, arrived and called out to the accused, who then opened the door. When Ms. Kurusiqa and Ms. Maca entered, they found the accused on the floor, which was covered in blood. They also heard a baby crying. Ms. Maca went to the draw and took out the baby, which she handed to Ms. Kurusiqa.

5. The accused and her baby were rushed to the Emergency Department at Labasa Hospital where, despite the best efforts of the clinicians, the baby sadly died later that day. The accused was attended to by midwives who helped deliver her placenta and clean her up.

6. A post-mortem examination was conducted by Dr Temo. He found the cause of death to be severe blood loss as a result of multiple stab wounds.

7. On 31 May 2023, the accused was interviewed under caution and admitted that she had stabbed her baby because she wanted to kill him, and not to let outsiders know that she had given birth to a baby. She said that the baby stopped crying, and she wrapped him in a sack and put him inside a draw. She knew that he was still alive because she could hear him breathing.

8. The accused was tried on a count of murdering her newborn son.

9. The prosecution adduced unchallenged evidence establishing the facts set out above.

10. At this juncture, it is appropriate that I commend the parties for the manner in which they have litigated this difficult and sensitive case. By accepting that the accused must be found guilty of murder unless the partial defence is made out, the defence has not diverted the Court from its central task of determining whether the accused

is guilty of infanticide, and may be dealt with as if she had been guilty of manslaughter of her child. As the Court of Appeal observed in *Devi v State* [2012] FJCA 1; AAU0008.09 (30 January 2012), at [29]:

> *"… the intention to kill and the act of murder is the starting point for the real enquiry in every trial where, if murder is expressly charged, and the facts raise infanticide, the issue is whether the mother killed the child while the balance of her mind was disturbed in terms of the statute."*

11. Meaningful facts were agreed, and the Post-Mortem Examination Report, and the accused's record of interview were tendered by consent.

12. There was no dispute that the accused had wilfully stabbed her baby, causing his death.

13. The accused gave evidence in her own defence, and called her mother and an uncle as defence witnesses.

14. The defence relied on the partial defence of infanticide, arguing that, at the time of the stabbing, the balance of the accused's mind was disturbed by reason of her not having fully recovered from the effect of giving birth, and by reason of other matters associated with her pregnancy, delivery and post-natal state.

15. It is to the question whether the defence have satisfied me, on the balance of probabilities, that, at the time she stabbed her baby, the balance of her mind was disturbed by reason of matters connected to having given birth that I now turn.

16. After closing speeches, I raised with counsel my concern that the shifting of the burden to the defence to prove infanticide may infringe upon the constitutionally protected presumption of innocence. It was not an issue that had occurred to counsel, and I considered it appropriate to seek their assistance by the filing of written submissions within 7 days.

17. The parties filed helpful supplementary submissions but did not, unfortunately, engage with the difficult question of whether the shifting of the burden of proof to

a mother to prove that she is guilty of the lesser offence of infanticide impermissibly infringes upon the hallowed presumption of innocence.

The defence stance

18. In her written and oral submissions, Ms. Raj argued that the accused had met her burden of proving, on the balance of probabilities, that, at the time she fatally stabbed her baby, the balance of her mind was disturbed by her not having fully recovered from the effects of giving birth, and by other matters associated with her pregnancy.

19. To make good her argument, Ms. Raj placed reliance on the following evidence:

(i) The accused came from a broken family. Her parents split up when she was young, and her mother remarried.

(ii) She was abused by her step-father when she was around 21 years of age.

(iii) She had given birth to a baby girl from a relationship with a youth from Koroivonu village. That relationship broke down because the father, who was involved in the Church, used to travel to Suva and Nadi to conduct "*auditing*". She came to learn that he was seeing other women when he was away *"taking notes"*. She would not accept this, and left his parent's house and went to live with her uncle in Taveuni. When she was yarning with her uncle, he suggested that she go to the hospital for a scan. It was there that she came to know that she was 4 months pregnant.

(iv) Her uncle was supportive of her, and she went for all her ante-natal examinations.

(v) Her mother was not happy to learn of her pregnancy, but she returned to her mother's home to give birth. As is customary, she stayed 4 nights, but was molested by her step-father during that time.

(vi) Her uncle attended the 'roqoroqo' and was concerned that the accused and her baby were not thriving. He wanted to take care of her and the baby, and they went to live with him for a year.

(vii) When her uncle attended a funeral at Kioa Island, she returned to her mother's home for a week. Her step-father continued to abuse her, and she ran away to Savusavu with her baby.

(viii) In November 2022, she found a job at the bowser, and her mother came to collect the baby and take her home.

(ix) In December 2022, she realised that she was pregnant with her second child. The father of that child had already left, and she had no means of contacting him.

(x) She was scared to tell anyone about the pregnancy because she would have been told to return to her mother's place. She felt isolated and alone.

(xi) Her mother and step-father had warned her not to get pregnant again.

(xii) She did not make any bookings or attend any clinics, and was not aware of her due date.

(xiii) She consumed herbal medicine in an attempt to terminate her pregnancy because her parents did not wish to raise another child.

(xiv) The accused was due to start her shift at the bowser at 2pm on 14 March 2023. On her way to work, she called her friend, Ms. Adi Maca, asking her to bring a pad, as she thought she was having her period.

(xv) After filling several vehicles, the accused went to rest in the small office. She was feeling a bit dizzy and thought it was because of the heat. She called Adi to come and help her.

(xvi) She got a shock when her waters broke. When a colleague came into the office, she did not tell her that her waters had broken because she was scared and in a state of shock.

(xvii) When her colleague left, the accused closed the office door. After about 2 minutes, she felt the baby trying to come out. After pushing the baby out, she was in a state of shock.

(xviii) The accused reached for a pair of scissors and was trying to cut the umbilical cord. As she did this, her eyes were fixed on the small office window as she was worried that someone may look inside.

(xix) She did not call for assistance because she was worried that if anyone heard or saw her they would inform her parents, who had already warned her not to get pregnant again.

(xx) After she cut the umbilical cord, she was in a state of shock and didn't know what was happening after that.

(xxi) She put the baby in a drawer because she didn't want anybody to know what had happened.

(xxii) When Adi entered the office, the accused hugged her legs to show that she needed help as she was crying and too weak to speak. She gathered her senses as she hugged Adi's legs and, after that, she went blank again.

(xxiii) When she was at the hospital, the midwives were trying to help her regain consciousness. They asked her to push so that the placenta would come out.

(xxiv) It was painful for her when she was told that her baby boy had died.

20. In supplementary written submissions, the defence cited a decision of the Supreme Court of Canada: *R. v. Borowiec* [2016] 1 S.C.R. 80. In the context of the statutory provision relating to infanticide in Alberta, the Supreme Court stated:

> *"I conclude that 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."

The prosecution stance

21. In his oral and written closing submissions, Mr. Tuenuku placed reliance on the accused's voluntary admission that she wanted to kill the baby because she did not want any outsiders to know that she had given birth.

22. He also sought to distinguish the case of *State v Mausa* [2018] FJHC 69; HAC23.2012 (12 February 2018) from the present case. He submits that the accused had a supportive family, evidenced by the fact that her parents were taking care of her first child.

23. Mr. Tuenuku submits that the evidence does not support that the balance of the accused's mind was disturbed at the material time.

24. In his supplemental written submissions, Mr. Tuenuku cites *R v Tunstill* [2018] EWCA Crim 1696, a decision of the Court of Appeal of England and Wales (Criminal Division), in support of his contention that expert forensic psychiatry evidence should always be considered when the court is required to determine whether the balance of a new mother's mind was disturbed by reason of matters connected to the pregnancy and circumstances of giving birth.

Analysis

25. Taking first Mr. Tuenuku's point about the necessity for expert evidence to assist the court on the ultimate issue of whether the balance of an accused mother's

mind was disturbed at the time of her wilful act or omission causing the death of her baby. I respectfully disagree with Mr. Tuenuku.

26. The conditions for demonstrating diminished responsibility and infanticide laid down by statute are in very different terms and include very different approaches to a defendant's mental state at the relevant time.

27. It is well-established that the word *'disturbed'* is not a legal or medical term of art, but should be applied in its grammatical and ordinary sense.

28. Medical evidence may or may not assist the court but, on general principles, it must always be for the tribunal of fact to answer the ultimate question based on a careful analysis of all the evidence, including evidence of socio-economic factors relevant to the question of disturbance of a mother's mind.

29. The particular issue that arose for determination in *Tunstall* called for expert evidence because it centred on the interrelationship between the appellant's recognised pre-existing mental condition and the disturbance of her mind by reason of matters connected to giving birth. No question arises in the present case as to whether a mental impairment mitigates the accused's culpability for killing her newborn son. The Court is well-able to determine whether the accused's mind was disturbed without the need for expert evidence.

30. Turning then to the evidence. I must admit that I have found this a difficult case. The evidence cuts both ways in the sense that, on one view, the manner in which the accused concealed her pregnancy, tried to terminate her pregnancy, attempted to conceal the fact that she had just given birth, and Dr Singh's evidence that a Mini Mental State Exam was conducted, and the accused was not found to be suffering from any cognitive impairment a couple of days after giving birth, point towards the balance of the accused's mind having not been disturbed by reason of giving birth and the matters surrounding her pregnancy.

31. Looked at differently, however, the futile attempt to conceal her newborn baby in a draw as she lay in a pool of blood, having just unexpectedly given birth at work, suggests to me that the accused was simply not thinking straight when she used

the scissors with which she had cut the umbilical cord to fatally stab her baby. Her ability to think rationally was clearly impaired.

32. In determining that the balance of the accused's mind was probably disturbed at the material time, I attach weight to her evidence about how she was feeling as she gave birth. I do not doubt that she was in a state of shock in the traumatic circumstances in which she found herself. I find merit in Ms. Raj's point that the accused was still in the process of giving birth when she stabbed her infant son. It was only later at the hospital that the placenta was delivered.

33. There is some merit in Mr. Tuenuku's argument that the accused had a degree of family support, although her mother confirmed that she was treated badly by her step-father. However, the issue is not so much whether there was support available to the accused. Rather, it is her perception that she was alone and unsupported that is relevant to my determination. I find that this perception contributed to the disturbance of her mind at the time she stabbed her baby, albeit the dominant factor was the traumatic circumstances of the unexpected childbirth at her place of work.

34. In all the circumstances of this case, I am satisfied that it is more likely than not that the balance of the accused's mind was disturbed by reason of the matters set out in s. 244(1)(c) Crimes Act. Accordingly, I acquit her of murder. Being satisfied that she wilfully stabbed her child under the age of 12 months and that, at the material time, the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child, I find her guilty of infanticide and convict her accordingly.

Infanticide

35. In my recent Judgment in *State v Sainaz Begum* Criminal Case No. HAC 4 of 2023 (17 April 2025), I expressed my concerns about the current state of the law of infanticide in Fiji. Those concerns are principally centred on the shifting of the burden of proof to an accused mother to prove that she is guilty of the lesser offence of infanticide.

36. In *State v Mausa* [2018] FJHC 69; HAC23.2012 (12 February 2018), Aluthge J provided an erudite analysis of the historical background and recent developments of infanticide law in Fiji, which I gratefully adopt:

> *"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, 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."

Does section 244 (2) of the Crimes Act unjustifiably derogate from the accused's right of presumption of innocence?

37. The presumption of innocence, which has been given constitutional effect in Fiji, reflects the fundamental common law rule that it is the prosecution which must prove the accused's guilt of the offence charged beyond reasonable doubt. This rule, described as the *"golden thread"* of the criminal law, is subject to the exception relating to the defence of insanity and other statutory modifications, and is the basis for the proposition that the accused is presumed innocent of the offence charged unless and until proven guilty.

38. As discussed above, s. 244 of the Crimes Act modernised the law of infanticide in Fiji. It provides as follows:

"(1) 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.

(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 of 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."

39. In considering this important and difficult question, I have found a recent Judgment of the Hong Kong Court of Final Appeal ("HKCFA") to be most illuminating. The appeal in *HKSAR v. Tsim Sum Kit*, Ada [2024] HKCFA 14 raised the following important question of law:

> *"Does section 3(2) of the Homicide Ordinance (Cap.339) unjustifiably derogate from the [appellant]'s right of presumption of innocence under Article 87(2) of the Basic Law and Article 11(1) of the Hong Kong Bill of Rights, and if so, should section 3(2) be read down as imposing only an evidential burden?"*

40. Although framed specifically in terms of the statutory provision concerning criminal liability for the killing of another by a person suffering from a relevant abnormality of mind, the appeal in *Tsim Sum Kit* raised the more general question of how courts in Hong Kong should approach the question of whether the constitutionally protected presumption of innocence is engaged in relation to provisions which place a burden of proof on a defendant. It also provided the opportunity for the HKCFA to consider the proportionality of the particular reverse onus provision in that case.

41. The appellant in *Tsim Sum Kit* contended that the legal burden on a defendant under s.3(2) of the Ordinance to prove diminished responsibility is unfair and infringes on the defendant's right to a fair trial and the presumption of innocence. It was argued that s.3 (2) of the Ordinance should be read down to impose instead an evidential burden only. That is to say, instead of requiring a defendant to prove diminished responsibility on a balance of probabilities, as a legal burden would require him to, it should be sufficient for the defendant to disclose and proffer evidence to support the issue of diminished responsibility, thereafter requiring the prosecution to disprove the issue to the criminal standard of proof, viz. beyond reasonable doubt.

42. The HKCFA observed that acceptance of the appellant's argument would be novel, and noted that other common law jurisdictions have considered and rejected it. No other jurisdiction has read down a similar statutory provision relating to diminished responsibility from imposing a legal burden on a defendant to an evidential burden.

43. The leading decisions in Hong Kong have treated the key question to be whether the impugned rule reverses the onus in relation to an essential element of the offence which one would normally have expected the prosecution to have to prove.

44. *HKSAR v Hung Chan Wa & Another* was a dangerous drugs case involving a statutory presumption, in s.47 of the Dangerous Drugs Ordinance (Cap.134), of knowledge of the presence of drugs in a container in the defendant's possession and of his or her knowledge of the nature of the drugs. It was held that there was a derogation from the presumption of innocence, Sir Anthony Mason NPJ stating

that *"the reverse onus under s.47(2) relates to a critical aspect of the offence, involving what is blameworthy conduct on the part of the defendant, namely his knowledge that he is in possession of a dangerous drug."*

45. The courts in Fiji have followed a similar approach in connection with offences contrary to section 5 of the Illicit Drugs Control Act: see *State v Abourizk* [2023] FJHC 402; HAC126.2015 (16 June 2023).

46. In *HKSAR v Ng Po On*, Ribeiro PJ pointed out that since the subject-matter of the reverse onus may be variously expressed, its linguistic characterisation matters less than an evaluation of its substantive effect, derogation from the presumption being a matter of substance and not of form:

> *"… in determining whether an impugned provision has this effect, the Court looks at the substance and reality of the enactment rather than its form. Thus, it does not matter whether the ultimate fact which the defendant is required to prove involves an element which may be characterized as an essential ingredient of the offence or a matter of defence. Its substantive effect is what counts: does the enactment expose the defendant to a conviction even though there may be a reasonable doubt regarding some matter determinative of his criminal liability?"*

47. In *Tsim Sum Kit,* the HKCFA stated that*:*

> *"A defendant is exposed to such risk in cases where the prosecution is relieved of proving the relevant elements of the offence beyond reasonable doubt. In other words, it is a risk which arises in relation to the burden of proving an element of the offence beyond reasonable doubt which, because of its centrality to the criminality targeted, one would otherwise have expected to rest on the prosecution."*

48. At [38] of *Tsim Sum Kit*, the Court concluded that:

> *"38. In our view, applying the principles identified above, the s.3(2) onus does not engage or derogate from the presumption of innocence. A defendant who seeks to raise diminished responsibility is ex hypothesi liable to be convicted of murder if that defence fails. That is to say, the prosecution will already have done enough to prove the elements of murder beyond reasonable doubt. The defendant is not therefore someone presumed innocent at the point of invoking the partial defence. He or she will already have had the benefit of the presumption of innocence requiring the prosecution to prove the actus reus and mens rea of murder before seeking to establish the elements of the diminished responsibility defence."*

49. As helpful as I have found *Tsim Sum Kit*, it does not, of course, provide the answer to the question posed above.

50. As was noted in *Mausa,* the offence of infanticide has a number of notable features that distinguish it from other defences such as diminished responsibility and mental impairment. 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.

51. In my view, it is this unique feature of infanticide – that, as well as operating as a partial defence to a charge of murder, it is also a separate offence – that leads to the inevitable conclusion that section 244(2) Crimes Act *does* derogate from an accused mother's right of presumption of innocence.

52. Infanticide is a most unusual criminal offence in Fiji. As far as I am aware, it is the only offence that requires an accused person to prove their own guilt.

53. It seems to me that the very fact that the matters referred to in sub-section (1) (c) are elements of the offence of infanticide which the accused person is required to prove clearly derogates from the presumption of innocence.

54. Section 14 (2) (j) of the Constitution provides that:

> *"(2) Every person charged with an offence has the right –*
>
> *(j) to remain silent, not to testify during the proceedings, and not to be compelled to give self-incriminating evidence, and not to have adverse inference drawn from the exercise of any of these rights."*

55. It is difficult to see how a mother charged with murdering her child aged under 12 months could avail herself of these fundamental rights should she wish to advance the partial defence of infanticide. At the very least, she would be compelled to incriminate herself in the *wilful* killing of her baby.

56. In *R v Gore* [2007] EWCA Crim 2789 the Court of Appeal (Criminal Division) set out the *mens rea* for the offence of infanticide, at [34]:

> *"34. The mens rea for the offence of infanticide is contained, as we see it, explicitly in the first few words of section 1(1), namely the prosecution must prove that the defendant acted or omitted to act wilfully. There is no reference to any intention to kill or cause serious bodily harm. Mr Webster acknowledges that on his version of the section the word "wilful" would be superfluous. The word "wilful" was not superfluous in the Children and Young Persons Act 1933 and to our mind, it was not superfluous here. It is from the word "wilful" that one derives the necessary mens rea for the offence of infanticide. As to the meaning of the phrase "notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder", to suggest as the CCRC and Mr Webster suggested that this means "notwithstanding and provided that" is to strain the English language. We take the word "notwithstanding" to mean what the Oxford English dictionary says that it means when used as a preposition. It means "despite the fact" or "even if". It does not mean "provided that". In an era when a mother who killed her child with the intention of doing so would have faced the death*

penalty, we take the view this phrase was added for the avoidance of doubt. Further, we note that in subsection (1) Parliament has used the word "would", it has not used the word "must". "Would" does not mean "must" and there is no reason to give the word "would" an extended and unnatural meaning. Had the draughtsman intended to provide that a woman could only be guilty of infanticide if she intended to kill or seriously harm her child, he would no doubt have said so and Parliament would not have agreed the deletion of the word "intentionally". Finally, as Mr Reid pointed out, the section creates an offence in subsection (1) and it provides a partial defence to murder and a possible alternative verdict to murder in subsection (2). If section 1(1) were intended only to be used where the mental element for murder was proved then section 1(2) would be redundant. The offence created by section 1(1) could always have been left open to the jury as an alternative charge to murder."

57. At [33], the court stated that:

> *"33. … In our view, there is no requirement that all the ingredients of murder be proved before a defendant can be convicted under section 1(1) of the Infanticide Act. We are satisfied that Parliament intended to create a new offence of infanticide which covered situations much wider than offences that would otherwise be murder. If the criteria in subsection (1) are fulfilled, the mother who kills her child does not have to face an indictment for murder. She faces a lower grade criminal charge, namely infanticide."*

58. Section 244(3) Crimes Act uses the same formulation as was considered by the court in *Gore*. I find the reasoning in *Gore* to be compelling and conclude that there is no requirement that all the ingredients of murder be proved before an accused mother can be convicted under section 244(1) of the Crimes Act.

59. This is significant because it distinguishes the partial defence of infanticide from diminished responsibility.

60. Unlike an accused person who seeks to raise diminished responsibility, an accused mother who seeks to raise infanticide is not *ex hypothesi* liable to be convicted of murder if that defence fails. She would still be presumed innocent at the point of invoking the partial defence, and would have to embrace having *wilfully* caused the death of her child in order to run the defence of infanticide.

61. In cases decided under the Penal Code where, on a charge of murder, there was a sufficient evidential basis, the tribunal of fact was required to consider an alternative verdict of guilty of infanticide, and it was for the prosecution to make the tribunal of fact sure that the balance of the mother's mind was not disturbed by the effects of giving birth.

62. It is difficult to understand why the legislature considered it appropriate or necessary to shift the burden to an accused mother to prove her guilt of infanticide when section 244 Crimes Act was enacted.

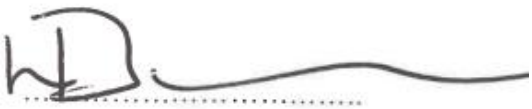
63. As I have said, I consider that section 244(2) Crimes Act derogates from an accused mother's right of presumption of innocence under section 14 of the Constitution.

64. Unless I am wrong about that, the legislature may wish to consider whether this derogation from such a fundamental right and protection is justifiable in Fiji in this day and age.

65. Alternatively, a situation may arise in which the courts are required to determine whether section 244(2) Crimes Act may properly be read down to impose a lesser evidential burden only.

66. If the provision is not read down, the danger is that an accused mother may be convicted of murder in circumstances where there is a reasonable doubt that she *may* have killed her child at a time when the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth.

67. 30 days to appeal to the Court of Appeal.



Hon. Mr. Justice Burney

At Labasa
25 April 2025

Solicitors
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Legal Aid Commission for the Accused